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**The Changing Nature of Police Interviewing in
Ireland**

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Declaration


I hereby declare that this dissertation, submitted in fulfilment of the requirement for the degree of Doctor of Philosophy, represents my own work.

Kevin Sweeney

04 July 2016

Acknowledgments

This thesis is the culmination of six years of study and writing. I have therefore been very fortunate in having the support of a number of persons without whom I would never have finished.



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Abstract

The Changing nature of police interrogation in Ireland

This thesis examines the role of investigative interviewing in the Irish criminal justice system. Investigative interviewing covers all aspects of speaking to persons, in the course of a criminal investigation, to obtain from them all pertinent information that he or she may have in his or her possession. Such investigative interviewing therefore also applies to the witnesses and victims of crime. Though all aspects of investigative interviewing are examined in this thesis, it is primarily concerned with the interviewing of criminal suspects. It will be argued that a major paradigm shift occurred with the introduction of the Criminal Justice Act 1984 in Ireland. This Act created, for the first time, the legal architecture necessary to question those suspected of involvement in serious crime. This changed the stated purpose of an arrest from a mechanism to bring a person speedily before the courts to one where an arrest became an integral part of the police criminal investigation. Alongside this legislation, new provisions provided safeguards to protect those brought in for questioning.

The Irish police, An Garda Síochána, received no additional training to address this change of function. As a result of the Morris Tribunal, it was established that Gardaí received very little instruction in obtaining witness, victim or suspect statements. This thesis will examine two alternative police interview models in order to evaluate the interview model adopted by the Gardaí. This has resulted in a well-designed interview model that is appropriate in the majority of interview situations. To ensure its successful implementation into practice requires a committed training programme. Training began in 2014 and is on-going throughout the organisation. However, some training aspects have been considerably shortened and previous experience suggests that even well designed programmes can fail to deliver their objectives because of issues with training. Consequently, legislation may often itself fail in its stated purpose and aims.

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“He who fights monsters should be careful lest he thereby become a monster. And if thou gaze long into an abyss, the abyss will also gaze into thee.”

(Friedrich Nietzsche. Beyond Good and Evil p. 88, 2004. 1st World Library, Fairfield)

1: Introduction

1.1 Background

The original function of the police, when created, was to prevent crime (Williams 2015). They have over the years acquired, appropriated or been delegated many other functions (Emsley 2014 p.3). In fact, it is only relatively recently that the functions of An Garda Síochána (AGS) in the Republic of Ireland have been formally laid out; these include the provision of policing and security services for the State, with the objective of, protecting property, vindicating the human rights of each individual, preventing crime, bringing criminals to justice, including by detecting and investigating crime.¹ It is the investigative role that this work focuses on and specifically the role of interviewing in investigations. However, the context of police work first needs some discussion.

Criminal Law

AGS fulfil their policing duty in the common law legal context, inherited from England. Although Ireland shared this model for centuries with England, “the contours of the Irish model were often a lot rougher” (Vaughan and Kilcommins 2013 p.43). Moreover, the written formal law was often an idealised version, subject to local variation great or small. This phenomenon is well known, described by Roscoe Pound in 1910 as the disparity between “law in books” and “law in action” (quoted in McCrudden 2006 p.637). Following independence, Ireland retained similar legal principles to England although over the last number of years an apparent divergence is occurring (Heffernan and Ní Raifeartaigh 2014 p.1).

Packer famously conceptualised the objectives in a criminal law system along a continuum from due process at one extreme to crime control on the other (Packer 1964). The more the focus becomes on crime control, the less attention is paid to due process. Efficiency is valued in crime control often utilising a screening process by investigators as a reliable indicator of probable guilt (Packer 1964 p.4-5). This work will examine the legal changes that have occurred in Ireland since the 1984 introduction of questioning in detention provisions, which appear to conform to Packer’s analysis. However, the punishment of transgressions against the law has existed for much longer. Over time these have evolved and morphed into different

legal systems including the common law system. In many ways the orthodox explanation of the evolution of the common law, and in particular, the right to silence in the common law provide a classic example of what Priestland (2013 p.2) refers to as the dominant ‘Whig’ approach to history, that is, a belief in liberal progress. Many legal scholars have sought to justify the changes with cogent expert accounts, unfortunately most started from a false premise and built from there. Although humans are innately fair-minded (Fehr 2008, Haidt 2012), that does not mean the same today as it did three hundred years ago. The common law has changed drastically from pre-modern times. It is beyond the scope of this work to chart these changes comprehensively, much less create a development trajectory with cause and effect, or even the reasons for such changes, or as often, the unintended consequences. Legal rules are rarely framed in an apolitical or asocial context (Vaughan and Kilcommins 2013 p.42), and these legal changes occurred in the context of a society simultaneously undergoing profound social, cultural, religious, scientific, economic and political transformations. Many of these interacted with each other to influence the zeitgeist in criminal law; for instance, the early nineteenth century saw a transmutation in perceived criminal motivation from moralism to causalism (Weiner 1990 p.337). The critical change in the criminal law, as Vaughan and Kilcommins (2013 p.41) argue, was that the prosecution process changed from an “intensely local, unstructured and victim-precipitated arrangement – where it was incumbent on the accused to actively participate in the proceedings” or the exculpatory model, to the modern state accused inculpatory model, which is structured, adversarial and where the accused is largely silent. This change in the role of the accused from having to explain himself to silence is often ascribed to the events around the demise of the Stuarts and the Court of Star Chamber. The great legal historian John H. Wigmore postulated this highly influential view in 1940. More recent historical work, including a large body of work by John H. Langbein, challenges this explanation. However, the bulk of this recent research has focused on the trial process with peripheral attention to the pre-trial process. While the victim then played a critical important role throughout the pre-modern process, the local government voluntary administrator in the form of the local justice of the peace was also an important functionary. While never close to his European counterpart in terms of efficiency or motivation, few deserving the accolade of Williams (1955 p.42) as “half magistrate, half detective,”² some did take their role

seriously. The Fielding half brothers provide a much later prototypical example of this type of activism (Beattie 2007, 2012). I will therefore attempt to build on this research to examine the pre-modern version of questioning suspects. I believe this is consistent with the hypothesis advanced by Langbein and will set the context for the use of silence in the modern era for the remainder of the work and perhaps illuminate some of the current contradictions inherent in modern law.

The Oath

The common law in particular was intrinsically bound up with the history of Christianity and in an age when the ability to read was limited, the Bible was interpreted in an absolute literal sense (Whitman 2008). In such circumstances, swearing an oath before God was a serious event. In criminal cases, the alternative to swearing an oath, if of low status, was the ordeal. The canon law of the Church specifically prohibited compelling self-incrimination under the Latin maxim *nullus tenetur seipsum prodere* (Helmholz 1997 p.17). Here, it appeared to require an accuser to come forward as opposed to judges launching pre-emptive investigations. Confession was a public affair and was not meant to entail civil sanction as well. In 1215, a number of far reaching decisions by the IV Lateran Council, presided over by Pope Innocent III, were made. These included the eighteenth Canon of the Council that introduced a ban on clergy officiating at the ordeals, which had the practical effect of eliminating them (Brooks 2001, Whitman 2008 p.53). An alternative criminal justice model was therefore required to evaluate disputed guilt or innocence. The Council also sought to encourage the investigation of heresy under papal bull *Excommunicamus et anathemizamus*. Heresy was considered a serious social problem that threatened the very social fabric of society (Forrest 2005 p.60). Consequently, the procedures adopted by the Inquisition included a method of investigation using the oath of *de veritate dicenda* that compelled those under suspicion to answer truthfully on oath any question put to them (Helmholz 1996 p.155).

The ending of the ordeal in England led to the introduction of the jury trial, that had been a feature of the Coroner's Court, and a travelling circuit judge to preside over the assizes to deal with ordinary crime (Langbein 1973 p.319). Nevertheless, throughout the development of the common law there remained the principle of

respect for the power of the oath. Therefore, the accused was not to be compelled to testify under oath (Langbein 1994 p.1055, 1974 (2007), 1978). It may have been that the accused was not to be placed in a position of self-interest that conflicted with his religious responsibilities. MacNally (1802 p.47) asserts that prisoners should never be examined on oath because of the “obvious principles of justice, policy and humanity.” Defence witnesses also remained unsworn until 1702.³ Even in civil cases, interested parties had to give their evidence unsworn until 1851 (Bodansky 1981 p.93).

England, however, also had the courts of Star Chamber⁴ and its ecclesiastical equivalent, the High Commission,⁵ which adopted the ‘*ex Officio*’ oath procedures of the Inquisition.⁶ The secular authorities were especially enthusiastic about the investigation of heretics where treason was also suspected (Forrest 2005 p.46).⁷ Criticism of the methods of inquiry of both, but particularly their political allegiance to the Stuarts, led to their abolition in 1641. Such criticism included condemning the use of the ‘*ex Officio*’ oath (Helmholz 1997).

Trial Process

Throughout most of common law history, the accused at criminal trial was unrepresented by defence counsel and responsible for his or her own defence. It was believed that the strength of the defence rested on the vigour that the accused used to contest the charge (Langbein 1994 p.1053, Beattie 1991). While many crimes carried the death penalty, it was not always given even where guilty verdicts were returned. The moral focus of the pre-modern age was not on fact-finding, which was rarely in doubt; rather it was more concerned with the morality of punishment (Whitman 2008 p.209). Many accused, as a result of favourable performances, escaped punishment entirely or received much-reduced penalties by benefiting from the ‘pious perjury’ of the jury, benefit of clergy, or a Royal pardon (Radzinowicz 1956 (1981) p.25).⁸ Langbein (1994 p.1047) refers to this period as ‘the accused speaks’ trial. This was the exculpatory model of criminal justice where the accused was a vital “informational resource” (Langbein 1999 p.315). In court, the prosecutor, usually the victim or relative, put forward the complaint with the accused being expected to respond while unsworn (Beattie 1986 p.347). The accused at trial, according to Langbein, could not then use any privilege against self-

incrimination, as manifested by a right to silence, simply as such a right when no one else can speak for you is merely the right to slit your own throat (Langbein 1994 p.1054, 1978, 1996, 1997, 2003). Langbein posits that such a privilege never had a place in the common law courts, until the arrival of defence counsel in noticeable numbers from the 1780s. He argues: “the maxim did not make the privilege. It was rather the privilege, that developed much later, that absorbed and perpetuated the maxim” (Langbein 1994 p.1083). The contemporary evidence, furthermore, suggests that protection against compulsion was already in everyday use in the common law courts before the abolition of the English inquisitorial courts, as it was the very reason that defendants were not sworn. After the arrival of the lawyers to speak on his behalf, the accused was then silenced, although it was 1837 before the accused had the right to have defence counsel address the jury (Smith 1997 p.145). It was not until 1898 that the accused for the first time was granted the privilege to give sworn evidence.⁹ Therefore, while the misuse of *ex officio* oaths could be galvanised as an argument for the privilege, it was the extended and revitalised privilege that absorbed the maxim.

Pre-trial Process

The ban on questioning an accused under oath extended to the pre-trial process. The central figure in the pre-modern criminal justice system was the Justice of the Peace (JP) or Magistrate (Beattie 1986 p.268, Emsley 2014 p.14).¹⁰ It was created by statute in 1327¹¹ but predates that to the *custodes pacis* of the twelfth century (Harding 1960 p.85). The role principally involved local government and administration although the JP were further tasked with the investigation of crime and the bailing and examination of criminals in his locality (Lander 1989, Smith 1984). The JP also oversaw a system of local constables and the local sheriff and by the end of Elizabeth’s reign, the examination of witnesses and the taking of their depositions were frequently serving as an alternative to presentment (Beattie 1986 p.36, 2012, Bellamy 1984). Either the victim or local constable would normally bring the accused before the JP for examination (Styles 1982).

Examination

The power of examination was first granted to JPs for some offences including petty crime in 1383 (Bellamy 1984 p.10).¹² This was followed by a power of arrest in

1391,¹³ and in 1487 Henry VII made provisions for the granting of bail.¹⁴ Then in 1554, the Marian Statutes of that year and the following year required that the JP examine any person accused of a felony crime or manslaughter that was brought before them.¹⁵ Thereafter, they should either be bailed or committed to gaol.¹⁶ The examination process stipulated the taking of sworn testimony of the victim and any witnesses in writing but not in the presence of the accused.¹⁷ The testimony of the accused was then taken in writing, but never under oath. Suspects were expected to answer the JP's questions and any failure by suspects to answer would be reported at trial (Morgan 1949 p.18). Langbein (1973 p.321, 1996, 1997, 2003) states that contemporaries perceived the original purpose and function of the Marian statutes as the organisation of the prosecution evidence for the crown at jury trial. Recognizances were also taken from the victim and any witnesses to ensure they appeared at the next sitting, as it was a private prosecution, any expenses had to be met by the victim. The written report of the examination was then certified to the next sitting of either the assizes or the quarter sessions, if petty felonies, by either the JP or more frequently, his clerk, who would read it to the jury.

Manuals

JPs who had received formal legal training were appointed members of the *quorum*,¹⁸ otherwise the only instruction available for most magistrates were privately published manuals, such as *Eirenarcha*, written by William Lambard and originally published in 1581.¹⁹ Lambard, a highly respected lawyer and eventual Master of the Rolls under Elizabeth I, gave guidance on the actions a JP should undertake on a range of tasks including those on investigating the commission of a felony. The manual stipulated that the examination of a suspected felon was not to be on oath as it was regarded as a form of compulsion. The absence of compulsion was a long established principle of the common law as Lambard (1588 p.213 2nd Bk) states in the following extract from *Eirenarcha*:

“Every Justice of the Peace, before whom any person (arrested for Manslaughter, or Felonie, or Suspicion thereof) shall be brought, ought (before he commit him to prison) to take the examination of such prisoner, and the information of those that bring him, and to put the same (or as much thereof, as shall be materiall to prove the Felonie) in writing within two dayes after: and to take bond of all such as do declare any thing (materiall to prove the offence) to

appeare at the next generall Gaole deliverie, and to give evidence there against the offender. *2&3. Phil. & Mar. c.10.*

Here you may see (if I be not deceived) when the examination of a Felon began first to be warranted amongst us. For at the common Law, *Nemo tenebatur prodere seipsum*, and then his fault was not to be wrung out of himselfe, but rather to be discovered by other meanes and men.”²⁰

Another contemporary respected manual by Michael Dalton (1655 p.369), in the section on examination of felons, again emphasises the privilege against compulsion and states:

“The offender himself shall not be examined upon oath, for by the Common Law, *nullus tenetur seipsum prodere*: Neither was a mans fault to be wrung out of himself (no not by examination only) but to be proved by others, untill the Stat. of 2 & 3. P. & M. cap.10. gave authority to the Justices of peace to examine the Felon himself.”

A later highly respected authority, Rev. Richard Burn, whose manual *Justice of the Peace and Parish Officer* was first published in 1755, also acknowledges that suspects should not be examined on oath but omitted the Latin maxim as the reason.²¹

The form an examination should take is presented in Lambard at page 220 and 221 and in Dalton at page 371 and 372. Both suggested beginning at general questioning establishing identity and character, which consisted of questions regarding the lifestyle and history of the accused including background details, known associates, employment history as well as intemperate habits. Questioning then moves to particulars of the offence of which Dalton’s book provides the clearer example, in Fig.1:

Figure 1 Dalton Examination

372	Examination, &c.	CAP. 113.
[306]	<p>If he hath any blood about him, on his apparell, or that his weapon be bloody;</p> <p>If any of the goods stoln be in his possession.</p> <p>If any of the apparell of the party Murdered be in his possession.</p> <p>The change of his countenance, his blushing, looking downwards, silence, trembling.</p> <p>His answers doubtfull or repugnant.</p> <p>If he offered agreement or composition.</p> <p>If he hath laboured his neighbours not to speak thereof.</p> <p>The measure of his foot, or his horse foot.</p> <p>The bleeding of the dead body in his presence.</p> <p>If, being charged with the Felony, or called thief, he saith nothing. <i>F. Cor. 24.</i></p> <p>If he fled, <i>fatetur facinus, qui iudicium fugit. Co. 11. 60.</i></p> <p>If he hides himself, or takes sanctuary.</p> <p>If he lies lurking in a place where he hath nothing to doe.</p> <p>If he were the first that found the party Murdered, Place, <i>sc.</i> if convenient for such act, as in a house, in a wood, dale, &c.</p> <p>Time, the year, day, hour, early or late.</p> <p>Where the offender was at the time of the fact, and where the day or night before, his businesse and company there, and witnesse to prove all these.</p> <p>Manner, if willingly, by chance, or necessity.</p>	
3 Marks or Signes		
4 the fact		

As can be seen from the above, the suspect was expected to account for any suspicious marks on his person or property found in his possession. He was also expected to provide details of any alibi if he had one. The manner of his replies and demeanour were also noted. The JP could detain the prisoner for a reasonable time for the purpose of examination: "But the time of the detainer must be no longer than is necessary for such purpose; for which it is said, that the space of three days is a reasonable time" (Burn 1772 p.525).

It appears clear, therefore, that the privilege against compelled self-incrimination was an inherent part of the common law from the beginning and the principal reason the accused was not sworn. The accused was nonetheless expected to respond to grounded allegations and suspicious evidence with the manner of his explanations also being noted.

Policing

The arrival of lawyers in the courtroom as defence counsel in the late eighteenth century began a cascade of associated developments including the law of evidence (Vaughan and Kilcommins 2013 p.41). Lawyers had silenced their clients in the courtroom (Langbein 2003, 1978, 1974 (2007)), but silence in the courtroom would be pointless if this silence did not also exist pre-trial. The negation of magistrates pre-trial questioning was necessary and the role of the magistrate was subsequently redefined by the 1848 John Jervis Act²² when they lost their investigatory role entirely, their role now being limited to one of preliminary examination. It was unfortunate timing for the newly created police who were still newcomers to criminal investigations. The police gradually adopted some of the pretrial procedures of the old system, particularly in regard to the examination of prisoners, even though police had no express authority to do so and in spite of much judicial opposition.²³

The modern police organisation in Ireland is older than in England. However, unlike Peel's consensus policing model, Ireland's was initially more a paramilitary imposed one. If the police in England from their beginning were regarded with suspicion (Radzinowicz 1956 (1981)), in Ireland, the suspicion was far more pronounced and relationships acrimonious (Palmer 1988, Hawkins 1991). Almost every Irish county had a higher density of police than any English county (Palmer 1988 p.557). Murder averaged around 487 murders a year between 1835 and 1842 with a conviction rate of 41 per cent. However there was a general reluctance amongst the people to prosecute most crime, allegedly because of 'sympathy' with the perpetrators (Palmer 1988 p.370-74). Following the creation of the Irish State, a new policing organisation, An Garda Síochána (AGS) was created which has, in general, enjoyed both high public and political support. In a 2008 survey, 81 per cent expressed their satisfaction with Gardaí, while 91 per cent felt that Gardaí are approachable (O'Keeffe 2013). AGS from its inception has been subject to centralised government control through the Department of Justice. This control, arguably, has been further strengthened by the Garda Síochána 2005 Act (Walsh 2009b p.163). Whether the creation of the Policing Authority, in early 2016, to oversee the management of the force will be a counterweight to this influence is yet

to be established.²⁴ The force has been subject to unprecedented review and oversight in the last decade, at a time when the force is also struggling with budget constraints and the absence of recruitment from 2009 until 2014 as a result of the economic downturn in 2008. Management in AGS closed 100 Garda stations reducing the operational number to 564 at the end of 2013 (Brady 2014 p.216). Many of the remaining stations are open only limited hours. It is not a conducive environment in which to undertake fundamental changes in policy and training. Moreover, the level of change required will be expensive as an entire culture may need reform (Brady 2014 p.329). On the other hand, some changes may not only be cost neutral but may result in savings, not least from the types of civil suit that wrongful police actions attract.

The performance of the police in detecting most crime is dependent on factors outside the control of police. These factors, “include the extent of the public’s willingness to assist in investigations; the crime mix in the area; the nature of individual crime types; and sociodemographic factors of the area” where the crime occurred (Jansson 2005 p.15). In general, most arrests occur as a result of being called to the scene. In Phillips and Brown’s Home Office study in England, it was found that almost 75 per cent of arrests were as the result of such reactive policing. Proactive policing, on the other hand, accounted for the remainder. This was divided with over half resulting from stop and searches, resulting in drugs, weapons or traffic arrests. The balance of just over 10 per cent of arrests arose from surveillance and enquiries (Phillips and Brown 1998 p.33). In enquiries, the assistance of the public is essential to providing the necessary information to the police to solve crime. As well as often alerting the police to a crime, evidence from an independent witness was perceived as essential to an arrest being made in 47 per cent of burglary cases, according to Jansson (2005 p.36) in her Home Office study. Moreover, the taking of statements from, or more generally speaking to victims and witnesses, are the most commonly undertaken police actions across all volume crime types (Jansson 2005 p.62).²⁵ Serious crime presents a much more complex investigative dilemma, particularly crime resulting from gangland or terrorist offenders. In such situations, the simple proposition that the prime suspect should be immune from any police questioning during an investigation has created a confusing dilemma. A

dilemma that the legislative changes permitting police to detain suspects for questioning has not completely resolved.

Investigative interviewing is therefore an essential skill requirement to obtain the maximum information of evidential value from human sources. Apart from the relatively complex legal jurisprudence surrounding interrogation, investigative interviewing is a high order interpersonal skill, relying upon higher order information processing, methodical observation, intent and active listening, effective reading and study skills and a better than average ability to hold detail in working memory. In short, a good interviewer has to be a master of detail and people skills (Shepherd 2010 p.xi). This study proposes to examine how well prepared the Gardaí are to perform this function. While it has become a truism that the critical stage in most criminal cases is the interview of the suspect at the police station (Baldwin 1993 p.326), studies examining just how important the interview process is are scarce (see Gudjonsson 2003, McConville, Sanders, and Leng 1991). Even in the US, where one might expect a proliferation of studies, the subject has almost been universally ignored in academia (Leo 2008 p.5). Equally, in Ireland, difficulties of access to data compound a relative lack of interest into research in the field. From the 1970s on, in common with many other institutions, AGS has begun to be subject to critical review. Amongst these criticisms, the most serious were allegations of brutality directed at suspects in custody to obtain admissions, as well as incompetence. While the 1970s and 1980s brought home the dangers of confessions deliberately coerced through brutality, oppression or threat, the 1990s raised awareness of the risks of false confessions procured through more subtle means (Heffernan and Ní Raifeartaigh 2014 at 9.128). Nevertheless, apart from commentary on cases of miscarriage of justice, even the Morris Tribunal failed to stimulate much interest in interrogation procedures here. The Morris Tribunal from 2002 to 2008, with eight large reports produced, was a seismic event for AGS. It examined many aspects of Garda operations from management to scene preservation to discipline. The Tribunal, “showed that a cohort of gardaí, from garda to superintendent rank, were prepared to engage in criminal acts to further their own career ends” (Brady 2014 p.241). The Tribunal undertook an extensive evaluation of Garda interviewing practice and produced a number of recommendations. It directed criticism at the lack of training and its resultant undermining of investigations.

The Morris Tribunal was a pivotal change in public perceptions of the AGS and began a cascade of internal reports and examinations of the AGS. It stimulated the Garda Síochána 2005 Act, which established the Garda Inspectorate that has undertaken groundwork research into the AGS. The Garda Inspectorate Reports (GIR) have examined various aspects of Garda operations and made recommendations for improvements. While the new Policing Authority will now have responsibility for implementing the recommendations of the Inspectorate, the Inspectorate itself has “found gaps between the development and implementation of policy and an absence of effective governance, leadership and intrusive supervision needed to ensure that policy aims are actually delivered” (GIR 2015 p.2). This has meant that while Garda management accepted previous recommendations, they have not been fully implemented, leaving many unresolved issues. The 2014 Inspectorate report examined crime investigation, finding irregularities in crime recording to present an overly positive impression of effectiveness (see also O'Higgins 2016). This report also looked at the lack of skills and training to undertake crime investigation, including the continued lack of interview training. The 2015 Inspectorate Report into changing policing in Ireland focused on management issues in AGS. The Report found a needlessly hierarchical and bureaucratic organisation that was still failing to utilise IT effectively. This Inspectorate’s report is very important in understanding issues with management and the inhibiting influence of culture on progress, and is essential reading to the contextualisation of this work. The AGS is therefore now subject to regular and close scrutiny. Sadly, change is slow. The force is fortunate to have many dedicated and capable individuals in it who strive to perform a good service, often despite organisational obstacles. As Brady (2014 p.267) observes, “Garda successes sometimes owed more to initiative and persistence by individual gardaí than to organisational capacity.”

As well as domestic scrutiny, Ireland is now also part of Europe. The European Convention of Human Rights (ECHR) is not part of Irish law by its own force, but it became part of domestic law in accordance with the terms of the European Convention on Human Rights Act 2003, and since the enactment of that Act, the ECHR has been adopted on a sub-constitutional level under Irish domestic law.²⁶ It has been argued that the Irish Constitution already protects many of these same

rights at an equal level as the European Convention (McDermott and Murphy 2008). The jurisprudence of the European Court of Human Rights (ECtHR) therefore has a greater influence in domestic proceedings in that the Superior Courts are now required to take judicial notice of decisions, opinions and judgments of the ECtHR and to take “due account” of the principles established by their decisions.²⁷ The European Commission has further undertaken to have a roadmap in place to protect suspects’ rights across the EU to include access to legal advice.²⁸

This study, therefore, seeks to examine police interviewing in the Republic of Ireland, from both the legal perspective and from the perspective of international best practice to establish what is the current position of investigative interviewing in AGS. While the importance of pre-trial detention and questioning has grown, little attention has been given to the commensurate training provided to police.

1.2 Study design

Aims and objectives:

The central research question seeks to examine the framework permitting questioning in police detention. It seeks to examine the training and practice of investigative interviewing as conducted by Gardaí and to evaluate and compare that to the best international practice. The study focuses on the normal investigative interviewing by police trying to discover the authors of crime. It does not cover the role of specialist interviewers, who are specially trained and whose sole task is the interviewing of certain vulnerable victims and witnesses.²⁹

Other objectives include an exposition of the contextual environment that precipitated the legislative changes creating the power to arrest suspects for questioning, and the examination of the subsequent changes that such legislation has had for the right to silence and what it means for a suspect in custody. This includes an examination of the concept of adverse inferences where the suspect’s use of silence may impact at any later trial. The study will outline the jurisprudence protecting the suspect in police custody from abuse or coercion to make a statement. Alongside the legislation introducing detention, new safeguards such as audio-visual recording and custody regulations to protect detainees were introduced and these will be examined. The study will then examine the interview training provided to

AGS members to conduct criminal investigations including the interviewing of persons with potential information. It will analyse alternative interview models used elsewhere to train police officers for this role. The study will then evaluate the Garda training model recently introduced in light of the other models analysed and recommend further training or modifications if required.

The thesis will seek to gain a greater understanding of the manner in which Irish police interview suspects in an increasingly inquisitorial criminal justice process. It will also seek to determine what these legislative changes mean for the questioning of suspects and how these change operational practice as well as the expectations of key stakeholders in the criminal justice system.

Methodology

In seeking to answer the research question, a mix of historical, socio-legal, legal, and comparative methodologies will be used. The emphasis on the historical aspect permits the tracing of the changes that have occurred in the criminal justice system, which have moved fact finding from the courtroom to the interview room. This pluralism of research method strives to present a richer and more in-depth analysis of the subject of custodial interrogation.

The legal analysis will be doctrinal, identifying the legislation as well as precedent in criminal cases that have legitimised this move to fact finding in Garda custody in Ireland. Using standard positivist methodology, this project will seek to highlight the relevant legal rules and principles that authorise this shift in fact-finding. This is the internal approach and its sources, “are predominantly those that are thrown up by the legal process: principally statutes and decided cases, supplemented where possible with lawyers' literature expounding the rules and occasionally reflecting on them” (Ibbetson quoted in McCrudden 2006 p.633). In this work, standard legal methods will be used to analyse as well as synthesise available legal sources such as case law, legislation and constitutional principles. These include the rules on arrest, detention, right to silence, as well as judicial, constitutional and legislative safeguards. The decided cases of the Irish Court of Criminal Appeal and the Supreme Court are a principal source of relevant case law. The impact of supra-national influences on the Irish legal system, including EU directives and the

European Court of Human Rights, is recognised and analysed accordingly. This method is also used to examine government appointed reports that examined various aspects of the criminal law as well as the operational functioning of AGS. Of particular importance to this work has been the work of the Garda Inspectorate who is tasked to “ensure that the resources available to the Garda Síochána are used so as to achieve and maintain the highest levels of efficiency and effectiveness in its operation and administration, as measured by reference to the best standards of comparable police services.”³⁰

A socio-legal methodology will be used to attempt to reveal the social reality behind this paradigm shift, what this change means for the interviewers and for those who are being interviewed. Law is neither a closed normative circuit nor an external force exerting its force on society, and if doctrinal analysis is an internal study of law, the external is the study of law in practice (McCrudden 2006 p.634). Furthermore, knowledge “turns out to be far more complex than the unitary model of positivism would suggest” (Samuel 2011 p.189). It is the social reality that motivates political and other actors to precipitate changes to specific laws and processes. It is therefore at the routine, lowest level of the legal hierarchy where this analysis occurs, reflecting the social reality of the law (McCrudden 2006 p.638). This examination of the social reality enriches and informs the legal analyses. This work has utilised contemporary Dáil debates and newspaper coverage to convey the prevailing cultural and social dynamics involved at certain critical times in Irish society. Concurrent with an increase in policing powers was a desire amongst many to ensure strong protections for those in police custody. Building on Packer’s model, David Garland (2001) has spoken of a culture of control developing around criminal justice. Some elements of this transition have been witnessed in Irish society but so also has an increased rights based framework. The transition in Irish society should therefore be viewed as an effort to create a balance between two conflicting needs, protection of society on one hand along with protections for individual rights on the other.

A comparative analysis with other jurisdictions will also be undertaken to identify what is accepted as best international practices and why this is so. This is confined to common law countries as the appropriate questioning technique is defined by the

underlying legal architecture and cannot be easily separated, as over time, both influence the other as well as critical decisions made by actors, including judges and politicians, who further shape diverging outcomes. The United Kingdom provides one model that was praised by the Morris Tribunal and which is supported and based on criminological and psychological studies. It focuses on open questioning to minimise incidences of false confessions. Initial training efforts were less than completely successful and the reasons may inform Irish practice. The United States offers an alternative model that was designed by police themselves with little psychological underpinning, being designed for its effectiveness in obtaining confessions utilising persuasion. Comparative analysis with these models permits a deeper understanding of the interview system in place in Ireland without training. Both models will be critically analysed for both strengths and weaknesses to learn from mistakes made elsewhere. These two models represent almost the two opposite ends of the spectrum of police questioning available in democracies. They map poorly onto Packer's justice model continuum, however. A number of other countries have aspects of training that have also been examined where appropriate to Irish conditions. Not all these models operate in entirely similar justice systems and direct comparisons are not always appropriate or definitive.

This comparative analysis will further utilise the experiential learning of the author, gained over 25 years frontline operational experience in An Garda Síochána, the majority of which was in detective branch. This operational experience includes knowledge of internal institutional literature and institutional policies and procedures under which investigators have to operate, as well as interview training available. This operational experience also serves to analyse and synthesis materials and sources used in this study. This experience permits an almost ethnographic methodology or an insiders view to understand the world of policing and interviewing from the practitioners viewpoint (Snow, Morrill, and Anderson 2003 p.182). This is constrained to a large extent by the strict regulatory regime that Gardaí work under, which includes preventing disclosure of operational information by serving members. However, I believe the participatory insights of this approach helps in understanding some of the underlying social processes experienced by Gardaí in undertaking their duty. Of course, the fundamental criticism of such a

methodology is the bias of being overly subjective (Semmens 2011 p.70). As such, it is used sparingly and every effort is made to tie observations to established theory.

This interdisciplinary approach to methodology strives to achieve a broad epistemological understanding of this vast area of law and practice, not just in the last 30 years but also in the 200 plus years to gain insights into future directions.

Limitations

A request to study investigative interviewing was submitted to AGS but was refused on the grounds of data protection and the need to protect tradecraft. AGS does not generally cooperate with outside research. AGS has an internal research unit but much of its work is unpublished. Currently, the AGS website under published research has a number of public attitude surveys, the last in 2008. It also has an internal survey of staff that responded to a 2014 survey. Even though the response rate in the staff survey was low, issues raised by staff included, lack of transparency in promotions, low morale and lack of operational training.³¹ The Garda Inspectorate, however, has assumed a more assertive role in examining the role and function of AGS. The Inspectorate reports have provided a great deal of useful information that informed this study. This study found the Garda Inspectorate report of 2014 an invaluable tool. In their research, the Inspectorate interviewed almost a thousand Gardai as well as examining interview memos and comparing these to crime reports. Nevertheless, the ability to access and examine real life audiovisual tapes from AGS or interview GSIM trainers or students for this study would have provided additional critical insight into current and prospective practice. Furthermore, a great deal of valuable information is gathered during the arrest and detention phase that could inform policy at the highest levels but which remains unavailable. Even the number of arrests annually in Ireland is unavailable. The annual number of detentions has been given as 20,000 by one committee but the source is unclear (Working Group 2013 p11 & 17). This study would also have benefited from discussing the main research question with senior AGS management but this was not possible without official sanction. Operationally, few Gardai over the rank of sergeant are involved in investigative interviewing (unless the suspect is a Garda) but senior management sets policy and their buy-in is critical to any subsequent success of policies and training.

Many academic researchers worldwide encounter similar limitations of access to police. Therefore, much of the academic literature on the subject of interviewing is based on artificial conditions rather than real life with studies using laboratory conditions to simulate the interview setting (Fisher, Brewer, and Mitchell 2009, Oxburgh, Walsh, and Milne 2011, Cooper, Herve, and Yuille 2009, Yarmey 2009). Controlled lab conditions with students have limited general applicability (Fisher, Brewer, and Mitchell 2009 p.133). Especially, these simulated scenarios can never replicate the high stakes emotional intensity of a real interview room environment (O'Sullivan et al. 2009, Cooper, Herve, and Yuille 2009). Those few researchers who have been granted such access are cited accordingly and are especially important. It is beyond the scope of this study to make distinctions between the work practices and cultures of different units in the AGS. Other researchers have noted that detectives are generally more competent interviewers through experience than uniform police but even the detective branch can be highly diversified. Fraud detectives can be expected to have a different ethos to anti-terrorism officers, for example.

1.3 Outline of work

The work is divided into two parts; part one examines the legal architecture that now exists permitting AGS to arrest suspects specifically for the purpose of questioning them and is covered in chapters two through four. Part two then examines the AGS and their functional response to this changed paradigm. The second part will also examine what international best practices have been adopted in other countries and what lessons these hold for Ireland. Part one commences with an examination of the law on arrest and detention. It explores the legislative changes to the common law function of arrest, where its purpose was the speedy production of a suspect before a law court, to one where now it can be a prelude to questioning. The introduction of the section 4 provision in the Criminal Justice Act 1984 Act (the “1984 Act”) created the legal architecture and was the first time a routine detention was provided to allow police question those suspected of committing serious crime. Prior to the 1984 Act the lacuna of any detention provision for ordinary crime that police investigated resulted in two alternative solutions; one was to find some aspect of the crime that fitted into the acceptable criteria to utilise the anti-subversive legislation,

alternatively, a suspect would be brought to a Garda station to ‘help police with their enquiries’ supposedly in a voluntary capacity. This was what some have described as a twilight world that suspects could enter prior to the introduction of the statutory detention provisions (Heffernan and Ní Raifeartaigh 2014 at 9.148). This appeared to have been a universally agreed subterfuge of the written law but consequently lacking any framework to protect and vindicate the rights of any suspects. The result of the lack of such a framework was too frequently the abuse of many suspects with the inherent damage to the credibility of AGS and the whole criminal justice system.

Accordingly, alongside the introduction of such statutory detention a number of safeguards to protect those brought into police custody were introduced. These included regulations, a complaints mechanism, and audio-visual recording of interviews. Judicial activity also pushed for increased access of legal advice. There followed a number of other detention provisions, which extended the detention times for specific crimes, drugs and gangland crime, up to seven days. This chapter also attempts to contextualise the introduction of these changes by reference to the social situation that was prevailing in Ireland at the time these provisions were introduced.

Part one then moves on to examine the right to silence of the suspect when being questioned by police, and the right to not have to answer questions. Specifically, did the legal architecture that created the legal provisions to detain suspects for questioning alter their right to silence in any way? Suspects continue to retain a right to silence in the Irish jurisdiction, and need not answer police questions, even though police now have the statutory power to question them. The introduction of the detention provisions therefore did not alter this general situation. There had been previous legislative provisions that, under certain conditions, have sought to force a criminal suspect to provide answers to police questions under pain of a prison sentence for refusing. The ECtHR and the Irish Supreme Court have concluded that such provisions have no place in criminal law and a suspect cannot be compelled to answer police questions.³²

Nevertheless, the right to silence is not absolute and in certain circumstances where an explanation could be expected, a failure to provide one can lead to an adverse

inference that an explanation is not provided because the suspect does not have one or at least one that would stand up to scrutiny. Although the taking of inferences from the silence or conduct of the accused had diminished in the common law, certain statutory adverse inference provisions were introduced in the 1984 Act, which again provided for their use.³³ These provisions provided, that in certain circumstances, when a suspect is being questioned, and certain marks or objects were in his or her possession or he or she had been found close to the scene of the crime, then an account is required. When one is not provided, a court may use the failure to account as corroboration of other evidence. A later addition was adding an alibi provision. This provides where if a suspect fails to mention during questioning a fact that he or she later relies on as a defence at trial, the court may take the adverse inference that it was a recently made up fact or one tailored to answer the prosecution case. Terrorism legislation has its own adverse provision where a person is being questioned for membership of an unlawful organisation.³⁴ Involvement in a criminal organisation can also cause an adverse inference provision to be invoked.³⁵ These adverse inference provisions are nevertheless limited in scope. Furthermore, counterbalancing safeguards in their use to protect suspects have been introduced. These include the advice of a solicitor, a simple language explanation and the video recording of the process. This chapter examines the use of these inference provisions and the safeguards accompanying them.

Part one then concludes with a chapter on Questioning and Confessions, which examines the rules around the questioning of suspects in Ireland. Many of these rules have an ancient origin and existed before any such institution as a professional police force was created. The creation of the police was not universally popular and more especially their adoption of an interrogation role was controversial. It was often not accepted amongst legal practitioners with the result that the jurisprudence in this area is extensive but often contradictory. Eventually, judges produced a set of guiding principles in 1912 to govern police interrogation even though formally it was non-existent. These Judges' Rules continue to operate in Ireland despite the introduction of the 1984 Act. Alongside the detention provisions in the 1984 Act, other provisions sought to balance the rights of suspects during questioning and provide for the protection of their rights. Judicial activism has also sought to ensure protections and fairness during this questioning. These protections operate at

different levels of absoluteness. Compliance with the Custody Regulations may not necessarily influence the admissibility of any resultant confession whereas denying access to legal advice or using improper inducements will. This chapter examines the rules and their application to the questioning of suspects.

Part two will begin with an examination into what preparations the Irish police have made to respond to the new role, as outlined in part one, expected of them. This will begin with a brief history of AGS from its inception at a critical and dangerous time where getting police on the ground was the priority. This chapter will examine the training provided to both new entrants to the force as well as serving members. The importance and availability of training provided to interview witnesses will be explored. A number of different training programmes have been introduced to provide recruits with the necessary skills but the outcomes have remained unsatisfactory. This chapter also examines what specialised training was provided to interviewers who question suspects and some of the failings that resulted from training deficiencies. The chapter will provide a contextual background and will assist in framing analysis of the recommendations made by the Morris Tribunal in relation to Garda practice and abuses.

Part two then provides an overview of models of interrogation. It begins with a review of psychological literature to examine some fundamental human traits. This also looks at the structure of memory as well as the interaction of emotions and environment. The chapter then evaluates the two most important interrogation models available to democratic police forces used worldwide. The two models are the Reid method from the United States and the PEACE method from the United Kingdom. The two models are at opposite ends of the interviewing spectrum. The Reid method has evolved from police experience and is a commercial model taught throughout the world. It is a confrontational model that seeks to convince the suspect that there is little option but to confess. The PEACE method, on the other hand, is the result of design based on psychological research and literature. It seeks to avoid taking confessions, focusing instead on fact-finding. Both models utilise elements of human behaviour and interaction to achieve results but the Reid method, in particular, is associated with incidences of false confessions. Criticism of the PEACE method is that it has become too effective in eliminating confrontation from

the interview room with incidences of police failing to challenge suspects' accounts even when having evidence to contradict the accounts given.

Part two then examines the new Garda training model (GSIM) in light of the discussion of the other interview models. The new Garda model is fundamentally based on the PEACE method but with some important enhancements. These seek to overcome some of the problems identified with the PEACE method to make it more practical in responding to serious crime. However, fundamentally the PEACE method remains ineffective where a suspect is uncooperative. Nevertheless, a number of other modifications are possible, including techniques to maximise the strategic use of available evidence and to strengthen the development of rapport, which may help overcome such noncooperation and these are discussed. Notwithstanding such enhancements, situations can still occur in the investigative interviewing context where the fundamental underlying purpose of police in gathering evidence may have to yield to a higher purpose. This chapter discusses, utilising case studies, situations where the interviewee holds potential information to save a life or lives.

1.4 Introduction to Part One

The first part of this thesis examines the legal framework that now exists to detain suspects in criminal investigations and question them. The next chapter takes the introduction of the 1984 Criminal Justice Act as the starting point in this major paradigm shift. The societal background is referenced throughout to contextualise these changes. As each legislative introduction failed to achieve its objectives a more focused and stronger Act attempted to rectify the situation. The chapter serves then as a historical perspective on attempts in Ireland to respond to criminal activity that was changing faster than legislation or politicians could. The other major societal influence, on both law and policing, as a result of the conflict of Northern Ireland is also examined. What is evident is a closer convergence in legislative responses as the State attempts to suppress both terrorism and violent ordinary crime.

The thesis then examines how the State has changed the other traditional presumptions around the right of silence. As well as permitting the detention of suspects, the State moved to place limits on the applicability of the right to silence. This moved towards a continental model whereby silence was not prevented, but a cost attached to employing such a tactic. As a result, in certain circumstances not providing an exculpatory account could later lead a trial court to draw the inference that no reasonable account could have been provided to contradict the evidence presented.

The introduction of these legislative provisions has not been in one direction only. These moves towards efficiencies in the criminal justice system have been balanced by a comprehensive set of safeguards that continue to evolve. Some of these are created by legislation, some from judicial activity. Some are very old rules, while others are more recent. The influence of Europe is also important in this area as is the Irish Constitution and both serve to ensure fairness is observed in the interviewing process.

What is evident is that while a new paradigm has been introduced it is highly regulated and controlled, making it transparent. It remains imperfect as all human

institutions are but it acknowledges a reality that was subverted for many decades in jurisprudence; when investigating serious crime, an investigator needs to talk to the prime suspect.

2: Arrest and Detention

2.1 Introduction

Liberty is an essential prerequisite for a democracy. This liberty should permit individual physical freedoms and personal opinions together with the ability to express them without fear of arbitrary deprivation of that liberty, except where a public code of justice requires the punishment of those who commit crime. In such a system the process of crime investigation may take many forms but ultimately it is a process where the objective is to lay a prosecution case before a court of law. In Ireland, as in other common law countries, the sole purpose of an arrest was to bring an accused person before the law courts in the most efficient manner.³⁶ Most arrests continue to be executed for that purpose. Hence, arrests tended to be the culmination of a police investigation into criminal activity.

The ability to question a suspect is particularly important in the investigation of serious or complex crime. Nevertheless, in common law countries, police were legally not permitted to execute an arrest to question a suspect, with few exceptions.³⁷ To surmount this obstacle, there was a divergence, in reality, between theory and practice whereby a system of legally irregular detention had long become established. No safeguards existed, as officially this process was non-existent, and therefore, this detention was open to abuse. While occasionally the courts criticised the police in individual cases for overstepping the mark, confessions obtained in custody were never banned outright. Brooks suggests that often judges were acutely aware that most crime would go unsolved if such confessions were ruled inadmissible (Brooks 2001 p.11). In Ireland, at one stage, confessions were claimed to account for solving 80 per cent of all crimes (O'Briain 1978 p.14).

Following the introduction of the section 4 provision in the 1984 Criminal Justice Act (the "1984 Act") and other subsequent detention provisions, arrests can now routinely occur at the very initial stages of an investigation and can be critical in producing prosecution evidence. The resistance to the initial introduction of detention has long faded and the more recent provisions now permit seven-day detentions. On average, approximately 20,000 such detentions occur annually in Ireland under the various detention provisions now provided for (Working Group

2013 p.11).³⁸ Consequently, an arrest can now be critical to an investigation and is now routinely employed as a method to bring a suspect in for questioning under these detention provisions.

Various social factors dictated the need for the introduction of a crime investigation model that incorporated the need to question any suspects but in conjunction with the introduction of such detention provisions, the legislature was concerned to regulate the conditions of detention with a view to eliminate previous abuses. As a consequence, new safeguards were introduced in tandem with the new detention provisions to ensure fairness and adherence to certain principles and rights. Other safeguards have developed through judicial activity, both in Ireland and Europe, to protect the rights of individuals in custody and include access to legal advice, an issue that is continuing to evolve. A valid arrest remains the essential prerequisite to the detention provisions and this chapter begins by examining the essential components to a valid arrest. The chapter then examines the various detention provisions available, as well as some of the social reasons for their introduction, before examining the general safeguards in place for those in custody. The specific safeguards for those suspects who are questioned will be examined in chapter four.

2.2 Arrest

Until 1997, unless acting under a judicial warrant to arrest, the power to arrest was founded in a mix of common law powers and various statutory powers with the difference between felonies and misdemeanours being of particular importance. In 1997 the Criminal Law Act abolished the distinction. A particular statute can create a power of arrest in its provisions and there are numerous statutes that contain a power of arrest for designated offences (Coonan and O'Toole 2011 p.62). Many are rarely used, while other statutes are frequently and routinely employed to deal with relatively minor offences such as public nuisance offences (Kilcommins et al. 2004 p.216, Phillips and Brown 1998 p.28).³⁹ For offences carrying a penalty in excess of five years, however, there now exists a general statutory power of arrest available to members of the Garda Síochána under section 4 of the Criminal Law Act, 1997 (Ryan 2000 p.1).⁴⁰

Normally, once a person is arrested with or without warrant, he or she must be brought as soon as practicable before a judge of the District Court. If arrested on warrant or charged after 5 p.m., it suffices to bring the person before the court on the following morning.⁴¹ This requirement is without prejudice to the provisions of any enactments relating to proceedings after arrest or charge in particular cases.⁴²

Arrest Requirements

Knowledge

In order to effect a lawful arrest there are a number of requirements to be fulfilled. The person should know the reason that he or she is being deprived of his or her liberty.⁴³ Unless the deprivation of liberty is grounded in a relevant statute or common law provision, no motive, no matter how worthy or socially desirable, will make an arrest lawful.⁴⁴ Normally the slightest physical touch with some form of words is sufficient but circumstances in particular cases may affect the form of words or actions taken (O'Malley 2009 at 10.01). Bare words will not normally constitute an arrest unless the person to be arrested acquiesces and submits to the process.⁴⁵ The words should indicate the reason for the arrest. Normally, it is not necessary that an arrest be accompanied by words and/or physical intervention in every case, an arrest may be valid if a member of the Gardaí has carried out the arrest and the circumstances and context of the arrest patently supply the reason.⁴⁶ It is also usually unnecessary for the form of words to be technical or to quote the precise section of statute.⁴⁷ The Oireachtas may enact statutory requirements that carry a high level of peculiarity in the information to be given. If, however, it is not so specified, then it is implied that only basic information is necessary in the exercise of police powers.⁴⁸ On the other hand, failure to make the person aware of the reason for his arrest may render the arrest unlawful.⁴⁹ If the person is not supplied with this information at the time of arrest but subsequently receives it then the arrest is validated from the time the explanation was given.⁵⁰ Nevertheless, if the person being arrested produces a situation that makes it impossible to inform him of the reasons, for example, by resistance or fleeing, then he can have no cause for complaint.⁵¹ A period of detention prior to arrest does not necessarily impugn an arrest once that arrest is based on reasonable suspicion, independent of the detention.⁵²

Suspicion

Unless an individual is caught in the act of committing a crime, which normally allows any person to make an arrest,⁵³ there is a requirement on police making an arrest of a person to have a reasonable cause for believing or a reasonable suspicion that the person has committed an offence.⁵⁴ Reasonable suspicion is now the common statutory basis for the exercise of a variety of police powers and the legal requirement that an arrest is founded on suspicion protects against the arbitrary and capricious use of arrest powers (O'Malley 2009 p.290). This test is partly subjective, in that it must be a genuine suspicion in the mind of the arresting member, and partly objective in that it must be based on reasonable grounds.⁵⁵ The standard required of the grounds for arrest is, nevertheless, of a lesser standard than the concept of *prima facie* proof as it is known in the law of evidence.⁵⁶ The suspicion of an arresting Garda that an offence had been committed does not have to be proved in any particular manner and it can be established in direct evidence or inferred from the circumstances.⁵⁷ Mere conjecture or speculation, however, is not sufficient to ground a reasonable suspicion.⁵⁸

Matters such as knowledge of the previous convictions of the suspect may influence the forming of reasonable suspicion.⁵⁹ Evidence provided by informants or hearsay evidence may also be sufficient.⁶⁰ Suspicion can take into account matters that could not even be put into evidence, and illegality is not ruled out in obtaining suspicion.⁶¹ For instance, in the Supreme Court case of *DPP v Cash*,⁶² the appellant sought to have the absolute exclusionary rule as it was then laid down in *DPP v Kenny*⁶³ extended to apply it to material grounding a suspicion of guilt, which influenced the mind of the arresting Garda. The suspect was arrested for a burglary as a result of prints recovered at the scene which were a match with those on file but which should later have been destroyed. In dismissing the appeal the Court stated it was unwilling to make the extension from evidence that is offered at trial under evidence rules to the pre-trial arrest process and the facts that provided the basis for the suspicion justifying the arrest.⁶⁴ Similarly, in *DPP v O'Driscoll*⁶⁵ the Supreme Court found that information coming into the possession of Gardaí did not have to amount to evidence or a *prima facie* case and it is irrelevant that the information is later shown to be incorrect. In this case, the information had created hearsay upon

hearsay. The Court, in this instance, stated that from a perusal of the authorities in this area that the test of reasonable cause for suspicion sets a very low threshold. The test would appear to be the one of a reasonable man in similar circumstances and once the information is reasonable and not fanciful, it does not matter whether it is correct or not; the Gardaí are entitled to take action on it (Glynn 2011).⁶⁶ Broadly consistent with this approach, the ECtHR defines reasonable suspicion as requiring:

“(T)he existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence, though what may be regarded as reasonable will depend on all the circumstances of the case.”⁶⁷

The arresting Garda does not necessarily have to have formed the suspicion himself or herself. It will suffice if a senior officer conveyed the suspicion to him or her, if the officer does more than simply order him to make an arrest. Similarly, if a short verbal briefing is given by one member of the force to another it “will suffice to constitute the material from which a *bona fide* and reasonable suspicion may be formed.”⁶⁸

The formation of suspicion in the mind of the arresting officer is subject to examination by the court.⁶⁹ In *Trimbole v Governor of Mountjoy*,⁷⁰ the court concluded that the real reason the appellant was arrested had been to ensure his availability for an extradition request in what the court held to be deliberate violation of his constitutional rights. In another example, in *DPP v Healy*⁷¹ the court stated that the object of the powers given by section 30 is not to permit the arrest of people simply for the purpose of subjecting them to questioning. Rather it is for the purpose of investigating the commission or suspected commission of a crime by the person arrested.

Force

Force, if used, must be proportionate and reasonable in the circumstances of the arrest.⁷² In its decision in a case where the SAS had shot three suspects dead while attempting an arrest in Gibraltar, the ECtHR held that only moderate and proportionate force should ever be used in effecting an arrest.⁷³ Even the use of handcuffs to secure a prisoner is only justifiable where it is reasonably necessary to

prevent an escape or the threat of violence.⁷⁴ The ECtHR stated that handcuffing is not normally an issue when used in connection with a lawful arrest and does not entail use of force or exposure exceeding what is reasonably necessary in the circumstances.⁷⁵ Although, Walsh (2009a p.48) notes that their use in circumstances where there was no real risk of the prisoner's escape could give rise to a breach of Article 3. Therefore, the use of handcuffs as a form of humiliation or degradation is to be avoided (Davies 2013 p.198). Nevertheless, it is necessary to give a generous amount of discretion to arresting Gardaí as they can have regard to previous experiences of similar situations and anticipated problems.⁷⁶

Arrest Location

In the Irish Constitution, Article 40.5 states that the dwelling is inviolable and shall not be entered save in accordance with law. In certain circumstances, the common law allows police to enter onto any private premises; for instance, where they reasonably believe a breach of peace is occurring,⁷⁷ where there is a threat of bloodshed or where life may be endangered, and in such circumstances it does not matter that the threat comes from people outside the dwelling.⁷⁸ There is also an implied consent available to Gardaí to enter onto private property to investigate crime, but the owner can revoke this at any time, at which point the Gardaí must leave.⁷⁹ It is only the dwelling that is so constitutionally protected; the surrounding building or curtilage is protected to the extent that unlawful intrusion may constitute a trespass, but it is not a violation of a constitutional right (O'Malley 2009 p.295).

In *DPP v Gaffney*⁸⁰ it was held that a statutory power of arrest does not confer the right to enter a dwelling to make an arrest unless the power of entry was expressly authorised for that purpose. The Criminal Law Act 1997 provides a general power of entry to any premises to effect an arrest of a person with or without a warrant. Normally, the consent of the occupier is required unless certain stated exceptions apply.⁸¹

As an alternative means of entering onto private property, the power of entry to a dwelling for the purpose of investigation pursuant to a search warrant is granted under various statutes.⁸² This permits entry and allows an arrest to be effected in the dwelling. If subsequently, however, the warrant is found to be invalid then the arrest

itself may fall.⁸³ If such an arrest is later held to have been unconstitutional then all evidence obtained subsequent to the arrest could also be invalid, as all unconstitutionally obtained evidence can be excluded.⁸⁴ This includes any admissions made during questioning in detention.

In terms of timing, arrest was traditionally regarded as an action indicative of the end of the investigative process with no middle ground between an arrest and liberty (Fennell 2009 p.427). In 1930, in *Dunne v Clinton*,⁸⁵ Hannah J. was condemning an investigative practice when he stated:

“In law there can be no halfway house between liberty of the suspect, unfettered by restraint, and an arrest. If a person under suspicion voluntarily agrees to go to a police station to be questioned, his liberty is not interfered with, as he can change his mind at any time.... As, in my opinion, there could be no such thing as notional liberty, this so-called detention amounts to arrest and the suspect has in law been arrested and in custody, during the period of his detention.”

Nevertheless, while O'Malley (2009 p.306) says that Hannah J. was condemning a practice that appeared to have been widespread at the time, he notes that his condemnation was not enough to stop the practice, as exactly fifty years later a similar case arose in *DPP v Coffey*.⁸⁶ As we will see, the fundamental situation as regards detention is no longer the same as when Hannah J. made his remarks. The arrest itself has changed substantively little, while the twilight zone that any subsequent detention could be no longer exists.

2.3 Detention for 'ordinary' crime

Criminal Justice Act 1984

There existed in Irish criminal law an interrogation provision, under section 30 of the Offences against the State Act 1939 (the “1939 Act”), for those suspected of involvement in subversive activity but this did not include serious ordinary crime, such as murder, unless a firearm was involved. With the introduction of the 1984 Act that locus changed. Section 4 of the 1984 Act is by far the most commonly used detention provision and now allows detention of up to 24 hours, double its initial duration.⁸⁷ It was long mooted prior to its introduction that such a detention provision was required and a number of cases in the early 1980s highlighted both

the need to regulate the issue of ‘helping the police with their enquiries’ and at the same time to provide some investigative mechanism for ordinary crime comparable to the powers under the 1939 Act.

Background

Escalating crime rates in Ireland saw a substantial rise in crime figures from 37,781 reported crimes in 1971 to 89,400 in 1981 (O'Donnell 2001 p.92, McCullagh 1996 ch.1). In the 20 years from 1963 to 1983, the rise in recorded crime figures actually showed an increase of 632 per cent (Parsons 2016 p.19). These rising crime figures including the increasing availability of drugs, especially heroin, and the perception of an increasing level of violence, made Ireland appear a much less safe country than a decade previously (Inglis 2003). The availability of illegal firearms amongst paramilitaries meant that, inevitably, some became available to ordinary criminals. Firearms were responsible for the murders of three Gardaí in 1980 alone, along with a further two Garda murders in 1982. Murder as a crime generally increased in Ireland; in 1951 there had been four, by 1976 murders stood at 19 and in 1981 the number of murders was 24.⁸⁸ These statistics reflected a growing sense of fear of crime. The Gardaí were willing to tailor the 1939 Act to allow them detain suspects for interrogation and when firearms were used such a provision made sense, but when a suspect was arrested for malicious damage to a door as opposed to the murder he caused when inside the house, the creativity was more than a little dubious and caused unease to many to have to resort to semantics and colourful devices to ground an arrest for the purpose of questioning (Hederman 2002 at 7.8-7.10).⁸⁹ One such case that was rejected as a valid arrest by the courts was where the accused was arrested on suspicion of causing malicious damage to a knife by making contact with bone while stabbing the victim.⁹⁰

Furthermore, cases such as *DPP v McLoughlin*⁹¹ and *DPP v Coffey*⁹² highlighted the continuing misuse of the alleged voluntary attendance at Garda stations. In *DPP v Shaw*, the Supreme Court had stated that this practice was illegal and “no more than a euphemism for false imprisonment.”⁹³ In the case of *DPP v Lynch*, the defendant was detained for the murder of Vera Cullen. Lynch was then questioned continuously for 22 hours in the Garda station without ever being given the opportunity of communicating with family or friends.⁹⁴ O’Higgins C.J., in excluding

the confession given due to the oppression and harassment of the questioning, noted that he had sympathy and understanding for the difficulties Gardaí face when investigating such crime but “to excuse irregular means adopted because of these difficulties in order to secure evidence at a trial is quite another.”⁹⁵

Walsh J. further noted, in the confession, inconsistencies with the actual facts including that the accused had admitted killing the victim several hours too early; he noted that a newspaper which had made speculations had been supplied to the suspect in custody and may have served to plant information that the suspect did not have.⁹⁶ Walsh J. concluded that a person in the custody of the Gardaí must be informed that he or she is free to leave at any stage as “he may very well reasonably assume that he is not free to leave until he is so told and he may not venture to assert his belief in his right to leave.”⁹⁷ Fennell (2009 p.427) suggests that the judgment in *Lynch* effectively abolished the police tactic of inviting someone into the police station to ‘help them with their enquiries.’

The unregulated detention that such an invitation permitted was open to abuse and the use of heavy-handed interrogation tactics against such suspects had previously been highlighted in the Irish media leading to rows in the Dáil.⁹⁸ Other well-publicised cases, such as convictions in the Sallins train robbery, followed by acquittals, highlighted the issue further (Joyce and Murtagh 1984). The Kerry Babies case in 1984, eventually the subject of a tribunal, sought to establish how a local woman had confessed to the murder of a baby that had washed up on a Kerry beach while her own dead newborn baby was later discovered hidden on the family farm (Lynch 1985).

Legislation

The Criminal Justice Bill 1984 was vigorously debated with some disputing the need for such legislation whilst also claiming an overuse of section 30 provision.⁹⁹ Mr. Michael Noonan, then Justice Minister, insisted the need existed to give the Gardaí a power of detention for serious crime. The Minister conceded that tape-recording of such interviews should be introduced as soon as the details had been worked out.¹⁰⁰ Such was the opposition to the Bill that a compromise of the simultaneous introduction of two further counterbalancing proposals was required

(Walsh 1998 p.263). The first was a complaints mechanism¹⁰¹ and the second was the introduction of custody regulations to ensure proper treatment of persons in custody.¹⁰² It was July 1987 before the provisions of section 4 of the 1984 Act came into force,¹⁰³ along with the Custody Regulations.¹⁰⁴ These regulations extend to all persons who arrive under arrest at a Garda station, not just persons detained under section 4 of the 1984 Act.

Section 4 Criminal Justice Act 1984

The section 4 provision permits detention, of persons of full age, in the case of offences carrying penalties of five years or more so therefore it excludes many common minor offences.¹⁰⁵ However, the fact that any subsequent prosecution is taken summarily does not invalidate the original detention (O'Malley 2009 p.308). Full age now means over 12 years and full mental capacity.¹⁰⁶ The initial condition necessary for the detention is a valid arrest of the suspect on grounds of reasonable suspicion.¹⁰⁷ The arresting member then conveys the prisoner to a Garda station where the member in charge at the station may authorise the detention of the person if he has reasonable grounds for believing that the detention is necessary to properly investigate the offence. The person must be conveyed to the station as soon as possible.¹⁰⁸ It is the responsibility of the member in charge to authorise the initial detention, which is for not more than six hours from the time of arrest.¹⁰⁹ A superintendent can extend the detention for a further period not exceeding six hours if he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence.¹¹⁰ The time can then be extended from 12 hours to 24 hours on the authorisation of an officer not below chief superintendent.¹¹¹ Extensions must be given before the original detention time has expired.¹¹² The detention is not solely to allow the questioning of the suspect but for the proper investigation of the offence.¹¹³ Once there are no further reasonable grounds for believing the detention necessary, then the prisoner must be released.¹¹⁴

Criminal Justice Act 2006

The continued rise in gangland shootings, as well as the use of intimidation to obstruct justice despite the introduction of measures following the murders in 1996 of journalist Veronica Guerin and Detective Jerry McCabe, led to a perception that the criminal justice system was unable to deal effectively with these new types of

criminals. In November 2003, a Limerick man, Liam Keane, went on trial for the murder of a member of a rival gang in Limerick.¹¹⁵ In the course of the trial, six prosecution witnesses changed their testimony from that given to investigators and as a result of this “collective amnesia” as described by the trial judge, Judge Carney, the DPP had no choice but to halt the prosecution.¹¹⁶ In the Dáil, then Justice Minister Mr. McDowell, described the situation as a challenge “for the Irish State, for the rights of individual citizens and of entire communities, and for the system of criminal justice.”¹¹⁷ There were further claims that the ‘fabric of society was at risk’ amid calls for more ‘anti-terrorist type laws’ and a recognition by the Taoiseach that the Gardaí cannot “take on a crowd of gangsters with their peann luaidhes” (quoted in (quoted in Vaughan and Kilcommins 2013 p.133). In Limerick, the local State Solicitor claimed that intimidation of witnesses was endemic in the region to such an extent that one in 10 criminal cases could not be successfully prosecuted in Limerick in 2004 as a result.¹¹⁸

In 2006, of 67 homicides, 27 people had died as a result of gun violence.¹¹⁹ However, the National Crime Council statistics indicate 26 murders by firearm in that year, but it remained a massive increase on four such murders in 1998. Fig. 2 shows the murders involving firearms from 1998 to 2006.¹²⁰

Figure 2 Murders involving Firearms and outcomes



The trend in such murders was clearly upward. The other most notable and important aspect is the lack of progress made in police investigations into these types of murders.¹²¹ In most years, few such murders had proceedings commenced and convictions represented a still smaller fraction. The fact that many represented gangland killings of rivals meant investigations met with little support from anyone with information.¹²² The government's response was the Criminal Justice Act 2006 (the "2006 Act"). As well as introducing measures to counter witnesses retracting their evidence, this large and diverse Act dealt with a wide range of issues including persons who hold prominent positions in criminal organisations and rarely actively participate themselves.¹²³ In terms of detention, the major change introduced in the legislation was the increase in the section 4 detention time from 12 hours to 24 hours on the authorisation of an officer not below chief superintendent.¹²⁴

O'Malley (2009 p.315) notes the virtual silence that greeted the doubling of the extension time compared to the opposition to the original detention powers in the 1984 Act. Section 9 of this Act now permitted the detention to take place when the arrest occurred at a Garda station, as previously it was necessary to have brought the arrested person to the station from somewhere else. The 2006 Act also contained a provision to detain a person whom a judge had issued a warrant for the rearrest of as a result of new information.¹²⁵

Criminal Justice Act 2011

The 2011 Act provides a provision to allow a section 4 interview to be suspended for certain offences to allow investigations to be carried out. Under section 7 of the 2011 Act the suspension can last up to four months and a criminal offence is created of failure to return to complete the interview.¹²⁶ This permits the investigators to follow up on information and enquiries that arise from the questioning. This section only applies to offences scheduled as 'relevant offences' by ministerial order. Currently these offences relate to certain banking, money laundering, theft and terrorist related offences. These offences often require detailed and highly complex investigation, including the assistance of outside independent experts. The creation of breaks in interviewing allows lines of enquiries to be concluded and new questions formulated for the next interviewing stage. The range of offences may

reflect governmental concern about the investigation of financial impropriety in economic institutions. The 2011 Act also provides a provision which, once enacted, would prohibit questioning of a suspect prior to his or her consultation with a solicitor (Heffernan and Ní Raifeartaigh 2014 at 9.55).¹²⁷

Children Act 2001

While the Children Act was an overdue piece of legislation that focused on the needs of children, for the purposes of detention it reclassified a child as any person under eighteen years of age.¹²⁸ In part six of the Act certain provisions are made for the treatment of a child who is a suspect and detained in a Garda station.¹²⁹ As Garda custody regulations determine that persons known or suspected of intellectual disability should be treated as children for the purpose of their detention, it also has important implications for their treatment.¹³⁰ Section 55 of the Act provides that Gardaí will act with due respect for the personal rights of the child, for their dignity and vulnerability and for any special needs that they may have. This includes not being allowed associate with an adult detainee or being placed in a cell, unless no other secure accommodation is available.¹³¹ Section 58 provides, inter alia, that notification of the arrest should as soon as practicable be provided to the parent or guardian of the child, and that notification should include notice of the entitlement of the child to consult a solicitor.¹³²

The Gardaí have a right and a duty to investigate offences as comprehensively as possible and to gather as much evidence as the law permits in order to facilitate the effective prosecution of an offence.¹³³ Nevertheless, a person must be charged as soon as there is enough evidence to do so and while a full admission may be required to meet that standard, an admission or confession may not in itself be sufficient to stop the detention. If the situation arises whereby there are no longer any reasonable grounds for believing that the detention is necessary for the proper investigation of the offence then the person must be released forthwith. Although no research has been conducted on the average duration of detentions in this jurisdiction, research conducted in the UK suggests that, under a similar provision, the average detention time is less than four hours for three quarters of juveniles and less than six hours for the same fraction of adults (McConville, Sanders, and Leng 1991 p.46, Softley 1980, Phillips and Brown 1998 p.109 suggest average of 7

hours). Interviews themselves rarely last longer than an hour although there may be more than one. The mean average was 22 minutes (Pearse and Gudjonsson 1997 p.68).

Criminal Justice (Drug Trafficking) Act 1996

The murder of crime journalist Veronica Guerin in 1996 created a feeling among many citizens that drug-gang members, in particular, regarded both the criminal justice system and the State with scorn. Politicians were urged to pass legislation to tackle the perceived “calculated attack on the freedom of each and every person in this country.”¹³⁴ The new legislation to tackle the illegal drugs business, introduced as a result, included the Disclosure of Certain Information for Taxation and Other Purposes Act, 1996, the Proceeds of Crime Act, 1996, the Criminal Justice (Miscellaneous Provisions) Act, 1997, the Criminal Assets Bureau Act, 1996, and the Criminal Justice (Drug Trafficking) Act, 1996.

Section 2 of the Criminal Justice (Drug Trafficking) Act 1996 permits the detention of a person suspected of a drug trafficking offence to be held for seven days; however, the authorisation of a judge is required on two separate occasions during that period to continue the detention. Following the suspect’s arrest, where the member in charge has reasonable grounds for believing that the person’s detention is necessary for the proper investigation of an offence involving drug trafficking he may authorise a detention of up to six hours. If the person is taken to another place of detention, for example, a hospital or prison, because he or she is suspected of having concealed drugs on their person, the initial detention must be authorised by an inspector of AGS. A superintendent may extend the initial detention in either case for a period up to a further 18 hours.¹³⁵ A chief superintendent may again extend this for a period up to a further 24 hours, bringing the detention to 48 hours, providing both have reasonable grounds for believing that the detention is necessary for the proper investigation of the offence.¹³⁶ A chief superintendent may then apply to a judge for a warrant authorising the detention for a further period up to another 72 hours.¹³⁷ The judge should only grant such a warrant if satisfied that such a detention is necessary for the proper investigation of the offence and that the investigation is being conducted both diligently and expeditiously.¹³⁸ The chief superintendent may make a second application to a judge for another warrant, this

time for a period up to 48 hours.¹³⁹ The judge must again be satisfied that the appropriate preconditions are met before issuing the warrant. The detained person previously had to be present in court for the application for the warrant and the judge must consider any submissions made by the person or his legal advisor.¹⁴⁰ The judge may also order that the detained person be brought before him or her at other times to permit an enquiry into the necessity of the detention. The person should be immediately released if there are no longer reasonable grounds for believing that his or her detention is necessary for the proper investigation of the offence, unless the person is charged and brought before a court as soon as possible or his or her detention is authorised for some other purpose, for example, a bench warrant is in existence for his or her arrest.

Section 50 Criminal Justice Act 2007

Problems with gangland crime continued unabated. The Criminal Justice Bill 2007 was proposed shortly after the introduction of the 2006 Act. In relevant debates, the Justice Minister spoke of the need for the proposed introduction of a new provision, section 47 of the Bill, as it then was, to allow for extended period of detention of up to seven days for certain crimes. He stated:

“Section 47 introduces new detention arrangements for persons arrested in connection with murder where firearms or explosives were used, capital murder, false imprisonment where firearms were used, or possessing a firearm with intent to endanger life. These offences are frequently linked to gangland activity and the extended detention time is, in the view of prosecuting authorities, necessary to locate and interview witnesses and suspects as well as to provide adequate time for the forensic examination of crime scenes. Some recent offences have seen people, arrested due to ongoing Garda surveillance, released from Garda custody at a time when new evidence relevant to their detention was only coming to light.”¹⁴¹

Opposition TDs agreed on the extent of the problem while criticising the government’s failures to obtain convictions in gangland related crime.¹⁴² Other opposition deputies criticised the rushed nature of the debate arguing that the Bill was unlikely to achieve the objectives as envisaged by the government.¹⁴³

As an illustration of the changing nature of criminal activity, the Irish Army Explosive Ordnance Disposal teams normally dealt with less than one hundred incidents per year from 2002 to 2005 but this began increasing annually and in the year 2011 alone they responded to 237 separate incidents.¹⁴⁴ Some callouts involved old munitions but many involved improvised explosive devices, some now manufactured by former terrorists and sold onto gang members. In February 2008, two men were jailed after attempting to import firearms, including rocket launchers and assault rifles, in 2007, on behalf of a Limerick crime gang.¹⁴⁵ On coming into law,¹⁴⁶ the Criminal Justice Act 2007 (the “2007 Act”) contained the section referred to by the Justice Minister to create new detention arrangements for certain types of crime. Section 50 applies to murder involving the use of a firearm or an explosive, murder to which section 3 of the Criminal Justice Act 1990 applies,¹⁴⁷ an offence under section 15 of the Act of 1925,¹⁴⁸ or an offence under section 15 of the Non-Fatal Offences against the Person Act 1990 involving the use of a firearm.¹⁴⁹

The wording of the section 50 detention is similar to that of the 1996 Drug Trafficking Act provision. Following arrest, it is the member in charge who has initial responsibility to ensure he has reasonable grounds for believing that the person’s detention is necessary for the proper investigation of an offence involving murder using firearms or explosives, capital murder, possession of a firearm with intent to endanger life or false imprisonment using a firearm; he may then authorise a detention of up to six hours.¹⁵⁰ This may be extended by a superintendent for an additional period of up to 18 hours and extended again by a chief superintendent for another period of up to 24 hours, bringing the detention time to 48 hours. Both officers must have reasonable grounds for believing that the detention is necessary for the proper investigation of the offence.¹⁵¹ A chief superintendent may then apply to a judge for a warrant authorising the detention for a further period up to another 72 hours.¹⁵² The judge should only grant such a warrant if satisfied that such a detention is necessary. The chief superintendent may make a second application to a judge for another warrant, this time for a period up to 48 hours.¹⁵³ The judge must again be satisfied that the appropriate preconditions are met before issuing the warrant. The person should be immediately released if there are no longer reasonable grounds for believing that his or her detention is necessary for the proper

investigation of the offence, unless the person is suspected of having committed another appropriate offence or is charged.¹⁵⁴

The Criminal Justice (Amendment) Act 2009 made a number of changes to section 50 of the 2007 Act including extending the number of offences to which the detention applied. All offences created by Part 7 of the Criminal Justice Act 2006, which deals with organised crime including conspiracy to commit a serious offence and committing a serious offence on behalf of a criminal organisation, were now included as offences to which the seven day detention applied.¹⁵⁵ The 2009 Act also made a provision to hold the chief superintendent's application for a warrant to extend the detention in-camera or exclude certain persons from the court including, in certain instances, the detainee. The judge may also prohibit publication or broadcast by the media in relation to the application.¹⁵⁶

2.4 Subversive Detention

As mentioned, while the section 4 provision of the 1984 Act was the first detention provision for ordinary crime, the Irish State had a certain precedent for detention in section 30 of the 1939 Act. The first Irish detention and interrogation provision arose soon after the formation of the Irish State. Following independence from Great Britain, the Irish Republican Army (IRA) opposed the initial formation of the Irish State on the grounds that the whole country was not included and six of the 32 counties would remain part of Britain. This opposition soon led to civil war.

A range of measures to counter this subversive threat was introduced, including detention provisions (Hederman 2002). Section 2(1) of the Public Safety (Emergency Power) (No.2) Act 1923 permitted detention for up to seven days. This was followed by the Public Safety (Emergency Powers) Act 1926 that permitted the arrest and detention for up to a week of anybody found or suspected of committing a scheduled offence. Following the murder of the Justice Minister, Kevin O'Higgins, in July 1927, the Public Safety Act 1927 was enacted. This particular legislation permitted the detention of suspects in certain circumstances for up to three months, under a Ministerial order. While this legislation lapsed in 1928, it was replaced in October 1931 by Part III of Article 2A of the 1922 Constitution, which was inserted by the Constitution (Amendment No. 17) Act 1931. Article 2A was a large and in

effect an “elaborate anti-terrorism law” (Davis 2007 p.45). Section 13 of Article 2A permitted members of the Garda Síochána and the Defence Forces to arrest any person whom they suspected of having committed any offence listed in the Appendix to Article 2A. Section 14 permitted any person so arrested to be detained for a maximum of 72 hours (Hederman 2002 at 7.2). By this stage, the IRA were not the only threat to the government as a former Garda Commissioner, Eoin O’Duffy, had gone on to lead a quasi-fascist organisation, the ‘Blueshirts.’ O’Duffy’s machinations were directed particularly against the new Fianna Fáil government responsible for his dismissal. By 1934, more Blueshirts were being convicted before military tribunals than IRA members.¹⁵⁷

Widespread official dissatisfaction with the entire Article 2A provision meant that there was no such provision in the 1937 Bunreacht na hÉireann Constitution (Hederman 2002 at 4.9-12). However, within two years the 1939 Act was enacted. This followed proclamations by the IRA that it had assumed legitimate control of the government and declared war on the United Kingdom. The then Justice Minister, Patrick Rutledge, argued that many of the powers in the proposed Offences against the State Bill were powers which were previously available.¹⁵⁸ Opposition politicians such as Labour TD, William Gavin, suspected that it was not the perceived threat from the IRA that was behind the new legislation, as it appeared to have passed; rather it was the looming prospect of the impending Second World War into which Ireland might be dragged.¹⁵⁹ He suspected the Government believed it needed the legislation to have repressive powers in its possession in that event to prevent the wartime situation providing any opportunities to opponents. In the event, over a dozen Gardaí would be shot during the war years by the IRA (Brady 1974 p.230). However, the threat of a possible alliance between the IRA and Nazis, especially following an opening of a British campaign in January 1939 by the IRA, undoubtedly impacted on the urgency of the situation.¹⁶⁰

The Offences against the State Act 1939

This Act introduced on 14 June 1939 specified that its purpose was to defend against attempts to undermine public order and the authority of the State. It contained a provision in section 30 to give powers to the Gardaí to stop, search, interrogate and arrest any person on suspicion of certain offences connected with the establishment

of and being a member of a subversive group. The section 30 provision is contained in Part IV of the Act and is permanent legislation. Unlike Part V of the Act that sets up the Special Criminal Court and contains scheduled offences, it does not therefore require the government to issue a proclamation.

Once arrested, a person could be detained for up to 24 hours initially by the arresting member based on his suspicion that a person had committed, was about to commit, or was concerned in the commission of an offence under the Act. No role existed for any member in charge. Then, if an officer of the Garda Síochána not below the rank of chief superintendent so directed, the suspect could be detained for a further period of 24 hours.¹⁶¹ No requirement was originally specified on the grounds to extend the detention. The offences that were originally covered by this legislation were those created by the Act itself plus a schedule of other offences which were offences under the Firearms Acts 1925.¹⁶² The cumulative effect of wartime shortages resulted in further additions to scheduled offences in 1947 and concerned offences under the rationing of fuel, firewood and turf legislation.¹⁶³ Most of these new offences were removed in 1948.

Renewal of violence

The IRA began another brief military campaign from 1956 to 1962 which saw a number of targets in Northern Ireland attacked and the deaths of a number of RUC policemen, although by this time the IRA had dwindled to few hundred (Aylward, O'Reilly, and Tansey 1993 p.110). The civil rights movement in Northern Ireland was gaining momentum by 1969, seeking to highlight and protest against the inequality of treatment of the minority Catholic population by the majority Protestant population. The heavy handed policing response, particularly from the reserve B-Specials, exacerbated the situation and in 1969 the British Army were deployed to the streets of Northern Ireland to prevent an impending civil war and to restore law and order in a "limited operation."¹⁶⁴ Initially at least, their arrival was welcomed by the nationalist community (Horgan 2009).

This escalating violence and the subsequent renewed armed conflict was viewed with alarm by the Irish government. In that same year, a loyalist terrorist group, the UVF, exploded a number of car bombs in the Republic. In 1972 two men were

killed in a bomb blast in Dublin, the first fatal bomb attack in the republic (Conway 2013 p.110). On the December 28, 1972 a car bomb exploded in Belturbet, Co, Cavan; two young teenagers were killed and eight people were seriously injured. A bomb had exploded earlier that day in Clones seriously injuring two men. On the other hand, armed nationalist paramilitary groups such as Saor Eire, the 'Official' IRA and the 'Provisional' IRA were engaging in armed raids in the Republic to raise funds. Furthermore, at trials of those accused of involvement, there were fears of interference with jurors.¹⁶⁵ In such circumstances, on May 26 1972, the Government issued a proclamation that it was satisfied that the ordinary courts were inadequate to secure the effective administration of justice and Part V of the Act of 1939 came into force. This reestablished the non-jury Special Criminal Court to try suspected members of subversive organisations (Davis 2007). The government also created a list of scheduled offences for which a person could be arrested and detained under section 30 of the 1939 Act.¹⁶⁶ This schedule of other offences included offences under the Malicious Damage Act 1861, the Firearms Acts 1925 to 1971, the Explosive Substance Act 1883, and section 7 of the Conspiracy and Protection of Property Act 1875.

Violence in the Irish Republic appeared to be further escalating when, on Friday May 17, 1974, 26 civilian deaths were caused by three car bombs in Dublin with a further seven deaths the same day in Monaghan from another car bomb.¹⁶⁷ Following on from the bombing of the Special Criminal Court and the murder of British Ambassador Christopher Ewatt Biggs, the Government declared a state of emergency in August 1976 (Conway 2014 p.101). This was followed by the passing of the Emergency Powers Act 1976 which granted Gardaí the power of detention of suspects for up to seven days on the authorisation of a Garda chief superintendent. The Emergency Powers Act was tested in the Supreme Court¹⁶⁸ where it was held to be consistent with the Constitution, but the Act was short-lived and allowed to lapse after 12 months (O'Mahony 2002 p.81).

Interpretations

The conflict has had a major impact on both criminal law legislation and policing in the State (Daly and Jackson 2016 p.280). Concern was raised about the high use made of the section 30 provision to arrest and detain, and figures that were used,

including by the UN Human Rights Committee in its report on Ireland in July 2000, showed that of those arrested between 1981 and 1986 only approximately ten per cent were actually charged.¹⁶⁹ These figures were taken from Dáil answers to questions,¹⁷⁰ but according to the Hederman Report (2002 p.153-4), while concern had been expressed by some that the power of detention was being overused, the Committee “was unable to obtain reliable recent data on this point and it is understood that no such statistics are kept by official sources.” The Committee in its attempts to establish the facts could only receive numbers of those arrested from 1971 to 1999 and was informed that the compilation of the number of persons who were subsequently charged with offences could only be at the cost “of a disproportionate amount of scarce Garda resources.”

The courts had to deal with a high volume of cases brought under the 1939 Act. Cases such as *People v Towson*¹⁷¹ and *DPP v Quilligan*¹⁷² examined a number of aspects of detention under section 30 including the use of section 30 for non-subversive crime and the need of the arresting Garda to have a *bona fide* suspicion. In *Towson* the court was satisfied that it was justifiable to arrest for possession of a firearm with intent (a scheduled offence) even when that firearm had been used to murder someone (not a scheduled offence). In *Quilligan* the two accused were arrested for malicious damage to a door of the house where the victim received fatal injuries in the course of an aggravated burglary. The trial court ruled their detention unlawful and therefore their statements, the only evidence against them, inadmissible and directed the jury to find them not guilty. On appeal by the DPP, the Supreme Court concluded that even though the Gardaí were also investigating a more serious offence that was not scheduled, it did not invalidate the arrest. Whether or not the Garda in question has the required suspicion is itself a question of fact, as if he has not, then the action taken by virtue of section 30 would be illegal.¹⁷³ It was also established that there was a requirement that the chief superintendent have the necessary suspicion to extend the detention. This requisite *bona fide* suspicion needed to be proved by the chief superintendent in person in court where he was to be available for cross-examination by the defence.¹⁷⁴ This extension, in order to be valid, must be given during the first period of detention.¹⁷⁵ Walsh J. stated, however, that the courts would not tolerate questioning that was oppressive or unfair. Walsh J.

also noted that while the 1939 Act was specifically created for ‘political type’ offences it could also easily be extended to:

“a grave situation dealing with ordinary gangsterism or well financed and well organised large scale drug dealing, or other situations where it might be believed or established that juries were for some corrupt reason, or by virtue of threats, or illegal interference, being prevented from doing justice.”¹⁷⁶

Following on from this case, the constitutionality of the section 30 provision was itself unsuccessfully challenged in 1992 in *DPP v. Quilligan (No.3)*.¹⁷⁷ In *DPP v Tyndall*¹⁷⁸ the absence of any evidence, either direct or indirect, that the arresting Garda had formed the necessary suspicion to make an arrest led the court to quash the conviction. The court stated that while evidence of suspicion could be inferred from the circumstances of the arrest, the mere fact that an investigating officer or detective made the arrest is insufficient, in itself, to furnish either direct or indirect evidence of suspicion. It is, however, an essential proof for the prosecution in establishing the prosecution case.

Offences against the State (Amendment) Act 1998

In August 1994 the IRA announced a cessation of military action. On Good Friday April 10 1998 all parties in Northern Ireland signed a peace agreement (Hederman 2002). Those in the republican movement opposed to any form of compromise, chose to continue their campaign and rebranded their terrorist organisation the ‘Real IRA’ (Dingley 2001 p.451). After some initial setbacks the Real IRA was anxious to successfully conclude an attack and placed a car bomb in Omagh in Northern Ireland on Saturday, August 15 1998. The resulting explosion killed 29 people (including 9 children) and injured 200. It was the single most deadly attack in the history of Northern Ireland attacks (*ibid*). Speaking in the aftermath, the Taoiseach Mr. Bertie Ahern, in the Dáil said:

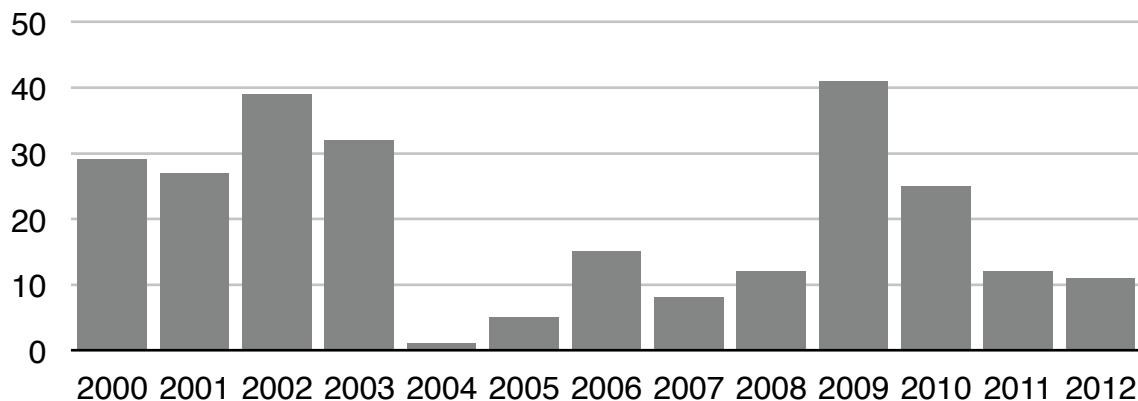
“That is the evil done by the self styled “Real IRA” at Omagh — death, pain, suffering, grief and horror — that will unfortunately echo down through the years. Our first objective must be to do all within our power to prevent the recurrence of such an atrocity. I am under no illusions, though, as to the continuing danger fanatics who remain at liberty can pose to the rest of society....

At a meeting in August the Government decided on a security and legislative response to the challenge of the Omagh atrocity, a response that is extremely tough, even draconian, but that will stay in force only as long as we require it.”¹⁷⁹

That legislative response was the Offences against the State (Amendment) Act 1998 (the “1998 Act”). The Act created a number of new offences.¹⁸⁰ Among its provisions, one permitted a superintendent to apply to a judge of the District Court for a warrant authorising the extension of a person detained under section 30 by a further 24 hours.¹⁸¹ This provision reverses the role of senior Garda officers from the ordinary crime detention provisions. This provision brought the total detention time to 72 hours. The legislation requires that the superintendent must first have reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned before applying to the judge, who must have equal grounds to believe the detention is necessary before granting the application and that the investigation is also being conducted diligently and expeditiously before allowing the further detention period.

The use of this provision has been varied over the years since its introduction. Fig. 3 shows a table of the number of occasions that a judge has granted such extensions. This shows a period after its introduction until 2003 when it was frequently used followed by a reduction in overall use, apart from 2009.¹⁸²

Figure 3 S.10 Extensions



In addition to the above figures, in 2014, 12 of the 13 section 10 extensions were granted resulting in seven people being charged. In 2015, of the 20 section 10 applications, 19 were granted with 10 people subsequently charged. It is apparent that the section 30 provision of the 1939 Act is now used less frequently and accordingly contributes to far fewer annual detentions annually. The 2015 annual report on the renewal of the 1998 Act shows 331 section 30 arrests in 2014 and 246 such arrests in 2015.¹⁸³ Of the 331 arrests in 2014, 57 arrests were for offences under the 1998 Act while in 2015, 43 of the 246 were for 1998 Act offences.

Section 11 of the 1998 Act inserts section 30(A)(3) into the 1939 Act and provides that where a person is released from detention under the provisions of section 30 they may only be rearrested again for the same offence for the purposes of charging them forthwith. This arrest is under the provisions of section 4 of the Criminal Law Act 1997 expressly for the purpose of charging the person before the Special Criminal Court and section 4 of the Criminal Law Act does not provide for any period of detention. Moreover, 'forthwith' is to be strictly interpreted and is a more stringent requirement than 'as soon as practicable.'¹⁸⁴

The Criminal Justice (Amendment) Act 2009 introduced a further provision that deals with the investigation of a second offence other than the one the suspect was originally arrested for and allows the detention to continue as if it was that offence for which he was arrested.¹⁸⁵ Section 21 also further amends the rearrest procedure if new information becomes available. This Act, in section 8, also added a number of offences under Part 7 of the 2006 Act to the Scheduled Offences. Sections 71A, 72, 73 and 76 dealing with the operation of criminal gangs were now included as offences for which a person could be arrested and detained under section 30. As these offences also come under the jurisdiction of the section 50 detention provision which can be extended for up to seven days, their inclusion is more to do with the court of trial to which these offences would be sent, that is, the Special Criminal Court (Campbell 2016 p.560).

International war on terror

The 1939 Act was enacted to deal with a domestic terrorist threat. The introduction of the Criminal Justice (Terrorist Offences) Act 2005 widened the applicable

sections to include international terrorism by extending the definition in section 18 of the 1939 Act to cover groups who engage in, promote, encourage or advocate the commission, in or outside the state, of terrorist activity.¹⁸⁶ The resultant practical application of this is the use of the legislation to engage in the ‘global war on terrorism’ together with other foreign governments. In light of both domestic and international terrorism, Ireland has one of the highest rates of terrorism arrests in Europe. Arrests for terrorism average between 40-70 annually, which places Ireland high on the European league table for terrorism arrests although well below France, Spain and the UK.¹⁸⁷ In Ireland the terrorism situation remains predominately connected with separatism concerning Northern Ireland. The Europol Terrorist Situation (Te-Sat) Reports show only three arrests for Islamist terrorist activity in Ireland in 2008, five such arrests in 2010 and a single arrest in 2011. By comparison there were 68 arrests for indigenous terrorism in 2011. Nevertheless, in common with other European countries, Ireland has a proportion of its Muslim citizens fighting as jihadis in Iraq and Syria.¹⁸⁸ Although the absolute numbers are small, it is noteworthy that a relatively small Muslim population of fewer than 50,000 people currently lives in Ireland.¹⁸⁹ The International Centre for the Study of Radicalisation (ICSR) suggests that these jihadi numbers are increasing. In 2014, 30 Irish citizens had travelled to fight in Iraq and Syria. This was an increase from 26 citizens in 2013.¹⁹⁰ The ICSR reports that as many as 3,950 European citizens may currently be fighting in these regions.¹⁹¹ Additionally, some foreign fighters may be travelling to Ireland to rest and recover from such conflict zones.¹⁹²

Therefore the information that grounds an arrest may frequently originate with an outside agency and there may never be any criminal activity in this jurisdiction. As a result, information available to interviewers may be limited. This has the advantage of preventing cross-contamination of information, where the suspect gains more knowledge than necessary. This can be a useful tactic in important investigations, where limiting information flow to interviewers serves to quality check any ‘special knowledge’ that is gained from the suspect. The disadvantage, of course, is that it limits investigators’ abilities to penetrate deep cover stories and crosscheck accounts. An arrest of a suspect in such circumstances may serve one of two purposes: to interrogate in order to provide evidence to support a foreign

prosecution, or as frequently, to obtain intelligence on a targeted organisation. In the latter occurrence, there may be no prosecution contemplated and therefore admissions of complicity are not ends in themselves but a prelude to the acquisition of more information. Such incidences run the risk of less regard for the admissibility rules of confessions that pertain in domestic courts, as there is no ultimate trial envisaged and therefore no possible court sanctions on behaviour.

2.5 Safeguards

Custody Regulations

One of the principal safeguards proposed against alleged brutality of prisoners while in Garda custody was the creation of regulations relating to the treatment of persons in custody.¹⁹³ These regulations established the role of a *member in charge* whose function is to oversee the application of the Custody Regulations as regards any prisoners post-arrest.¹⁹⁴ On arrival at the Garda Station the arresting member immediately produces the arrested person to the member in charge. The time of detention begins at the time of arrest.¹⁹⁵ The District Superintendent should issue instructions as to who should be the member in charge at each station and maintain a written record of such instruction for any given time.¹⁹⁶ However, any failure to issue directions does not affect the validity of any subsequent authorisation to detain made by the member in charge.¹⁹⁷ The responsibilities of the member in charge includes the keeping of a written custody record in relation to the prisoner as well as possibly granting the authorisation to detain under the various detention provisions.¹⁹⁸ This record should show the reason for the arrest, place and time of arrest as well as the arresting member. Any relevant physical or mental condition of the prisoner should also be noted.¹⁹⁹ The record should contain details of all actions taken in relation to the prisoner. All entries made should be signed or initialed.²⁰⁰ The member in charge has an obligation to report any action taken by a higher rank member that is inconsistent with the proper application of the Regulations to a superintendent if efforts to resolve the issue fail.²⁰¹ Gardaí are liable to disciplinary proceedings as well as possible criminal sanction in the event of misconduct towards a prisoner.²⁰²

Regulation eight requires the member in charge to inform an arrested person in ordinary language of the reason for the arrest, their entitlement to a solicitor and

their entitlement to have another person contacted to notify them of the arrest. If the arrested person is less than eighteen years old then he or she should be notified that a parent or guardian is also being notified of their arrest. Foreign nationals must also be informed of their right to contact their national embassy or consul.²⁰³ This information is also contained in form C.72, which is available in various languages, and given to the prisoner. If there is no interpreter immediately available to come to the station it may be necessary to utilise a translation agency to provide a telephone translation via speaker phone. Regulation eight further specifies that the arrested person be informed that if they initially decline to avail of a right, it will not preclude them of doing so at a later stage. In a democratic society, friends, family or legal advisors should know where the person is being detained and if necessary be able to check on their welfare. The arrested person is entitled to visits from friends or relatives provided the member in charge is satisfied that these can be adequately supervised and do not hinder the investigation.²⁰⁴ Persons should only be detained in Garda stations with appropriate detention facilities.²⁰⁵ The Regulations forbid ill treatment of prisoners, with only reasonable force allowed at all times.²⁰⁶ Where a prisoner does suffer physical injury while in custody, which is consistent with a claim of ill-treatment and for which the authorities are unable to provide an alternative explanation, then the ECtHR could conclude that a breach of Article 3 Convention rights has occurred (Walsh 2009a at 3-17).²⁰⁷ Prisoners should also be afforded reasonable rest and meals, as well as any necessary medical treatment.²⁰⁸ The member in charge is under an obligation to summon a doctor where the person in custody is injured, cannot be roused because of drugs or alcohol, appears to be suffering from a mental illness or otherwise appears to need medical attention. Medical advice should also be sought if the person claims to need medication for any potential serious condition.²⁰⁹ Persons with an intellectual deficiency should be treated for the purpose of the Regulations as a child of less than eighteen years.²¹⁰

Failure, however, to prove compliance, or even non-compliance, with the regulations does not invalidate any subsequent prosecution.²¹¹ The Court in *DPP v Spratt*²¹² held that generally the prosecution should lead evidence to show that the constitutional rights of the accused had been respected and vindicated and where a breach of the Custody Regulations had occurred then it should be determined whether the accused had been thereby prejudiced and whether any information

might not have been obtained, but for the breach. Where there has been a breach of such a nature that goes beyond a trivial and inconsequential matter then it is a matter for the trial judge to determine whether the effect has prejudiced the fairness of the trial of the accused.²¹³ In the case of *DPP v D'Arcy*,²¹⁴ for example, the Court declined to exclude the statement taken from a juvenile in section 4 detention despite a breach of the Custody Regulations. In this case where the juvenile had been questioned by three Gardaí in the presence of his uncle, the Court ruled that there had been nothing unfair or oppressive about the interview.

Member in charge

The member in charge has the function of ensuring that the rights of the detained person are respected and that the Custody Regulations are correctly applied, and authorising initial detentions under all Acts except the 1939 Act.²¹⁵ This member in charge at the Garda station is a uniform Garda, usually of garda rank, although in Dublin City stations and the Bridewell in Cork it is a member of sergeant rank (SHO). It is the responsibility of the member in charge of the Garda station under section 5 of the 1984 Act to inform an arrested person, without delay, who is detained pursuant to section 4 of that Act of their right to consult a solicitor. Part 6 of the Children Act 2001 makes similar provision for child suspects.

Regulation nine makes it clear that where an arrested person has asked for a solicitor the member in charge shall notify or cause to be notified the solicitor as soon as practicable, and that, if the solicitor cannot be contacted within a reasonable time, or if the solicitor is unable or unwilling to attend at the station, the arrested person shall be given an opportunity to ask for another solicitor. If they ask for another solicitor the member in charge shall notify or cause to be notified that other solicitor as soon as practicable. An arrested person should have reasonable access to a solicitor of their choice and be enabled to communicate with them privately.²¹⁶

The issue of the formation of reasonable grounds for the detention of a suspect by the member in charge in a Garda station was dealt with by the Court of Criminal Appeal in *DPP v Reddan*²¹⁷ where the court held that hearsay, and even hearsay upon hearsay, could constitute sufficient grounds. The member must, however, have an independent *bona fide* belief that the arrested person should be detained.²¹⁸ He

must not simply rubber stamp the request but should engage in some consideration of the evidence before he authorises any detention. It is not, however, acceptable that the member in charge refuses the application until he concludes his own investigation into whether the detention is warranted.²¹⁹ He may make such enquiries as he considers necessary to satisfy himself that it is reasonable to detain the accused, and to do this he may be allowed a reasonable time to process and satisfy himself as to the appropriateness of detaining the prisoner.²²⁰ To that extent ‘arrival at station’ can be given a broader meaning to encompass not just physical arrival but the booking in process.²²¹ The member in charge should further ensure that all interviews with the prisoner are generally electronically recorded,²²² and that the interviews are “conducted in a fair and humane manner.”²²³

Performance issues

Walsh (2009 p.479) notes that there is evidence that the “vital duties of a member in charge of the Garda Station in which a suspect is detained are not always discharged with due diligence and independence.” The Morris Tribunal (2008 at 4.183) made a number of criticisms of the role of the member in charge and suggested that the duty as routinely performed by more junior Gardaí led to failures to implement the regulations through inexperience or apprehension that actions made to ensure compliance would be viewed unfavourably. The Tribunal recommended that the importance of the role in ensuring a suspect received information in respect of his or her rights warranted a member with considerable experience of sergeant rank at least. The Tribunal saw the role as proactive, involving independence from the investigation. The role may also involve potential conflict with colleagues to ensure the application of the regulations. The status of the role depended on the respect and authority given to that role in practice by other Gardaí and especially by those in leadership roles. The recommendations further suggested regular training for personnel involved in this role (*ibid* at 16.37). The Garda Inspectorate Report in 2014 noted that the vast majority of those performing the member in charge or SHO role had still received no specific training (GIR 2014 at 9.20). The Inspectorate noted that in many other jurisdictions, trained civilians are frequently utilised as detention officers. In the UK, members of the community visit the police station to monitor conditions for detained persons under the Independent Custody Visiting

scheme.²²⁴ The Garda Inspectorate suggested that such a scheme has great benefits in transparency and openness (GIR 2014 at 9.41).

Conditions in Garda custody have been examined with the first visit of the Committee for the Prevention of Torture (CPT) to Ireland from 26 September to 5 October 1993. The main conclusion of the report was that its findings were consistent with allegation of persons who had been in custody that they had been physically ill-treated. The response of the state to these criticisms of the CPT was so weak that it “might charitably be described as dilatory” with the State denying that the regulatory apparatus of policing needed systemic reform (Vaughan and Kilcommins 2013 p.162; Kilcommins et al. 2004). The second CPT report in 1999, reiterated concerns about the continued use of excessive force by police as well as the lack of significant supervision and oversight by senior police officers over custody conditions. The situation was improving, however, with the visit of the CPT in 2010 finding that progress was continuing to be made in reducing ill-treatment at the hands of police officers although vigilance was still required.

In the report of the Hartnett Inquiry (2008) which involved an examination of the circumstances surrounding the arrest, detention and subsequent death of fourteen year old Brian Rossiter in Clonmel Garda Station in 2002, the Inquiry found that, while the arrest was lawful, his detention was unlawful, notwithstanding that his father consented to it. The Inquiry further found that there was a failure to properly maintain a custody record in accordance with the Custody Regulations.

The Garda Ombudsman issued a report in March 2010 following the death in custody in 2005 of Terence Wheelock in Mountjoy Garda Station.²²⁵ It recommended that AGS introduce a specialist role for members responsible for the custody of prisoners. These members should have the necessary experience to carry out this function and receive adequate training and resources to enable them to perform this role adequately.²²⁶

Issues that frequently can cause concern are the conditions in which prisoners are routinely held. Many Garda stations have been occupied continuously since the formation of the force. Working conditions are often poor as are the conditions in

which prisoners are kept.²²⁷ The Bridewell Garda station in Dublin was singled out and criticised in the 2003 report of the CPT with the station described as dirty and in a poor state of repair. In the majority of Garda stations, regular uniform members perform the role of member in charge in conjunction with the role of public officer. This entails the handling of routine business in the Garda station, including phone calls and visitors to the station for a myriad of reasons. Therefore it is not unusual that the number of simultaneous demands made on that one member can be overwhelming.

Access to Legal Advice

The Irish Courts have long considered it important that a person detained have access to legal assistance and in 1976 the Supreme Court concluded that a person detained is entitled to legal assistance and stated that the refusal of such assistance could render the detention unlawful.²²⁸ Subsequently, the Supreme Court concluded that the right of a person in Garda custody to reasonable access to his solicitor was derived from, and protected by, the Constitution, and was not merely legal in origin but was in addition to any statutory entitlement to legal access.²²⁹ Although left open in a number of judgments (McGrath 2014 p.488), the Court of Criminal Appeal has specified that the right to legal advice extends to ensuring the suspect is aware of that right.²³⁰ If the arrested person (or parent if applicable) requests a solicitor, it is the responsibility of the member in charge to notify the solicitor of the request, with all such requests noted in writing including times.²³¹ Regulation nine deals specifically with contact with solicitors. It includes allowing the arrested person to nominate his or her own solicitor and it requires the member in charge to notify the solicitor as soon as practicable.

Another major factor in choosing a solicitor is cost and it appears to be an important inhibiting factor in deciding whether to obtain legal advice (Wycherley 2010). The free legal aid scheme covers court appearances but until the establishment of the Garda Station (Legal Aid) Scheme in 2001 there was no facility to allow free legal advice to persons detained for questioning *per se*.²³² But even the existence of such a scheme is not highlighted in form C.72. There is therefore little or no information as to the potential cost involved in obtaining legal advice. For many suspects,

especially vulnerable suspects, understanding the amount of information on this form can be a challenge (Sanders and Bridges 1999 p.88).

The Courts have emphasised that while it is most usual to have the solicitor attend at the Garda station, when that is not possible the telephone can be used.²³³ In many cases, advice is given initially over the phone (Working Group 2013 p.6).²³⁴ The detainee and the solicitor then jointly assess whether a face-to-face meeting is required. In virtually all cases, bar the most straightforward ones, a face-to-face meeting is held. The main reason for this, in the view of solicitors, is the difficulty of ensuring trust and candour and for the solicitor to be in a position to evaluate how vulnerable the person is. In addition to giving legal advice, solicitors also record on behalf of their client any issues of concern such as alleged ill-treatment, medical condition and requests for consular or translation assistance (*ibid* p.7).²³⁵

The ECtHR, in *Murray v UK*²³⁶, appeared to suggest that the appropriate time for the suspect to receive legal advice is before the beginning of the interrogation. This was made explicit in 2009 in *Salduz v Turkey*²³⁷ when the court stated that access to a lawyer should be provided before the first interrogation of a suspect. This of course gives rise to a potential difficulty in Ireland where there is no panel of available solicitors operating a 24 hour service. Unlike England and Wales, there is currently no duty solicitor scheme available in Ireland. It is possible that it is for this reason that the courts have not been inclined to impose an obligation on the Gardaí to suspend questioning until the arrival of a solicitor.²³⁸ In 2002 the recommendations of the Criminal Legal Aid Review Committee were against the introduction of any such scheme, arguing that the current arrangements were sufficient.²³⁹ The Committee argued such a scheme would lead to a lack of continuity in legal advice for accused persons and that the confidence in and ability to choose one's own solicitor was preferable to a random duty solicitor. In view of the introduction of the Garda Station Legal Advice Scheme in 2001 the committee felt that adequate provisions were in place. There is a clear entitlement to free legal advice in England and Wales without any means testing, the PACE code of practice states that the arrested person should be clearly informed of their right to free independent legal advice.²⁴⁰ There are, however, significant costs involved in

maintaining such a comprehensive legal aid service and the UK government is in the process of implementing radical cost saving measures.²⁴¹

In a landmark case in the Supreme Court, *DPP v Gormley*,²⁴² Clarke J., in delivering his judgment in March 2014 suggested that the Irish criminal justice system would have to be prepared to meet that eventuality in the near future. Following this judgment and pending the implementation of EU Directive 2013/48, a directive was issued from the office of the Director of Public Prosecution to AGS in May 2014 advising that in future instances where an arrested person requested the presence of their solicitor in the interview room the request should be acceded to. The Legal Aid Scheme was extended in August 2014 to cover attendance by a solicitor at questioning.

Audio-visual recording

Warren J., in *Miranda v Arizona*,²⁴³ noted that interrogation invariably takes place in the privacy of the police station and no-one outside that room knows what transpired there. A number of reports commissioned by the government had examined aspects of Garda interrogation and methods in response to concerns about methods to safeguard the rights of those detained in Garda stations. These included the O'Briain Report (1978), which was established as a result of political concern flowing from allegations in the 1970s of Garda brutality towards suspects in custody. Another report in 1985 examined Garda procedures in the aftermath of the Kerry Babies scandal (Lynch 1985). This was followed by a report in 1990 by the Martin Committee (1990), which was set up in the aftermath of the release of the Guildford Four to investigate what lessons it held for the Irish criminal justice system.²⁴⁴ Among the recommendations was the introduction of the routine audio-visual recording of police interviews, which was needed to ensure that inculpatory admissions by accused persons are properly obtained and recorded. While the 1984 Act, in section 27, had made provision for the introduction of electronic recording, it was 1997 before the introduction of the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations (ERI) 1997²⁴⁵ in relation to persons detained under the detention provisions of section 4 of the 1984 Act, section 30 of the 1939 Act, section 2 Criminal Justice (Drug Trafficking) Act 1996, and later followed by section 50 Criminal Justice Act 2007 and section 42 Criminal Justice Act 1999.²⁴⁶ In

2004, over six years after the introduction of the Regulations, the Steering Committee²⁴⁷ found that, of the 167 stations used for interviewing, at the publication of their report in 2004 only 132 were so equipped.

In *DPP v Holland*,²⁴⁸ the appellant argued that he had been denied an electronically recorded interview. The Court of Criminal Appeal held that as it was not established that the suspect had been deliberately taken to a station that was not equipped with electronic recording to deprive him of the benefit of having an electronic recording of his interview, the interview should be admissible. Nevertheless, this failure to record and the absence of the appropriate recording facilities has been the subject of adverse judicial comment; for example, in *DPP v Diver*²⁴⁹ it was ruled that “grave, obvious and deliberate” breaches of the 1987 Custody Regulations in relation to the recording of Garda interviews had occurred. Hardiman J. further accused Gardaí of not only regularly avoiding audio-visual recording, but of making selective notes and breaching the clear and simple regulations for the treatment of persons in custody. Similarly, in another case where Gardaí failed to use the recording equipment where it was available, the Court of Criminal Appeal stated “there should be a marked reluctance to excuse failures to comply with the requirements of the Criminal Justice Act 1984.”²⁵⁰

The ERI imposes certain legal obligations on Garda members conducting an interview that is electronically recorded, including stating the commencement time and the time the recording is turned off.²⁵¹ The recording facilities allow the simultaneous recording of three VHS videotapes or CDs with a time and date stamp that is automatically imprinted which prevents tampering. While the original Regulations permitted a person interviewed to be allowed to have a copy of the interview tape, following allegations that these were often displayed in public houses, the 2007 Act made provision that only after a person was charged and before the court could a court direct that a person or their legal representative receive a copy.²⁵²

There is also a growing practice to videotape certain witness interviews, especially potentially contentious witness interviews, as well as in other circumstances.²⁵³ Part 3 of the Criminal Justice Act 2006 makes specific reference to this practice and

proposed regulations that the Minister may make regarding the manner in which such recordings are made and preserved.²⁵⁴

Exclusion of detention times

The maximum time in detention under the provisions of section 4 is 24 hours. There are, however, a number of factors that may extend the actual time spent in detention. The first of these considerations is section 4(8) of the 1984 Act where time excluded from the reckoning of detention is either time spent in court challenging the lawfulness of the detention or the removal of a person detained in need of medical attention to a hospital or other suitable place for treatment. Such time spent away from the station is not included in reckoning for detention time. If a medical practitioner certifies that a person, who does not need hospitalisation, is unfit for questioning, he or she shall not be questioned for a period of time. This period is not to exceed six hours, which shall be excluded in reckoning a period of detention permitted.²⁵⁵

The most common used exclusion is the rest period between midnight and 8am. Section 4(6) of the 1984 Act states that if a person is being detained pursuant to this section in a Garda Síochána station between midnight and 8 a.m. and the member in charge of the station is of the opinion that questioning of that person should be suspended in order to afford him reasonable time to rest, and that person consents in writing to such suspension, then the period between the suspension and the time specified, not being a time later than 8 a.m. shall be excluded in reckoning the period of detention. For serious reasons the suspension may be withdrawn. The choice between rest and continuing questioning is one for the detained person to make.²⁵⁶ The Custody Regulations contain a similar provision that cover questioning of persons in custody under any provision. An arrested person shall not be questioned between midnight and 8am in relation to an offence except with the consent of the member in charge, in certain circumstances.²⁵⁷

The effect of this imposed rest period because of the Regulations during these eight hours takes from the detention times of the provisions of section 30 detentions and from the seven-day detentions of section 50 and section 2. The clock continues to run on these giving a 16-hour period every 24 hours in which to conduct

interviewing. Possibly as a result of the criticism in the Morris Report (2008 at 16.40-42), the Criminal Justice (Miscellaneous Provisions) Act 2009 in section 47 provided for the deletion of section 4(6), dealing with consent, from the Act of 1984, while section 52 provided for the corresponding deletion of references to the consent form in the Custody Regulations. These were not introduced and the above provision appears to be superseded by the introduction of the Criminal Justice Act 2011 as section 7(c) provides for the substitution of subsection (6) of the Criminal Justice Act 1984. This provision would create the default position as one of suspension of questioning between midnight and 8 a.m. unless the person objects in writing, while under the original 1984 Act the person had to consent to the suspension of questioning. Currently this section has not yet been introduced.²⁵⁸ The 2011 Act also planned to exclude from reckoning time spent awaiting the arrival of a solicitor to the station to provide legal advice.²⁵⁹ This has also not yet been introduced.

Rearrest

Where a person detained under the provisions of section 4 is released he or she may not be rearrested for the same offence or be arrested for any other offence of which, at the time of the first arrest, the member of AGS by whom he or she was arrested suspected him or her or ought reasonably to have suspected him or her. However, with the authority of a justice of the District Court who is satisfied on information by a Garda superintendent that further information has come to the knowledge of the Garda Síochána since the person's release as to his suspected participation in the offence for which his arrest is sought,²⁶⁰ or where the Gardaí had knowledge, prior to the person's release, of the person's suspected participation in the offence for which his arrest is sought, the questioning of the person in relation to that offence, prior to his release, would not have been in the interests of the proper investigation of the offence²⁶¹ then he may be rearrested. A person arrested under this authority shall be dealt with pursuant to section 4 as before.

When a person is later released without charge from detention, he or she is still liable to be arrested for the same offence for the purpose of charging.²⁶² If he or she is rearrested for the purpose of charging, this should be done immediately as any

delay in charging at this stage may result in a finding of a violation of the suspects constitutional right by holding him or her in unlawful custody.²⁶³

2.6 Human Rights Issues

The European Convention of Human Rights requires that an arrested person be informed promptly of the reasons for his arrest and of any charge against him, in a language he understands.²⁶⁴ The European Code of Police Ethics similarly imposes an obligation as well as to provide an interpreter if necessary to an arrested person.²⁶⁵ Article 5 of the Convention provides for the right to liberty and security and that no one shall be deprived of their liberty save in accordance with law. Article 6 of Convention is titled "Right to a fair trial" and provides for a "fair and public hearing." Article 6.2 provides that everyone is presumed innocent until proved guilty. Article 6.3 provides certain minimum rights, including the right to be informed promptly and in detail of the nature and cause of the accusation against him. The terms, a "trial" and "hearing" in the Convention have far broader meaning than simply that of the court hearing at which a final verdict is reached and the protections afforded by Article 6 apply to anyone who has been "charged" with an offence. "Charged" also has a broad meaning; it does not necessarily mean the laying of a formal accusation but also when a preliminary investigation has been opened in the case and, although not under arrest, the applicant has officially learned of the investigation or has begun to be affected by it."²⁶⁶ Thus, Article 6 "fair trial" protection can apply to a person from the time of arrest and detention on suspicion of having committed a crime.

The arrested person is further entitled to be brought promptly before a judge or other judicial officer and is entitled to a trial within a reasonable time, and is also entitled to take legal proceedings challenging the legality of his detention. If his or her detention is found to be unlawful his or her release should be ordered.²⁶⁷ O'Malley (2009 p.291) suggests that the habeas corpus provision in article 40.4 of the Irish Constitution undoubtedly satisfies the European Convention in this respect. O'Malley points out that the Strasbourg court has been equally insistent on an adequate level of suspicion before arrest and detention can be justified. He argues that the requirement under current statutes for detention, such as the 1939 Act, and statutes that allow seven-day detention periods are in conformity with the

Convention in that they require a recourse to a judicial authority for any extension of detention lasting longer than two days.²⁶⁸

Ireland has ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²⁶⁹ Article 3 of the European Convention prohibits torture. In 2014, the Equality Commission was merged to create the Irish Human Rights Commission, which is to ensure human rights are observed in organisations, including AGS, which supply public services.²⁷⁰ The Freedom of Information Act 2014 brought AGS within the scope of freedom of information requests. However, a commissioned survey, in 2004, found that leadership in AGS was not committed to human rights and rank and file members expressed fear about speaking out about abuses witnessed.²⁷¹

2.7 Conclusion

Arresting for the purpose of questioning remains the exception to the normal course of arrests, the majority of which are for public order offences. Other arrests, for instance, section 4 of the Road Traffic Act facilitate the taking of samples necessary to prove the offence of drink driving. Other statutes also authorise detention under certain specified circumstances.²⁷² However, the closing of the last millennium brought a changed legal landscape, with the move by government to formally end the long stated purpose of arrest being solely for the speedy production of a suspect before a law court. There was an increased acceptance by the legislature of the need for a controlled pre-trial arrest process that is investigatory in nature, blending inquisitorial methods into the adversarial process. This had been prompted by escalating crime as well as a move by courts to reject the continuance of informal custody of suspects in Garda stations.

There had been previous exceptions, specifically to safeguard the integrity of the State, of which section 30 of the 1939 Act has been the most enduring. However, beginning with the introduction of the section 4 provision in the 1984 Act, arresting to question has become routine rather than the exception in crime investigation. Moreover, the detention process has become intertwined with new legislation permitting an increasing complexity and this greater complexity has developed as it targets more specific crimes. These crimes required proof of subjective states such

as ‘intention’ and ‘recklessness’ which previously would have had presented difficult challenges to investigators. In general, the issue as to whether the accused intended the consequences of the prohibited act has been the most problematic in the construction of criminal responsibility (Coffey 2009 p.395).

Despite the introduction of these initial provisions, the country nevertheless continued to witness the growth and prevalence of crimes such as drug dealing, which created an atmosphere where it appeared the law was impotent to respond. The political reactions to the associated crimes resulted in ever more targeted legislation to tackle those responsible, with even longer detention times. As a result the arrest process does not now occur at the culmination of the investigation as it traditionally used to, but neither does it usually occur at the very start of the investigation stage.

Such a radical introduction of this detention provision saw a demand for protection for those who would be subjected to these provisions. In parallel with the developments of detention provisions was the introduction of safeguards to protect the rights of those who are in such detention against the use of violence or unfair treatment. Children and other vulnerable persons such as the mentally-ill were identified as requiring special care. Access to legal advice has been strengthened to a constitutional level. Somewhat belatedly, and after a good deal of negative commentary by the courts, audio-visual recording of the process was finally introduced. The legislation has identified time limits for periods of custody and clearly defined what exemptions apply to time spent in custody. It has also ensured that a recursive loop of arrests is prevented by tightly constricting rearrest. The Irish courts and now the ECtHR have maintained their vigilance to the conditions of persons kept in police custody and have continued to develop the legislation in this regard to ensure the rights of detainees are respected. Of particular importance, and increasingly, of assistance to the courts is a reliable record in the form of video footage as to what transpired during interrogation as well as the availability of legal advice to the detainee. Courts continue to hold investigators accountable for having adequate reasons with the necessary suspicion to arrest ensuring that the arrest is genuine, as well as for the proper treatment of suspects.

Such changes have moved the process inexorably towards a European inquisitorial model. This cannot be unexpected, considering the influence that the ECtHR now exerts on national laws and policies. However, in becoming more than a method for bringing the accused before the court, the arrest and detention became an important element in the determination of guilt, possibly more important than the trial itself. The 1984 Act gave the power to police to detain suspects for questioning and displaced the subterfuge that previously existed in how confessions were obtained. However, did the suspect, once detained, have to answer such questions? The next two chapters examine what the legal position is for a suspect while being questioned.

3: The Right to Silence

3.1 Introduction

A fundamental difference between the criminal law of common law jurisdictions and many non-common law jurisdictions has long been whether a criminal suspect can be compelled to answer the questions of investigating authorities. The assertion that a criminal suspect should not be compelled to answer questions can be found in the legal maxim “*nullus tenetur seipsum prodere*” (no man is bound to betray himself). Judicial torture was always forbidden in England and a source of national pride.²⁷³ Over the centuries, this legal maxim has sometimes evolved and developed to mean that the freedom from compulsion denies investigating authorities, including police, the right to even question a suspect, as in the United States (Myers 2010). Moreover, it has been claimed that this right to silence does not just denote any single right, but actually refers to a disparate group of immunities,²⁷⁴ thereby attaining an almost mythical symbolism that is not borne out by its exercise in custodial law and practice (Heffernan and Ní Raifeartaigh 2014 at 9.80). Nevertheless, as a result of the continued force of liberal constitutionalism or judicial habitus (Vaughan and Kilcommins 2013 p.10), the Irish legal model broadly continues to embrace the due process model of criminal justice where McGrath (2014 at 11-04) outlines three broad strands of protection afforded a suspect. The suspect need not give evidence at trial, or be prejudiced by this decision.²⁷⁵ The suspect need not answer questions and is afforded a right of silence during the investigation stage. Finally, any witness is protected from being forced to answer questions that may incriminate himself or herself, which McGrath ascribes as the privilege against incrimination. In Ireland, it means a suspect has the right to silence and need not answer questions even if the police have the power to ask them. Furthermore, no comment may be made on this decision.²⁷⁶ Unlike McGrath, I use the term *privilege against self-incrimination* to refer to protection against compulsory methods of obtaining answers.²⁷⁷ In mitigation, McGrath does concede that his terminology also does not always coincide with case law.

The 1984 Criminal Justice Act, as well as introducing a concept of detention for questioning in relation to ordinary crime, also introduced for the first time statutory inference provisions. These provided for the failure of a suspect, while being

questioned at pre-trial, to answer police questions to be used as evidence against the suspect at any future trial in corroboration of any other evidence.²⁷⁸ Subsequently, a number of other legislative provisions have increased the situations where adverse inferences may apply. These provisions appear to have radically altered the situation from the traditional or orthodox interpretation of the right to silence (McInerney 2014 p.102). These provisions clearly point to a situation where the accused has no absolute right to silence, and is therefore more in accordance with the early common law. He or she cannot be forced to answer, but such refusal in certain circumstances may weigh against him or her at trial. Nevertheless, accompanying these inference provisions are safeguards to ensure their fair use.

While there is overlap between the privilege against compulsory self-incrimination and the right to remain silent as noted by the ECtHR,²⁷⁹ they will be treated as separate for the purpose of analysis. The voluntariness of a statement is also intrinsically linked to the privilege, but voluntariness as a precondition has a different genesis. Moreover, while it is true to state that a voluntary statement is free from compulsion, the alternative proposition that a statement that is not compelled is a voluntary one is not correct.

The chapter examines the general rule on silence before examining compelled self-incrimination. The chapter then examines the current statutory adverse inference provisions in Irish criminal law as well as the safeguards in their use that have developed concurrently to protect the rights of a suspect. The adoption of adverse inference provisions has continued the evolution of arrest from that traditionally viewed as the bringing of a suspect before a court to answer charges to the use of arrest as a stage in the investigation process, aligning it much closer to the European inquisitorial model.

3.2 Use of Silence

General rule on silence

What did the introduction of the inference provisions, which permitted police to question suspects, mean for the right to silence? Generally, it is not possible to draw adverse inferences merely from an accused person's silence during police questioning. The Supreme Court in its decision in *DPP v Finnerty*²⁸⁰ confirmed this

general rule. In *Finnerty*, the accused had advanced a defence at trial that the allegation of rape was a fabrication and that the sex had been consensual. Counsel for the prosecution had then sought leave from the trial judge to cross-examine the accused as to the reasons why he failed to answer any questions during the time he was detained by Gardaí under the provisions of section 4 of the 1984 Act. The Supreme Court on appeal overturned the conviction. Keane J. stated that the right of the accused in custody to remain silent is a:

“[C]onstitutional right and the provisions of the 1984 Act must be construed accordingly. Absent any express statutory provisions entitling a court or jury to draw inferences from such silence, the conclusion follows inevitably that the right is left unaffected by the 1984 Act save in cases coming within (the inference drawing provisions of) ss. 18 and 19 and must be upheld by the courts.”²⁸¹

Keane J. warned that trial judges should, generally speaking, make no reference to the fact that the defendant refused to answer questions during the course of his detention. The failure of the accused to answer questions during interrogation should not be brought to the attention of the court and/or jury and the introduction of adverse inferences does not change that position and does not permit the use of silence generally or general refusal to answer questions to be admitted in evidence.²⁸²

Similarly, in *DPP v Bowes*,²⁸³ the appellant was arrested after driving a motorcar containing heroin and detained for drug trafficking, when he was warned that adverse inferences could be drawn for failing to mention any fact under section 7(1) of the Criminal Justice (Drug Trafficking) Act 1996.²⁸⁴ The court stated that the section did not relate to silence generally but instead to some ‘identifiable fact’ relied on by the defence at trial, which the applicant could reasonably have been expected to mention during questioning.²⁸⁵ In this case, the prosecution could not know at the start of the trial what ‘fact’ the defence might rely on. Therefore, it was not appropriate for the prosecution in opening statements to comment that when the applicant was shown various items in Garda custody, he had had no comment to make.

3.3 Compelled Self-incrimination

There have always been exceptions to the privilege against self-incrimination, with many as old as the privilege itself.²⁸⁶ As taxation was a vital income source to a government or monarchy many of these exceptions primarily focused on financial propriety and they did not enter the sphere of criminal legislation. Many such exemptions remain and the ECtHR does not, per se, regard compulsion as inconsistent with Human Rights: its use by administrative bodies depends on what use is made of the information (McDermott and Murphy 2008 p.35).

As noted by McGrath, the right to silence also exists at an Irish criminal trial and an accused cannot be forced to give evidence. The accused at trial only received the right to give sworn evidence in Ireland in 1924.²⁸⁷ The purpose the modern oath serves, concluded the ECtHR, is to ensure that statements made are truthful.²⁸⁸ However, if the accused chooses to give evidence on his or her own behalf, he or she thereby lifts this shield against self-incrimination, as he or she is then obliged to answer any question put to him in cross-examination even if it would incriminate him or her.²⁸⁹ The accused may, however, invoke privilege against any other offences other than those he or she is charged with.²⁹⁰ In reality, many defendants will often choose to not give evidence rather than risk losing this shield (Duffy 2009 p.4). Early on in the Irish State an exception was created in the 1939 Act to force answers from terrorism suspects in providing an account of their movements while being questioned by police.

Section 52 Offences against the State Act 1939

As noted in the previous chapter, the turbulent political situation prevailing at the formation of the State led to a range of measures to counter the anti-government threat (Hederman 2002 ch.4). The 1922 Constitution contained a provision in section 15 of Article 2A (inserted in 1931) whereby failure or refusal to truthfully answer the questions of a Garda could potentially result in a death sentence (Daly 2009a p.40). Widespread official dissatisfaction with the entire Article 2A meant that there was no such provision in the 1937 Bunreacht na hÉireann Constitution (Hederman 2002 at 4.9-4.12). However, two years later the Offences against the State Act 1939 was enacted. It contained a provision under section 52 entitled

‘*examination of detained persons*’ that allows a member of the Garda Síochána to demand an account of a detained person’s movements.²⁹¹

Section 52 compels a person to provide an account of his or her movements or the movements of another person during a specified time interval, and any information in his or her possession regarding the commission or intended commission of specified offences in the Act, on pain of possible imprisonment of up to six months if they fail or refuse to do so, or if they give false information.²⁹² The Court of Appeal examined the use of section 52 in the first modern decision in *DPP v McGowan*²⁹³ where Hogan (1999 p.177) argues that the court’s conclusion that information obtained through the use of section 52 could subsequently be admissible as evidence in a prosecution was flawed. This, he suggests, is because the court relied on a pre-1937 decision of the Supreme Court in *The State (McCarthy) v Lennon*²⁹⁴ which in turn was based on Article 2A of the previous 1922 Irish Constitution.²⁹⁵

Heaney

The constitutionality of the section 52 provision was tested again in *Heaney v Ireland*.²⁹⁶ The plaintiffs in this case had been arrested pursuant to section 30 of the 1939 Act on suspicion of having been involved in a bomb attack in Northern Ireland. Under the provisions of section 52 they were asked to account for their movements, which they refused to do. They were charged with membership of an illegal organisation but subsequently acquitted. However, they were convicted of the failure to answer questions and sentenced to six months imprisonment. In upholding the constitutionality of section 52 the Supreme Court affirmed the earlier decision of the High Court²⁹⁷ in the case that the provisions of the section were permissible as it was proportionate to its objective. Of notable importance in his ruling in the High Court, Costello J. had firmly established the constitutional basis for the right to silence in Article 38.1, while clarifying that it was not absolute (McGrath 2014 at 11-29-31). The Supreme Court, however, held that in the same way that the freedom of expression is qualified, the right to silence was not absolute and might in certain circumstances with regard to the common good have to give way, provided that the means used were proportionate to the public object to be achieved; this placed silence under the ambit of Article 40 (McGrath 2014 at 11-35). The Supreme Court

felt there was no effect on the due course of the trial in this case as the failure to answer the questions created a separate and distinct offence. Therefore, it did not impact on Article 38.²⁹⁸ Holding that section 52 is contained in the exceptional provision of Part V of the Act, O’Flaherty J. stated that:

“[T]he innocent person has nothing to fear from giving an account of his or her movements, even though on grounds of principle, or in the assertion of constitutional rights, such a citizen may wish to take a stand. However, the court holds that the *prima facie* entitlement of citizens to stand must yield to the right of the State to protect itself.”²⁹⁹

This reference to what some have called Benthamite values has attracted criticism where it is claimed that it represents the epitome of a form of judicial hyper pragmatism, focused only on results (Hogan 1999 p.177, McGrath 2014 at 11-39).³⁰⁰

The case was subsequently appealed to the ECtHR in *Heaney and McGuinness v Ireland*³⁰¹ in 2000. The ECtHR disagreed with the Irish courts, holding that the degree of compulsion imposed on the applicants by section 52, compelling them to provide information relating to their movements which may then have been used against them in proceedings under that Act, in effect destroyed the very essence of their privilege against self-incrimination and the right to remain silent. The ECtHR concluded that arguments of public interest or security and public order concerns could not be relied upon to justify the use of answers compulsorily obtained in a non-judicial investigation being used to incriminate the accused during a trial.³⁰²

Saunders

In its decision in *Heaney*, the ECtHR was following a consistent logic developed from earlier cases such as *Saunders v United Kingdom*.³⁰³ In *Saunders* in 1996, the ECtHR had considered the appeal against the use made in a criminal prosecution of previous compulsorily obtained statements by Department of Trade and Industry inspectors. As part of a civil process, the inspectors interviewed Mr. Saunders on nine occasions during the first half of 1987. In early May 1987, the police also began an investigation that resulted in formal charges of conspiracy, false accounting and theft against Saunders in April 1989. Transcripts of the interviews

with the DTI investigators were used to refute evidence given by Mr. Saunders at the trial and he was convicted.

In its judgment which found that the use of the compelled answers was oppressive and had violated Saunders entitlement to a fair hearing under Article 6(1), the ECtHR concluded:

“The privilege against self incrimination is an important element in safeguarding an accused from oppression and coercion during criminal proceedings. The very basis of a fair trial presupposes that the accused is afforded an opportunity of defending himself against the charges brought against him. The position of the defence is undermined if the accused is under compulsion, or has been compelled, to incriminate himself. The privilege against self-incrimination is also closely allied to the principle of presumption of innocence protected in Article 6(2) of the Convention in that it reflects the expectation that the State bear the general burden of establishing the guilt of an accused, in which process the accused is entitled not to be required to furnish any involuntary assistance by way of confession.”³⁰⁴

The Court, in its judgment, stated that the desire to prosecute complex fraud cases did not justify the use of compelled answers, even if those answers were exculpatory. The principle against self-incrimination applied without distinction to all criminal cases from the most simple to the most complex.³⁰⁵

NIB

In 1999, the Irish Supreme Court revisited the issue of self-incrimination in *Re National Irish Bank*.³⁰⁶ In a case that the Court noted was very similar to the case of *Saunders* decided by the ECtHR, the Supreme Court examined the constitutionality of the Companies Act 1990 which also allows inspectors to compel a person to answer certain questions. The court concluded that section 18 of the Companies Act 1990 allowing an answer provided to the inspectors in exercise of statutory powers to be used in evidence was appropriate in civil cases but it did not authorise the admission of forced or involuntary confessions against an accused person in a criminal trial (Heffernan and Ní Raifeartaigh 2014 at 9.94). It can be stated, therefore, as a general principle, that in order to be admissible at a criminal trial, a

confession must be voluntary: “it is proper therefore to make clear that what is objectionable under Article 38 of the Constitution is compelling the person to confess and then in convicting him on the basis of this compelled confession.”³⁰⁷ Furthermore, the Court stated that Article 38.1 of the Constitution which deals with due course of law has no place for the application of the proportionality test.³⁰⁸ The Court noted, however, that there might be circumstances in which a trial court is entitled to draw fair inferences from the accused having remained silent when he could have spoken.

Traffic Acts

An older Irish case had already examined the use of compelled answers, this time in relation to the requirement of the owner of a motor vehicle to provide an answer as to the driver of a motor vehicle at a particular time. Section 107 of the Road Traffic Act 1961 requires the giving of this information on the demand of a Garda in lieu of a conviction and penalty. In the case of *AG v Gilbert*,³⁰⁹ the accused had been convicted for receiving a motorcar knowing it to be stolen, but before his arrest the accused had been asked to give information under section 107 to state who had been using the car at the time and had been warned that failure to answer constituted an offence. The Court of Criminal Appeal ruled that a statement made after the Garda had stated that a failure or refusal would constitute an offence involving serious penalties could not be said in any sense to be a voluntary statement, and that the trial judge should not have admitted it in evidence. The Court stated that it expressed no opinion if the offence had been an offence under the Road Traffic Acts.³¹⁰

The subject of compelling persons who own motor vehicles to provide certain information was brought before the ECtHR in *O’Halloran and Francis v UK*.³¹¹ In this case the Court seemed to depart from its rulings in cases like *Saunders* and *Heaney* that public interest concerns could never justify compulsion. The applicants submitted that the serious problem caused by the misuse of motor vehicles was not sufficient to justify a system of compulsion, which extinguished the essence of the rights under Article 6.³¹² In finding against the applicants, the Court stated that it was unable to accept the contention that the right to remain silent and the right against self-incrimination are absolute rights. It further stated that even though to date it had found a violation in such cases taken by applicants, it did not follow that

any direct compulsion automatically results in a violation.³¹³ The Court concluded that those who choose to own and drive motorcars can be taken to have accepted certain responsibilities and obligations as part of the regulatory framework in existence relating to motor vehicles.³¹⁴

Judge Pavlovski, in dissenting, briefly outlined the history of the privilege against self-incrimination in English common law, albeit using the orthodox Wigmore version.³¹⁵ He then went on to argue that the majority of the Court had made a fundamental mistake by accepting the United Kingdom's government position that obtaining self-incriminating statements under the threat of criminal prosecution can be accepted as a permissible method of prosecution in certain very specific circumstances. This was not only wrong but also potentially extremely dangerous, he warned.³¹⁶ Judge Pavlovski questioned how it was that persons who committed relatively minor traffic violations should find themselves in a less favourable position than those suspected of terrorism or organised crime.³¹⁷ He suggested that the alternative approach to the fact that the right to silence is not absolute would be that the drawing of inferences from an accused's silence might be admissible, as is the use, in principle, of presumptions in criminal law.³¹⁸

The Review Committee into the Offences against the State Act recommended that section 52 be repealed (Hederman 2002 at 8.60). The committee further suggested that the ECtHR in *Heaney* might have reached a different conclusion if the decision of *NIB* had been in place prior to the issues raised. In *Quinn v Ireland*,³¹⁹ the ECtHR had emphasised the fact that at the date the applicant had been questioned under section 52, in July 1996, the legal position regarding the admissibility of any statements made by an arrested person in a subsequent criminal prosecution was uncertain and this uncertainty was only later clarified by the subsequent Supreme Court judgment in *NIB* in January 1999. Section 52 still remains on the statute books.

Sections 15 and 16 Criminal Justice Act 1984

The compulsion to give an answer to a question asked by a Garda is also present in two sections of the 1984 Act. Section 15 deals with the finding of a person with a firearm or ammunition. Section 16 deals with the finding of a person with stolen

property.³²⁰ These sections require the prior use of an ordinary language explanation of the penalties for failing or refusing to provide an account. But any information given cannot be used in evidence against the person or his spouse in any proceedings except proceedings relating to the failure to give an account or alternatively the giving of false or misleading answers. Neither section confers a power of search to the Garda and section 16 also requires the Garda to believe that an appropriate offence has been committed. The offence is not committed if the person has a “reasonable excuse” for withholding the information.³²¹

3.4 Silence and Inferences

Criminal Justice Act 1984

It was not until the introduction of the 1984 Act that statutory provisions would be made to require explanations in certain circumstances or risk an adverse inference being drawn. The 1984 Act contained a number of statutory abridgements to the right to silence including provisions for drawing adverse inferences in sections 18 and 19. Both sections allowed a Garda who found a person in certain situations to question him or her and a court to draw adverse inferences from a failure to answer certain questions. It was only occasionally used; the principal limiting factor was that it appeared to allow only the arresting Garda who made the discovery to invoke the provisions.³²² This in itself should not have been a major disadvantage as the arresting officer is usually involved in the questioning; nevertheless, use of the provisions was not widespread. In debating the Criminal Justice Bill 2007, opposition TD Mr. O’Keeffe queried the reason behind the poor use of these provisions.³²³ The TD made the valid argument that cosmetic legislative provisions have little impact if they are rarely used. Possibly, the inference provisions introduced in the 1984 Act, which introduced a completely new investigative regime, may simply have been lost in the implementation of that new paradigm. This was also the first time that a statutory abridgement had been made to the right to silence using adverse inferences. The lack of training in this regard must therefore bear some responsibility. After their introduction the adverse inference provisions were unsurprisingly challenged in the courts in *Rock v Ireland*³²⁴ on the grounds that such provisions interfered with an accused’s right to silence and presumption of innocence.

Rock

On 4 May 1994, Paul Rock was arrested in possession of forged US dollars. He was detained under the provisions of section 4 of the 1984 Act. During the course of the interview, the provisions of sections 18 and 19 of the 1984 Act were read and explained to him. He still declined to answer any questions put to him. He was later charged with possession of forged notes.

Rock applied to the High Court seeking a declaration that sections 18 and 19 of the 1984 Act were unconstitutional on the basis that they constituted an unjust attack on the presumptions of innocence and the right to silence. The High Court refused to grant the declarations and the applicant appealed to the Supreme Court.

During both the High Court and the Supreme Court cases reference was made to the decision in *Heaney*³²⁵ and section 52 of the 1939 Act. It was noted that, in the case of section 52, the most serious consequences of failure to answer questions was the possibility of a six-month prison sentence, while a similar failure or refusal under sections 18 and 19 would not attract a penal sanction in and of itself. But, the drawing of an inference could result in an accused being convicted of the substantive charge in circumstances where there might otherwise have been insufficient evidence. The Court therefore regarded the potential consequences of sections 18 and 19 as more serious and that they should be considered on their own merits. The Court considered that the decision in the *Heaney* case did not automatically dispose of the issues raised.³²⁶

The Supreme Court noted, however, that while the provisions of sections 18 and 19 allowed a court to draw inferences, it was not obliged to draw any inference from such failure or refusal. It is purely a matter for the court to decide what inference from a failure to provide an account should be properly drawn. In making such a decision a court is obliged to act in accordance with principles of constitutional justice, having particular regard to the entitlement of the accused person to a fair trial:

“It is clear from the provisions of the said section that it does not interfere in any way with the accused person's right to the presumption of innocence or the

obligation on the prosecution to establish guilt beyond all reasonable doubt. The burden of proof which rests on the prosecution in any criminal charge is not in any way affected by the provisions impugned sections, which merely provide a factor which may be adduced as evidence in the course of the trial.

If inferences are properly drawn, such inferences amount to evidence only; they are not to be taken as proof. A person may not be convicted of an offence solely on the basis of inferences that may properly be drawn from this failure to account; such inferences may only be used as corroboration of any other evidence in relation to which the failure or refusal is material. The inferences drawn may be shaken in many ways, by cross-examination, by submission, by evidence or circumstances of the case."³²⁷

Accordingly, the Court held that there was no interference with an accused person's constitutional right to the 'presumption of innocence.' In dealing with the issue of the 'right to silence,' the Court cited the judgment in the *Heaney* case and the corollary made between the freedom of expression and the right to silence, where the Court affirmed that, just as the freedom of expression clause is qualified, so must the entitlement to remain silent be qualified.³²⁸ The Supreme Court accordingly dismissed the appeal but established two important limiting factors to the use of inferences; first, inferences that might be drawn were evidential in nature only and could never be the sole basis for conviction. Secondly, a court remains bound to act under the constitutional obligation to adhere to principles of the right to a fair trial. A further attempt to appeal to the ECtHR was ruled inadmissible by that Court.³²⁹

Criminal Justice Act 2007

The limited use that sections 18 and 19 were put to, as well as the influence of ECtHR judgments, led to a revision of the inference provisions.³³⁰ At a time when politicians remained under pressure to resolve the growing violent feuds between drug gangs, the new provisions were part of a collection of new proposals. There was a political determination to remove the absolute right to silence that ordinary criminals appeared to enjoy at the pre-trial process. A review committee was formed to examine the application of the right to silence in the criminal process as well as other areas including the rights of victims.³³¹ In its final report in March 2007 to the then Minister for Justice, Michael McDowell, it made a number of recommendations

to changes in the inference provisions and suggested the addition of a number of procedural safeguards in their implementation.³³² During the committee stage of the Criminal Justice Bill 2007, Michael McDowell noted that internationally, most countries, apart from Ireland and the United States, accepted that inferences might be drawn from an accused's failure to mention certain matters. He commented, "it is not an abrogation of the right to silence to say that someone can exercise it but may face implications by doing so."³³³

Subsequently, Part 4 of the 2007 Act came into effect on July 1, 2007.³³⁴ The relevant changes in the 2007 Act included the substitution of sections 18 and 19 of the 1984 Act with sections 28 and 29 and the insertion of an additional provision of section 19A into the 1984 Act. The Act also amended section 2 of the Offences against the State (Amendment) Act 1998 and repealed section 7 of the Criminal Justice (Drug-Trafficking) Act 1996 and section 5 of the Offences against the State (Amendment) Act 1998.³³⁵

Section 28 of the Criminal Justice Act 2007

Section 28 inserted a new section 18 into the 1984 Act, which permits *any* Garda to seek an account for any object, substance or mark, or any mark on any such object that was

- (i) on his or her person,
 - (ii) in or on his or her clothing or footwear,
 - (iii) otherwise in his or her possession, or
 - (iv) in any place in which he or she was during any specified period,
- and which the member reasonably believed may be attributable to the participation of the accused in the commission of the offence.

A failure or refusal to provide an account can permit the drawing of an adverse inference by a court or jury under this provision as appear proper and the inferences may amount to corroboration of any evidence in relation to which the failure or refusal is material.³³⁶ A person cannot be convicted solely or mainly on an inference drawn.³³⁷ A suspect must have the provision explained to them in ordinary language, be permitted an opportunity to consult with a solicitor and have the questioning electronically recorded.³³⁸

Section 29 of the Criminal Justice Act 2007

Section 29 of the Criminal Justice Act 2007 inserted a new section 19 into the 1984 Act which permits a Garda to seek an account from a suspect for his or her presence at a particular place, at or about the time the offence is alleged to have been committed, where the member reasonably believed that the presence of the accused at that place and at that time may be attributable to his or her participation in the commission of the offence. If the person fails or refuses, then the inference as in section 28 can be drawn. The comparable safeguard subsections relating to further evidence required to convict, being told in ordinary language of the effects of failing to answer, opportunity to consult a solicitor and having the interview electronically recorded are all repeated as in section 28 of the 2007 Act.

Section 30 of the Criminal Justice Act 2007

In section 30 of the 2007 Act there was an additional insertion of a new adverse inference of failing to mention certain facts by amending the 1984 Act with the insertion of section 19A. This section states that if, while being questioned or charged, the suspect failed to mention any fact relied on in his or her defence in those proceedings, being a fact which in the circumstances existing at the time clearly called for an explanation, then the court may draw such inferences from the failure as appear proper, and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to which the failure is material.³³⁹ Once again, the comparable safeguard subsections from section 28 of the 2007 Act are repeated, relating to further evidence required to convict, being told in ordinary language of the effects of failing to mention a fact, opportunity to consult a solicitor, having the interview electronically recorded, and ability to draw other inferences outside the section.

General requirements to use of 2007 inferences

The sections have broadly similar conditions of use. The failure must occur during proceedings for an arrestable offence; that is, an offence for which a person of full age and capacity with no previous convictions could receive a penalty of a period of imprisonment of 5 years or more.³⁴⁰ The failure occurs at any time on being questioned before being charged with the offence, on being charged with the offence or informed of the possibility of being so prosecuted. The member *reasonably*

believes the mark, substance or presence of the accused may be attributable to the participation of the accused in the offence for sections 28 and 29. The member informs the person of this belief.³⁴¹ The accused then failed or refused to give an account. The 2007 Act introduced additional elements to the offence as well as safeguards. This included that the circumstances around the account sought clearly called for an explanation. The inference may be treated as corroboration of any other evidence if the accused was told in ordinary language of the effect of the failure or refusal to provide account. The accused must also have been given a reasonable opportunity to consult a solicitor before the failure or refusal occurred. The person cannot be convicted of an offence solely or mainly on an inference.³⁴² The questioning should be recorded by electronic means unless the person consents otherwise in writing. Finally, the court *may* draw such inferences as appear proper.

Circumstances clearly called for an explanation

The phrase ‘clearly called’ arises from the judgment in *Murray v UK*³⁴³ of the ECtHR (McGillicuddy 2008a p.9, n.63). This is an objective test where the court can enquire into the overall circumstances to determine if they warranted an explanation. The court will evaluate what was put to the suspect in the context of establishing the circumstances that called for an explanation, which therefore means the disclosure of information to the suspect and the suspect’s solicitor will be subject to review. It may be relevant to the court whether information regarding the proposed inference provisions was made available to the solicitor to enable the solicitor to properly advise the suspect. This right to disclosure is not absolute³⁴⁴ and need not be complete.³⁴⁵ However, if little information is disclosed then the suspect could be properly advised to remain silent.³⁴⁶ McGillicuddy (2008a p.13) suggests that the jury would have to examine the course of questioning, the direction of the questions and such matters as the evidential materials disclosed to the accused during the course of the interview which may be relevant in this regard. The prosecution must establish that the accused had a reasonable and sufficient opportunity to volunteer the information.³⁴⁷ The jury must then reach the conclusion that the only explanation for the failure of the accused to provide an account is that the accused had no answer or none that would stand up to scrutiny.³⁴⁸

In *Averill v UK*³⁴⁹ the ECtHR concluded that in exercising the powers contained in adverse inference provisions in the case, the trial court had not exceeded “the limits of fairness” since it could properly have concluded that:

“...when taxed in custody by questions as to his whereabouts at the material time or the presence of fibres on his hair and clothing, the applicant could have been expected to provide the police with explanations. It is to be noted that the applicant had been stopped by the police not far from the scene of the crime and had volunteered an explanation of his movements. However, he held his silence after being taken into custody. For the Court, the presence of incriminating fibres in the applicant’s hair and clothing called for an explanation from him.”³⁵⁰

The extent of the explanation actually required was examined in *DPP v Devlin*³⁵¹ where the appellant had been convicted before the Special Criminal Court with the possession of explosives. On his arrest a boxcutter knife and black insulation tape were found in his jacket while there was also black insulation tape around the explosive device. He was detained and interviewed on a number of occasions; he initially denied any knowledge of a bomb and claimed the items in his jacket were there from the last time he wore it. For most subsequent questions he adopted a formulaic response of “I refer you to my previous answers.”³⁵² The provisions of sections 18, 19 and 19A of the 1984 Act were invoked to which the appellant continued his formulaic responses. The Special Criminal Court in convicting had taken as evidence of corroboration the accused’s failure in interview under section 18 to account for the knife and tape. However, the Court of Criminal Appeal in allowing his appeal concluded that the defendant had previously offered an account and “this may or may not be a satisfactory explanation, but it was an answer. It does not amount to a failure or refusal to account.”³⁵³ The Court stated that where an account of any kind is given, the provisions of section 18 do not apply.³⁵⁴

Failure to mention facts later relied on

McGillicuddy (2008a p.2) suggests that it appears that the insertion of section 19A is directed at the supposed mischief of the positive defence and/or the ambush defence mounted at a trial by an accused person following a ‘no comment’ interview at the investigative stage. These may be defences or alibis that are fabricated and tailored to suit the prosecution case and which are not mentioned sooner as they

would not bear up to any scrutiny. Section 19A is seen by many as the greatest incursion on the right to silence in this jurisdiction to date (Daly 2009a p.51), although the section relates to matters which may only be raised in defence.³⁵⁵ Therefore, there are restrictions preventing the leading of such evidence in prosecution.³⁵⁶ It cannot be mentioned unless the accused seeks to first adduce into evidence a fact that he ought reasonably have been expected to mention at the pre-trial stage. The English Court of Appeal has held that in section 34 of the Criminal Justice and Public Order Act 1994, an almost identical provision to section 19(A), the object is early disclosure of the suspects account and preventing “a sprung defence, that is, a recently made up, or improvised defence.”³⁵⁷ Where the defence case is stated in full at the relevant time there can be no basis for adverse inferences because the inference of recent fabrication cannot arise. For example, where a prepared statement is handed in and the suspect refuses to answer further questions but subsequently, at his trial, gives evidence consistent with that statement then in effect the section has achieved its aim.³⁵⁸ However in England and Wales, it is not just the allegation of recent fabrication that may see the section 34 inference provision applied. It may also result where the suspect remained silent at interview but the prosecution can demonstrate that “an innocent person would have wanted to assert their innocence to the police” (Cape 2006 p.16). The section cannot be invoked where the fact relied on by the accused person was not known to the accused at the time he was being questioned.³⁵⁹ A fact “covers any alleged fact which is an issue and is put forward as part of the defence case. If the defendant advances at trial any pure fact or exculpatory explanation or account which if it were true, he could reasonably have been expected to advance earlier, section 34 is potentially applicable.”³⁶⁰

McGillicuddy (2008a p.6) notes that the fact may be established by the accused himself in evidence or by a prosecution witness in his evidence-in-chief or in cross-examination. He says that, under English law, when defence counsel puts a specific and positive case to prosecution witnesses, whether the witness agrees with it or not, it can be taken as a fact relied upon even if the defendant does not give evidence. But in Irish courts the principle appears to be that the questions posed to witnesses and closing speeches are not evidence and should not be treated as such by the jury.³⁶¹

Daly (2009a p.55, 2007) suggests that Gardaí are reluctant to use the section 19A provision as no regulations have yet been promulgated by the Minister for Justice to deal with technicalities of its usage, including the caution, although in the earlier article she suggested that it is because of the awareness of the definitional disarray caused by the similarly phrased section 34 in the English courts. While it is generally true that the uses of adverse inferences vary considerably, this is most probably due to deficiencies in training (GIR 2014 at 9.36).

Section 2 of the Offences against the State (Amendment) Act, 1998

The Irish government's response to the Real IRA attack in Omagh was swift and the 1998 amendment to the Offences against the State Act (the "1998 Act") included a section 5 which introduced a provision of a failure to mention certain facts. This section was removed by the 2007 Act, which also amended the inference provision of section 2 of the 1998 Act.³⁶² The section is phrased similarly to the other adverse inference drawing provisions, but with some important differences. Unlike other inference provisions, section 2 inferences are exclusively for use in situations where a person is arrested and being questioned for membership of an unlawful organisation.³⁶³ Section 2 states that when a person on being questioned by a Garda in relation to the offence, fails to answer *any* question material to the investigation of the offence, then the court may draw such inferences from the failure as appear proper, and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to the offence.³⁶⁴ Section 31 of the 2007 Act introduced additional safeguards to the section 2 provision that a conviction cannot be based solely or mainly on an inference, the suspect must be told in ordinary language of the effects of such a failure and afforded a reasonable opportunity to consult a solicitor, and the interview is electronically recorded.

As offences under the 1998 Act are tried before the non-jury Special Criminal Court, it is there that the adverse inferences drawn from the failure to answer questions under the section 2 provision are used to provide corroboration of other evidence. Of particular importance in the Special Criminal Court is the 'belief evidence' of a chief superintendent under section 3(2) Offences against the State

(Amendment) Act 1972 used in prosecutions for membership of an unlawful organisation. Such belief evidence has apparent inherent dangers and it is now the practice of the Director of Public Prosecutions not to initiate a prosecution on the basis of belief evidence alone. Neither does the Special Criminal Court now convict without corroborated evidence of the chief superintendent's belief (Hederman 2002 at p.123).³⁶⁵ Adverse inferences can therefore be used as corroboration of this belief evidence to obtain convictions.³⁶⁶ Both the Supreme Court and the ECtHR, in recent decisions, have upheld this use of inferences to provide the necessary corroboration of the belief evidence.³⁶⁷

General requirements to use

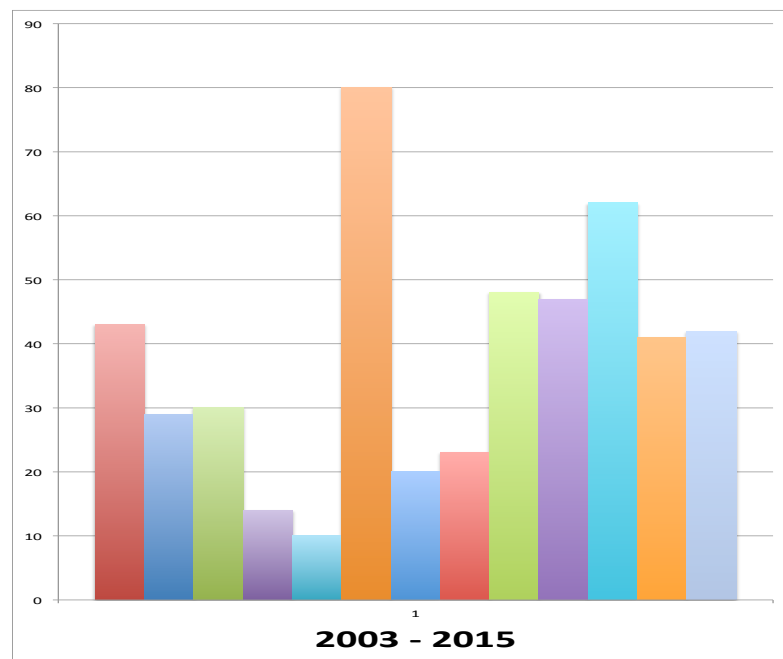
It is apparent that the wording from the old section 52 of the 1939 Act has been recast as an inference in section 2(4), where failure to answer any question material to the investigation of the offence include providing an account of movements or associations, so it is a broader category than the old section 52. It is an objective test for the court whether the questions were indeed material.³⁶⁸ The inferences may be drawn if the suspect fails to answer *any* material question,³⁶⁹ unlike the situation in *Devlin*³⁷⁰ where one account is sufficient. The material questions need not relate solely to the offence of membership, as the circumstances in which the accused was found may be of consideration to the court. In *DPP v Kelly*,³⁷¹ for instance, the accused was seen exiting the front of a van. When Gardaí approached, another man ran from the rear of the van and escaped. Subsequently, a handgun and other items were recovered in the van. Prosecuting counsel conceded that there was insufficient evidence to prosecute for the unlawful possession of the firearm. In appealing his conviction it was argued that the context in which the arrest occurred ought not to have been taken into account. In dismissing the appeal the Court of Criminal Appeal held that, while, when taken in isolation, such circumstances may have an innocent explanation and are not capable of leading to a conviction, they form part of a matrix of facts to which the court is entitled to have regard. The questions must be asked before any inference can be taken, however.³⁷²

The reference to failure includes giving a false or misleading account, so unlike the situation in *Devlin*, it would not appear that simply supplying any account would suffice to prevent the drawing of adverse inferences. In *DPP v Maguire*³⁷³ the Court

of Criminal Appeal concluded that the trial court, in this case the Special Criminal Court, was entitled to have regard to answers given which it considered misleading or even false and that as such it could serve to provide corroboration to the belief evidence of a chief superintendent. The ECtHR has also concluded that false or untrue answers to police questions can amount to evidence against the accused.³⁷⁴

The section 2 provision is contained in the 1998 Act, which requires the government to move a motion for continuance annually. Consequently, the government enters into the record of the Dáil the report regarding annual usage of various provisions. Figure 4 shows the annual use made of the section 2 inference provision.³⁷⁵

Figure 4: Use of section 2 Inferences 2003 to 2015³⁷⁶



Gangland crime inferences in Criminal Justice Act 2006

The killings in 1996 of journalist Veronica Guerin and Detective Jerry McCabe galvanised politicians who perceived the murders as an attack on the state, not from

terrorists pursuing a political agenda, but from those whose sole motive was financial gain. This led to an erosion of the usual boundaries between organised crime and national security with a greater alignment in legislation to target both (Conway and Mulqueen 2009 p.106). In *Gilligan v CAB*,³⁷⁷ McGuinness J. referred to evidence given in court by two senior Gardaí who described how some criminals take only a controlling role in criminal organisations. McGuinness J. commented that this outlined:

“[A] picture of an entirely new type of professional criminal who organises, rather than commits, crime and who thereby renders himself virtually immune to the ordinary procedures of criminal investigation and prosecution. Such persons are able to operate a reign of terror so as effectively to prevent the passing on of information to the Gardaí.”

The continued rise in gangland shootings as well as the use of intimidation to obstruct justice, despite the introduction of the many counter-measures post 1996, had led to the 2006 Criminal Justice Act. The Criminal Justice (Amendment) Act 2009 sought to further deal with the continued perceived threat from organised criminals, particularly in relation to witness intimidation and potential jury intimidation. The killing, in April 2009, of thirty-four year old Roy Collins, in revenge for testimony previously given by family members against major figures in the drug business in the Limerick area, was viewed as a direct assault on the institutions of the state.³⁷⁸

An adverse inference provision included in section 9 of the Criminal Justice (Amendment) Act 2009 was introduced to target those involved in criminal organisations. The relevant provisions relate to efforts to combat criminal organisations that have as their main purpose or activity the commission or facilitation of a serious offence. A serious offence is defined in the 2006 Criminal Justice Act as an offence resulting in imprisonment for four years or longer.³⁷⁹ This inference provision was inserted in the 2006 Act as section 72A:

“(1) Where in any proceedings against a person for an offence under this Part evidence is given that the defendant at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, failed to answer any question material to the

investigation of the offence, then the court in determining whether a charge should be dismissed under Part IA of the Criminal Procedure Act 1967 or whether there is a case to answer and the court (or subject to the judge's directions, the jury) in determining whether the defendant is guilty of the offence may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to the offence, but a person shall not be convicted of the offence solely or mainly on an inference drawn from such a failure."

As in section 2 of the 1998 Act inferences, the provision is limited to participation in serious offences by organised crime organisations as created by Part 7 of the Criminal Justice Act 2006.³⁸⁰ No question shall be regarded as being material to the investigation of the offence unless the member of the Garda Síochána concerned reasonably believes that the question related to the participation of the defendant in the commission of the offence. Failure to answer includes the giving of false or misleading answers. This is consistent with the provisions of section 2 of the 1998 Act although the material questions potentially cover a much broader range of topics.

3.5 Safeguards

A number of safeguards were put in place concurrently with the new adverse inference provisions to protect the rights of suspects. These strive to ensure that suspects, particularly vulnerable suspects, adequately understand these new and sometimes complicated provisions. It is imperative that suspects and their legal advisors understand that previous reliance on simple non-cooperation may now, in some circumstances, have an adverse outcome at a future trial.

Caution

The Garda must inform the person of his or her belief and the consequences of failing or refusing to provide an account, which must be explained in as simple and ordinary language as possible to the person, and avoiding "legal mumbo jumbo" as much as possible.³⁸¹ The courts have particular regard to the availability of video evidence in this regard. For instance, in *DPP v Matthews*³⁸² the trial court took the

opportunity to examine interview videotapes to satisfy itself that the accused had indeed understood the inference provisions.

In *DPP v Bowes*³⁸³ the Court of Criminal Appeal examined the provisions of section 7(1) of the Criminal Justice (Drug Trafficking) Act 1996³⁸⁴ allowing adverse inferences to be drawn from the failure of the accused to mention any fact relied upon in his defence. In this case, at interview, the investigating members had simply stated: "I must point out to you that certain inferences can be drawn by your failure to answer some questions in relation to the amount of alleged heroin in your car today." The court concluded that this warning given by the Gardaí was not sufficient and did not comply with the necessary legislative requirement. Fennelly J. also noted that the trial judge, while originally allowing the adverse inference into evidence, had expressed his difficulties with the context of the usual Judges' Rules caution and the confusion caused by its subsequent withdrawal, as, by the usual caution, the accused had first been told that he did not have to say anything, but he was then told that certain inferences could be drawn if he failed to answer.

This confusion was also noted by the Court of Criminal Appeal in a number of other cases, for example, in *DPP v Heaney*,³⁸⁵ where the Court accepted the claim of the accused's confusion in relation to the use of the traditional caution before it was removed without explanation. In *DPP v Fitzpatrick*,³⁸⁶ the confusing caution was again subject to judicial comment as was the necessity for appropriate training that needed to be made available to Gardaí. In *DPP v Bolger (no.2)*, the original trial judge had accepted the giving of the usual Judges' Rules caution, followed by its removal, as proper. The Court of Criminal Appeal subsequently ruled that, in circumstances where new regulations continued to be awaited, the trial judge had acted correctly in allowing such evidence.³⁸⁷

Under the provisions of section 32 of the 2007 Act, the minister has the power to put an alternative caution into place to surmount such difficulties. To date, no such new regulations have been introduced and the situation continues to be that the old Judges' Rules caution is administered at the beginning of an interview and then perhaps without appropriate explanation, a situation is put to the accused whereby it is explained to him that adverse inferences can be drawn if he fails to provide an

account.³⁸⁸ This is obviously poor practice. The failure to put in place effective and workable procedures in regard to the caution contributes to difficulties in utilising the inference provisions. In July 2010, the then Justice Minister Dermot Ahern established an advisory committee on Garda interviewing of suspects, to make recommendations in relation to a new caution. The committee formed under the chairmanship of Mr. Justice Edmond Smyth, who had previously served as chairperson of the Steering Committee that oversaw the introduction of audio-visual recording.³⁸⁹ The government, however, has not yet implemented any changes to the interview caution.

Opportunity to consult a solicitor

The inferences provisions should not provide the sole or main prosecution evidence to obtain a conviction (Ni Raifeartaigh 2004 p.25). Nevertheless, the most critical element in safeguarding the suspect's rights is the opportunity to consult a solicitor. There is a constitutional right to access to legal advice in pre-trial detention.³⁹⁰ The primary reasons given in *Healy* for the recognition of a constitutional right to legal advice are: the need to maintain a balance of power in the pre-trial period, the need for suspects to understand their rights and to allow a person to make informed decisions about his or her actions during an interrogation (McGillicuddy 2008b p.3).³⁹¹ The case of *Lavery v Member in charge Carrickmacross*³⁹² involving inference-drawing provisions under the 1998 Act in relation to the Omagh bombing, established the previous rule regarding the presence of the solicitor at interview. It was held by the Supreme Court that not only has the solicitor no right to be present, but that neither is the solicitor entitled to regular updates regarding the investigation or to Garda interview notes. The Court held that it is a matter for the Gardaí to conduct the investigation as they see fit, provided they do so reasonably. However, the Supreme Court in 2014 highlighted that in order to conform to ECtHR jurisprudence, the presence of a solicitor in the interview room, where requested, will be necessary.³⁹³ The ECtHR has also concluded that the vulnerability of the accused at this stage of the process can only be properly compensated for by the assistance of a lawyer.³⁹⁴

Furthermore, as well as general legal advice, the ECtHR has further emphasised the importance of legal advice before the invoking of adverse inference provisions. In

Murray v UK,³⁹⁵ the ECtHR held that inferences could not be the sole or decisive evidence against the accused, that inferences only became permissible when there was a *prima facie* case, that is, prosecution evidence that might lead to a conviction of the accused and that the burden of proof remains on the prosecution to prove the guilt beyond a reasonable doubt.³⁹⁶ Silence could not, therefore of itself, be regarded as an indication of guilt.³⁹⁷ The Court, nevertheless, concluded that the right to silence was not absolute and that there had been no violation of Articles 6(1) and 6(2) of the Convention arising out of the drawing of adverse inferences on account of the applicant's silence.³⁹⁸ But the Court was unwilling to allow the adverse inferences be drawn in circumstances where access to legal advice had been denied to the suspect.

Again, in *Averill v UK*,³⁹⁹ the ECtHR concluded that the denial of access to a lawyer for the first 24 hours of the suspect's detention in circumstances where adverse inferences could be drawn from his silence constituted a violation of Article 6(3)(c) of the ECtHR. The Court noted that:

“Under such conditions the concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation.”⁴⁰⁰

In Ireland, the right to consult a solicitor before questioning under the inference drawing provisions was not specifically addressed until the Court of Criminal Appeal considered the appeal of Cormac Fitzpatrick⁴⁰¹ for his conviction for the possession of explosives. Fitzpatrick was detained but refused to answer any questions. Sections 18 and 19 of the Criminal Justice Act were invoked and his failure to provide answers was given in evidence at his trial before the Special Criminal Court. The Special Criminal Court accepted the prosecution argument that Fitzpatrick had had reasonable access to his solicitor during his detention and had been both visited by his solicitor and spoken to him on the phone a number of times. The Court ruled to allow inferences into evidence on the basis that he had been given a reasonable opportunity to consult with his solicitor. On his appeal to the Court of Criminal Appeal on a number of points, that Court held that there should be a specific right of access to a solicitor where it is proposed to invoke the adverse inference provisions and, taking *Rock* into account, that where ambiguity exists, it

should be interpreted to ensure advice is given to the suspect in relation to the provision as it applies to the suspect in his current position. The Court therefore ruled that the adverse inferences were inadmissible; nevertheless, the Court held that sufficient alternative evidence existed to leave the conviction stand.⁴⁰²

Quality of Legal Advice

What if the solicitor chooses to advise the suspect to remain silent and risk adverse inferences? In *Condron v UK*,⁴⁰³ the applicants had been advised by their solicitor not to make statements, as the solicitor believed them to be suffering withdrawal symptoms as a result of their heroin addictions, despite the suspects having been examined and cleared for interview by a police doctor. The trial court had rejected this explanation for silence and the judge left the jury free to draw adverse inferences, even if satisfied that the explanation was plausible. The ECtHR concluded that this omission to give appropriate directions to the jury had not been remedied on appeal and was incompatible with the applicants right to silence. In such circumstances there had been a breach of Article 6(1). The trial judge should have told the jury to only draw an adverse inference if satisfied that the applicants silence during questioning could only be attributed to their having no answer or having no answer which could stand up to cross-examination.

The question of the effect of received legal advice has been considered in the English Courts on a number of occasions. In *R v Betts and Hall*,⁴⁰⁴ the defendants were convicted despite claiming they had only refused to answer police questions on their solicitor's advice. On appeal, the court ruled that the genuineness of their reliance on the advice should be what is of relevance to the jury rather than the quality of the advice. However, four years later, in a different appeal case in *R v Howell*,⁴⁰⁵ the court concluded that it was not enough to genuinely rely on legal advice. The court stated that "there must always be soundly based objective reasons for silence, sufficiently cogent and telling to weigh in the balance against the clear public interest in an account being given by the suspect to the police."⁴⁰⁶ In *R v Hoare and Pierce*⁴⁰⁷ the court noted the apparent conflict between *Howell* and *Betts and Hall*, but concluded that there was no inconsistency between the two cases; what is reasonable in the circumstances is a matter to be considered by the jury and

while it is an objective test, it is also tied to the subjective circumstances of the case before the jury.

Using the defence of the quality of legal advice as the reason for refusing to provide an explanation may see solicitors forced to give evidence at trial and a waiver of the normal confidence of legal privilege (McGillicuddy 2008a p.13). Lord Woolf C.J. in *R v Beckles*, in discussing the effect of legal privilege in such cases said:

“(T)he position is singularly delicate. On the one hand the courts have not unreasonably wanted to avoid defendants driving a coach and horses through s.34 and by doing so defeating the statutory objective. Such an explanation is very easy for a defendant to advance and difficult to investigate because of legal 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.”⁴⁰⁸

In *Beckles* the court therefore concluded that while the accused may have genuinely relied on legal advice, it may still not have been reasonable for him to rely on the advice. Alternatively, the advice may not have been the true explanation for his silence.

In Ireland, the case of *DPP v O’Callaghan*⁴⁰⁹ examined the claim by the applicant that his solicitors bad advice had influenced his decision not to answer questions and that the trial court should therefore not have drawn adverse inferences. The Court of Criminal Appeal, in rejecting the appeal, emphasised that the individual retains autonomy over the decisions he or she makes and stated that an adult being interviewed is responsible for decisions made to answer questions and in what manner. The applicant had been properly advised of the right to silence and it was his responsibility whether to exercise it or not. The fact that a person is entitled to remain silent may not be enough to stop an inference being drawn.⁴¹⁰

In *DPP v Birney*,⁴¹¹ it was again argued on behalf of the applicants that a solicitor whom they had consulted, gave them advice, which was incorrect in law. It was claimed that he had advised them that they were not obliged to make a statement unless they wished to do so and that he had failed to explain the statutory regime

under which inferences adverse to them might be drawn from their failure to answer certain questions. This situation made it unsafe and inappropriate to draw any inference from the failure to answer questions, it was argued. The Court of Criminal Appeal concluded that by virtue of the independence of legal advice, it was difficult to see that the State or the Gardaí could be in any way responsible for the content of the advice given, or for any shortcomings in it.⁴¹² Furthermore, there had been a failure on the part of the applicants to engage with the facts of the case or to establish that the advice said to be incorrect had had any practical effect.

When there are two conflicting reasons given at the trial why the accused remained silent, even where both are equally likely, the accused is entitled to have the inference which is most favourable to him drawn by the court unless it can be excluded by prosecution evidence beyond a reasonable doubt.⁴¹³ Other factors which might be relevant to the jury deliberations would be factors such as the accused's age and experience, mental capacity, state of health, time-of-day, tiredness, knowledge, personality and legal advice as well as the possibility of the accused's suspiciousness of the police (McGillicuddy 2008a p.10).⁴¹⁴

The widespread use of adverse inference provisions in England and Wales places responsibility on legal advisors to carefully evaluate potential replies to police questioning with the traditional reply of 'no comment' deemed counterproductive in many instances. Therefore, in many police interviews, some form of account will be given.⁴¹⁵ In fact, as a result of these provisions, suspects availed less frequently of silence both in the station and the trial court, although there was no increase in admissions (Bucke, Street, and Brown 2000). The purpose of section 34 CJPOA is to "encourage speedy disclosure of a genuine defence or of facts which may go towards establishing a genuine defence."⁴¹⁶ Furthermore, as a result of *R v Howell* where a suspect has an innocent explanation to give, then it is expected that the explanation be given at the earliest opportunity.⁴¹⁷ Under English Law, section 144 of the Criminal Justice Act 2003 permits sentence reduction for an early indication of a guilty plea, with a greater reduction the earlier the indication. Shepherd (2010 p.324) further argues that once a suspect in England begins answering questions, he or she risks drawing an adverse inference if they again resort to 'no comment' responses, known as 'mixed responding.' This type of responding can effect the credibility of

the defence at trial (Cape 2006 p.17). However, lack of police disclosure pre-interview may prevent a solicitor from properly advising his client and therefore no adverse inference may be drawn.⁴¹⁸ A police officer should always disclose sufficient information to enable a suspect to understand the nature and circumstances of their arrest,⁴¹⁹ and if little disclosure is made on the subject of inference questioning a solicitor may correctly advise his or her client to remain silent.⁴²⁰ Attention should therefore be drawn to the potential of adverse inferences provisions to remake the criminal justice process and possibly partly account for the divergence between Ireland and England. In describing the effect of the section 34 provision, Laws L.J. noted it:

“[H]as served to counteract a culture, or belief, which had been long established in the practice of criminal cases, namely that in principle a defendant may without criticism withhold any disclosure of his defence until the trial. Now, the police interview and the trial are to be seen as part of a continuous process in which the suspect is engaged from the beginning.”⁴²¹

Corroboration of evidence

Corroboration is anything that tends to connect the accused with the crime.⁴²² The word ‘corroboration’ has no special legal meaning. Its Latin roots can best be described as ‘to strengthen’ and with the best synonym for the word being ‘support.’⁴²³ Corroboration “in essence may be defined as independent evidence which implicates the accused, in a material way in the offence charged.”⁴²⁴ McGillicuddy (2008b p.5) contends that the number of Court of Criminal Appeal cases arising from convictions in the Special Criminal Court where adverse inferences drawn under the provisions of section 2 of the 1998 Act provided corroboration of the prosecution case, suggests that a wider and more flexible approach to corroboration is now accepted than the definition in *Baskerville*⁴²⁵ suggests.⁴²⁶ However, in *DPP v Donnelly*,⁴²⁷ the court concluded that it did not appear that the reference to evidence ‘capable of amounting to corroboration’ amounted to a requirement that such evidence be capable of satisfying the test for corroborative evidence before it could be accepted. Where, as in the present case, under section 2 questioning the accused had denied membership of an unlawful organisation but refused to answer any further material questions, such as ownership or origin of a handgun, this failure to answer material questions was taken as

corroboration of other prosecution evidence.⁴²⁸ In *Donohoe v Ireland*,⁴²⁹ the ECtHR examined the use of inferences as corroboration of the belief evidence of a chief superintendent and in holding that the trial court was entitled to draw the inference it did, the ECtHR stated that “silence maintained in response to questions ‘clearly calling for an explanation’ can be taken into account although that negative inference cannot be the ‘sole or main’ basis for a conviction.”⁴³⁰ It was argued in *DPP v Binead*⁴³¹ that the use of section 2 inferences could not be used as corroboration evidence against the accused on trial for membership as this interfered with the accused’s right to silence. Neither, it was argued, should the trial court have commented on the demeanour of the accused in refusing to answer police questioning. However, the Court of Criminal Appeal rejected both these arguments.⁴³²

Judges discretion

The authority of judges to apply their overriding discretion has long been an aspect of common law. In 1790, Grose J. concluded that the “rules of evidence shall ever depend on the discretion of judges.”⁴³³ Recent Irish cases confirm the authority that rests with the trial judge to exclude any evidence where he or she is of the view that to allow its admission would run the risk of an absence of fundamental fairness.⁴³⁴ There is no obligation on a judge to accept the evidence of adverse inferences and in *Averill v UK*⁴³⁵ the ECtHR stated that adverse inferences, which may be drawn from the failure to respond to police questioning, must be “necessarily limited.” Likewise, in England and Wales, under the similar adverse inference provisions of the Criminal Justice and Public Order Act 1994, the English Court of Appeal has stated that, as these provisions restrict the right to silence to which a person is entitled, they “should not be construed more widely than the statutory language requires.”⁴³⁶ In *DPP v Doran*,⁴³⁷ the court concluded that the exception to the normal rules of proof provided for in section 2 of the 1998 Act must be construed appropriately and strictly. This is especially so, given that the inferences permitted to be drawn are themselves used to corroborate the belief evidence of chief superintendents under section 3(2) of the 1939 Act and that this belief evidence is not capable of itself being challenged against a claim of confidentiality by the chief superintendent.⁴³⁸

3.6 Conclusion

The rule against self-incrimination arose because of a deep-rooted sense of fairness combined with the notion of Christian values, which incorporated principles of reciprocity and fairness. It did not prevent the development of a notion of justice which expected the accused person to provide an explanation where common sense dictated that he provide one in suspicious circumstances. The European justice model abandoned the torture model to adopt that very notion; that, if faced with an accusation and some evidence, an accused should be expected to provide an explanation or the refusal would be taken as evidence against him. In effect, granting the right to silence and freedom from being forced to answer, but with a penalty attached to its invocation in certain circumstances. This appeared, from historical sources, to also have been the common law *de facto* position in the investigation of crime until the withdrawal of the investigative function of justices of the peace.

What has been evident in Ireland in recent years is a move away from a legislative framework compelling cooperation with the investigative authorities in criminal affairs but with the move towards the use of adverse inferences being drawn where silence is invoked. The entitlement to maintain silence does not subsist in a vacuum but must be balanced against other competing societal values including vindicating the interests of victims (Heffernan and Ní Raifeartaigh 2014 at 9.80). The inference provisions are confined to limited circumstances and their use has developed alongside procedural safeguards in their deployment. These safeguards include the consultation with a lawyer and the electronic recording of the interview before the acceptance into evidence of any adverse inference interview, which results in careful oversight of the use of the adverse inferences by the courts.

The influence of the European Court of Human Rights is leading to a greater acceptance of courts drawing an adverse inference from the failure of the suspect to supply an answer in circumstances that clearly called for one when being questioned in the pre-trial process. This further emphasises the growing importance that the pre-trial process has in the overall criminal justice system. Now, the gathering of evidence is to facilitate an interview of the suspect. This interview has the capacity

to put questions that common sense would expect to be answered. If the suspect declines to answer, then in certain circumstances it will be subsequently be taken by the court to mean that it was because he or she had no answer to give or none that would stand up to scrutiny. Dangers have been highlighted with regard to those who have intellectual or learning disabilities, and the possible disadvantage at which this places them.⁴³⁹ It is on these areas in particular that training and education of investigators needs to focus. Without adequate training, members of AGS are frequently left to make the best decision they can and take any subsequent criticism on an individual basis. In reality, without training, many investigators simply avoid many new legislative provisions.⁴⁴⁰

Judges are, by nature, pragmatic and cognisant of the fact that the administration of justice should not be brought into disrepute; therefore, the choices they face are dealt with as best they can without any legislative assistance. There is a growing realisation, however, that the orthodox interpretation of the right to silence has caused a great deal of confusion and a system that appears to conflict with its purported aims. Others point to the increasingly complex and global nature of many financial frauds and question why, in a situation like Ireland's banking crisis, those responsible should hide behind a rule that sought to prevent the undue compulsion of torture.

Politicians, subject to scrutiny from their electorate, create new legislation. They respond to criticism and it is important that they appear to have an agenda for dealing with serious crime. The electorate is rarely informed or perhaps even care how effective legislation ultimately is, with little research on the long-term effects of such legislation. The circumstances in which the adverse inferences can be used are increasing; the only limiting factor in their use in the pre-trial process is the ability of the investigators to use them in a fair and efficient manner. This is hindered by a lack of training in their use and a lack of logistical support to investigators in interviewing. The next chapter examines the rules, which have developed over centuries, which strive to ensure that confessions or admissions from suspects are fairly obtained by investigators and are not the result of coercion.

4: Questioning and Confessions

4.1 Introduction

The previous chapters examined the legislative changes allowing the detention of a person for the purpose of questioning and the changes to the right to silence in the Irish jurisdiction. Ultimately though, the purpose of questioning from the prosecution's viewpoint can often be an attempt to obtain that vital piece of prosecution evidence: the confession. A confession may be narrowly defined to describe a full, written narrative and acceptance of guilt.⁴⁴¹ However, inculpatory comments that tend to confirm aspects of the prosecution case are also important and can be called admissions to distinguish them from a full confession (Murphy 2008 p.303).⁴⁴² The confession has traditionally been regarded as the 'Queen of Proofs' in criminal trials and it remains important both as a conclusive proof and as a strong predictor of both prosecutions taken and guilty pleas made (Leo 1996 p.288, Gudjonsson 2003, McConville, Sanders, and Leng 1991, McConville and Mirsky 2005 p.vi, Williamson 2006c, Murphy 2008 p.289, Phillips and Brown 1998). Confession evidence is therefore usually highly prejudicial to an accused (Kassin and Gudjonsson 2004 p.33). Subsequently, in many instances, what is said in the interview room determines the outcome of any subsequent trial (Sanders and Bridges 1999 p.92). In Ireland, the critical importance of confessions to the investigation strategy of the Gardaí was evident in the data presented before a 1977 committee that 80 per cent of serious crimes, in respect of which convictions are obtained, were as the result of confessions (O'Briain 1978). The Committee considered this statistic to indicate "a high degree of reliance on self incrimination and an inability or reluctance to secure evidence by scientific methods of criminal investigation and by persevering police enquiries" (*ibid*, p.38). In contrast, contemporary figures from England and Wales estimate the rate of confessions at approximately 55 to 60 per cent (Morris 2008 at 15.116).

The rules governing confessions are as old as the practice itself and illustrate the deep connection with Christianity. Seeking forgiveness and admitting culpability are often the first steps to reintegration into a community.⁴⁴³ It has the added advantage of making passing judgment easier as a confession settles completely any questions of guilt (Whitman 2008 p.10). As explored in the last chapter, the compelling of a

person to confess intrinsically tarnishes any resultant confession. Therefore, one of the oldest rules surrounding the taking of confessions was that the confession should be given voluntarily and not coerced from a person.⁴⁴⁴ This apparently simple rule has still produced volumes of legal opinion throughout the centuries. Nevertheless, it remains the critical element for the prosecution to prove.

Notwithstanding the voluntariness rule, judicial activity over the years has sought to define what is or is not permissible in obtaining confessions from criminal suspects. Even in the absence of violence or threats the interrogation environment can remain highly coercive and intimidating.⁴⁴⁵ It remains important to contextualise these judicial developments by exploring the changing nature of crime investigation that judges were attempting to address. As recounted in the first chapter, by the beginning of the nineteenth century lawyers were a more regular feature as defence counsel in criminal trials. As this paradigm shift was occurring another major change was happening with the investigation of crime and the creation of professional police forces throughout Great Britain. These were initially under the control of magistrates but the role of the magistrate was redefined in 1848, removing them from any involvement in investigation.

This resulted in many interpretations of the law based on a judge's own interpretations of the function of police⁴⁴⁶ thereby creating a confused and often contradictory mass of judgments, even by 1862.⁴⁴⁷ This situation has not greatly improved in the intervening 150 years. The 1984 Act permitted detention for the purpose of questioning; the first time the function of the police in Ireland clearly permitted such a role. This new role required additional safeguards that are explored in this chapter but many of the older rules remain important. This is despite a completely revised and novel police role. This chapter seeks to examine these rules. The rules governing questioning carry different weights with some absolute while others are not. The situation is even now evolving with some rules losing this absoluteness.

The new safeguards put in place to protect suspects while in custody from both outright abuses and unfair practices have, paradoxically, lessened the importance of the traditional full confession with more emphasis now being placed on partial

admissions with a mix of inculpatory and exculpatory statements. As a result, confessions, or partial admissions, continue to play a pivotal role in the criminal justice system despite advances in forensic sciences.

4.2 Safeguards for statements from suspects

The Judges' Rules

Background to development

At the beginning of the twentieth century, the modern professional police had existed in some parts of the United Kingdom for less than 60 years.⁴⁴⁸ The eventual establishment of police forces, along with the move in 1848, (in the John Jervis Act⁴⁴⁹) to restrict the magistrate's role from investigative to procedural only, removed judicial involvement in criminal investigations. The 1848 Act established that the purpose of the magistrate's examination was now simply to ask the prisoner if he wished to say anything in response to the evidence he had heard adduced against him. The Act stipulated that a suspect was to be cautioned first in similar words to: "you are not obliged to say anything unless you desire to do so but whatever you say will be taken down in writing and may be given in evidence against you upon your trial."⁴⁵⁰ The section elaborated, however, that this did not preclude or prevent "the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such a person." This appeared to permit investigating police to continue to obtain incriminating statements and left interrogation solely to the new police forces. This was not made explicit, however, and Toney (2002 p.417) argues that as interrogation was originally the magistrate's function, modern police have been confused about their role in it from their inception. It appears that some judges reacted in the same manner. Therefore, contrary to Weinberg's (1975 p.20) assertion that it was only after 1885 that trial judges began to exclude voluntary confessions made to the police,⁴⁵¹ it would appear that many nineteenth century judges were unwilling to allow the police to usurp the examination role vacated by magistrates.⁴⁵²

At the beginning of the nineteenth century there existed no requirement to caution suspects that their words could be used as evidence against them (MacNally 1802

p.38, McConville and Mirsky 2005 p.111), but it was apparently becoming an issue. By 1832, the principle was firmly established that a suspect should be cautioned first by the magistrate that his confession would not result in any favour at his trial and that any incriminating statement made would be used as evidence against him. However in this instance, it was additionally stated that a magistrate should not go further and attempt to actually dissuade a prisoner from confessing.⁴⁵³ Nevertheless, following the demise of the magistrate's investigatory role in 1848, many judges remained ambivalent about the new police taking on the role. One case that arose soon after was *R v Baldry*,⁴⁵⁴ in 1852. Lord Campbell C.J. had presided over the original trial and had ruled the accused's confession admissible. However, as the matter was considered of such importance he had referred the case to his colleagues in the Court of Criminal Appeal for consideration. When he had called to the suspect's house to arrest the suspect for his wife's murder, the policeman had administered a caution but had used the word 'will' instead of 'may (be used against you)' before then receiving a confession. Lord Campbell C.J. and the other appeal judges held that the wording in the Jervis statute was guidance and the caution as it was expressed in this case could not be considered a promise or threat.⁴⁵⁵ This decision overturned a number of previous decisions.⁴⁵⁶ In agreeing with the decision to admit the confession, Baron Parke stated that confessions to be admissible must be perfectly voluntary. However, he continued on to say:

“The decisions to that effect have gone a long way: ... but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame when I consider what objections have prevailed to prevent the reception of confessions in evidence; ... that the rule has been extended quite too far, and that justice and commonsense have, too frequently, been sacrificed at the shrine of mercy.”⁴⁵⁷

However, Lord Campbell C.J. had also commented at one stage in response to counsel: “Prisoners are not to be interrogated. By the law of Scotland they may be, but by the law of England they cannot.”⁴⁵⁸

In Ireland, judicial opposition to police questioning appeared even more strident. For instance, in *R v Johnston*,⁴⁵⁹ Dublin police had stopped a suspected shoplifter on the street with suspected stolen boots and had cautioned her before asking where she

had obtained the boots. The case was reserved to the Court of Appeal. While the majority, eight judges, held to allow into evidence the suspect's responses to police questioning, after caution, three others strongly dissented. Pigot C.B., in the minority referred to questioning in custody as "a species of torture"⁴⁶⁰ and in a prescient argument, stated that a prisoner in custody could never be truly free to make a statement and therefore it could never be voluntary.⁴⁶¹ He claimed that in Ireland, in particular, evidence obtained through police interrogation was generally held to be inadmissible.⁴⁶² In the same case, Lefroy C.J., also in the minority, asserted that while the right to question a prisoner was recently withdrawn from the magistrate, police never had such a power and should not now claim it as a privilege.⁴⁶³

The development of the adversarial trial and associated law of evidence after the arrival of lawyers had already silenced their clients in the courtroom (Langbein 2003, 1978, 1974 (2007)), but silence in the courtroom would be pointless if this silence did not also exist pre-trial. Langbein refers to this time as "the epochal alteration that began with the large-scale entrance of defence counsel into the process" (Langbein 1997 p.144). The *Johnson* judgment examined various precedents, including *Baldry* (where the judges often presented contradictory interpretations, especially evident on Lord Campbell's comment), and it reveals the dissension of opinion amongst the judiciary, particularly after the 1848 Act, with one judge admitting that previous judicial decisions were a mass of confusing and contradictory authority.⁴⁶⁴ Throughout this era, many judges regarded a policeman's duty as simply the apprehension of a suspect to take before a court. As McInerney (2014 p.112) notes, the use of the voluntariness principle in these circumstances was also to contribute to the modern right to silence. Linking voluntariness with the caution, which by implication had an inherent choice, enforced the modern interpretation of the right to silence as the right to refuse to answer police questioning. Although treatises were appearing from the 1840s, beginning "adventurously to present a general right to silence," it was the 1898 Act allowing the interested party of the accused to give sworn evidence that made a general right to silence essential to counter any perceived reluctance on the part of the accused to give evidence (Smith 1997 p.148). Smith (p.156) further notes the amalgamation of the witness privilege rule into the modern interpretation at this stage.

Towards the end of the nineteenth century, in cases such as *R v Gavin*,⁴⁶⁵ judges continued to refuse to admit any evidence obtained through interrogation while in custody. Other judges continued to permit confessions to be admitted.⁴⁶⁶ It was accepted as being entirely within the judge's discretion whether to admit a confession into evidence or to exclude it and it was suggested as impossible to formulate general rules on the subject (Taylor 1887 p.748). Langbein (2003 p.229) notes that Wigmore was very critical of early nineteenth century English decisions to exclude confessions and suspected "a general suspicion of all confessions, a prejudice against them as such and an inclination to repudiate them upon the slightest pretext."⁴⁶⁷ Fennell (2009 p.395) agrees that there was, amongst the judiciary, a general mistrust of the police obtaining confessions and she quotes the comments of Cave J. when he expressed these sentiments:

"I always suspect these confessions which are supposed to be the offspring of penitence and remorse and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoners guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory, the prisoner is not infrequently alleged to have been seized with the desire.... to supplement it with a confession: a desire which vanishes as soon as he appears in a court of justice."⁴⁶⁸

Origin of Rules

In an attempt to obtain some guidance on the issue, in 1906 the Chief Constable of the Birmingham police wrote to the Lord Chief Justice asking him to clarify the circumstances in which the caution should be used when questioning a prisoner; as in one recent case the judge had criticised the constable for using it while in a similar case the judge had criticised the constable for omitting it (Johnston 1966 p.85). Similar requests followed until in 1912, the Judges of the King's Bench Division of the High Court formulated the first four Judges' Rules. Nevertheless, in 1914, in delivering the advice of the Privy Council, Lord Sumner, in *Ibrahim v R*,⁴⁶⁹ made no mention of the Judges' Rules. In this case, Ibrahim had appealed his conviction of murder while serving in the British army. The appellant's objection in *Ibrahim*:

“[R]ested on the two bare facts that the statement was preceded by and made in answer to a question and that the question was put by a person in authority and the answer given by a man in his custody. This ground, in so far as it is a ground at all, is a more modern one. With the growth of a police force of the modern type, the point has frequently arisen, whether, if a policeman questions a prisoner in his custody at all, the prisoner’s answers are evidence against him, apart altogether from fear of prejudice or hope of advantage inspired by a person in authority.”⁴⁷⁰

Lord Sumner opined: “when judges excluded such [confessional] evidence, it was rather explained by their observations on the duties of policemen than justified by their reliance on rules of law.”⁴⁷¹ He noted that, while Cave, J. had once rejected a statement made by a prisoner in custody to a constable who had cross-examined him,⁴⁷² saying merely that the police had no right to manufacture evidence, he had then, in a very similar matter, concurred in the statement’s admissibility.⁴⁷³ Lord Sumner continued on to say that the matter in English criminal law was still unsettled and while some judges feared that nothing less than the total exclusion of such evidence could prevent the improper questioning of suspects in custody, the Court of Appeal would, however, generally not consider cases where judges had properly allowed its admission.⁴⁷⁴

The Judges’ Rules first appeared at the end of the report in the 1918 case, *R v Voisin*.⁴⁷⁵ This case arose when Voisin was suspected of murder when parts of a body were discovered in a parcel. Attached to the parcel was a handwritten note. Voisin was later asked in the police station, without being cautioned, to write the words ‘*Bloody Belgian*’ which he wrote as ‘*Bladie Belgiam*’ matching the note found. The Court of Appeal held that whether the accused had been properly cautioned was a factor to be taken into account by the judge in deciding whether to exercise his discretion to exclude the accused’s statement, but the absence of a caution did not as a matter of law mean the statement had to be excluded and in this case the handwriting sample was admissible. Lawrence J. commented on the Judges’ Rules in *Voisin*:

“These rules have not the force of law; they are administrative directions the observance of which the Police Authorities should enforce on their subordinates

as tending to the fair administration of justice. It is important that they do so, for statements obtained from prisoners, contrary to the spirit of these rules may be rejected as evidence by the judge presiding at the trial.”⁴⁷⁶

The Rules had increased in number to nine by 1922 (Almond et al. 2012 p.88).

These nine rules are as follows:

1. When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.
2. Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions or further questions, as the case may be.
3. Persons in custody should not be questioned without the usual caution being first administered.
4. If the prisoner wishes to volunteer a statement, the usual caution should be administered.
5. The caution to be administered to a prisoner, when he is formally charged, should be in the following words: "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 will be taken down in writing and may be given in evidence."
6. A statement by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such a case he should be cautioned as soon as possible.
7. A prisoner making a voluntary statement must not be cross-examined and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

8. When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.

9. Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.⁴⁷⁷

It appeared to be clear that the rules had moved to a position contrary to that expressed in cases such as *Gavin* in that they would permit questioning in custody, as rule three appeared to provide for persons in custody to be questioned. McBarnet (1981 p.110) indeed argues that the formulation of the Judges' Rules was not actually a step in the direction of civil rights and control of the police, but, on the contrary, they were a move away by accepting and recognising interrogation in custody at all. Brooks makes a similar point about the US case in *Miranda v Arizona*.⁴⁷⁸ He argues that the US Supreme Court was restrained by pragmatism from banning the practice of interrogation outright. Instead, it developed a process, which, if followed by the police, would allow confessions to be admitted as evidence (Brooks 2001 p.11).

Application of the Rules

In Ireland, the giving of the caution to the suspect is not in itself enough to satisfy the voluntariness of the confession.⁴⁷⁹ On the other hand, as noted in *Voisin*, the failure to comply with the Judges' Rules will not mean that a statement, if voluntary, has to be excluded.⁴⁸⁰ In 1978, in *People v Farrell*,⁴⁸¹ however, the court concluded that while a statement taken in breach of the Rules may be admitted into evidence this should only occur in very exceptional circumstances and required the breach to be fully explained. This issue of contravention of the Judges' Rules was again considered in 2004 in *DPP v Casey*,⁴⁸² where McGuinness J. concluded that the trial judge had correctly allowed the admissions into evidence in circumstances where

there were “technical breaches of the Judges Rules and of the [Custody] Regulations but the substance of the applicant’s rights was preserved.”⁴⁸³

While in 1964, in *McCarrick v Leavy*,⁴⁸⁴ Davitt J. had concluded that it was never intended by the Judges’ Rules that a police officer should caution every person of whom he asked a question, the issue of when to give the caution was again raised in *DPP v O’Reilly*,⁴⁸⁵ where the appellant had been convicted of his wife’s murder. He sought to appeal the decision because, inter alia, he had voluntarily given a witness statement shortly after the discovery of his wife’s death. This had been a wide-ranging exculpatory statement made to two Gardaí at his mothers home, where he had outlined both his and his wife’s histories as well as his activities on the day of the killing. This, it later transpired, conflicted with other evidence uncovered by the investigation. The appellant sought to have this witness statement excluded, as he had not been cautioned, even though, it was submitted, he must have been considered a suspect. The Court of Criminal Appeal noted that the trial judge had commented that after such a serious crime as a murder, investigating Gardaí may have a number of suspects. Indeed, after such a crime, the whole world is a potential suspect. The Court noted that the degree to which a person may be considered a ‘suspect’ may vary greatly and that the decision to charge is a critical element. The charging of a person requires some element of proof and there is no authority that a Garda investigator must caution a person simply because he is a suspect. However, counsel for the appellant further argued that following the decision of *DPP v Breen*,⁴⁸⁶ a failure to administer a caution in the circumstances of that case had violated the requirements of basic fairness. The Court concluded that the facts of the *Breen* case differed from the present one in that there was no evidence of agitation on the part of the accused before an inculpatory disclosure was made. It therefore concluded: “to say that the mere failure to give a caution is a want of fairness is to misconceive the principle involved.” The trial judge had admitted this statement into evidence although other statements had been ruled inadmissible. The trial judge had, however, noted that on the arrest of the accused and his subsequent detention for questioning, the interviewing Gardaí, after caution, had reread this statement back over to the accused and the accused had then acknowledged the correctness of it.

In *DPP v McCann*,⁴⁸⁷ the appellant sought to have his conviction for the murder of his wife and foster child in a fire at their home overturned. One of the grounds of appeal lay in the admissibility of a statement he had made after he had been detained pursuant to section 30 of the 1939 Act and questioned. The appellant argued that any statement made as the result of questioning should be inadmissible, as there had been a breach of the Judges' Rules in that they forbade the questioning of a suspect whilst making a statement.⁴⁸⁸ In his judgment dismissing the appeal, O'Flaherty J. concluded:

“(I)t is clear that the very word ‘interrogation’ means more than some form of gentle questioning and, provided there are no threats or inducements or oppressive circumstances, then the Gardaí are always entitled to persist with their questioning of a suspect.”⁴⁸⁹

A more recent case similarly examined whether investigators can question a suspect beyond his or her willingness to cooperate. In *DPP v Yu Jie*,⁴⁹⁰ the accused was found guilty of murder after a fifty-eight day trial. One of the grounds argued on appeal was that, while he was detained for questioning, he had, on several occasions, indicated that he did not wish to answer any more questions. The Court of Criminal Appeal held that the Gardaí were entitled to continue with their questioning and that “there is no authority whatever for the proposition put forward on behalf of the Applicant that the questioning should have ceased when he indicated that he did not want to answer any more questions.”

In Ireland, the original Judges' Rules have, without any revision, remained the benchmark for the admissibility of confessions since their introduction.⁴⁹¹ There have been recommendations, for example, to remove the requirement to commit to writing everything said by the suspect after caution (Morris 2008 at 16.17) and the 2007 Act made provision for a recording or a transcript of the recording to be admitted into evidence.⁴⁹² As currently stands, however, confessions must still be committed to contemporaneous written form and no changes have ever been made to the rules. Of additional concern is the actual level of comprehension of the caution among some suspects, especially vulnerable suspects as research has indicated that some suspects can fail to comprehend completely the contents of the caution even though they believe they have.⁴⁹³ Heffernan suggests that “the rules are

clearly in need of modernization” particularly to address the relationship with the Custody Regulations and provide the necessary framework for safeguards for the inference-drawing provisions (Heffernan and Ní Raifeartaigh 2014 at 9.193).

As well as the difficulties with the confusing caution, the ongoing practice of continuing to take painstaking hand written notes as a result of the caution contained in the Judges’ Rules interferes with the normal pace of the interview and uses up time unnecessarily. The Morris Tribunal (2008 at 15.138) asserted that such memo taking “interrupts the flow of the interview and renders it less effective as it is constantly stalled and interrupted in order to maintain the note.” People speak at a speed up to seven times faster than normal writing speed.⁴⁹⁴ Despite interfering with the flow of the interview, this method is cheap. The alternative of transcribing the audiovisual tapes would require a trained cohort of civilian personnel in Garda stations specifically for that purpose and may be prohibitively expensive,⁴⁹⁵ unless an alternative system such as operates in the English system where a bare written memo is provided unless the defence wishes to have a full transcript made available.

Custody Regulations and questioning

The need to alleviate concerns regarding the oppressive nature of police questioning was a priority when the proposed enactment to allow investigative detention was first mooted, with the mistreatment of suspects in cases such as *DPP v Lynch*⁴⁹⁶ still fresh in memories. The Criminal Justice Act, 1984 (Treatment of Persons in Custody) Regulations 1987⁴⁹⁷ was therefore introduced to coincide with the detention provisions under the same Act.

A suspect detained for questioning is entitled to both the protection of the Judges’ Rules and the Custody Regulations.⁴⁹⁸ These regulations cover the way persons detained in custody, not just for questioning, should be treated and, for instance, specify that if a detained person makes any complaint about his treatment, it should be brought to the attention of the member in charge, who should note same in the custody record and a note should also be made in the record of interview.⁴⁹⁹

Regulation 12 deals specifically with the interviewing of suspects with regulation 12(1) providing for the identification of the interviewing Gardaí to the suspect

before the beginning of any interview. It further provides that the interview is conducted in a fair and humane manner.⁵⁰⁰ Regulation 12(3) states that an interview should be either terminated or adjourned if it has lasted longer than four hours. In *DPP v O'Connell*,⁵⁰¹ the suspect had been offered a rest period but had declined. Following a post-conviction appeal, the Court of Criminal Appeal, in rejecting the confession, concluded that the regulations do not permit the interviewee an option or waiver with regard to this rest period.

Regulation 12(7) prevents the questioning of suspects between the hours of midnight and 8am except in certain prescribed circumstances. The suspect currently must give his written consent to the suspension of questioning and a possible influencing factor for a suspect is the fact that this rest period is excluded from the time reckoning of the period of detention if the suspect so consents. Regulation 12(9) states that a person who is under the influence of an intoxicant to the extent that he is unable to appreciate the significance of questions put to him shall not be questioned except in certain circumstances on the authority of the member in charge. Regulation 12(11) states that a record should be kept of the interview, including details of times and those present. Any notes taken should be signed and dated by the member taking it. In the case of *DPP v Diver*,⁵⁰² the Supreme Court concluded that in circumstances where the Gardaí had failed to record as far as practicable an interview with an accused, then it was the task of the trial judge to determine whether such a failure to abide by the regulations had prejudiced the fairness of the trial by allowing the admission of such statements from the accused. The Gardaí were not entitled to exercise editorial control over what was said and therefore it was unacceptable to omit denials. It was particularly important that context be provided especially where there might be ambiguity surrounding a comment.

Audio-visual recording of questioning

Such concerns added to the demand for the introduction of the electronic recording of interviews. The introduction of the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations (ERI) 1997⁵⁰³ made provision for the electronic recording of interviews with persons detained under the detention and questioning provisions conducted in stations equipped with electronic facilities. The ERI imposed certain legal obligations on Garda members conducting an interview

that is electronically recorded, including stating the commencement time and the time the recording is turned off.⁵⁰⁴

Interview process

The interview process now involves the interviewee being taken to the interview room by the member in charge and the interviewers. Normally there are two interviewers present, with one asking questions and the other transcribing the memo.⁵⁰⁵ The member in charge reenters the interview regularly during the course of the interview. Article 5 of the ERI states that the member in charge should, before the commencement of the interview, inform the interviewee, in ordinary language, that the interview is to be electronically recorded and give him a notice that outlines what will happen the tapes (or CDs). The interviewer should then unwrap the tapes in the presence of the interviewee before loading them into the machine.⁵⁰⁶ The main camera is usually located high behind the interviewers, pointing towards the face of the interviewee. There is a secondary camera overhead in the center of the room, which captures the entire room in wide angle and displays in a corner of the footage. The time and date is also shown on the footage. The interviewee should then be cautioned:

“You are not obliged to say anything unless you wish to do so but anything you do say may 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 given in evidence.”⁵⁰⁷

Once this has been given, the interviewer should identify himself by name and rank and any other member present. The name and status of any other person present should also be given.⁵⁰⁸ The name of the person being interviewed should then be stated, as well as the date, location and time of commencement.⁵⁰⁹ When the interview is being interrupted or concluded, the interviewer should record the time and reason for the interruption and then remove the tapes before sealing one of the three tapes with a master tape seal that is signed by the interviewer and interviewee.⁵¹⁰ Allowing the tape to run and then reminding the interviewee that he has been cautioned, and stating the reason and duration of the interruption as well as the recommencement time, can deal with shorter interruptions.⁵¹¹ At the conclusion of an interview the interviewer should enquire if the interviewee wishes to say anything or clarify anything. The memo of the interview should then be read back

and the interviewee asked if there are any alterations or additions he or she requires to make. The time should be noted, the tapes ejected and the master seal signed and applied to one tape.⁵¹² If the interviewee declines to sign the member in charge should be called to the interview room and asked to sign.⁵¹³ The sealed master tape should then be given by the interviewer to the member in charge who should note that fact in the custody record as well as the time and identification number of the tape.⁵¹⁴ The sealed tapes are then passed on to the sergeant in charge of the station who stores them securely. The other copies are working copies and may be given to solicitors for the interviewee on direction of the court.⁵¹⁵ After six months the interviewee may apply to the superintendent for the district where the interview took place to have the videotapes destroyed, unless certain conditions are met which can delay destruction.⁵¹⁶

Effect of electronic recording

The Morris Tribunal (2008 at 16.12) concluded that the electronic recording of interviews is an invaluable and essential tool for protecting the rights of the interviewee from abuse and improper interrogation methods, the interviewers from false allegations and the integrity of the interview process as a whole. The Tribunal (at 16.15) also suggested that, in line with international best practice, that an external audiovisual monitoring of the interview should be done, especially in serious crimes. This supervision might further facilitate the replacement of an ineffective or inappropriate interviewer.

In *DPP v Murphy*⁵¹⁷ the Court of Criminal Appeal noted that the viewing of videotapes has the potential to be particularly useful in dispelling suspicions regarding the voluntariness or reliability of statements and in protecting the Gardaí from allegations of improper conduct, but that such viewing is not mandated.⁵¹⁸ A powerful example of the potential for routine taping is the case of *DPP v Pringle*.⁵¹⁹ The prosecution evidence in this case relied on Garda evidence that Pringle had said to investigators 'I know that *you know* I was involved' but Pringle claimed that he had actually said 'I know that *you think* I was involved.' Obviously in such a conflict, the availability of the recorded statement could have resolved a crucial difference in meaning created by one word. In addition, the existence of a recording has other potential benefits; for example, in *DPP v Buck*,⁵²⁰ Keane C.J. noted that in

previous cases before the courts, such as in *DPP v Healy*,⁵²¹ the court had to exclude the entirety of the statement from evidence as the trial judge could not be satisfied that the significant incriminating statements were made prior to the arrival of the solicitor at 4pm. If the judge could have been so satisfied it would have been admissible as there had been no violation of the suspects constitutional rights prior to that time. Audiovisual recording now permits that forensic examination. Viewing of these interview tapes also allows the court to gain insight into more than was simply said. For example, in *DPP v Yu Jie*,⁵²² the Court noted that with video recording, the court may rule upon the fairness of the questioning and the demeanour of the person being questioned in a manner which is far more reliable than merely reading a transcript of what took place.

In another example, in the High Court case of *McCormack v Judge of the Circuit Court*,⁵²³ the applicant sought to restrain his trial for snatching a handbag. Shortly after the incident he had been arrested and detained under the provisions of section 4. The applicant claimed that the Garda videos showed that Gardaí had failed to properly conduct the interviews they had with him. He claimed that the chaotic and unstructured nature of the interviews had deprived him of an opportunity to put forward, on video, his defence to the offence. In ruling against him, Charleton J. noted that, on watching the video, the “factual matrix contended for is absent” and further concluded that it is not the purpose of a police interview to enable the accused to make a case on video so that it can be shown to the jury.⁵²⁴ While the rule that statements of the accused person were admitted in evidence was grounded in an exception to the hearsay rule⁵²⁵ – that is, the tribunal of fact should consider an admission against interest – Charleton J. noted that there was a growing practice, by persons arrested, to use the opportunity of being questioned to deny the offence. These statements may be entirely self-serving but may be presented as part of the prosecution evidence subject to the discretion of the trial judge.⁵²⁶ However, such self-serving statements, if entirely exculpatory, should be inadmissible under hearsay rules.⁵²⁷ The Court of Criminal Appeal has previously held that while an exculpatory statement should be taken as evidence of the facts stated, the jury is not bound to accept such favourable facts as true, even if unrefuted by contrary evidence.⁵²⁸ The vast majority of statements now tend to contain a mix of

inculpatory and exculpatory comments and it is for the trial judge to rule on their admissibility (O'Malley 2009 at 19.11).⁵²⁹

Charleton J. also noted that while, heretofore, complaints were regularly received about “Garda prose” or inaccuracies in written memos, video evidence of police interviews, now demonstrates the real circumstances of conversations between people who may be under pressures of accusation, of work, or of life.⁵³⁰ It is to be expected then that the interviews may appear chaotic or laconic with occasional profanity such as one may hear at any hour around Dublin City. On memo taking, Charleton J. noted that as the spoken word is much faster than the written, the written memos may not get everything that is said but concluded that it was never the law that absolutely everything had to be written down by the Gardaí conducting the interview.⁵³¹ While ever more diligent note-taking may be as a result of the electronic recording and the attempt to avoid discrepancies, the use of profanity in the interview room appears to support the notion that as such recording has become routine, Gardaí fail to appreciate how offhand or colourful comments may be later interpreted. On occasion such lapses can have serious consequences and Walsh notes the case of two Gardaí who were forced to apologise to a solicitor for comments made about her to her client during an interview on tape (Walsh 2009a at 24-09).

Advantages of electronic recording

There appears to be a growing awareness amongst investigators of the potent effect of a video tape presented to a jury as evidence rather than a simple memo which may be open to dispute as to whether certain words or phrases were ever uttered. Where admissions are otherwise made off camera, the practice has developed of repeating the admissions on camera and inviting the suspect to comment (Orange 2014 p.105). In the United States, police departments that have introduced video recording, either voluntarily or at the behest of the courts, have reported overall positive experiences as a result and have noted that having an interview taped actually assists in getting incriminating information from suspects than in traditional interrogations and of “rendering confessions more convincing” (Garrett 2010 p.1115). Consequently, the major advantage of a taped confession, from a

prosecutor's perspective, is that it provides a reliable and solid piece of prosecution evidence.

Additionally, it can protect innocent suspects. A principle cause of the acceptance of false confessions from suspects in custody is as a result of 'police contamination' where esoteric crime scene information is leaked to a suspect (Garrett 2010 p.1066). The resulting confession then contains information that should only be known to the perpetrator and appears genuine as a result. Having a full and accurate audio-visual recording of the interrogation allows an examination of whether any such non-public information was passed to the suspect, consciously or unconsciously, by the investigating members. The record also presents judges with an objective record to the interviewing process to allow them evaluate any resulting confessions, as well as scrutinise the behaviours of investigators, thereby giving the advantage of protecting both suspects from abuse and investigators from false allegations (Morris 2008 at 15.18). Another potential use of such tapes might be to permit the ongoing professionalisation of the interviewing process by enhancing training and feedback.

4.3 Questioning Vulnerable suspects

The Children Act 2001 changed the definition of children from persons under seventeen to persons of less than eighteen years of age.⁵³² There are also specific provisions under the Custody Regulations made for the requirements of such persons who are detained for questioning.⁵³³ This includes the presence at any interview of a parent or guardian unless they are unavailable or cannot be contacted. In certain circumstances it is possible that the member in charge may exclude the parent or guardian; such circumstances include where the parent or guardian is the victim of the alleged offence, or is suspected of complicity in the offence or is likely to obstruct the interview. Where the parent or guardian is unavailable or excluded, the other parent or guardian should be present instead. In circumstances where that person is unavailable or unsuitable, an adult relative may be present and failing that, another responsible adult, other than a Garda, should be present. This is normally a locally available Peace Commissioner. If the adult present requests a solicitor this should be treated as if the arrested person had made the request.⁵³⁴ Regulation 22 states that the provisions regarding the treatment of children should also apply to persons whom the member in charge "knows or suspects to be mentally

handicapped” or intellectually disabled, and the responsible adult in these cases should, where practicable, have experience in dealing with the mentally handicapped.⁵³⁵

4.4 Constitutional and ECHR safeguards

Exclusion of evidence

In criminal cases, some safeguards that extend to a suspect in custody had such value placed on them that any breach resulted in any subsequent statement being ruled inadmissible, with no discretion being afforded to the trial judge. The most important of these was a breach of a suspect’s constitutional rights (Walsh 1998 p.357). This was known as the ‘exclusionary rule.’ Until 2015, the exclusionary rule automatically applied to involuntary confessions and conscious and deliberate breaches of the accused’s constitutional rights.⁵³⁶ As in all common law jurisdictions, in Ireland, the judiciary plays no role in the evidence gathering process characterised by the police investigation. What the courts are then required to do is to engage in a retrospective evaluation of that investigation and in particular, how evidence was gathered (O’Malley 2009 p.727). O’Malley (2009 p.728) argues that Ireland’s exclusionary rule, while not absolute, had “few counterparts elsewhere in terms of the rigour with which it treats evidence obtained in breach of an accused person’s constitutional rights.” He notes that such exclusionary rules are treated as classic examples of judicially-imposed restrictions on police discretion.

Development

While in other common law jurisdictions the common law position on admissibility of evidence is that, provided the evidence is relevant it is admissible and it is not rendered inadmissible simply because unfairness or even illegality were used in the obtaining of it. Lord Diplock famously stated that the trial court was not concerned with how the evidence was obtained.⁵³⁷ Nevertheless, judges have shown discretion to exclude evidence where the actions of the police were such as to be morally reprehensible.⁵³⁸ But evidence can still be admissible, even if the confession that led to the discovery of evidence is excluded, as a result of a principle of evidence that has been settled since *R v Warwickshall*.⁵³⁹ This principle prevents the prosecution from stating why they came upon the evidence, but the evidence itself, once found, will be admissible. Baron Eyre noted that:

“It is a mistaken notion that the evidence of confessions and facts which have been obtained from prisoners by promises or threats, is to be rejected from a regard to public faith: no such rule ever prevailed. The idea is novel in theory, and would be dangerous in practice as it is repugnant to the general principles of the criminal law.... The principle respecting confessions has no application whatever to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source; for a fact, if it exists at all, must exist invariably in the same manner, whether the confession from which it is derived be in other respects true or false.”⁵⁴⁰

Therefore, “traditionally the administration of justice was robust, even ruthless, in requiring that all relevant evidence be available.”⁵⁴¹ The Irish exclusionary rule was first formulated in *AG v O’Brien*,⁵⁴² where the Supreme Court considered an appeal from a decision of the Court of Criminal Appeal. In this case a search warrant had been issued to the Gardaí by the District Court, but the wrong address had been put on the warrant. The Court of Criminal Appeal in their decision, had adopted the usual common law approach where the test to be applied was one of whether the evidence to be admitted was relevant to the matters at issue and this decision was guided by the relatively recent English decision in *Kuruma v The Queen*.⁵⁴³ On appeal, the Supreme Court took a different approach, with Kingsmill Moore J. concluding that if the evidence was obtained illegally, it should be at the discretion of the trial judge whether to exclude it or not. This decision should encompass all the circumstances of the case including the nature and extent of the illegality, whether this was done intentionally or unintentionally, as well as the public interest.⁵⁴⁴ Walsh J. went further, however, and stated that in the case of unconstitutionally obtained evidence, the defence of constitutional rights was superior to the right to prosecute a criminal charge. Therefore, he concluded in the case of unconstitutionally obtained evidence, where there was a deliberate and conscious violation of the constitutional rights of the suspect, it should be absolutely inadmissible with no discretion resting with the trial judge, save in extraordinary excusing circumstances.⁵⁴⁵ Such extraordinary excusing circumstances could include the imminent destruction of vital evidence or the need to rescue a victim in peril. In the case considered, the Court concluded that, as the wrong address was a

pure oversight and not intentional, the search was admissible. However, claims Daly (2009b p.6), the phrase ‘deliberate and conscious violation’ continued to cause controversy. She notes that in the case of *DPP v Shaw*,⁵⁴⁶ where the accused had been arrested and detained for questioning before any such statutory power existed, the accused appealed to the Supreme Court on the grounds that his confession had been obtained while he was deprived of his liberty contrary to Article 40.4.1 of the Constitution. Griffin J., in giving the majority decision of the Court, expressed the view that the ‘conscious and deliberate violation’ referred to the constitutional rights and not to the acts of the Gardaí. Therefore, the Gardaí had to know that they were breaching the constitutional rights of the suspect before the evidence was excluded. Walsh J., in his judgment, again went further and suggested that it was not the breach of the constitutional rights by the Gardaí that was important. Indeed, there was no need for *male fides* or knowledge of the Constitution on the part of the Gardaí – but that the act was a ‘conscious and deliberate’ act as opposed to an accident.⁵⁴⁷ The alternative approaches can be defined as deterrence on the part of Griffin J. and, on the other hand, protectionism from Walsh J. (Daly 2009b p.7). O’Malley (2009 p.744) writes that while Griffin J. sought to limit the principle to real evidence and not inculpatory statements, this interpretation was “emphatically rejected by both O’Higgins C.J. and Walsh J. in *DPP v Lynch*.”

When the Supreme Court in *DPP v Kenny*⁵⁴⁸ again considered the matter it once again involved the circumstances surrounding a search warrant. It transpired that the Peace Commissioner who granted the warrant had not been personally satisfied that there were reasonable grounds for the grounds held by the Garda who had prepared the Information. The Court of Criminal Appeal had held that there had been no conscious and deliberate violation and that the Gardaí executing the warrant could not have known from the warrant’s face that it was defective. The Supreme Court, however, in its majority judgment concluded that there was an obligation to choose the principle that is likely to provide the strongest and most effective defence and vindication of the right concerned.⁵⁴⁹ The Court thereby denounced the deterrence principle and embraced the ideals of protectionism as the basis for the rule. Finlay C.J. stated that “evidence obtained by invasion of the constitutional personal rights of a citizen must be excluded” unless the act was committed unintentionally or accidentally or there existed extraordinary excusing circumstances.⁵⁵⁰ Griffin J., this

time in the minority, again argued that there should be some culpability on the part of Gardaí before the evidence was excluded.

Interpretations

However in order for an accused to have the evidence excluded he or she must first have established a causal connection between the breach of his or her constitutional right and the evidence obtained (O'Malley 2009 at 19.23). This principle extends back to *DPP v Shaw*⁵⁵¹ and beyond. It has been applied in *DPP v Cullen*⁵⁵² by the Court of Criminal Appeal and was considered again by the Supreme Court in *DPP v Buck*.⁵⁵³ In *Buck*, Keane C.J. suggested that a preferable approach to a rigid exclusionary rule was the discretion of the trial judge as to whether to admit into evidence a statement that had been taken before the arrival of the solicitor.⁵⁵⁴ However, he continued that even if the questioning by Gardaí before the arrival of the solicitor could be regarded as a conscious and deliberate violation of the detainee's constitutional rights, "there was no causative link between the breach in question and the making of the incriminating statements."⁵⁵⁵ McCracken J. defined the causative link in *O'Brien v DPP*⁵⁵⁶ as meaning that, if the admissions were obtained from the accused using information disclosed while in unlawful custody, then there would have been a causative link. More recently, in *DPP v AD*⁵⁵⁷ the Supreme Court again concluded that it is well-established jurisprudence that there must be a causal link between the conscious and deliberate violation of the rights of the accused and the statement made by the accused whose admissibility is challenged.⁵⁵⁸ Clarke J. continued on to say:

"To impose an exclusionary rule, at the level of principle, to statements made by the accused during lawful custody simply because the accused's custody later, albeit while the statement taking process was continuing, became unconstitutional would, in my view, be to impose an unnecessarily excessive exclusionary rule not warranted by the need to discourage improper activity by those investigating crime."⁵⁵⁹

The group set up by the Justice Minister, Michael McDowell, to examine balance in the criminal law had majority support for the notion of amendments to the current form of the exclusionary rule to soften the strict exclusion criteria.⁵⁶⁰ The majority considered that technical errors made by the prosecution which result in an unjust

acquittal was unfair. The chairperson of the group, Dr. Gerard Hogan, disagreed with the majority on any changes to the rule and suggested that the retention of the rule in its present form ensured high standards were adhered to.⁵⁶¹

In the most recent development, in 2015, the Supreme Court, by a narrow majority of four to three, concluded that the exclusionary principle should not result in an automatic exclusion of evidence but should be discretionary, resting on the decision of the trial judge.⁵⁶² O'Donnell J., in delivering his judgment, stated: "the outcome of *Kenny* is a solution which is worse than the problem."⁵⁶³ He went on to say:

"A criminal or civil trial is the administration of justice. A central function of the administration of justice is fact finding, and truth finding. Anything that detracts from the courts' capacity to find out what occurred in fact, detracts from the truth finding function of the administration of the justice. As many courts have recognised, where cogent and compelling evidence of guilt is found but not admitted on the basis of trivial technical breach, the administration of justice far from being served, may be brought into disrepute. ...But in my view, there is neither authority nor constitutional justification for an absolute rule or near absolute rule of exclusion."⁵⁶⁴

Access to Legal Advice and questioning

Arguably the most important safeguard for the suspect is the right of access to legal advice before questioning: this topic was discussed briefly in previous chapters. This right continues to evolve as a result of ECtHR decisions, especially *Salduz v Turkey*.⁵⁶⁵ This section discusses in detail the right of the suspect being questioned to have legal advice. Previously, failure to permit access to legal advice would have led to an automatic exclusion of confession evidence under the *Kenny* 'exclusionary rule.'

Interpretations

Instances of such exclusions include *DPP v Healy*,⁵⁶⁶ where a solicitor on arrival at the police station was refused access to the suspect until after the confession had been made. The evidence of the superintendent, as to his reason for not permitting the defendant access to the solicitor, was that he felt it would be bad manners on his part to interrupt the interview between the two interrogators and the suspect while it

was taking place. The Court rejected this as a sufficient excuse. Fennell (2009, p.403) argues that in *Healy* there was an “implicit recognition of the inherently coercive nature of interrogation by Finlay C.J.” In his judgment, Finlay C.J. suggested that the availability of a lawyer contributes towards some measure of equality between the position of the detained person and his or her interrogators.⁵⁶⁷

In *Healy*, the right to legal access was located in Article 40.3 of the Constitution as it had been in the dissenting judgment of Walsh J. in *DPP v Conroy*.⁵⁶⁸ In this case, he had stated that Article 40.3 requires the observance of basic or fundamental fairness of procedures during interrogations. It was further held that, where a breach of that constitutional right of access to a solicitor occurred as a result of the deliberate and conscious acts of a member of AGS, any admission subsequently obtained from a person detained in custody was inadmissible in evidence. Therefore, a conscious and deliberate violation by the Gardaí of the accused's constitutional right of access to a solicitor would probably still render a detention, which was otherwise lawful, unlawful.⁵⁶⁹

This position was also emphasised by the Supreme Court in *O'Brien v DPP*,⁵⁷⁰ which excluded from evidence the statement of the accused because at the time his detention in custody had been rendered unlawful by reason of the conscious and deliberate denial of his constitutional right to consult a solicitor, although he had made a request for one. Both the Court of Criminal Appeal and the Supreme Court held that the admissions made before the arrival of the solicitor should be excluded, while those made after his consultation would be admitted. The Supreme Court concluded that once the arrested person has access to a solicitor, it would “put an end to any unconstitutional situation. The unconstitutionality lay in the absence of legal advice and once that advice had been obtained, his constitutional right had been complied with.”⁵⁷¹

Right of access

Section 5 of the Criminal Justice Act 1984 and Custody Regulation eight require that, on arrival at a Garda station a person is to be informed of his or her right to consult a solicitor at any time while in custody. The Court of Criminal Appeal has specified that not only has the prisoner a right to legal advice but that the obligation

extends to ensuring the prisoner is aware of that right.⁵⁷² If the arrested person (or parent if applicable) requests a solicitor, it is the responsibility of the member in charge to notify the solicitor of the request, with all such requests noted in writing including times.⁵⁷³ Regulation nine deals specifically with contact with solicitors. It includes allowing the arrested person to nominate his or her own solicitor and it requires the member in charge to notify the solicitor as soon as practicable. If the solicitor cannot be contacted or is unable or unwilling to attend, then the arrested person should be allowed to nominate another solicitor. Regulation eleven specifies that a person is entitled to reasonable access and consultation in private with his solicitor. The prisoner has a right to a consultation in private whether by telephone or in person. The term “consultation in private” includes within sight of, but not within hearing distance of, a member of the Gardaí for reasons of security. In *DPP v Finnegan*,⁵⁷⁴ the arrested person was unable to have a private conversation out of earshot of the Gardaí because of the confined space available in the Garda station. The court ruled that, as a result, there had been a breach of the arrested person’s constitutional rights and from that time on he was then in unlawful detention. The courts have emphasised that, although it is most usual to have the solicitor attend at the Garda station, when that is not possible a telephone consultation can be had.⁵⁷⁵

Once genuine efforts to contact a solicitor by the Gardaí had been made there was no constitutional prohibition against questioning before the arrival of a solicitor. For instance, in *DPP v Buck*,⁵⁷⁶ the police had made a *bona fide* effort to contact the solicitor and there had been no incriminating statements made until after the suspect had consulted his solicitor. Therefore, if a person was subjected to questioning after requesting a solicitor but before the solicitor arrived it could not be said that the constitutional right of access to a solicitor had been denied. In an earlier hearing of *DPP v Gormley*⁵⁷⁷ before the Court of Criminal Appeal, Finnegan J. held that there was no obligation to suspend questioning or refrain from questioning a suspect to wait for a solicitor and it would be up to the legislature to introduce such an obligation if it saw fit.⁵⁷⁸ Daly (2006 p.356) observes that in *DPP v Cullen*,⁵⁷⁹ the Court suggested that the absence of a duty solicitor scheme was the primary reason for not placing obligations on Gardaí to suspend questioning until the arrival of a solicitor. Perceived delay in waiting for a solicitor, contributing to extended time in detention, was a major factor in suspects declining to call a solicitor (Sanders and

Bridges 1999 p.86). However, failing to request a solicitor does not preclude an arrested person from later making that request; even if that request is made during an interview, it must be complied with.⁵⁸⁰

In *DPP v Buck*, another argument made on behalf of the appellant was that the assertion by the Garda that he was simply questioning the suspect and not seeking a statement was disingenuous and that the substance of the regulation had not been observed.⁵⁸¹ The Court, however, adopted the position advanced by the State that the regulations envisaged that a statement meant “a narrative by the person in detention which was reduced to writing by a Garda and signed by the person in detention.”⁵⁸² Therefore, merely to question before the arrival of a solicitor was not a breach of the Custody Regulations. This, as argued by Ryan (2003 p.264), is a formalistic way to interpret a written statement and ignores the fact that a memo of the interview may be as prejudicial to an accused as the formal statement. Indeed, recent practice has been to simply conduct a question and answer format: rarely is a traditional, narrative-type statement or confession now taken (Orange 2014).

The solicitor, while entitled to immediate access to his client upon arrival,⁵⁸³ is not entitled to see interview notes or obtain updates from the investigating Gardaí, and the right of access previously did not include allowing the solicitor to be present at the interview.⁵⁸⁴ In *Lavery v Member in Charge Carrickmacross*, where the suspect was detained under section 30 of the 1939 Act, the solicitor wished to obtain interview notes, as there was a possibility of the use of inferences under section 2 of the 1998 Act. O’Flaherty J. considered that the right of the suspect to reasonable access should be balanced against the right of the Gardaí to interrogate. He considered that it was going too far to have the Gardaí give a running account and regular update of the interviews. He then went further and stated that the “solicitor is not entitled to be present at the interviews.”⁵⁸⁵ This decision was later confirmed in the case of *J.M. v Member in Charge of Coolock Garda Station*.⁵⁸⁶

The fact that legal advice, to be effective, should occur before any interrogation begins, was confirmed by the judgment of the ECtHR in 2009 in *Salduz v Turkey*⁵⁸⁷ where the court ruled that access to a lawyer should be provided before the first interrogation of a suspect. Other European countries including Scotland reevaluated

their detention policies in light of this decision.⁵⁸⁸ In March 2014, the Supreme Court delivered its judgment on a combined appeal,⁵⁸⁹ overturning the *Lavery* position. Citing the case of *Salduz v Turkey*, Clarke J., in his judgment, stated that the entitlement not to self-incriminate oneself incorporates an entitlement to legal advice in advance of mandatory questioning of a suspect in custody, and that the right to legal advice before interrogation is an important constitutional entitlement of high legal value.⁵⁹⁰ Clarke J. also suggested that the Supreme Court regarded the Constitution as a living document to be altered as norms and values changed, and that the presence of a solicitor in the interview room during questioning may shortly be a feature of Irish law.⁵⁹¹ This judgment was followed by the decision of the Director of Public Prosecutions, on the 6th May 2014, to direct Gardaí to accede to any further requests for a solicitor's presence at interview with his or her client.

Fairness of procedure

In order to be admissible as evidence a statement has to be proved to be voluntary, and has not been obtained by unfair methods or obtained as the result of any conscious and deliberate violation of a constitutional right of the accused.⁵⁹² However, even when so proven there has long been an accepted principle that there remains with the trial judge a great deal of discretion as to whether to allow the admissibility of any evidence. For example, in *Callis v Gunn*, Lord Parker C.J. stated:

“(I)n every criminal case a judge has a discretion to disallow evidence, even if in law relevant and therefore admissible, if admissibility would operate unfairly against a defendant.”⁵⁹³

This English decision followed a similar ruling in *Noor Mohamed v The King*⁵⁹⁴ in 1949. Another English case in 1978 concluded that there should be judicial discretion in the area where police are guilty of actions that are morally reprehensible.⁵⁹⁵ Irish cases confirm the authority that rests with the trial judge to exclude any evidence if he or she is of the view that to allow its admission would run the risk of an absence of fundamental fairness or be unjustly or unduly prejudicial to the accused.⁵⁹⁶ However, fairness is not the same thing as trickery, as for example, Walsh J. noted in *AG v Cummins*:

“There is ample authority for the proposition that a confession which was induced by a false pretence or a trick or a fraud, however reprehensible they are

in themselves, it is not necessarily excluded from evidence provided the trick does not constitute an illegal act or a breach of the accused's constitutional rights.⁵⁹⁷

Griffin J., in *DPP v Shaw*,⁵⁹⁸ stated that fairness should be taken into account along with voluntariness as even technically voluntary statements should still be excluded if unfair,⁵⁹⁹ or if the effect of the trick is to produce an involuntary statement (McGrath 2014 at 8-159). The regulations also require interviews to be conducted in a fair and humane manner.⁶⁰⁰ Therefore an absence of fundamental fairness may lead to the exclusion of prosecution evidence at trial even if there is no evidence of oppression but where the behaviour and general circumstances of the case are such as to be so unfair as to necessitate the exclusion of the evidence.⁶⁰¹ For example, in *DPP v Ward*,⁶⁰² the Special Criminal Court found that the taking of the accused's elderly mother, as well as his girlfriend, to Lucan Garda station to meet the suspect, was unfair and a cynical ploy which led to statements of the accused being excluded, although the court also expressed doubt as to the authenticity of the statements. Barr J. criticised both the interrogators and their superiors for their deliberate gross violations of the fundamental obligation that they had to conduct their dealings with the accused in accordance with principles of basic fairness and justice.

The case of *DPP v Kelly*⁶⁰³ is important for an understanding of the concept of basic fairness in the pre-trial process. In this case the accused had been arrested under the provisions of section 30 of the 1939 Act for the possession of explosives. However, when the chief superintendent extended his detention, the focus of the interviews had changed to the accused's alleged membership of the IRA and inferences under section 2 of the 1998 Act had been invoked. The Court held that those interviews were in effect a mechanism for allowing the invoking of the section 2 inference provision rather than for eliciting information, which was contrary to the principle of fair procedures as laid down in 1976 in *State (Healy) v Donoghue*.⁶⁰⁴ In *Donoghue*, the juvenile accused was charged before the Children's Court. He was unable to afford to retain a solicitor and pleaded guilty, receiving a three months custodial sentence. The High Court later quashed the convictions and held that a court should not proceed with a trial where the accused is not represented and facing serious charges.

Voluntariness

Background

The rule that confessions made should be voluntarily and be free from coercion is one of the oldest, and remains the single most important, rule in relation to confessions. There is an onus on the prosecution to prove that any statement made by an accused person is admissible in law before it can be tendered in evidence (O'Malley 2009 p.731).⁶⁰⁵ In order to be admissible such a statement has to be proved to be voluntary and has not been obtained by unfair methods or obtained as the result of any conscious and deliberate violation of a constitutional right of the accused. Fennell (2009 at 9.23) argues that voluntariness, in modern Irish law, is a peremptory requirement to admissibility while not a determination of admissibility. She suggests that originally the perceived rationale behind the need for voluntariness was that of the reliability principle which originally appeared, in 1783, in *R v Warickshall*.⁶⁰⁶ In *Warickshall*, the accused made a full confession after a promise of the prosecutor's favour. This she did not receive, instead being prosecuted. In ruling her confession inadmissible, Baron Eyre stated that a forced or induced confession "comes in so questionable a shape when it is considered as the evidence of guilt, that no credit ought to be given to it."⁶⁰⁷ Langbein, however, suggests that this formulation of the rule in *Warickshall* was simply a restatement of a rule that first appeared in the 1740s through to the 1760s (Langbein 2003 p.204, Beattie 2007). About this time, the giving of monetary rewards to thief-takers for the conviction of criminals had had the effect of raising judicial suspicion to supposed freely given confessions (Beattie 2007 p.64, 2012). Furthermore, there is evidence that the potential unreliability of supposed voluntary confessions was remarked on much earlier by some judges presiding over cases of witchcraft (Levack 2006).⁶⁰⁸ Indeed, sensitivity to and awareness of the dangers of confessional evidence can be found as far back as 1584 in the highly skeptical work of Reginald Scot (1584 (1989) p.28) who wrote a book disputing the existence of witchcraft and questioning the worth of confession evidence obtained through the extremities of threats or tortures or from persons subject to "melancholike passions." In 1618, William Perkins book on witchcraft used the terms 'free and voluntarie confession' to emphasise both freedom from external coercion and internal freedom (as denoted by voluntarie), that is, no delusions or mental illnesses (p.170).⁶⁰⁹

A more modern statement on voluntariness can be found in *Ibrahim v R*, where Lord Sumner noted:

“It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.”⁶¹⁰

Interpretations

More recent criminal cases, Fennell (2009 p.394) notes, have taken a broader approach than the reliability principle and include other functions of the rule to include: the protection principle, the principle against self-incrimination and the deterrence principle. O’Malley (2009 p.730) suggests that the requirement that a confession be voluntary is by reference to two principles; the reliability principle and the disciplinary principle. Both the deterrence principle and the disciplinary principle appear to amount to one and the same, that is, the discouragement of improper police practices.

The definition in *Ibrahim* comprises three elements; a ‘threat,’ an ‘inducement’ and the concept of a ‘person in authority’ (Fennell 2009 at 9.24). Griffin J. in *DPP v Shaw*, in 1982, expanded on Lord Sumner’s definition of the circumstances which could render a statement inadmissible and said:

“[A] statement will be excluded as being involuntary if it was wrung by its maker by physical or psychological pressures, by threats or promises made by persons in authority, by the use of drugs, hypnosis, intoxicating drink, by prolonged interrogation or excessive questioning, or by any one of a diversity of methods, which have in common the result or the risk that what is tendered as the voluntary statement is not the natural emanation of a rational intellect and a free will.”⁶¹¹

This passage makes explicit the potential effect on free will that alcohol or drugs, or the withdrawal effects of such substances may have. If a person has not rationally

exercised their free will in volunteering a statement then it should be excluded.⁶¹² A person in authority is somebody in a position to influence the initiation of a prosecution or some of the proceedings and include a police officer or other person having lawful custody of the accused, a magistrate, or the prosecutor or person acting on behalf of the prosecutor. In *DPP v McCann*,⁶¹³ the suspect's two brothers had both visited the accused in custody and had urged him to tell the truth and to protect the reputation of the family.⁶¹⁴ The Court of Criminal Appeal agreed with the trial judge to admit the statement, even though the two brothers had put pressure on the suspect over their embarrassment and the potential consequence for their mother's weak heart, as the brothers were not persons in authority.⁶¹⁵

'Inducement' is an umbrella term to cover both threats and promises (McGrath 2014 at 8-118). There is both a subjective and an objective element to the test of whether a statement is voluntary as a consequence of an inducement. Objectively, were the words used by the person or persons in authority capable of amounting to a threat or a promise? Subjectively, did the suspect understand them as such? Finally, was the confession the result of the threat or promise?⁶¹⁶ Fennell (2009 p.396) provides some examples of unlawful inducements from older case law, including: *AG v Cleary*⁶¹⁷ where a woman was threatened with a doctors exam which would reveal if she had recently given birth; *R v Smith*⁶¹⁸ where a sergeant major refused to allow troops off parade until he had discovered the truth; similarly in *R v Thompson*⁶¹⁹ the phrase 'it will be the right thing to make a clear breast of it' was also held to have amounted to an inducement. In a 1963 case, a statement to a prisoner that it would be better for him to make a statement admitting his guilt was held to be an inducement.⁶²⁰ An inducement must be of a temporal nature and an appeal to moral or religious conscience will not render a confession inadmissible.⁶²¹

Individual characteristics

Irish case law provides that individual differences and characteristics may influence the potency of any inducements. The prosecution may therefore be able to prove that there was no causative link between the inducement and the making of the confession; the effects of an inducement may be proved to have not influenced the mind of the person in making the statement or the effects of the inducement may be

found to have dissipated when a series of interviews are conducted. For instance, in *State v Treanor*, it was noted that induced confessions are inadmissible unless:

“[I]t be clearly proved to the satisfaction of the Judge, whose duty it is to decide the question, that the promise or threat did not operate upon the mind of the accused, and that the confession was voluntary notwithstanding, and that the accused was not influenced to make it by the previous promise or threat.”⁶²²

The subjective element as to what any particular individual may be affected by was again raised in *DPP v Pringle*.⁶²³ O’Higgins C.J. noted that:

“What may be oppressive as regards 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...in this case the accused was a man of 42 years of age, in good health, who for some years prior to his arrest had been a fisherman in the Galway area. He was apparently an experienced man of the world not unused to conditions of physical hardship.”⁶²⁴

In this case, O’Higgins C.J. had approved of the description of oppressive as used previously in *R v Praeger*,⁶²⁵ (and also adopted by the Supreme Court in *DPP v Breathnach*⁶²⁶), in which ‘oppressive’ was defined as:

“Questioning which by its nature, duration or other attendant circumstances (including the factor of custody) excites hope (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.”

O’Higgins C.J had therefore concluded that:

“(A)lthough such threats and inducements may have been a motive which brought the accused to admit his involvement in the crimes...they cannot be regarded as having been oppressive in the sense of having so undermined the will of the accused that he spoke when otherwise he would have remained silent.”

In 1987, in *DPP v Hoey*,⁶²⁷ the Supreme Court appeared to adopt a stricter approach to what would be regarded as an improper inducement. The accused in this case was being questioned in relation to firearms and ammunition found at his house. He had

refused to answer any questions until an interviewing detective eventually made a threat to arrest other members of his family for questioning. The appellant had then taken sole responsibility for possession. This statement had subsequently been the only evidence against him. Both the trial court and the Court of Appeal had accepted the admissibility of the statement, accepting that the detective had not intended it as a threat but had merely been outlining what could possibly happen if he did not take responsibility. Walsh J. stated that the subjective hope or intention of the person making the inducement is irrelevant: rather the “test is what effect is it calculated to produce upon the person to whom it was made.”⁶²⁸ Therefore, the intention of the “offeror is irrelevant.”⁶²⁹

However, a statement of accurate fact given to a suspect as to the future possible attitude of a court in the event of co-operation does not necessarily amount to an inducement. For example, in the event of a request for information, where a reply is given that is both factually correct and of common currency, then it is not an inducement.⁶³⁰

Constitutional Right

The Supreme Court, in 1999, placed voluntariness on a constitutional footing in *National Irish Banks Limited*,⁶³¹ where Barrington J. concluded that:

“Article 38 of the Constitution confers on accused persons a right not to have involuntary confessions accepted in evidence at a criminal trial and that right is reinforced by the general provisions of Article 40.3 of the Constitution.”

Again, in *DPP v Buck*⁶³² before the Supreme Court, Keane C.J. prescribed the admissibility of confessions in Irish law. Firstly a confession, whether made to a police officer or any other person, will not be admitted into evidence unless it is proved beyond reasonable doubt to have been voluntarily made. Secondly, even where a statement is voluntarily made, a trial judge retains a residual discretion to exclude such a statement where it is made to a police officer otherwise than in accordance with certain procedures, accepted in Ireland as being embodied in the English Judges’ Rules.

Effect of electronic recording

The issue of voluntariness in such cases was decided by trial judges solely based on their interpretation of the demeanour of witnesses before the court, usually in a *voir dire*. However, the availability of an audio-visual record of the interview now permits a judge to directly witness what transpired and to take notice of such matters as voice tone and non-verbal communication. The case of *DPP v Ryan*⁶³³ provides an illustration of how the availability of video footage of the interrogation process may lead to greater tolerance as regards the concepts of voluntariness and oppression in the interview room, compared to the older cases cited. This case concerned the gangland shooting of Ian Tobin in May 2007. It was alleged by the applicant on his appeal against conviction to the Court of Criminal Appeal that admissions had not been given voluntarily and had been obtained by oppressive means, and that he had been denied his constitutional right of reasonable access to a solicitor. The alleged oppression included the proffering of threats and improper inducements in circumstances where the minimum standards of fairness had not been observed. These allegedly included misrepresentations of the law, shouting and jeering at the suspect and the taunting of him. It was further suggested to him that making ‘no comment’ replies meant that he was guilty. The appellant alleged that the investigators had raised their voices or shouted on at least four occasions and had accused the appellant of lying. The applicant’s own evidence was that while he had not been physically beaten, he had been mentally beaten and that he had felt that he had had no choice but to make admissions. The trial judge had ruled as inadmissible in their entirety five out of six interviews as he had decided that the accused had been denied his right of access to legal advice. Of these, the first two interviews contained no admissions. Admissions were made in the third, but after the suspect had requested to talk to his solicitor, a request that was not acted on. A fourth interview took place, again without any opportunity to talk to a solicitor. He had also ruled out some of the fifth interview, for the same reason, but had concluded that a brief telephone contact, some three minutes (although this was not limited by Gardai) with his solicitor, was sufficient to remedy his unconstitutional status and that the remainder of this interview was admissible. The sixth interview was also ruled inadmissible, as reasonable access to his solicitor was again not provided even though it was requested.

The Court of Criminal Appeal noted that while there was a stark conflict between prosecution and defence counsel regarding the *voir dire* at the trial, there “was and could be no substantial dispute concerning what factually occurred as the relevant transactions were recorded on videotape” and the trial judge could view same. The Court of Criminal Appeal considered the view of the trial judge who having viewed the video of the interrogations stated:

“It is clear that the suggestion that has been made to the accused man, that it would be impossible for him to say matters in the court if they hadn’t been said to the Garda Síochána, was wholly improper and should not have been said. However, it is clear, from the evidence given by the accused man himself, that he does not contend that it anyway influenced his decision to speak to the Garda Síochána. It is clear from the video footage that the accused’s interrogation alternated between being vigorous and robust and being sympathetic and cajoling.... I am satisfied from viewing the video that the accused was well capable of standing his corner.... The accused can be seen in the video as being relaxed and in jocular form and it is clear in the course of that interview that he was more than capable of choosing which questions he would answer and which questions he would not.... I’m satisfied that his answers were freely and voluntarily given, where the accused man had the choice either to speak or remain silent.”⁶³⁴

The Appeal Court noted the further argument of the appellant that even if the trial judge had concluded the interview was voluntary, it should still have been excluded as the interviewing process fell below the minimum standards of fairness as expressed by Griffin J. in *DPP v Shaw*.⁶³⁵ The Court of Criminal Appeal noted that for a statement to be admitted it must be voluntary in the sense that it was not “coerced or otherwise induced or extracted without the true and free will of its maker.”⁶³⁶ Using the definition of oppressive questioning in *DPP v McNally*,⁶³⁷ the Court concluded that, “measured by those standards, the admissibility of the interview admitted in evidence in this case cannot be questioned.” The Court concluded that the trial judge was entitled from the evidence before him, including a “careful scrutiny of the videotapes of interview” to reach a finding that the suspect was not suffering from oppression. The Court further noted that the trial judge had, during the *voir dire*, found the applicant not to be a credible witness and in

circumstances where he had sought to contradict what “so readily appeared on the video of interview,” considerable weight should be attached to this credibility assessment.

Corroboration

Section 10 of the Criminal Procedure Act 1993 introduced the requirement that there must be a warning given where there is no corroboration of confession evidence, in response to the rising awareness of a number of miscarriages of justice through disputed confessions (Fennell 2009 p.240). Fennell suggests, however, that the corroborative element is much weaker than required in *R v Baskerville*.⁶³⁸ She gives as an illustration the case of *DPP v O’Neill*⁶³⁹ who was charged with armed robbery (Fennell 2009 p.391). In addition to a number of verbal admissions, the only corroborative evidence available was a balaclava found close to the scene that contained hair but was insufficient to enable a definitive link to the accused to be proved. However, in *DPP v Meehan*,⁶⁴⁰ in the judgment delivered by the Court of Criminal Appeal, the Court noted in relation to corroboration:

“Perhaps the most important thing that must first be said about corroboration is that it is *not* a prerequisite to a conviction where the main evidence against an accused is that of an accomplice. It is a corroboration warning, not corroboration, which is the mandatory requirement. While a warning about the dangers of convicting without corroboration must be given in such cases, the evidence of an accomplice alone is admissible and is sufficient to ground a conviction whether that evidence is corroborated by other evidence or not.”⁶⁴¹

The issue was that a confession or an accomplices testimony should be viewed with caution and corroboration was what bolstered credibility. The Court noted that:

“What constitutes corroboration must depend on the facts and circumstances of each particular case, on the defence set up by the accused, and on the nature of the question to be determined by the jury ... it seems to us evidence of any material circumstance tending to connect the accused with the crime and to implicate him in it would appear to us to be corroboration in the circumstances of this case.”⁶⁴²

The *Meehan* case involved denials that the accused had been in phone contact with another of the alleged gang and the court noted that in such circumstances what

constituted corroboration may as in the above definition, depend on “*the particular circumstances of the defence offered*” by the accused.⁶⁴³ Corroboration does not have to directly prove that the offence was committed,⁶⁴⁴ and neither does it have to corroborate the whole of the evidence of the witness who requires corroboration.⁶⁴⁵

The judgment of Denham J. in *DPP v. Gilligan*⁶⁴⁶ is now regarded as the definitive law of corroboration in this jurisdiction.⁶⁴⁷ In that case, the Supreme Court considered the definition of corroboration and Denham J. concluded that corroborative evidence depends on the facts and circumstances of the case as well as the defence that the accused establishes. She thus defined the requirements of corroboration:

“First, that it tends to implicate the accused in the commission of the offence. It renders it more probable that the accused committed the crime. Secondly, it should be independent of the evidence which makes corroboration desirable.”⁶⁴⁸

Denham J. also noted that the cumulative effect of circumstantial evidence could serve to provide corroboration.⁶⁴⁹

4.5 Conclusion

Confessions have long been crucial to criminal justice systems, providing perceived certainty and easing consciences of adjudicators who had to condemn the guilty. The jurisprudence regarding the taking of confessions has developed over centuries to ensure the suspect is not coerced into making it. The common law insists that any admissions made should be done voluntarily. Over the years, it became apparent to many judges that the absence of outright torture was not sufficient protection for some accused to prevent them being forced to make involuntary statements. As such the voluntariness of statements is an essential element to its admission as evidence. The creation of professional police forces resulted in the set of rules known as the Judges’ Rules that were formulated by judges at the beginning of the twentieth century. These nine rules have remained unchanged and while not law, set the standard by which Irish confessions continue to be evaluated.

When Irish legislation introduced a detention and questioning provision in the 1984 Act, additional safeguards were considered as essential features in balancing the

detention provisions as well ensuring the acceptance of the legislation. These safeguards included a special responsibility placed in a member in charge and custody regulations to ensure fair and proper treatment of all persons brought to Garda stations. Audio-visual recording of any questioning ensure rights and regulations are adhered to and also permits forensic examination of any subsequent statements. Both the Irish Courts and the ECtHR have continued to remain vigilant that a confession is not obtained unfairly. A confession also requires a corroboration warning to jurors. Failure to ensure adherence to constitutional rights may see any admissions ruled inadmissible. One of the most important safeguards, the presence of a solicitor throughout the questioning is now permitted as a result of the continued judicial activism of both the domestic and European courts.

4.6 Conclusion to Part One

The introduction of section 4 of the 1984 Act was a sea change to criminal legislation with the use of detention periods for the specific purpose of interviewing suspects of crime. This changed the emphasis of the interrogation from a desperate attempt to obtain a confession as a last resort to a process as part of the investigation where an opportunity was created to put evidence uncovered during an investigation to a suspect and to obtain his or her account. This process has developed into a routine part of crime investigation with arrests now potentially made for investigation purposes rather than initiating a prosecution. This in turn influenced the form that confessions took, with the loss of the traditional narrative of confession to replies to questions and evidence that resulted in admissions of either partial or full culpability. The interrogation of suspects has, as a result of the detention provisions, become standard practice for police officers investigating crime where suspects can be identified. As such, the detention of a suspect can in many respects serve as a rehearsal for the trial itself; indeed, it offers some important advantages over the trial. In a trial, the accused is not obliged to take the stand to give evidence and risk a subsequent cross examination, while the suspect in detention is obliged to submit to questioning. The evidence rules in a trial are strict and often preclude evidence being offered that may be relevant but inadmissible, while in interrogation any question may be asked including previous bad character. The role now played by the ECtHR has seen the inquisitorial criminal model gain a greater foothold.

The ability to question suspects has always played an important part in the criminal justice system. While an arrest was formally the initial step in taking a prosecution in common law jurisdictions, questioning of suspects did occur throughout history but with the introduction of a full time professional police force the practice of questioning prisoners continued as an ad hoc practice that was unregulated and open to abuse. This was not always a process approved of by the courts and many judgments reflected this disapproval. However, alongside the new provision contained in section 4 of the Criminal Justice Act 1984 there were measures specifically designed to protect the rights and integrity of suspects in custody. As well as a formal complaints measure, there was a position created of member in charge who had responsibility for the care and well being of the prisoner. All

detentions were governed by a set of Custody Regulations that set out the procedures to be followed in all cases where persons are detained in any Garda station. These regulations specified legal access and notification to other persons. Other rules covered non-nationals and those with special needs. The electronic recording of all interviews followed these and more recently, the physical presence of a solicitor in the interview room.

The result created a transparent formal arrangement where the rules were visible to all and any infringements liable to sanction. The process now requires a reasonable suspicion that a suspect has committed a serious crime, for which he or she can then be arrested. On arrest, the suspect is taken to a Garda station where he or she is handed into the care and custody of the member in charge. The member in charge is to continue to monitor the progress and care of the prisoner to ensure he or she is treated fairly and humanely in accordance with the Custody Regulations. The interviews are to be free from threats or inducements that would cause a suspect to speak when he or she would otherwise remain silent. The suspect is entitled to adequate rest and meals. Some of these safeguards are at the constitutional level of protection. However, even when the suspect wishes to remain silent, police may continue to question him or her.

Alongside the provisions to detain a suspect for questioning there have been a number of statutory abridgements made to create a situation where a refusal to answer questions may result in adverse consequences. This is as an alternative to earlier attempts to force suspects to divulge information. Using judgments of the ECtHR as a guide, statutory provisions now opt instead to draw adverse inferences from the refusal of a suspect to provide an account in circumstances where an explanation was clearly called for. These are limited in scope and apply to only certain offences and relate to only certain instances. Alongside the provisions, safeguards have also been introduced that ensure fairness in the process. The right of a suspect to suffer no consequences for refusing to answer questions put to him by investigators created a potentially insurmountable obstacle. This right has a long and disputed history. I have attempted to show, by an examination of contemporary mediaeval sources, that there existed a belief that the right to be protected from torture or other compulsions did not necessarily mean that the suspect could refuse

to offer an account when challenged. There does appear to be a return to the situation where, at least in certain circumstances, the suspect has been returned to an informational resource. In England this has developed even further with implications for not testifying in court in some instances.

The detention process is no longer an informal shadowy process where euphemism and colourful devices are necessary to question suspects. It is now an open and heavily-regulated process with precise durations, safeguards and procedures. Police when planning and executing interrogations, will therefore require detailed knowledge about the jurisprudence in this area, as well as the legislation around the crime being investigated. An investigator will also require knowledge of an appropriate interviewing technique and strategy that complies with this jurisprudence but is also effective and allows adaption to individual suspects. Once such a technique is developed, it then needs to be made available to operational police interviewers. In part two, I examine how police have adapted to these challenges and the training they receive to perform this task of interviewing persons who may hold valuable information about crimes.

4.7 Introduction to Part Two

Part one outlined the legal architecture permitting police to arrest and detain persons suspected of involvement in serious crimes. It permits police to detain them for a specified time depending on the suspected offence. Existing law, where in certain circumstances the silence of a suspect may be used against them, was outlined. Part one outlined the safeguards in place to protect suspects and their rights while in custody.

The second part of this work examines how police undertake their newly authorised function of questioning suspects. Chapter five will first examine the Irish police organisation – An Garda Síochána, from its creation to an understanding of how Gardaí are trained to investigate crime and to conduct forensic interviewing. This chapter will examine shortcomings that have become apparent and how these influence operational practice. Chapter six then seeks to contextualise Garda practice by comparison with the most widely-used interview models available in the English-speaking world and beyond. These are the highly influential Reid method from the United States and the more recently developed PEACE method from the United Kingdom. These two models differ enormously and display an almost competing ethos. Both models will be examined in detail before being critically analysed. This will then lead to chapter seven where the recently devised Garda model will be assessed on our understanding of the strengths and weaknesses of the PEACE and Reid models. In this chapter, relevant literature will also be examined to identify potential modifications that may assist in overcoming some of the weaknesses identified. This chapter further explores some of the rare but difficult scenarios experienced by investigators who need information to save lives. Again, some possible solutions are explored. This part examines the skills that a police investigator requires to perform the interviewing role that was outlined in part one. Part two in general suggests that training in anticipation of an event is preferable to a wait and see approach.

5: An Garda Síochána: Interviewing and Training

5.1 Introduction

The responsibility for crime investigation and State security in the Republic of Ireland rests with An Garda Síochána (AGS). By combining both roles AGS differs from many countries in integrating civil policing responsibilities with those of an intelligence agency. However, both functions necessitate the ability to gather information from persons outside the organisation. In criminal investigations, the victims of the crime, witnesses and culprits themselves hold critical crime information. As a result, the effective interviewing of victims, witnesses and suspects is a core policing skill central to the success of a criminal investigation (NPIA 2009 p.5). Not engaging fully with these interviewees, or failing to give adequate time and preparation to their interviews may result in the loss of vital information. Furthermore, skilled interviewing may save valuable investigation time by filtering information that ranges from confabulation to deception. The interviewing stage also presents an opportunity to increase public confidence in the criminal justice system. For instance, not all potential witnesses to a crime may be interested in giving evidence in court or may fear possible intimidation if they cooperate; skilled interviewing at this stage may surmount such problems (Griffiths and Milne 2010 p.88).

Nevertheless, the skills associated with interviewing have long been regarded as innate, naturally existing within the competency of all police personnel. It was regarded as unnecessary to provide training beyond the esoteric format required by the individual police force. While problems with witness interviewing rarely come to public attention, problems with suspect interviewing have been the cause of failed prosecutions because of improper methods, such as coercion or inducements, used to obtain confessions from suspects. When such issues arise and are publicised it is often ascribed to an individual investigator's bad practices rather than any systemic problems caused by deficiencies in training. Moreover, as a result of the legislative changes introduced in the 1984 Act, the arrest of suspects for interview is now a routine part of many criminal investigations. This chapter aims to examine how AGS has prepared for this function.

The chapter will take a broad focus on training since the inception of the State until 2013. As investigative interviewing is only a tool to achieve the principal function of crime investigation, it is first necessary to examine the context of overall police training before examining the specific training for investigative interviewing. Beginning in 2014, a new foundation-training programme was designed and delivered to the new intake of student Gardaí. There was no student intake to AGS between 2009 and 2014.⁶⁵⁰ The principal focus throughout this chapter will remain on suspect interviewing, but as will be discussed in the following chapter, the skills required to interview the witnesses and victims of crime provide a foundation to suspect interviewing. Sadly, the force is normally reluctant to cooperate with outside research and there remains a paucity of literature or research publicly available. In recent years, the mounting criticisms from various sources, including allegations from serving members of corruption, ineptitude and incompetence against managers in the force has stimulated more interest in the workings of the national police force and a number of important reports have been issued, including the Morris Tribunal and Garda Inspectorate reports.

The chapter will also specifically examine suspect interview training provided to members of AGS up to 2013. This section examines some of the problems that result from failing to provide adequate investigative interview training to Gardaí including malpractices by Gardaí against crime suspects. At the time, many of those concerns were in relation to the ongoing security situation involving the IRA and as such public and political sympathy for the suspects involved was limited. That tolerance began to dissipate in the early 1980s, when ordinary citizens with no criminal records made full admissions to crimes that they could not have committed. The introduction of the 1984 Act and the concurrent safeguards to protect the rights of suspects covered in the first part of this thesis were generally effective but possibly due to the lack of awareness of the dangers amongst investigators, other issues remained.

5.2 An Garda Síochána

A professional police force has been in existence in Ireland longer than in England itself. In 1786, the failed Westminster Police Bill of 1785 was adopted in Ireland where it established the Dublin Metropolitan Police (DMP).⁶⁵¹ This was followed

countrywide by a force that would become known as the Royal Irish Constabulary (RIC).⁶⁵² The RIC were organised on military lines with strict discipline and hierarchy. They were, however, considered well-trained and professional, often providing the template and training expertise for newly created police forces throughout the colonial empire (Jeffries 1952 p.30). Although by 1921, their training and weapons had become outdated and morale was low (Townshend 2008 p.23, Hawkins 1991). Furthermore, their armed paramilitary role, necessary to counter Irish nationalism, differentiated them from the consensus model adopted in England itself. The RIC also suffered from its military-type training and command structure, together with a constant rotation practice that militated against developing local knowledge and detective abilities (Palmer 1988 p.374).

Following the signing of the Anglo-Irish Treaty in December 1921, An Garda Síochána was formed in 1922, almost immediately after independence from English rule.⁶⁵³ Government would centrally control the new force from the beginning. Initial organisational plans included adopting a force structure similar to the RIC as well as absorbing equipment and some former RIC men to provide training and leadership at senior ranks. The new force would be half the RIC complement, approximately 6,000 police officers, with the first recruits personally selected for training from a nationalist background (Brady 1974 p.47). Initially, the new force was to be armed (Conway 2013 p.27). However, this planned absorption of some senior ex-RIC personnel to provide continuity and leadership to the new force was an unpopular arrangement with the majority of recruits, many of whom were formerly IRA members. Frustrations led to a mutiny at the training center in Kildare (Allen 1999 p.31). Ultimately, as a result, most RIC men were not retained in the force. In the end less than three per cent of the new force would be former members of the RIC, and these only if they had resigned or been expelled for nationalist tendencies, thereby denying the new force their knowledge and experience (Conway 2013 p.31, McNiffe 1997). The government also withdrew weapons from the new force, despite the opposition of some, including Michael Collins (Aylward, O'Reilly, and Tansey 1993 p.109).

As a result of the need for rapid deployment of the new force throughout the country, there existed little opportunity for training, with what training available wholly inadequate (Brady 1974 p.85). The training available consisted of military drill, firearms training, Irish language and criminal law. The crime investigation training was of such a low quality that the Judges' Rules, vital to investigative interviewing, were virtually ignored, as were other routine aspects of policing such as report writing and court presentation (Conway 2013 p.32). A new training manual for the force was not published until 1942, replacing the obsolete RIC one (Allen 1999 p.25). Nonetheless, the new entrants to the force came predominantly from a tradition of a successful guerrilla conflict and they little doubted their ability to successfully police the country, having defeated one of the best armies in the world. Conway (2013) argues that this post-colonialism left a continuing legacy on the policing climate. In addition, the legacy of such armed conflicts may create situations where there is, "a tacit acceptance of violence as a permissible tool of statecraft and a strategic means of political change" (Waller 2007 p.282). The new force was not reluctant to mete out violence to any who attempted to oppose it. Brady (1974 p.115) writes that the lack of training or policing experience, together with their previous exposure to violence meant that a physical beating was a regular alternative to official prosecution. Fortunately, in many communities, this approach of dealing with primarily public order problems locally and non-officially was in direct contrast to the former officious nature of the RIC, and as well as being effective, it was generally welcomed. Moreover, the force boasted an impressive conviction rate for indictable crime; from 1927 to 1931 the conviction rate for indictable crime averaged between 63 per cent to 71 per cent (Conway 2013 p.39).⁶⁵⁴

The withdrawal of the army from internal security duties led to the amalgamation and extension of an armed plainclothes detective branch in 1925 (Conway 2013 p.42). This created the unusual arrangement whereby civil police and state security were combined into one organisation. This led to inherent conflict between the two roles. Initially, detective work involved direct confrontation with the IRA and detectives developed a reputation for tough tactics, while the uniform section avoided direct involvement. The election of Éamon De Valera, who had fought

against the Anglo-Irish treaty, as leader of the country in 1932, created additional difficulties for policing the IRA with mixed messages now coming from government (Conway 2013 p.48). De Valera dismissed popular Garda Commissioner Eoin O'Duffy within a month. O'Duffy went on to form a right wing organisation, the Blueshirts, which itself soon became a target of AGS. In 1933, De Valera recruited his own loyal former IRA men, who were particularly infamous with regard to violence, to detective duties.⁶⁵⁵ These 'Broy Harriers' took their orders directly from the government and were used to enforce government policies at the time, often destroying much of the goodwill that had been established with local populations. Conflict between the Blueshirts and government was regularly leading to open violence. Blueshirts support was particularly strong amongst farmers who were resisting government efforts to raise money through land annuities with AGS directly involved in forcibly seizing the assets of farmers.

The shared tensions of the Second World War had a unifying effect and helped restore much of that goodwill. This was further assisted by a deliberate policy of fostering the ideals of Irish nationhood and nationalist values in the force (Kilcommins et al. 2004 p.204). Members of the new force used the Gaelic Athletic Association in particular to enhance these ideals while also facilitating their integration into local communities (Allen 1999 p.99, McNiffe 1997). Bonds of trust came to develop between communities and their local Gardaí, which helped with successful crime detection (Brady 2014 p.212). The official devotion to the Catholic religion was especially important, then the most influential institution in the State (Conway 2013 p.40, Inglis 2003, Cruise O'Brien 1998) and an important aspect of the new force's integration and acceptance by communities with official mass parades and the observance of religious ideals and values. The high esteem given to Catholic hierarchy throughout this time and into the 1980s would later contribute to hampering the police response to allegations of abuse made against church clergy (Keenan 2016, Brady 2014, Murphy 2009).

Apart from the turbulence of the Second World War, the four decades after independence saw peaceful conditions with little change in the mode of policing. Local administrative duties, such as collecting agricultural statistics and delivering

old-age pension books, accounted for up to 40 per cent of a policeman's duties (Kilcommins et al. 2004 p.205). The Garda force was indispensable to the administration of the State but these duties also gave them unprecedented levels of local knowledge (Conway 2013 p.61). The government, in the main, appeared to show little interest in the majority of crime with social control the main preoccupation of government until the early 1960s (Aylward, O'Reilly, and Tansey 1993 p.110). Ireland had not yet been critically impacted by the social problems of other countries such as rising crime rates and drug misuse. Many of the original men who had joined AGS continued to serve until the 1960s, with promotion prospects therefore limited as 60 per cent of superintendents who had been appointed to that rank before 1926 remained there for the next 30 years (McNiffe cited in Conway 2013 p.60). These had had little relevant experience when appointed and gave little priority to training (McNiffe 1997 p.73, Conway 2013). Moreover, poor pay and conditions were regular issues of concern (Kilcommins et al. 2004 p.207). The force continued to be totally subservient to central government through the Department of Justice (Brady 1974). The 1951 MacEoin Report recommended an investment in technology for AGS, but the only parts implemented were the recommendations of a reduction in Garda numbers and functions (Conway 2013 p.70). Garda stations were also closed but no investment was made to offset this as only the costs saving elements were embraced. The overall result was as Brady suggested, in his book on the Gardaí, that with the arrival of the 1970s and even before the 'Troubles,' the force had failed to adjust its role to the changing priorities within the society it served (Brady 1974 p.ix).

The civil strife in Northern Ireland was to have a major impact on policing and policy in the South. With the arrival of the 'Troubles,' Garda members were to suddenly find themselves confronting serious crime with little preparation, experience or training and left to it by a government whose only policing response was to double the force to almost 11,500 Gardaí by 1984 (Conway 2013 p.103). Special Branch detectives were tasked with primary responsibility for countering this threat. However, there was no increase in the numbers of specialist intelligence officers to respond effectively to the terrorist threat (*ibid*). There was a sudden major increase in police workload as a result of the conflict, with many ancillary

operations – principally robberies for fundraising – carried out by armed paramilitary groups such as Saor Eire, the ‘Official’ IRA and the ‘Provisional’ IRA in the South (O'Mahony 2002 p.286, Joyce and Murtagh 1984). Uniform Gardaí once again risked death and in June 1972 an IRA bomb killed Garda Inspector Sam Donegan in Monaghan. Furthermore, a certain ambiguity in policing in Ireland continued to exist during this period as in some communities allegiances to the militant republicanism were well known. While many Gardaí died as a result of the Troubles, most uniform Gardaí again tried to avoid direct involvement. The deaths of 33 people in the Dublin and Monaghan car bombings, in May 1974 – the largest death toll in any single day of the troubles – led to no arrests. The scale of the ineptitude in the investigations would be the subject of two official enquiries (Barron 2004, McEntee 2007). However, there was no State Forensic Laboratory until 1975. The lack of any positive training in dealing with suspects for such crimes soon led to allegations of ill-treatment of prisoners and coerced confessions from suspects. Rumours of a special ‘Heavy Gang’ operating in the force to extract confessions began to circulate (O'Mahony 2002 p.288, Walsh 2004). No regulations existed at the time in relation to persons in custody in Garda stations. Other complaints began emerging of prisoners being moved from station to station to deny visits from family, and being denied food and rest (Walsh 2004 p.310). The force meanwhile continued to maintain a reputation for violence and handing out summary justice to offenders (O'Mahony 2002 p.288). Commenting on the political apathy to such allegations of brutality, Conway (2013 p.106) writes: “this was a trade-off of sorts for not equipping the force appropriately.” 23 people were to die in Garda custody in the years between 1975 and 1983 (Conway 2013 p.174).

Brady writes that the government’s security approach to the Troubles remained ad-hoc, driven by events (Brady 2014 p.46). Politicians of all parties, nevertheless, declined to criticise any Garda operational failures. The Justice Minister generally declined to comment on any operational matters, with even “embarrassing bumbles” insufficient to move him to criticism (Walsh 1998 p.399). This reticence has had a major long-term impact on police accountability (Walsh 1998 p.384). Walsh (1998) argues that the fact that the government appointed the Commissioner meant any criticism of him had the potential to reflect back onto the government. Furthermore,

many politicians were known IRA supporters with links to the subversives, which created additional difficulties (Brady 2014 p.31). In an interview with the Irish Times, Conor Brady, former GSOC commissioner, spoke about the consequences:

“The terrible, cultivated ambiguity in which the guards were asked to do their job over all these decades, because they remain directly under political control... the idea that the national police service can be the plaything of those in political power is deeply embedded in the Irish political psyche.”⁶⁵⁶

Politicians did occasionally question whether AGS was fit for purpose. Dissatisfaction with the professionalism of the force included the comments of a new Minister for Justice in 1968, Michael Moran, who stated that AGS was "a machine that was outmoded, outdated and inefficient...it belonged to the horse and buggy days at every level" (quoted in Kilcommins et al 2004 p.207). Reports were commissioned by government to examine aspects of organisation and remuneration, of which the Conroy Committee Report (1970) was the most important in terms of its review of the organisation, management and control of the force. As a result, Gardaí now received overtime pay for the first time, together with a reduction in working hours. The Conroy Report also recommended an examination of the relationship between Garda authorities and the Department of Justice (*ibid* p.1226). This recommendation was never acted on (Brady 2014 p.220).

Increasingly, subversives were not the only source of serious crimes encountered. Opportunities arose for a new breed of ruthless criminal, many of whom had some sort of relationship with various subversives groups where firearms could be procured (Brady 2014 p.141). These criminals, such as Martin Cahill and Dessie O’Hare – whose “resolution, ruthlessness and agility” in conducting his kidnap operation of John O’Grady “exposed the continued operational weaknesses” in AGS (Brady 2014 p.219) – were almost constantly in the press. Cahill carried out a number of high profile robberies including the theft of 18 paintings of the Beit art collection from Russborough House in May 1986. In August of that year, he also organised the theft of 150 criminal files from the office of the DPP (Brady 2014 p.222). Possibly inspired by such successes, it was claimed that up to 40 criminal gangs, all with access to firearms, were operating in Dublin city alone at the

beginning of the 1990s (Brady 2014 p.224). How then were the Irish police prepared to respond to these emerging threats?

5.3 Training and Practice

Garda Foundation Training

In 1964, training was moved from the Phoenix Park headquarters to a new facility in Templemore where the first 190 recruits began their training in February of that year.⁶⁵⁷ Recruits at this stage received 18 weeks training at the Training center in Templemore before allocation to their new station, with a possible return to Templemore for a further four weeks after 12 months service (Brady 2014 p.197, Walsh 1985). Many never received the final four weeks. Moreover, there was little change in training over the years (Walsh 1985 p.22). Training remained broadly in line with the old RIC model, being primarily of a military type with didactic instruction (McNiffe 1997 p.171). The subjects taught included Irish, criminal law, Garda policy, first aid and physical fitness as well as large amounts of formation drill. Classes were held Monday through Saturday with a requirement to attend a Mass parade on Sunday after which recruits were free (Conway 2013 p.79). The Crime Investigation training manual from 1947, which included interviewing instructions, continued to be used into the 1970s (Brady 2014 p.86). Discipline was harsh and orders were expected to be obeyed without question. Retired Gardaí consequently often complained that their recruit training had entirely failed to prepare them for their subsequent police work (*ibid*).

The Conroy Report had highlighted many training issues in 1970, together with a further report, the Ryan Report, in 1979. But without subsequent substantial changes, the continued dissatisfaction with the training received at the recruit or foundation level resulted in a further report in 1985. The 1985 Walsh Report resulted in the introduction of an entirely new training system in 1989, which extended Garda foundational training from six months to two years. The Report sought to create a foundation-training course that would produce a more professional Garda who could meet the changing needs of Irish society (Walsh 1985 p.22). This was designed on the experiential learning concept, where theory would first be taught, followed by an operational period where practice could be observed.

This phase would then followed by a period of consolidation back in the Garda College in Templemore, where both theory and real life practice could be reconciled. In Templemore, simulation training utilising instructors with real practical experience was to be undertaken (*ibid* p.31). These phases were then followed by an active operational role but where academic support continued to be provided on a regular basis with an emphasis on best practice. Walsh emphasised that the bulk of Garda work is “of a welfare type” (*ibid*). Therefore, a strong sociological emphasis was introduced to the training, moving from the traditional concept of a police ‘force’ to a police ‘service.’ In 1992, based on a Walsh recommendation (p.63), the Garda College was recognised by the National Council for Educational Awards as a third level institution and the award made on completion of training was a National Diploma in Police Studies. Additionally, in conjunction with the University of Limerick, a full degree course resulting in a BA in Police Management was made available to managers of superintendent rank and above, beginning in September 1998 in Templemore.

Under the Walsh training programme, the first six months on joining AGS were spent studying criminal law, police policy and procedures, social science, technical studies and the Irish language. Technical studies were to include radio operation, crime scene examination, telex and telephone, keyboard operation, firearms and car driving. It was projected to have 260 technical training sessions throughout the three Templemore training phases, of which motorcar driving was to involve 105 (*ibid* p.123). In the event, car driving was never taught at foundation level. Unlike other organisations who capitalise on the career experience of retired members by bringing them back as instructors in some areas, the Templemore instructors were all serving members with varying operational experience (also see GIR 2015 p.30). Some entered Templemore having seen little operational duty and remained there for the remainder of their careers. Training styles remained largely didactic. There was little practical simulation training. A great deal of training time was spent on the Garda Síochána Code that contained all operational policy and (sometimes conflicting) rules for members.⁶⁵⁸ This emphasised to all the importance of the hierarchical structure of the force. Police organisations can be particularly authoritarian hierarchical bureaucracies with a premium on compliance rather than

initiative (Fleming and Rhodes 2005). Templemore was the first introduction for most to the bureaucracy of the Garda Síochána, and the differences between the working, inhibitory and presentational rules that Smith and Gray (1983) defined in their study of London police. Working rules are those that cover the accepted ways of working although not formally sanctioned. Inhibitory rules are those that must be followed, even if regarded as unnecessary. Presentational rules can often be used as a language to frame and justify decisions, particularly to outsiders. Manning (1997) refers to these as the selective presentations of behaviours for public view and the symbolisations referring to those behaviours by police management. In Templemore, the presentational rules were formally introduced in the Garda Code but it was readily apparent that most everyday situations were dealt with completely differently, from teaching law to student discipline.⁶⁵⁹

Crime investigation and operational policing were not taught as distinct modules. Whilst some individual elements of both were taught – for example, crime scene preservation – it was not as part of any overarching theory or policy of which it would be a component part. As a result, the applicability of some areas of training was underestimated and by the time its importance was recognised, the training had been forgotten. The lack of any clear national policies for crime investigation, which could guide and inform training, was a major hindrance in this regard (GIR 2014 at 9.6).

Following the first Garda College phase, the student spent a further six months on various placements with different units, as an observer without police powers, while also attending regular classes. During the initial three months of this phase, while with a regular uniform unit, a tutor Garda would accompany the student constantly. A return to Templemore for a further three months was then followed by a nine-month attachment as a probationer on a regular uniform unit. This duty was as a regular Garda, with full powers, but including regular class work. Finally, the student spent another six weeks in Templemore before graduating.

The Keating Report (1999 p.26) reviewed Garda training and stated that “pedagogic, structural and managerial” deficiencies existed in the Walsh training programme.

The Keating Report, as a result, introduced a competency-based training programme, but retained the Walsh training format (p.76). In 2004, the training programme was accredited as a level seven qualification with a Bachelor of Policing Studies Degree. Unfortunately, this only served to deepen criticism of a training programme that was considered too academic and not providing students with the necessary practical skills to “perform as efficient and effective policemen and women” (Gordon 2007 p.25).⁶⁶⁰ An increase in role-playing scenarios was being developed in 2007, shortly before the economic recession led to a cessation of recruitment. Training was again reviewed in 2009, which expressed concern about the ability of the training programme to properly prepare students for their operational role (Nolan 2009). The Nolan Report recommended a move towards more scenario-based learning to achieve problem-based learning rather than rote learning, as well as utilising more civilian experts in Templemore training. The Garda Inspectorate Report in 2014 concluded that only 25 per cent of training time available in basic training had been spent on operational policing and crime investigation, less time than was spent on teaching Irish, physical exercise and study (GIR 2014 at 6.20-1).⁶⁶¹ This lack of basic training was further compounded by a lack of guidance from experienced tutor Gardaí to put the student’s foundation training into operational context on placement (GIR 2014 at 6.23). A new model of training was introduced when recruitment resumed in September 2014. This was modeled on a pedagogy of problem-based learning, to encompass practical policing and an ongoing association with higher education centers such as the University of Limerick.⁶⁶²

Prior to 2014, the training for interviewing witnesses, or level 1 training, received some attention in the Garda College but this training tended to focus on policy aspects and the mechanical aspects of the witness interview: the who, what, when, where and why questions. While, as Milne and Bull (1999) note, such training may be sufficient to equip police to be report takers, it fails to provide a foundation to police to be information gatherers (see also Kohnken et al. 1999, Fisher, Geiselman, and Raymond 1987b, 1987a, Ainsworth 2005). This results in defective witness interviews (Gudjonsson 2003 p.54). Fisher notes the importance of proper training in gathering witness information and concludes that poor training not only results in

an absence of vital information to an investigation, but also can actually distort witnesses' memories, with potentially catastrophic consequences (Fisher 2010 p.25, Loftus 1997, Zhu et al. 2012, Milne and Griffiths 2006). In cases involving wrongfully convicted defendants, the most common reason (found in three-quarters of the cases) has been eyewitness misidentification (Kassin et al. 2010).⁶⁶³ Badly taken witness statements can therefore damage the credibility of the entire criminal justice system. Research has shown that training in interview skills is more effective when given as part of recruit training, particularly as no alternative system has to be unlearned (Fisher 2010 p.32, Fisher, Geiselman, and Raymond 1987b). The Garda Inspectorate (2014 at 9.35) states: "effective interviewing and communication skills are essential for any police officer and particularly for an investigator. This training should start at the initial foundation training for new entrants...." Consequently, the Inspectorate concluded that deficiencies in the foundation training available for interviewing and statement-taking leaves many serving Gardaí ill-prepared to perform the interviewing role expected of them (*ibid*). Operationally, this lack of training, often combined with time pressures, results in victim and witness statements frequently lacking detail and completed to a poor standard (GIR 2014 at 9.5, 9.12, Morris 2008 at 15.128).

Later training for members on operational duty encounters various difficulties, not least the difficulty in releasing such members from operational duty to undergo training (GIR 2015 p.29). The 2009 Nolan Report found that Garda College facilities are mainly dedicated to student/probationer training, leaving very limited facilities available for other training, such as crime and functional training. The lack of facilities in the Garda College contributed to a lack of the basic needs to deliver sufficient operational training (Nolan 2009 p.292). In 2007, a Crime Training Faculty was established in Templemore to provide crime investigation training including senior investigating officer (SIO) training to detectives (Nolan 2009 p.286). Local arrangements are available throughout the country to provide some training through Continuous Professional Development (CPD) training. CPD has been criticised as being under-resourced, understaffed and providing limited courses (Nolan 2009 p.255). Generally, this training has been described as limited in scope with many serving personnel never receiving any meaningful training through it

(GIR 2015 p.31). The result is that many operational Gardaí receive little further training after Templemore. In one example, no further first aid training is delivered to operational members after Templemore basic training even though Gardaí are frequent first responders to critical incidents, including those involving prisoners in custody.⁶⁶⁴ In 2008, some level 1 and 2 interview training was rolled out throughout the country to operational Gardaí in CPD training, but the quality of training was poor and was not delivered to all staff. Furthermore, no record exists of who received it (GIR 2014 at 9.35). It was subsequently decided to retrain all Gardaí in level 1 and 2 skills, beginning in 2014, as the 2008 training was considered ineffective (*ibid*).

Policing Practice

As a result of the inadequacies in training, students left Templemore Garda College to practice operational policing without an adequate theoretical framework on which to build practice. The result was that investigating crime and questioning suspects was, therefore, not so much an experiential learning process as learning on the job. AGS did not differ from the majority of worldwide police forces at this time in relying on observational learning to learn interviewing and other skills (Kohnken et al. 1999).⁶⁶⁵ However, unlike some English forces, even this was primarily unstructured and ad hoc. As in many other occupations, the reality of operational work differed fundamentally from what the student was taught in college, but the level of the disconnect between subjects taught in the Garda College and knowledge required for operational policing was high. Brady (2014 p.99, 130) recounts a number of instances where poor Garda training and operational practice contributed directly to a number of high profile murders, including those of the British Ambassador to Ireland, Christopher Biggs, in 1975 and Lord Mountbatten in 1979. The different training systems did not improve significantly the level of practical knowledge a student left Templemore with. Operationally, AGS expects all Gardaí to be capable of investigating any offence to which they respond (GIR 2014 at 3.14). While detectives may receive some additional training, uniform Gardaí have only their foundation training to prepare them. Furthermore, a lack of qualified supervisors to give instruction and guidance compounds the lack of basic crime investigation training (GIR 2014 at 3.16). The Guerin Report (2014 ch.20) found serious deficiencies in crime investigations and concluded that it appeared that

serious criminal matters were being investigated by junior Gardaí, including probationers, without adequate supervision or training. It suggested that the causes were either professional failings at an individual level by investigating officers, their supervisors and at management level; alternatively the causes were systemic (*ibid* at 17.4). In his later report into the same matter, O'Higgins (2016) chose to lay the blame on individuals. He stated that it was "reasonable to expect that by virtue of his or her training, assessment and attestation, a probationer garda is competent to perform quality police work" (O'Higgins 2016 at 14.8). Unfortunately, it is only reasonable if the underlying assumption about a suitable training system is correct. Similarly, it is also a flawed assumption that all promoted supervisors have experience in operational and investigative duties (*ibid* p.332). Time served in the police can never equate with operational skill and expertise. The Garda Inspectorate (2015 p.30) has even questioned the operational experience of instructors in the Garda College.

Waddington (1999 p.129) argues that police training effectively encourages deviancy, as "the gap between 'working' and 'presentational' rules fosters an occupational environment that is steeped in organisational rule-breaking; deviancy becomes the norm," with the formal rules being regarded with complete contempt, as they are impractical. How different is theory from actual work practices in AGS and does such a gap exist? One insightful survey, conducted with student Gardaí at the end of their phase one training and again on their return six months later to the Templemore College, sought to examine the values and biases student Gardaí had observed while on placement. One hundred and eighty-six students responded to the questionnaire (Nally 2009). On the question as to whether rule bending, covering up infringements and backing each other up occurs amongst serving police officers, the percentage of respondents who agreed increased from 18 per cent prior to attachment to operational units to 26 per cent post attachment. Agreement with the statement 'what police say and what police do is different' increased amongst respondents from 42 per cent prior to attachment to 63 per cent post. The percentage of respondents who felt that there was a gap between law in theory as taught, and law in practice, rose from 68 per cent prior to attachment to 84 per cent post.

Therefore, to learn the necessary policing skills, one had to rely on colleagues who had more experience. Experienced colleagues are an essential guidance in many operational areas in the acquisition of police 'craft' (Willis 2013). Hence, when discussing socialisation processes and police culture, it is important to understand that many simple mistakes – but with potential serious ramifications – are only avoided if one can rely on colleagues experience and willingness to share that experience. Equally, experience and common sense are essential elements in policing as many situations encountered are novel and it is impossible to have written procedures for every situation. A great deal of police action is also in areas of non-criminal law. These are areas where the police are expected to do something, if only to negotiate between disputing neighbours. Solutions may often need to be pragmatic, sometimes even conflicting with written instructions or laws (Sharp 2005 p.450). A police officer therefore needs to spend much time 'guarding one's back' as rule violations are unavoidable (Waddington 1999, GIR 2015 p.11). Consequently, as mistakes may often result in disciplinary actions, police generally avoid admitting to any mistakes (GIR 2015 p.226). Alternatively, another common strategy adopted is to be risk-averse and avoid making decisions altogether.

Police expect that other police can be trusted, functioning as a form of social decision heuristic (Kramer 1999 p.582). Such trust is a potent form of expectational asset that facilitates spontaneous coordination and cooperation among organisational members and generates social capital but also generates an in-group bias (Knez and Camerer 1994), which may serve to promote unethical behaviour (Gino, Ayal, and Ariely 2009, Bazerman, Loewenstein, and Moore 2002), or simply ineffective practice (Levy 2001). Learning in this manner is therefore fraught with risks, for not only can bad practices spread through an organisation but also important and vital skills may never be acquired. However, to gain advantage of any available knowledge and experience, it is vital to conform to the group. This becomes important in understanding the organisational culture that exists in Irish policing and is an important element in loyalty. This can breed a reluctance to criticise colleagues for making mistakes that can potentially develop into a 'blue wall of silence.' The second report of the Morris Tribunal (2005 at 5.114-126, 6.38) concluded that many Gardaí were indeed willing to lie to cover up their own, or colleagues, misdeeds.

The inherent conflicts between the formal or presentational rules and the real environment promotes the development of working rules or, as Skolnick (1966[2011]) calls them, a set of hidden principles in response. Furthermore, junior Gardaí should be able to look for guidance to their managers but senior management can actually compound the problem by being reluctant to take action to address suggestions of wrongdoing or bad practice in AGS. One official report suggested that this was because of misguided loyalty (Smithwick 2013 p.431 & 395). The Report concluded:

“... there prevails in An Garda Síochána today a prioritisation of the protection of the good name of the force over the protection of those who seek to tell the truth. Loyalty is prized above honesty” (*ibid* p.153).

The first report of the Morris Tribunal criticised failures of Garda Headquarters in taking a more active role in management of Garda Divisions (Morris 2004 ch.13). The Report highlighted evidence of management failures, lack of discipline, professionalism, and in some cases, incompetence in Donegal. There was further evidence that senior Gardaí attempted to use the Garda regulations and the Garda Code to avoid taking any personal responsibility for failures in their leadership (*ibid* at 12.110). The push for promotion in the force with the less than transparent promotion process was another cause of much internal tension in the force, with many seeking to avoid tarnishing promising career prospects (*ibid* at 12.18).⁶⁶⁶ By failing to properly prepare and train an organisation with such work demands and pressures as the police, the only available source of knowledge is established colleagues. The knowledge thus acquired may be fundamentally flawed but the resultant loyalty to colleagues will be permanent.

5.4 Suspect interview training and practice

Although the legislative detention provision introduced in the 1984 Act was explained as part of legal studies at the Garda College, no practical training in suspect interviewing was given to student Gardaí (GIR 2014 at 6.21). While they received training in the legislation and procedures contained in the Garda Custody Regulations and Recording Regulations,⁶⁶⁷ they were merely shown the recording machines (GIR 2014 at 9.35). Of the 5000 Gardaí who had joined between 2005 and 2008, as a result of accelerated recruitment, the vast majority “have not received any

or appropriate interview training” (GIR 2014 at 9.36). Prior to 2005, the Inspectorate could not establish what training, if any, students had received. From the beginning of Walsh training in 1989, as the practical implications of detaining to investigate ordinary crime had only commenced in 1987, there were few Templemore instructors with any relevant knowledge or experience to pass on, at least initially. On their attachment as part of training, students also encountered few operational Gardaí who expressed sufficient confidence in their interviewing abilities to consider passing those skills on, so junior Gardaí from the introduction of the legislation did the best they could. Students therefore left Templemore with little practical knowledge of how to undertake investigative interviewing as part of a criminal investigation.

The only official manual to assist in crime investigation is a book called the Crime Investigation Techniques Manual. The first edition was published in 1979 with a second edition in 1994. This manual focuses on serious and complex crime technicalities but fails to provide a standard operating procedure for investigating all crime, including volume crime (GIR 2014 at 9.3). It includes a chapter on the interviewing of suspects, which in the current third edition, published in 2007, runs to 20 pages. It recommends that arrests should be made quickly as possible to prevent, inter alia, alibis being fabricated. Almost five pages are devoted to the Judges’ Rules. The remainder covers additional legal points and cases stated on voluntariness, inducements, oppressive questioning and the caution, as well as right of access to a solicitor. Issues such as interviewing children are briefly covered. One page is given to preparing for interview, covering familiarity with the case and the suspect while another page recommends covering relevant legal points and the form of any statement. An appendix at the end of the manual has 12 further pages relevant to interviewing; these cover the Electronic Recording Regulations, Custody Regulation 12 and the law relating to adverse inferences, as well as some supporting case law.

The first time most Gardaí received any type of formal training in suspect interviewing was after the introduction of audio-visual recording in 1997. At the Morris Tribunal, evidence was given that this training, from March 2001 until July

2002, was received by 8,945 Gardaí, or approximately 75 per cent of the total force (Morris 2008 p.1219). This broadly remained the training provided to students at the Garda College until 2010 (GIR 2014 at 9.35). It was stated by Garda Chief Superintendent Ludlow to the Tribunal that when the electronic interviewing of interviews was being introduced, a training programme was commenced “not only around the technicalities of operating the equipment properly, but also with a view to introducing a more formal and directed approach to interviewing.” However, the training delivered actually only covered the technical aspects of operating the electronic recording as well as the chapter on suspect interviewing in the CIT manual. This training was, furthermore, of only two days duration and, as noted by an expert witness, Chief Inspector Shaw of the Northumbria Police, UK, it was “entirely insufficient for the purpose of training police officers in respect of the PEACE model” (Morris 2008 p.1219). Garda Chief Superintendent Ludlow in evidence before the Morris Tribunal conceded that training was superficial but claimed it “indicated to participants that there was theory and research concerning this particular area in existence” (*ibid* at p.1220). Unfortunately, the most prevalent literature available on interrogation techniques is of those used in the American Reid method and therefore, paradoxically, the result of such an awareness may be the exact opposite of the desired one. Chief Superintendent Ludlow further elaborated on extra training received on the detective training course where another two days are devoted to the issue of investigative interviewing. The evidence was that a myriad of further topics was covered over these two days including: cognitive interviewing techniques, interviewing psychology, vulnerable persons, statement analysis, detection of deception, as well as issues surrounding audiovisual recording. This is again insufficient time for anything but the briefest definition of the topics covered. The Inspectorate, moreover, noted there could be long delays in receiving the detective training course, with up to approximately 20 per cent of detectives never having received it (GIR 2014 at 6.18). The entire detective training course itself is of only two weeks duration. Furthermore, there are generally limited continuous professional development or other training opportunities available to detectives resulting in many detectives being regularly expected to undertake complex investigations without any specific or appropriate training (GIR 2014 at 6.17).

Interview Practice

Serious criticisms of Garda suspect interviewing practices began shortly after the beginning of the Troubles, although legal cases, including *Dunne v Clinton*⁶⁶⁸ in 1930, demonstrated concerns from almost the creation of AGS. The continued failure to provide interview training for Gardaí has continued to attract adverse judicial comment. In *DPP v Ryan*,⁶⁶⁹ for instance, the Court questioned whether the lack of training of interrogators was the cause of otherwise important evidence being rendered inadmissible because of failures to provide detainees with proper access to solicitors. Many of the cases referred to in part one have highlighted concerns with Garda interviewing practices. But the deteriorating security situation arising from the Troubles intensified many issues and concerns.

In early 1977, the Irish Times newspaper suggested that Gardaí were using similar brutal interrogation tactics to those being used in the North of Ireland.⁶⁷⁰ A team from AGS, based in Headquarters, known officially as the 'Investigations Section' of the Garda Technical Bureau, was tasked with providing the relevant necessary expertise to local units in serious crime investigation (Brady 2014 p.98). The colloquial name of this unit was the 'murder squad' but a subset of this unit had attracted another name. They had become known as the 'Heavy Gang' as a result of their willingness to apply whatever techniques necessary to obtain a 'voluntary confession.' All criminal suspects, at the time, unless detained under s.30 of the 1939 Act, were supposedly at the Garda station in a voluntary capacity to 'assist the police with their enquiries.' The Irish Times ran a weeklong series of articles to highlight the activities of this Heavy Gang and their methods of extracting information (Conway 2013 p.140). The Times alleged that suspects were being physically assaulted and referred to one claustrophobic suspect being locked in a locker in order to obtain admissions.⁶⁷¹ In June 1977, Amnesty International examined alleged maltreatment of suspects, including testimonies, medical reports and evidence from lawyers. All of the alleged victims reported the abuses as having been carried out by plain-clothes Gardaí, with many saying they were beaten and punched, deprived of sleep and food and often interrogated for dozens of hours without access to a solicitor (McEnroe 2007, Walsh 1998). In October 1977, the government appointed Judge Barra O'Briain (1978) to lead an enquiry into any

necessary safeguards for persons in custody. Brady (2014 p.128) claims that the report and recommendations caused such deep unhappiness in both Garda Headquarters and the Department of Justice, that the government rejected O’Brian’s recommendations. A number of politicians also expressed concerns about the Heavy Gang, including Cruise O’Brien and Garret Fitzgerald in the 1970s but both they and the O’Brian findings “were largely disregarded” (Kilcommins et al. 2004 p.209). The publicity around a number of well-publicised cases, such as the Sallins Train robbery and the resultant convictions – followed eventually by acquittals – continued to highlight the issue (Joyce and Murtagh 1984). Allegations made by the defendants about their ill-treatment by detectives to coerce confessions had originally been dismissed and their injuries considered self-inflicted (Brady 2014 p.135). One accused’s interrogation had lasted almost 40 hours without much interruption and included being taken from the cell at 4am to be questioned and assaulted in a corridor of the station (O’Mahony 2002 p.64, Walsh 2004 p.307). Many of these cases arose in the context of the prevailing security situation as a result of the Troubles and as such attracted limited public reaction or criticism. In 1984 a case arose which changed public perceptions. The Kerry Babies case was eventually the subject of a tribunal that sought to establish how a local woman could have confessed, after interrogation, to the murder of a baby that had washed up on a Kerry beach while her own dead newborn baby was later discovered hidden on the family farm (Lynch 1985). For the first time, it became obvious that it was possible that anybody could be affected by Garda mistreatment during interrogation leading to a false confession.

It was this context that led to such calls for adequate protections prior to the introduction of the 1984 Act. Unfortunately, even though allegations of physical violence in interrogations receded, other issues with interviewing practice remained. The Morris Tribunal (2008) remit included an examination of the interview procedures and training in place in the Donegal Garda Division. The Tribunal was highly critical of investigators practices during interviews with suspects, including the showing of post-mortem photographs and foul-mouthed dismissals of protestations of innocence (*ibid* at 1.55). Failures to follow best investigative practice were also criticised in the second report including long delays in taking

statements (Morris 2005 ch.1&3). The Tribunal noted that issues can arise from many causes but frequently the 'tunnel vision' of investigators is frequently a major determinant in subsequent false confessions (Morris 2008 at 15.09).

The Irish criminal law and professionalism dictates that all confessions should be made voluntarily, with any use of coercion sufficient to render any resultant confession inadmissible. The use of audio-video recording and the application of the Custody Regulations can be expected to eliminate the use of coercive tactics. Unfortunately, the absence of overt coercion will not protect all persons. Vulnerable persons are particularly at risk when being questioned. Vulnerable persons can be persons who, because of age or intellectual ability, may fail to fully appreciate the situation or the consequences attached to a police interview. One of the clearest examples of the dangers of police questioning, especially where a suspect is particularly vulnerable, is the case of Dean Lyons. Dean Lyons, a heroin addict, confessed to the double murder of two patients in Grangegorman in March 1997, who were stabbed and mutilated at their home in the grounds of the psychiatric hospital. He was charged on the basis of these confessions. Dean Lyons had had intellectual learning difficulties and had attended a special school (Bermingham 2006 p.6). He subsequently left school with partial reading and writing skills and had a limited vocabulary. Later, he began sleeping rough, developing a heroin habit some three to four years before the murders. Nevertheless, after his interviews, his written statement of confession was in grammatically correct English, with a proper chronological narrative about the murders, along with an accurate description of the interior of the house and the actions of the murderer inside.⁶⁷²

However, within weeks of Lyons confession, after another double murder in Roscommon, Mark Nash was arrested as a suspect. Following his arrest, Nash also admitted to the Grangegorman murders. As a result, it was established that Dean Lyons had made a false confession, which led to the establishment of the Dean Lyons Enquiry in February 2006 under George Bermingham SC. This enquiry established that Dean Lyons had not been abused or ill-treated in any way during his detention or interviews. Oppression or coercion played no part in his confession and Gardaí had made no effort to frame him (Bermingham 2006 p.7). In his background

was discovered a “persistent pattern of attention seeking and storytelling” and a person who was happy to admit to things he had not done, if it gained him approval (*ibid* p.54). A forensic psychiatrist described him as having a “tendency to be easily led, of being passive and eager to please” (*ibid* p.56). However, these traits were not readily identifiable to Gardaí, including the member in charge who processed him or to the interviewers (*ibid* p.84). Nevertheless, it was established that the questioning style of the investigators – which included subtle communication – and in particular their use of leading questions, had allowed information to pass to Dean Lyons. Lyons, being anxious to please, then incorporated any such new information into his account and over time presented a more and more coherent account, which he had unintentionally gained from his interviewers (*ibid* p.88-90) (see also Gudjonsson and Young 2011, Wrightsman and Kassin 1993). Moreover, as the interviews progressed, discrepancies in Lyons account began to disappear and converge with the known facts (Bermingham 2006 p.124). The interviewers then transcribed a chronological and coherent account, as the language actually used in the final written confession was beyond Lyons intellectual capacity (*ibid* p.135). In the event, Lyons actually continued to claim responsibility for the murders to his family and even to his own legal team for some time afterward (*ibid* p.7). It would be April 20, 2015 before Mark Nash was eventually convicted of the crimes.⁶⁷³

Inspectorate evaluation

The Garda Inspectorate undertook an examination of the current suspect interviewing practices amongst operational Gardaí. The Inspectorate examined the written records of sixteen interviews that took place with suspects from 158 incidents and crimes that they reviewed. They noted that the necessity for note taking during the suspect interview removes spontaneity and flow from the questioning process, while causing a suspect to be detained for longer than necessary (GIR 2014 at 9.34). While some interviews were performed to an acceptable standard, in other cases the interviews were completed unreasonably quickly, some being completed in less than 30 minutes, even though they were for serious offences, including a robbery at knifepoint (GIR 2014 at 9.38). The Inspectorate found consistent failures by investigators to adequately prepare before the suspect interviews. Other issues found by the Inspectorate were examples of inappropriate language and terminology used during interviews. In some of the other

incidents and crimes reviewed, the Inspectorate found that persons arrested for the criminal offence were never even interviewed (GIR 2014 at 9.30), perhaps suggesting a reluctance by some investigating Gardaí to even attempt a suspect interview. A similar lack of confidence in their own interviewing skills by police investigators has also been found in research in England (Clarke and Milne 2001, Clarke, Milne, and Bull 2011, Dando, Wilcock, and Milne 2008). The Inspectorate concluded that the lack of appropriate interview training was a serious hindrance, potentially undermining criminal investigations from the outset, and that there was a necessity to introduce properly-accredited training to address the issue (GIR 2014 at 9.36-38). The Inspectorate recommended the upskilling of all operational Gardaí in appropriate interview techniques (GIR 2014 at recommendation 9.11). The Inspectorate, in particular, recommended the importance of training in the use of the adverse inference provisions at suspect interviews, which were essential to counter their current, limited use (GIR 2014 at 9.36).

In summary, it is reasonable to infer that the failure to provide adequate interview training for Gardaí investigating crime is responsible for poor interviewing practice in AGS and has damaged the credibility of the criminal justice system and the force itself as well as attracting adverse judicial comment. It further means that many of the real offenders of serious crimes have escaped prosecution as a result of such failings.

5.5 Conclusion

Modern police in the Republic of Ireland have legislative provisions to perform a quasi-judicial function, which allows the deprivation of liberty and the enforced submission to questioning over an extended period. This may have a critical impact on the criminal trial process for an accused. These powers were granted by the legislature in an attempt to tackle serious crime concerns amongst their constituents and voters, who believed that the absence of police powers was an inhibitory factor in stemming the rising crime trajectory. The subsequent failure to achieve this in turn led to even tougher provisions, which again failed their objective. It was rarely questioned if the lack of effective implementation of already existing legislation was part of the problem. Lack of effective implementation may be the direct

consequence of a failure to adequately train police in the implementation of their powers.

The political and social aspects to the origin of the national police force, An Garda Síochána, prevented the adoption of the former policing model. This model would have required modification to suit the needs of the new State, but instead it was jettisoned along with virtually all of its operational and training aspects. In the agrarian and local society that Ireland remained until the 1960s, this fundamental flaw in training remained largely unexposed. Two concurrent aspects combined in that decade to expose those flaws, although many refused to acknowledge them. The first was that, with a move towards urbanisation, consumerism, the decline of religious values and the role of traditional institutions, people were no longer afraid to criticise such institutions and one by one, in Ireland, each fell in turn. The second was the beginning of the Troubles that saw Ireland move from rural policing to anti-terrorist policing almost overnight. Too often, criticism of AGS was identified with support for terrorism. Members of AGS only did the best they could in the ambiguity that prevailed. It is a testament to the quality of many Gardaí, of all ranks, that AGS could achieve as much as it did, in the circumstances. However, failures to conclude many serious investigations because of careless mistakes were evident.

Training was remodeled in 1989 to provide a new theoretical training model as foundation training to new members of the force up until the end of recruitment in 2008. Deficiencies in training transmute to operational practice and contribute to the necessity to conform to prevailing police culture as the only source of knowledge. In theory, the Walsh system was ideally suited to the problem of training police. In practice, it failed to deliver the changes envisaged. It is difficult to pinpoint all the reasons it ultimately failed. Unlike other organisations that utilise retired employees in providing certain aspects of training, AGS uses currently serving police of varying service and experience. Operational credibility is essential in police trainers (GIR 2015 p.30). Retired police have the advantage of current experience and operational knowledge. Moreover, many police over the course of their careers develop wide-ranging esoteric expertise that usually departs with them. Having them return on contract permits such skills and real world experience to be disseminated

to new recruits rather than lost. They are current in contemporary mainstream practices rather than just theoretical versions and furthermore, there is always an available pool of such expertise. Nevertheless, police need to be taught to problem solve in an ethical manner, and some subjects taught in Templemore were superfluous within the finite timeframe available.

The failing of such a training system to recognise the needs of Gardaí, the failure to provide the specialised investigative interviewing training that AGS needed and the detention legislation required, ultimately meant failures to investigate many crimes efficiently, with many being victims denied justice. Pressures to achieve results but without any clear means of doing so leads to pragmatic solutions. With the benefit of hindsight many of these solutions created more problems than they solved, not least of which was the damage to the credibility of the entire criminal justice process. Police legitimacy is not a resource to be easily accessed and the public's trust in the police is hard-earned (Reiner 2010 p.201). Over time many such pragmatic solutions become established practice and eventually resulted in systemic failures, which sometimes resulted in individuals being held accountable as examples of bad apples. The need to protect the innocent from false accusations should be of primary importance to any democratic police force. Of equal importance is the need to prevent the escape of the truly guilty from justice, which also undermines confidence in the entire justice system when eventually exposed. Police not only need to have the tools to undertake the vital function of investigative interviewing but more importantly also need to be trained in their use. This is particularly important when interviewing suspects where the safeguarding of a suspect's rights can often appear to be in conflict with getting information from the suspect. The next chapter examines two very different models of addressing this issue of suspect questioning.

6: Models of Interrogation

6.1 Introduction

This chapter proposes to focus on interviewing methods available to democratic police forces, primarily in relation to suspect offenders. Some consideration is given to witness interviewing – an important though frequently neglected aspect of investigative interviewing. Interviewing is itself a task of tremendous cognitive complexity, requiring the interviewer to be aware of psychological processes and mindful of interacting physical and physiological factors, his or her own, as well as those of the interviewee and any third party present (Shepherd 2010 p.xi). Therefore, the ability to develop interpersonal relationships with disparate personalities in difficult circumstances is a prerequisite for effective police interviewers. Hence, to maximise the information flow from any interview, a training system that builds on psychology and sociopsychology will not only enhance individual interviewer skills but will prevent counterproductive behaviours.

This chapter first seeks to examine relevant fundamental psychological issues before proceeding to examine the two principal suspect interview-training models. The first training interview model examined is an American model, known as the Reid method, and by far the oldest method available. The technique begins with the premise that the suspect being interrogated is guilty but needs to be persuaded to admit to the crime and is therefore from the beginning an accusatorial model. The model and its variants are a commercial enterprise, dominating training within the United States, Canada and worldwide (Dixon 2010 p.428, 2006, Buckley 2006, Inbau et al. 2001, Gudjonsson 2003, Snook et al. 2010, St. Yves and Deslauriers-Varin 2009, King and Snook 2009).

The second model originated in England and Wales, where detention provisions were introduced in the Police and Criminal Evidence Act 1984 (PACE) along with safeguards including audiotaping of all interviews. Utilising these audiotapes, research encouraged by the Home Office quickly revealed serious deficiencies in interviewing skills amongst police interviewers. As a result of the subsequent interaction of professionals including police, psychologists and lawyers seeking to produce a safe ethical model of interrogation, a new training programme was

devised known by its mnemonic ‘PEACE.’ This is an information-gathering model; interrogation is not a term used, preferring instead to differentiate the model by using the term ‘interview.’ The method strives to reduce the incidence of false confessions by avoiding any tactics of persuasion, or even seeking a confession, per se, focusing instead on questioning to establish facts. The model has since become the benchmark standard in interviewing. It has been adopted in many countries where it is taught generally as part of in-house police training. Nevertheless, it has required some revision; the initial training was less than completely effective and the method itself has required further development.

This chapter also seeks throughout to conceptualise the prevalent interrogation style that operated in Ireland, as well as to identify the strengths and weaknesses of two very divergent interviewing models. In Ireland, with no training regime to act as guidance, many investigators would have watched other policemen to identify techniques that worked and emulated those, perhaps over time developing a nascent Reid model. Any interviewer with AGS who sought expert guidance would also have likely found material related to the Reid model. For example, Reid literature is widely published and information on interviewing techniques can be found in the Federal Bureau of Investigation (FBI) Law Enforcement Bulletin, which is freely available on the AGS database. The FBI technique broadly follows the Reid method, while strongly emphasising the importance of professional integrity and a respect for the suspect’s rights.

6.2 Considerations in interviewing

Social animals

Humans have always lived in social groups with the need to belong a “powerful, fundamental and pervasive motivation” that requires deep, positive, reciprocal interpersonal bonds (Yalom and Leszcz 2005 p.19, Cromby, Harper, and Reavey 2013, West, Griffin, and Gardner 2007, Zak 2011, Fehr and Fischbacher 2003, Fehr, Fischbacher, and Gächter 2002, Gintis et al. 2003, De Waal 2006, 2009, Atran 2002, Lieberman 2007). Therefore, experiences are always relational and shaped by the simultaneous experiences of other people (Cromby, Harper, and Reavey 2013 p.13). Reciprocity is the fundamental basis of all human social exchanges (Cialdini 2007

p.13, Shepherd 2010, Fehr, Fischbacher, and Gächter 2002, Cosmides 1989, Cosmides and Tooby 2005, Axelrod and Hamilton 1981, West, Griffin, and Gardner 2007, Haidt and Baer 2006, Shackelford and Duntley 2008, Krebs 2008, Zimbardo 2007). Interaction with other group members, understanding their perspective, and forming interpersonal bonds requires a people skill interchangeably known as intersubjectivity, mindreading, or theory of mind (Bruner 2003, Tomasello 1999, Baron-Cohen 1995, Fogassi 2011, Gallese 2001, Molnar-Szakacs 2011, De Waal 2006, Lieberman 2007, Schilbach et al. 2008), which allows the development of rapport and empathy. De Waal (2006 p.20) argues that reciprocity combines with empathy to form the building blocks of morality. A useful broad definition of empathy is where “the other is experienced as another being like oneself through an appreciation of similarity” (Gallese 2001 p.43). Empathy is a core requirement for an effective interviewer with the ability to understand the perspective of the interviewee essential to success (Pearse 2006 p.66). Rapport is defined as “developing an understanding, relationship or communication between people” (St. Yves 2006 p.88, for discussion see Vanderhallen, Vervaeke, and Holmberg 2011). In the interviewing context, it is essentially about setting up good communication with the interviewee and helping him or her relax (Bull 2010 p.9). The quality of the investigator-interviewee relationship is always important for the outcome of the interview with active listening, empathy, openness, respect and a desire for the truth being essential qualities in the investigator (St. Yves and Deslauriers-Varin 2009, Miller and Rollnick 2002, Fisher 2010). In suspect interviews, maintaining the self-respect and integrity of the suspect is also vital (Napier and Adams 2002 p.14, St. Yves 2006). Showing concern such as displaying an awareness of a person’s displayed emotion during interviewing, for example, allows the person to continue talking (Shepherd 2010 p.19, Sleen 2009). Studies concur that treating a suspect with humanity and respect is more often associated with admissions (Holmberg and Christianson 2002, Alison et al. 2013, Napier and Adams 2002, Beune, Giebels, and Sanders 2009, Vanderhallen, Vervaeke, and Holmberg 2011, Oxburgh and Ost 2011). However, an interviewer has also to be perceived as trustworthy and likeable although this may often be difficult to achieve in the confrontational confines of the interrogation. Cultural differences are an important element in establishing rapport with the possible interactions of age and gender in some cultures, for instance, a

potential blockage to rapport (Gelles, Kleinman, and Borum 2006 p.24, Frank, Yarbrough, and Ekman 2006). While liking leads to greater social influence, continued exposure to a person or object under unpleasant conditions such as frustration, conflict, or competition leads to less liking with feelings of anger and suspiciousness likely to interfere with the interviewing process (Gudjonsson 2003 p.28, Cialdini 2007, Cialdini and Goldstein 2004). In such circumstances, an interviewee may react to assert control and protect self-esteem by doing the exact opposite of what they feel an interviewer wants, even at a personal cost (Brehm and Brehm 1981, Festinger and Carlsmith 1959, Fehr, Fischbacher, and Gächter 2002, Fehr 2008).

For most people, maintaining positive self-esteem is critical for personal well-being, as a positive self-evaluation promotes happiness and good mental health (Mazar, Amir, and Ariely 2008, Huggins, Haritos-Fatouros, and Zimbardo 2002, Mezulis et al. 2004, Festinger and Carlsmith 1959). Consequently, people will often attribute their own personal successes to dispositional factors while blaming exogenous sources for failures but use the inverse premise for other people; a trait referred to as the *fundamental attribution error* (Nisbett and Ross 1980, Ross and Anderson 1982 (2008), van der Pligt and Eiser 1983). Moreover, it has been suggested that there is a bias towards positive feelings and that people suffering from depression are the only people who truly view the world realistically (for discussion see Babcock and Loewenstein 1997, Cromby, Harper, and Reavey 2013). To maintain this positive self-view, especially where it may not be warranted, involves some level of self-deception. Such self-deception arises when “we see the world according to our needs, wishes and hopes rather than according to the way it is” (Triadis 2009 p.32, van der Pligt and Eiser 1983, Trivers 1971, Mezulis et al. 2004, Nisbett 1982 (2008), Langer 1982 (2008), Mazar, Amir, and Ariely 2008, Vrij 2008a). A suspect’s denials, therefore, may not be deliberate conscious lying or an attempt to evade justice. For instance, Moston and Stephenson cite the work of Thombs (1969) in dealing with alcoholics, where Thombs argues “denial is not lying. It is actually a perceptual incapacity – the most primitive of the psychological defences” (Moston and Stephenson 2009 p.22, Yalom and Leszcz 2005, Haidt 2012). Indeed, directly confronting denials may have the unintended effect of actually strengthening them

(Moston and Stephenson 2009 p.22, Lord, Ross, and Lepper 1979). Furthermore, some suspects will continue to challenge the evidence no matter how obvious or conclusive. Additionally, in some instances, a prevailing local culture or subculture may exert a strong influence on the likely cooperation or willingness to make admissions of a suspect (Phillips and Brown 1998 p.73, Pearse and Gudjonsson 1997 p.72).

Memory

While in Rational Choice Theory (Robbins 1932, Friedman 1953, Becker 1968), actors are assumed to process information, make choices and execute behaviours in a way calculated to maximise their expected utility (Korobkin 2006 p.46), in reality, human cognition is limited, some information is prioritised over others and people often behave sub-optimally (Tversky and Kahneman 1981, Kahneman 2002, Simon 1972, Korobkin 2006, Cosmides and Tooby 2006, Stanovich 2011, Hertwig 2006, Ariely 2008, 2009, Devinney, Auger, and Eckhardt 2010, Zimbardo 2007, Haselton and Finder 2006). Generally, people use a mental shorthand of stereotyped beliefs to help make sense of the world (Shepherd 2010 p.4), built on a hierarchy of personal goals (Stanovich 2011 p.84). Individual behaviour may consequently result from the interaction between an individual's personality with a particular situation or in a particular context (Van Koppen 2009 p.55, Haidt 2012, Doherty 2003). The human body is constantly responding to environmental influences (Cromby, Harper, and Reavey 2013 p.92). Sometimes, the reframing of words or euphemisms can help this process; stories themselves organise information in a cognitively manageable way, which disregards some information while retaining the impression that all is understood (Haidt and Baer 2006, Bruner 2003). For most people, the most critical story is their own personal life narrative, which contains simplified and selective reconstructions of the past and idealised visions of the future (McAdams et al. 2008 p.978, Haidt 2012 p.281). In fact, the imagination is essential to perception in order to construct a coherent cognitive image from incomplete information (Mlodinow 2008 p.170). Memory, in particular, is also affected by selection and construction and therefore any account subsequently produced is similarly constructed (Dixon 2006 p.320, Peterson, Kaasa, and Loftus 2009, Kaasa, Morris, and Loftus 2011, Zhu et al. 2012, Most et al. 2001). Information is encoded to memory through a three-stage process of encoding, storage and retrieval (Shepherd 2010 p.36, Fisher,

Brewer, and Mitchell 2009, Ross and Sicoly 1982 (2008), Taylor 1982 (2008), Stuesser 2006). The very encoding of an event is achieved by using available information about the event together with information that the person has about the world in general (Dixon 2006 p.320, Milne and Bull 1999, Loftus, Wolchover, and Page 2006, Gigerenzer 2002, Davis et al. 2008, Tversky and Kahneman [1979] 2008). Through these schema or 'frames of reference' a stimulus is always experienced, perceived and judged in relation to other stimuli and its possible social relevance (Schilbach et al. 2008 p.457, Sherif 1936, Lieberman 2007, Shepherd 2010, Nisbett 1982 (2008), Nisbett and Ross 1980, Ross and Anderson 1982 (2008), Bandura 1986, Cromby, Harper, and Reavey 2013). The memory itself comprises three separate subsystems, immediate (the iconic or sensory store), working and long-term; information in the immediate is fleeting and unstable unless actively put into the working memory, while the working memory actively focuses attention to either maintain or suppress information, which moves into the long-term if maintained (Stanovich 2011 p.53). The long-term memory is further subdivided into the semantic and episodic. In the semantic, a personal store of knowledge is kept, including our stereotypes and scripts (stuff of routines and typical ways of acting), which all combine to provide our frame of reference. The episodic part stores memories of one-off events. Recollection then reflects not only the contents of the memory store but also the process of retrieval, with the specific question asked partly determining retrieval (Fisher, Brewer, and Mitchell 2009 p.126, Zhu et al. 2012, Loftus 1997, Roper and Shewan 2002, Ainsworth 2005, Ost 2006). Complex events may have many components, each processed independently and accuracy in one does not necessarily mean accuracy in all (Fisher, Brewer, and Mitchell 2009). Limited cognitive processing resources mean that, if several cognitive tasks are attempted simultaneously, it is likely to affect negatively on the accuracy and quality of recall (Holliday et al. 2009 p.138, Fisher 2010).

Studies have demonstrated that even adults can become confused between witnessed and imagined events in memory (Vrij 2008a p.248). To further complicate matters, even the reasons why a course of action was chosen is unlikely to be accurately remembered over a long time span (Kaasa, Morris, and Loftus 2011, Hulse and Memon 2006). One possible contributing phenomenon to this is known as *cognitive*

dissonance. This occurs when a person will change their evaluation of something they have been manipulated into doing to preserve their belief that they are in control of their actions and to protect self-esteem (Festinger and Carlsmith 1959, Lieberman 2007). A sociopsychological factor closely associated with cognitive dissonance is that of *sequential action* where the actor feels bound by previous decisions and actions undertaken: consequently the actor is unwilling to re-evaluate or condemn one's own past conduct (Milgram [1974]1997 p.166, Bauman 2000). Incrementally, therefore, the actor may continue onto greater acts, as a result of an inability to deny the propriety of previous actions. The subsequent result may be a mind divided into parts that sometimes conflict (Haidt 2012 p.27).

Emotion

Interviewing suspects is an intimate process and naturally risks being emotionally charged. Emotions “arise from an individual's evaluation of the significance of his or her circumstances” (Neumann 2000 p.179, Elster 1999, Kelter, Haidt, and Shiota 2006, Ekman, Friesen, and Ellsworth 1972). Wilson (2012 p.9) argues that emotion drives conscious thought solely for the purpose of survival and reproduction. Emotions may direct physical actions by unconsciously guiding one to personally attractive options and away from repulsive ones (Damasio 1994, LeDoux, Wison, and Gazzaniga 1977, LeDoux 2000, Slovic et al. 2004, Slovic, Fischhoff, and Lichtenstein 2008, Evans 2004, St. B. T.Evans and Curtis-Holmes 2005, Lee, Amir, and Ariely 2009, De Waal 2006, Devinney, Auger, and Eckhardt 2010, Elster 1999, Ekman 1992). Reason or rationality later simply provides the necessary justification for whichever action is chosen in a process called *post-hoc rationalisation* (Haidt 2012 p.81, 2001, Kelter, Haidt, and Shiota 2006, Gazzaniga 2008). Emotions have a social function and are regulated through the social world (Frewin, Stephens, and Tuffin 2006 p.245). Emotion can be delineated into two categories: social emotions, such as guilt and embarrassment, that require the presence and awareness of others (theory of mind), and the older, deeper, primary emotions such as disgust and anger (Burnett and Blakemore 2009 p.1294, Damasio 2000 p.50, Ekman 1992, Kemper 1987). Negative transference or feedback is the sum of emotions, positive or negative, which fall from one person towards another, whether by a look or behaviour, that may have consequences for the suspect in an interview (St. Yves 2006 p.92, Gudjonsson 2003). In addition, it is axiomatic to state that a person's

physiological state can affect the decisions he or she makes. As well as heightening emotional arousal, the deleterious effects of mental and physical stress can result in confusion and a difficulty in distinguishing fact from fiction. Hunger, exhaustion and drug withdrawal, can, consequently, all have a detrimental effect on one's decision-making ability (Zak 2011 p.55, Gudjonsson 2003, Roy 2006, Harrison and Horne 2000). An interrogator's own beliefs and attitudes can influence behaviour and techniques used (Pearse 2006 p.70), with those presumed guilty possibly subjected to more aggressive questioning (Moston and Stephenson 2009 p.21, Ofshe and Leo 1997). In this type of interview, some suspects are more vulnerable than others; generally, the older a suspect is, the less likely they are to confess, possibly because they are psychologically better equipped (Gudjonsson 2003 p.140). Those who have previous convictions are also more likely to exercise their right to silence (Moston, Stephenson, and Williamson 1992 p.23, Softley 1980, Kassin 2008, Phillips and Brown 1998). Furthermore, persons with personality disorders, as a group, "are generally less cooperative with the police and put up more initial resistance" while those with mental illnesses, on the other hand, rarely try to cover up (Gudjonsson 2003 p.155, St. Yves and Deslauriers-Varin 2009, Zimbardo 2007). The characteristics of psychopathy include a lack of emotional detachment or concern for others as well as selfishness in social interactions (Haidt 2012 p.61, Lalumiere, Mishra, and Harris 2008, Horgan 2005, Vrij 2008a). These, and extroverts such as narcissistic personality types, are less likely to collaborate and to resist, confessing only when evidence is very strong, whereas introverts are more likely to confess because of guilt (St. Yves and Deslauriers-Varin 2009 p.4). Generally, extroverts lie more often and more easily than introverts (Vrij 2008a p.32).

A potentially exacerbating exogenous factor in coercive interrogations, particularly in high profile investigations, is the expectation that a successful outcome to an interrogation is frequently regarded as a confession and the performance-management as well as competency of an investigator thereby defined by the confession obtained (Leo 2008 p.119, McConville, Sanders, and Leng 1991, Moston, Stephenson, and Williamson 1992, Moston and Stephenson 2009, Maguire 2008, Skolnick 1966[2011], Dixon 2006). The interviewer may experience a sense of failure, which he may attribute to the suspect (St. Yves 2006 p.99). Interviewers

themselves may therefore become hostile when confronted with denials, possibly because of surprise when the suspect's guilt is so clear, they believe, to them (Ofshe and Leo 1997 p.193). One line of research identifies this factor as discomfort with ambiguity (Alison, Kebbell, and Leung 2008, Alison et al. 2013). Humans treasure predictability (Bruner 2003 p.13) and our "illusionary certainty is part of our perceptual, emotional, and cultural inheritance" (Gigerenzer 2002 p.13, Kahneman and Tversky 1982 (2008), Langer 1982 (2008)). The greater an investigators need for closure, the greater the intolerance for ambiguity and when the suspect fails to provide an account matching the investigator's a priori belief, the more likely the use of coercion, by creating a state of cognitive dissonance in the interviewer who then seeks to overcome it by demeaning or belittling the source (Alison, Kebbell, and Leung 2008 p.1083). Moreover, the thinking disposition that needs closure is also associated with dogma and superstitious thinking (Stanovich 2011 p.35). Police questioning techniques, as a result, can be directly responsible for coerced-compliant and coerced-internalised false confessions (Gudjonsson 2003 p.198, Kassin, Meissner, and Norwick 2005, Meissner and Kassin 2002, Perillo and Kassin 2011, Kassin, Goldstein, and Savitsky 2003a, Kassin and Gudjonsson 2004, Ofshe and Leo 1997, Gudjonsson 2006).

Interviewers Influence

Some early studies in the United Kingdom had indicated that almost half of all suspects had already made up their minds to confess before they were interviewed, with interviewers having little influence (Baldwin 1993 p.333, Pearse and Gudjonsson 1997). However, a more recent study in Canada suggested that 25 per cent had changed their mind during the interview, but nearly half of these said that they had initially intended making a confession before deciding not to (St. Yves and Deslauriers-Varin 2009 p.2). This study suggested that slightly over 31 per cent of suspects were convinced at interview to confess. An Australian study also suggested that half of suspects were undecided whether to confess or not before the interview (Kebbell, Hurren, and Mazerolle 2006). Ultimately, the decision to confess can be correlated with three important factors: the strength of available evidence, access to legal advice, and previous criminal history or offence severity (Moston, Stephenson, and Williamson 1992 p.23, Moston and Stephenson 2009, Leo 1996 p.286, Phillips and Brown 1998 p.72). Access to a solicitor can reduce the odds of a confession.

One study found that 50 per cent of those who did not consult with a solicitor confessed compared to a 30 per cent confession rate for those who did consult (Moston, Stephenson, and Williamson 1992 p.37, Pearse 2009, Phillips and Brown 1998). Ethnic origins also appear to have a bearing, as one study found white suspects more likely to admit than suspects of either black or Asian origin (Phillips and Brown 1998 p.75) but this may have reflected the local cultural ethos. Using self-report surveys from prisoners, Gudjonsson and Petursson (1991) found that prisoners themselves identified three main factors in confessing: external pressure, that is, the interviewing styles and behaviour of police; internal pressure, usually brought about by a sense of guilt; and their perception of the strength of police evidence against them. Of the three, prisoners tended to resent most strongly those confessions which resulted from external pressure. Up to two-thirds of suspects claimed that they had admitted when the evidence appeared strong to them as it normally leaves them with only two options, as denial was useless; one is to stay silent and the other is to take the opportunity to explain while minimising the behaviour in an effort to save face. Allowing a suspect to save face and reciprocal gestures are subtle but important techniques in the police-suspect relationship (McConville, Sanders, and Leng 1991 p.60, Oxburgh and Ost 2011). Therefore, interviewing techniques can be important, if for no other reason than to prevent a suspect willing to confess from changing his or her mind (see also Holmberg and Christianson 2002).

6.3 Interview Models

Development of the Reid Method

Leo argues that following the 1936 case of *Brown v Mississippi*⁶⁷⁴ the use of ‘third degree’ tactics had become non-existent by the 1960s in the US. A book on abuses during interrogation and an official investigation had preceded the *Brown* case (Levine 1930).⁶⁷⁵ The decline was contributable to two major factors: the development of technology in the polygraph and psychological developments in changing the nature of interrogation from coercion to deception or the use of psychologically manipulative methods (Leo 2008 p.319, 1992).⁶⁷⁶ The Reid method was one of several that developed in the United States, where a large volume of literature on the practicalities of interrogation has been generated (Dixon 2010

p.427, 2009, Gudjonsson 2003, Buckley 2006), with the Reid method named after the author of one of the earliest books (Inbau et al. 2001).⁶⁷⁷

The Reid method suggests that, following a factual analysis after a crime, a potential suspect is first approached for a non-accusatory interview. The purpose of this interview is to establish if the person is lying; if so then the person is brought in for the interrogation phase (Buckley 2006, Inbau [1961] 1999, Inbau et al. 2001). The decision that a person is lying can often be based solely on the investigator's 'gut instinct' but may lead an investigator to decide to proceed to a full interrogation (Kassin et al. 2010 p.6, Dixon 2010, Gudjonsson 2003, Gudjonsson and Pearse 2011).⁶⁷⁸ Inbau et al (2001 p.173) have introduced, in recent additions of their book, a technique for conducting this non-accusatory interview, which they refer to as the 'Behavior Analysis Interview' (BAI) that includes information on verbal and non-verbal cues to deceit. Academic research suggests that many of the BAI cues as described are inaccurate (Leo 2008 p.97).⁶⁷⁹ Once brought in for interrogation, the suspect is subjected to a carefully staged process, designed from the very beginning to isolate the suspect in the investigator's controlled environment. The purpose of an interrogation is to obtain a confession (Gordon and Fleischer 2006 p.34). The method of questioning is confrontational and guilt-presumptive; it is accusatory and therefore more suitable to the term 'interrogation' than 'interview.' The investigator must possess a high level of confidence and is advised to display that confidence; otherwise the suspect is unlikely to admit (Buckley 2006 p.192, Inbau et al. 2001 p.78, Inbau [1961] 1999, Gordon and Fleischer 2006). The interrogation phase therefore begins with a confident assertion of guilt, ignoring any denials (Bowling and Resch 2005 p.6). The method involves nine escalating techniques, developed from years of police investigative experiences, and involves the active persuasion of the suspect to admit the offence by using these techniques that dominate the conversation and force the suspect to listen to the investigator's statements (Buckley 2006 p.193, Holmes 2002, Inbau [1961] 1999, Inbau et al. 2001). The refusal of the suspect to answer questions is relatively irrelevant as FBI interrogation instructor Boetig (2005 p.13) asserts: "interrogations are less of a conversation than a monologue by investigators in which they provide suspects with acceptable reasons to confess." Interrogators should therefore maintain "verbal dominance" throughout

the interview (Gordon and Fleischer 2006 p.35). There is an awareness that the consequences of a suspect's action may be a major inhibitor to confessing, with personal consequences, for example, family relationships, work or career prospects, or betraying friends, usually much more salient than the prospect of judicial sanction (St. Yves and Deslauriers-Varin 2009 p.9). The investigator tries to moderate the inhibiting influence of these consequences, without the use of promises or threats, to overcome these fears. Interrogators will enhance a suspect's natural tendency to employ defence mechanisms to justify the crime and maintain self-esteem (Gudjonsson 2003 p.120). To move from denial to admissions: "police accomplish this change in a person's behaviour by strategically manipulating the suspect's analysis of his immediate situation, structuring the choices before him and dwelling on the likely outcomes that attach to these choices" (Ofshe and Leo 1997 p.194, St. Yves and Deslauriers-Varin 2009, Dixon 2010). FBI trainers emphasise the need to maintain or restore the self-respect and integrity of the suspect throughout the process (Napier and Adams 2002).

The nine techniques used require a quiet interview room, free of distractions, with no desk or object between the suspect and interviewer (Buckley 2006 p.196). There should be no note-taking until the suspect has committed to confessing. The interrogator has one goal in mind throughout – to persuade the suspect to tell the truth (Inbau et al. 2001 p.211).

Table 1: The nine step Reid method⁶⁸⁰

<p>1. Positive confrontation</p>	<p>Direct accusation of guilt. Display certainty. Brief pause. Passive reaction is sign of deception. Regardless of response, offer reason why truth is important, a 'transition statement' to introduce interrogation theme.</p>
<p>2. Theme development</p>	<p>Investigator expresses supposition about reason why crime committed. Emotional v non-emotional suspect. If suspect listens attentively or</p>

	deliberates for short time-suggestive of guilt, resentment suggestive of innocence.
3. Handling denials	Discourage repetition or elaboration of denial by suspect. Use good cop/bad cop technique, return to step 2. Guilty usually cease to voice denial.
4. Overcoming objections	Suspects secondary line of defence; reasons why suspect cannot or would not commit such a crime e.g. moral, economic or religious reasons for not having committed crime. Evasion of bold denial instead rationalised denial.
5. Procurement and retention of suspects attention	When denials ineffective, suspect likely to withdraw and become unresponsive. Need to demonstrate sincerity. Move physically closer and maintain eye contact.
6. Handling suspects passive mood	Reflected in changes in non-verbal behaviour. Recognise mood, suspect weighing possible options including benefits of telling truth. Appeal to sense of honour and decency.
7. Alternative question choice	Presenting a suggestion of a choice to suspect, one more 'acceptable' or 'face-saving' as reason for committing crime than the other more extreme or repulsive choice. Suspect should choose an option, functional equivalent of an incriminating admission.
8. Develop details of offence	Suspect goes through details of offence to establish legal guilt orally.

9. The written confession	Oral admissions developed into full confession. Written out in suspect's own words. Legal points to be proved covered. Suspect's signature.
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Investigators typically use a combination of techniques, but most commonly used is an appeal to the suspect's self-interest, present in 88 per cent of interviews (Leo 1996 p.278, Leo et al. 1996). Leo identifies the most successful strategies as: identification of contradictions in the suspect's account, praise and flattery, allowing the suspect to ease his guilt and justify himself, and presenting moral justifications or psychological excuses to the suspect to help in this. The theme development techniques encompass rationalisation (acceptable reasons for the crime), projection (blame somebody else) and minimisation (lessen culpability and express remorse) (Napier and Adams 2002 p.14, Bowling and Resch 2005). Boetig (2005 p.15) describes rationalisation as a process that "offers suspects the opportunity to make the crimes appear soundly acceptable" and investigators may rationalise a crime, "merely by explaining to the suspect that the deviant act was logical behaviour that anyone in his position would have done." Projection of blame "distances suspects from appearing solely responsible" and an example of projection could involve putting "blame on the people that taught them to be criminals, such as siblings, peers, parents and fellow inmates," while minimisation "produces less guilt or shame for the suspect" (Boetig 2005 p.18). Other FBI instructors suggest interrogators should try to develop themes based on the suspect's own techniques used by him to neutralise his deviant behaviour (Napier and Adams 2002, 1998). They suggest that guilty suspects seldom tell everything and that most offenders are not proud of their violence and recognise it was wrong. Any feelings of guilt that a suspect may harbour as a result of having committed the crime can be a significant predictor of confession during the interview (St. Yves and Deslauriers-Varin 2009 p.4). Investigators are advised to avoid using any judgmental terms when presenting themes (Bowling and Resch 2005 p.3). By identifying what techniques a suspect uses to justify his actions to himself and assuage his conscience, the investigator uses the same to get first small admissions, followed by a fuller confession (Napier and Adams 2002 p.13). The effect of sequential action is thus important here. In

part, this may often be because of a genuine misperception on the part of the suspect; for instance, misreading an innocent action as a provocation in the case of an assault, but whether that is the objective reality is another question – indeed, the ‘truth’ may always be an elusive and negotiable interpretation of events (Moston and Stephenson 2009 p.22). However, Inbau et al (2001 p.235) advise that caution must be taken that any minimisation of moral blame will not indicate any reduction in criminal culpability. Therefore, one of the most successful investigator techniques is to appeal to the suspect’s conscience although this may be more potent with introverts than extroverts (St. Yves and Deslauriers-Varin 2009 p.4). Once a confession is obtained, investigators should follow up on information received to provide corroboration of the confession and pay particular attention to where contradictions exist (Inbau et al. 2001, Buckley 2006, Napier and Adams 2002). The best corroboration is provided where admissions lead to the discovery of further incriminating evidence (Gudjonsson 2003 p.131).

Development of the PEACE Method

Irving and Hilgendorf first published research on police interview training in the UK and noted that (as in Ireland) such training was not formalised; instead, police received some advice and instruction on the law, but by and large skills developed through experience (Irving and Hilgendorf 1980). In the PACE Act, audiorecording was instigated from the very beginning. Using these recorded interviews, a 1992 study concluded that there was an absence of evidence for any police interviewing skills (Moston, Stephenson, and Williamson 1992, also see Baldwin 1993, Moston and Stephenson 2009). The study found that many officers used a limited range of questioning techniques and some appeared even more nervous than the suspects. At the first sign of any resistance from the suspect, many interviewers concluded the interview while others continued on in a repetitive, stereotyped questioning manner or resorted to simply making assertions.

Following the publicity around a number of high profile miscarriage of justice cases in England, in 1992 the ‘Steering Group on Investigative Interviewing’ was established with the participation of police, psychologists and lawyers. This approved for the first time a number of ‘Principles of Investigative Interviewing,’ which were circulated to police in Home Office circular 22/1992.⁶⁸¹ The resultant

approach was based on academic research that suggested that the majority of suspects are relatively compliant to questioning and will respond to police questioning, posing little difficulties to a competent interviewer (Baldwin 1993 p.332, Pearse and Gudjonsson 1997, Dixon 2010). Following HO circular 7/1993, two booklets on interviewing were produced and issued to all 127,000 operational police (Milne and Bull 1999, Bull and Milne 2004). The establishment of a one-week national training programme on investigative interviewing augmented these. As a result, the PEACE model was introduced and, beginning in 1994, every operational police officer in England and Wales was trained in the method. The resultant questioning technique has spread to other jurisdictions, including common law ones such as New Zealand and Australia and even civil law jurisdictions (Fahsing and Rachlew 2009, Dixon 2010, Clarke, Milne, and Bull 2011). The Norwegian KREATIV technique is based on the model (Fahsing and Rachlew 2009 p.42, Bull and Milne 2004 p.181). There are even some indications of the development of similar methods in the US (Frank, Yarbrough, and Ekman 2006). The PEACE method is designed around its mnemonic: planning and preparation, explanation, account, closure, and evaluation (Shepherd 2010, Walsh and Bull 2010, Walsh and Milne 2008, Fahsing and Rachlew 2009, Oxburgh, Walsh, and Milne 2011). There was a need later identified to add ‘challenge and clarify’ to the account stage (Walsh and Bull 2010 p.306, Milne and Griffiths 2006). Police officers are encouraged through training to dispel biases and seek an account rather than guilt (Milne and Griffiths 2006 p.174, Oxburgh, Walsh, and Milne 2011). PEACE is currently taught through a five-tier interview-training programme (Milne and Griffiths 2006, Williamson 2006c, Centrex 2004).⁶⁸²

Table 2: PEACE Tier training structure:

Tier 1 Foundation or recruit
Tier 2 Volume crime investigator
Tier 3 Serious crime investigator
Tier 4 Interview supervisor
Tier 5 Interview adviser/consultant

Foundation training is of two weeks duration; tier two lasts one week while tier three is three weeks (Schollum 2005 p.98). The twin pillars of psychological

foundation to PEACE are the cognitive interview (CI) (Fisher and Geiselman 1992, Fisher, Geiselman, and Raymond 1987b) and conversation management (CM) (Shepherd 1988, 2010). The CI was originally developed as an interviewing technique for cooperative witnesses. Fisher and Geiselman had discovered that many police were interviewing witnesses not for the information they had but for their own ends, that is, report filling. They therefore developed the CI to surmount problems occurring with police witness interviews by focusing on improving communication and improving memory recall with the minimum of interference (Fisher, Geiselman, and Raymond 1987a, Fisher, Geiselman, and Raymond 1987b, Geiselman and Fisher 2014). The CI was later enhanced to incorporate better social facilitation, resulting in the enhanced cognitive interview (ECI) (Fisher and Geiselman 1992, Shepherd 2010, Dando and Milne 2009, Kebbell, Milne, and Wagstaff 1999). This focused on efforts to maximise rapport and shared understandings between interviewer and interviewee at the introduction stage and throughout. As a result, the CI process is built on three key pillars: knowledge representation/memory retrieval processes, social dynamics and communication skills within a structured, phased model, which compounds the effectiveness of the process as it progresses (Holliday et al. 2009 p.138, Dando and Milne 2009). Consequently, the important elements of the CI are: “(a) developing rapport with the witness, (b) asking open-ended questions primarily, (c) asking neutral questions and avoiding leading or suggestive questions and (d) funneling the interview, beginning with broader questions and narrowing down to more specific questions” (Fisher 2010 p.26, Dando, Wilcock, and Milne 2008). The CI differs from standard police interviews in the use of a ‘report everything’ instruction, transference of control to the interviewee, guided imagery questioning, witness compatible questions and reverse order recall to probe memory for detail (Fisher, Geiselman, and Raymond 1987b, Fisher and Geiselman 1992, Fisher 2010, Milne and Bull 2003, 1999, Shepherd 2010, Holliday et al. 2009). The ten key components of the resultant PEACE CI are: explain the aims of the interview, rapport, report everything, never guess, uninterrupted free-recall, encourage concentration, recall in a variety of orders, change perspective, mental reinstatement of context and witness compatible questioning (Dando, Wilcock, and Milne 2008 p.60).

Table 3: The CI interview structure.⁶⁸³

<p>1. Introduction</p>	<p>Rapport</p>	<p>‘Small talk’ to personalise interview Minimise distractions Explain investigative needs for complete information Need to concentrate hard Take active role Reduce anxiety Encourage questions about process</p>
<p>2. Memory enhancement</p>	<p>Context reinstatement</p>	<p>Mentally recreating the scene, if practical revisit. Emotional, cognitive and external factors Use of multi-sensory encoding including experiences of smell and sound Report everything – all detail important Ok if ‘don’t know’ – discourage guessing</p>
	<p>Repeat retrieval attempts</p>	<p>Momentum principle – stay with topic Keep going back Concentrate hard Focus on detail</p>
	<p>Reverse order recall</p>	<p>Inviting to begin at end and work backwards through narrative</p>
	<p>Adopting different perspective</p>	<p>Place at different vantage point and imagine what seen Auditory/visual questions</p>
	<p>Mnemonic techniques</p>	<p>Memory jogging Familiar face Resemblance to other person Activate images Temporal or spatial properties-express nonverbally Use sketch or maps</p>

3. Allow account	No interruption	Concentrate on disclosure Allow pauses Note for later any issues or questions
4. Productive questioning	Appropriate questions	Open questions: Tell, explain, describe No leading or suggestive questioning Interviewee-compatible questions Probing questions: more intrusive and require more specific answers; who, what, why, where, when (the 5WH's), and how Investigatively important questions
5. Closure		Thank witness Leave open interview mindset/contact details Official requirements Explain future Polite, positive, prospective

The first contact between people is vital to rapport. The first contact is visual and if followed by a warm welcome encourages rapport (St. Yves 2006 p.87). Requesting interviewees not to guess but to be certain before answering produces greater consistency and accuracy in statements (Fisher, Brewer, and Mitchell 2009 p.129). Although the entire technique can be time consuming, it is not necessary that all components be used every time rather it should be regarded as an available “toolbox of techniques” (Fisher 2010 p.31, Dando and Milne 2009, Dando, Wilcock, and Milne 2008, Schollum 2005). Context reinstatement can account for some 80 per cent of additional detail retrieved (Shepherd 2010 p.25), with open-ended questions achieving a high prediction of accuracy in statements (Fisher, Brewer, and Mitchell 2009 p.129). Meta analyses of available CI studies demonstrate that there is an increase of information of between 20 and 50 per cent, with comparable or slightly increased accuracy over controls (for meta-analysis see Kohnken et al. 1999, Memon, Meissner, and Fraser 2010, see also Milne and Bull 2002, Dando and Milne 2009, Dando, Wilcock, and Milne 2008, Holliday et al. 2009, Westera and Kebbell 2014).

Conversation Management

The CI element requires the active cooperation of the interviewee but is suitable for cooperative suspects. For more uncooperative interviewees, the conversation management technique is the preferred element (Shepherd 2010). For either witnesses or suspects who are uncooperative, the CM technique is more suitable as it puts the interviewer in control after the first free account is given. The interviewer then decides the sections of interview and how the interview develops. The CM is closely modeled on the approach of other professionals, such as counselors and psychotherapists, to difficult conversations. CM does not use the cognitive memory prompts of CI and is accordingly more suited to resistant suspects. The CM technique requires the interviewer to set out the ground rules as well as the investigative purposes of the interview from the beginning. The working relationship is fostered by an awareness of potential barriers to disclosure, realistic expectations about memory abilities and an explanation to ensure shared understanding and rapport. The interviewer should display relationship-building behaviours as well as genuine regard and respect for rights whatever the allegation is. Reciprocity, critical to all human social relationships, can be manifested through the RESPONSE technique (Shepherd 2010 p.18). The RESPONSE technique of CM is compatible with the CI as it also promotes rapport. RESPONSE is designed to show mindfulness of the other person and his or her sense of esteem and self-respect.

Table 4: RESPONSE technique:⁶⁸⁴

Respect	Good manners, warmth, sincerity, attentive, Use SOFTENS	SOFTENS: Signs – smile, facial expression O pen posture – arms uncrossed F orward lean T ouch – shaking hands only E yecontact – not staring N ods – supportive non-verbal signs S upportive sounds and noises
Empathy	Viewing from others	Knowledge of individual Use SOFTENS

	perspective	Provide explanations
Supportiveness	Help, sustain, encourage, reassure	Creating space and opportunity to talk Supportive remarks Beware excessive reinforcing or approving Use of non-verbal tools; enactment or drawing
Positiveness	Facilitator but in control Give guidance	Politeness Provide route map and expectations to overcome guessing game Provide ground rules
Openness	Frankness, sincerity, trustworthy	Have adequate case knowledge or admit lack
Non-judgmental stance	Avoid preconceptions	Remain objective
Straightforward talk	Limited attention spans	Short utterances Pausing Limit information per sentence Simple words/phrases Single questions Avoid police 'speak' Check comprehension
Equals talking 'across' to each other	Difference in relative power	Allow person take talking turn Freedom to ask explanation or make a request

The use of 'SOFTENS' behaviours combined with effective summarising and reflection enables active listening (Shepherd 2010 p.146). Active listening is essential to the investigator. Active listening is directed at detecting clues to what is going on inside the mind of the other person. In CM, attention to detail is imperative throughout with the necessary time made available for the gathering of quality evidence, which requires patience and persistence.

For countering inappropriate or disruptive behaviour from the interviewee, CM uses the DEAL technique.

Table 5: Deal technique:⁶⁸⁵

D	Description	Describe the behaviour
E	Explanation	Explain the actual or potential effects of the behaviour
A	Action required	Spell out action required to correct the behaviour
L	Likely consequences	Spell out what will happen if the requested action does not occur

As well as handling uncooperative interviewees, Shepherd (2010 ch.6) has further developed the conversation management technique to facilitate the recording and gathering of information, particularly information of high relevance to the investigation. For this purpose, he believes that some form of note taking in suspect interview rooms is essential. These can facilitate further interviews or follow-up investigation as well as identifying anomalies that may otherwise be missed. Shepherd emphasises that observing is an adjunct skill of active listening. This observing is particularly important in noticing the visible and audible cues of emotional arousal through the primary stress response. To assist in monitoring any arousal, or emotional leakage, a baseline of verbal and non-verbal behaviours from a distance and first contact should be noted. Any later departures from this baseline may indicate a “hot spot” or behaviour that requires further investigation (Shepherd 2010 p.149, also Cooper, Herve, and Yuille 2009).

6.4 Discussion of Interviewing Models

The research that has been conducted on untrained police interviews with suspects has produced discouraging results. Baldwin (1993) discovered that the untrained police interviewers were poorly prepared, approached the interviews with a guilt assumptive mindset, used repetitive and oppressive questioning, interrupted frequently and generally were ineffective in establishing the facts. Similar results were obtained in the United States (Fisher, Geiselman, and Raymond 1987a, Leo 1992, Leo et al. 1996). Baldwin did note, however, that in the UK, interviewers had few solid ground rules from the law on which to base practice and, at that time,

questionable practices such as deceiving the suspect or swearing at them still existed. Evaluations of interview outcomes were also difficult as a satisfactory outcome for police may be viewed differently from a defence or psychologist's viewpoint.

REID

The greatest danger from the standpoint of human rights is the danger of an innocent person making a false confession. In this regard, the Reid method has been the subject of strong criticism for its propensity and ability to induce false confessions (Gudjonsson 2003, Gudjonsson and Pearse 2011, Kassin, Appleby, and Perillo 2010, Kassin et al. 2010, Kassin, Goldstein, and Savitsky 2003b, Kassin and Gudjonsson 2004, Kassin et al. 2007). The pre-interrogation interview (BAI) has particularly been criticised as a platform for bias and error (Kassin 2006 p.209, Meissner and Kassin 2002, Kassin, Appleby, and Perillo 2010). As this interview is often based on a detective's 'gut instinct,' it can lead an investigator in an interview to simply try to confirm his or her own preconceived intuition (Dixon 2010, Hill, Memon, and McGeorge 2008, Kassin, Appleby, and Perillo 2010, Porter et al. 2007). The use of such instinctive decision-making has been studied in cognitive psychology as *heuristics*. Heuristics are the brains shortcut method of solving evolutionary recurring problems and decisions reflexively. Unfortunately, especially in the modern environment, heuristics may sacrifice in accuracy what they gain in speed. This is referred to as system one, which is in contrast to system two: a slow, effortful, consciously-monitored and deliberately-controlled process (Kahneman 2003a, Tversky and Kahneman 1981, Stanovich 2011). System one is automatic and inaccessible to consciousness (Hertwig 2006, Lieberman 2007); therefore, while system two is capable of monitoring – and should monitor – system one, it frequently merely provides post-hoc justifications (Haidt 2008 p.69, 2001, Gazzaniga 2008).⁶⁸⁶ Nevertheless, regardless of education or intelligence, all normal functioning persons are good at system one processes (Haidt and Baer 2006, Kanazawa 2008).

Biases that can result include a confirmation bias where, following the formation of an initial belief or expectation, a person searches for and interprets any further information in a way that confirms the original belief and preserves it (Nisbett and

Ross 1980, Kassin 2006, Kassin et al. 2010, Kassin, Goldstein, and Savitsky 2003b, Tobena, Marks, and Dar 1999, Ross and Anderson 1982 (2008), Stanovich and West 2000, Hill, Memon, and McGeorge 2008, Sleen 2009, Lord, Ross, and Lepper 1979). As a result, initial impressions can often have a lasting effect, transforming a subjective reality into an objective one by creating behavioural support for beliefs, generating a self-fulfilling prophecy (St. Yves 2006 p.89, Kassin 2006, Lerner and Tetlock 2003). Confirmation bias or tunnel vision is an enduring feature of cop culture, with premature inflexible case theories a significant cause of miscarriages of justice (Leo 2008 p.265, Williamson 2006c, Kassin, Meissner, and Norwick 2005, Meissner and Kassin 2002, Perillo and Kassin 2011, Cooper, Herve, and Yuille 2009).

Inbau et al (2001 p.78), nevertheless, insist that successful investigators should possess great inner confidence in their ability to detect deception. Unfortunately, while exposure to the Reid training and techniques does not increase lie detection abilities, it does significantly increase confidence levels (Kassin 2008, Kassin et al. 2007, Kassin 2006, Kassin, Appleby, and Perillo 2010, Hertwig 2006). Non-verbal indicators to detect deceit taught by the Reid method – which include claiming that a liar will look away rather than maintain eye contact and that liars are less helpful – are, according to academic literature, actually the reverse (Vrij, Mann, and Fisher 2006, Kassin 2006, Bond and DePaulo 2006, DePaulo et al. 2003). Furthermore, some people, such as introverts and socially anxious people, can often make a dishonest impression on others, particularly in stressful situations (Vrij 2008a p.177). In what Meissner and Kassin (2002) refer to as ‘investigator bias,’ having received training along with prior experience may actually lead to a perceptual bias towards deceit. In fact, police are no better than untrained members of the public at detecting deception (Meissner and Kassin 2002, Kassin 2008), but can often be highly confident in their skill, aggravating any existing bias (Vrij 2008a p.184). It is worth noting, however, that many studies often involve low stake scenarios in laboratory situations. There is some evidence that in real-life high stake situations, police do perform better than chance (for discussion see O'Sullivan et al. 2009, Vrij 2008a).

Once the investigator has concluded that the suspect is a liar, the next step is to bring the suspect in for interrogation. The interrogators begin convinced of the guilt of the suspect and begin the process of convincing the suspect to confess. In Ireland, Gardaí are entitled to persist in their questioning of a suspect.⁶⁸⁷ However, in the US since *Miranda v Arizona*,⁶⁸⁸ American police cannot question a suspect unless he consents through a knowing, intelligent and voluntary waiver to his right to silence⁶⁸⁹ and/or his right to counsel (Myers 2010).⁶⁹⁰ Furthermore, if during interrogation the suspect invokes right to counsel, the interrogation must cease until counsel is present.⁶⁹¹ Kassin and Gudjonsson (2004) critically summarise an interrogation as: first stage – custody and isolation of the suspect, detained in a small room and left to experience the anxiety, insecurity and uncertainty associated with police interrogation. The second stage is confrontation, in which the suspect is directly accused and informed of all the evidence that implicates him or her; denials are not acceptable. This is the ‘direct positive confrontation’ stage (Gudjonsson 2003 p.13, Leo 1996 p.279). Next is minimisation; as the friendly interrogator offers the suspect themes, face-saving excuses or justifications for the crime and implies more lenient consequences should the suspect provide a confession. Alternatively, more accusations and maximisation of the potential seriousness of the offence are put to the suspect. The process is one designed to maximise the strength of evidence or seriousness of the charge, or alternatively to minimise the seriousness of the charge or consequences. The implicit threat of harm is carried in the maximisation, while minimisation implies a promise of leniency (Kassin 2008 p.1313, Ofshe and Leo 1997, Kassin 2006, Kassin, Goldstein, and Savitsky 2003b). Leo contends that maximisation or negative incentives can “break down the suspect’s resistance, reverse his denials, lower his self-confidence; and induce feelings of resignation, distress, despair, fear and powerlessness” (Leo 2008 p.134). When the suspect has been broken down, positive incentives are then offered to motivate him or her to see the act of complying and admitting to some version of the offence as his or her best available exit strategy and option, given his or her limited range of choices and their likely outcomes. Interrogators will often suggest emotions and motives for the suspect to adopt such that after making a confession a suspect may experience a sense of emotional relief (Gudjonsson 2003 p.126). The net effect of the isolation, confrontation and sympathetic minimisation is to trap a suspect; with a confession

the only means of escape, even in an innocent suspect (Kassin 2006, Kassin, Goldstein, and Savitsky 2003b, Perillo and Kassin 2011). Persons prone to anxiety can particularly suffer from this internal pressure to confess (Gudjonsson 2003 p.155). Leo asserts that if the suspect's initial admissions do not match the interrogators vision of the crime, the detectives will remain adversarial and combative and will repeat many of the negative and positive incentives introduced in the pre-admission stage. Furthermore, there remains a possibility that through their questioning and badgering, police inadvertently reveal nonpublic facts about the case that the suspect can incorporate eventually into a narrative (Leo 1992, 2008, Kassin 2006, Garrett 2010). Particularly dangerous in this regard is the showing of crime scene photographs (Napier and Adams 2002 p.12). Inbau et al (2001 p.xii) oppose the use of, or threats of, force or promises of leniency but approve of using psychological tactics involving trickery and deceit. Police in the United States can use deceit by exaggerating evidence or fabricating its existence completely (Brooks 2001, Inbau et al. 2001, Kassin 2008), which serves to apparently strengthen the police case, while reducing the usefulness of denial. It can be a high-risk strategy as, if the suspect is innocent, it contributes to force an admission, while if the deceit is suspected any credibility the interviewer has is also destroyed. Some individuals are particularly vulnerable to these types of manipulation, especially the young, or those experiencing cognitive disorders or intellectual disabilities (Kassin 2006, Kassin, Appleby, and Perillo 2010, Kassin et al. 2010, Kassin, Goldstein, and Savitsky 2003b, Gudjonsson 2003, 2006, Gudjonsson and Pearse 2011, Napier and Adams 2002, Gudjonsson and Young 2011). In the US, more than one in five of those convicted in criminal cases but later exonerated by DNA evidence had made a full confession to the crime (Dixon 2010 p.433). Therefore, while critics of the Reid training programme assert that there is no empirical or scientific basis to its claims of effectiveness (Gudjonsson 2003 p.20, Borum, Gelles, and Kleinman 2009, Gudjonsson and Pearse 2011, Oxburgh, Walsh, and Milne 2011, Snook et al. 2010), there is no doubt that it has been implicated in inducing persons who were innocent of the crime to eventually make full confessions. Admitting responsibility in such cases can often result in severe penalties (Kassin et al. 2010 p.5, Kassin 2006, Kassin, Appleby, and Perillo 2010, Leo et al. 1996, Gudjonsson 2012, 2003, Ofshe

and Leo 1997), thus inferring that the Reid method is very effective in achieving persuasion.

The seminal work on persuasion is that of Cialdini. The key to persuasion or manipulation, Cialdini asserts, is to manipulate without appearing to do so, so that victims of persuasion regard it as a natural process (Cialdini and Goldstein 2004 p.592, Cialdini 2007). Cialdini writes that there is an inclination to accept the word of someone in authority, especially someone classed as an expert in the area and that, frequently the argument used is ignored but the status of the expert is used instead to believe what is said. One human factor that assists the manipulator is a feature of perception, what is referred to as 'the contrast principle,' where one item is compared to another: so if, for example, a shop offers its most expensive item first, any other items appear cheap (Cialdini 2007 p.9) (also anchoring heuristic see Kahneman 2002, Kahneman 2003a, Tversky and Kahneman 1982 (2008)). Therefore, in interrogation using the Reid maximisation technique, followed by the minimisation of the offence through alternative motives, the suspect is inclined to view the alternative motives in a much more positive light than if the motives had been presented in a stand-alone version. Cialdini writes that the good cop/bad cop technique is a powerful example of the potency of combination of the peculiarities of human nature – the fear the technique engenders in the threats of the bad cop; the invoking of the perpetual contrast principle; (as the good cop is especially nice) and the pressure of the reciprocity rule (as the good cop is constantly intervening on behalf of the suspect) (Cialdini 2007 p.140). Cialdini (2007 p.13) emphasises the importance of reciprocation in human societies; the rule of reciprocation is that we should repay in some way what another person has given us. When we like the person to whom we owe that favour, we are even more likely to want to comply. Even an unwanted favour, once received, can produce indebtedness. This reciprocity rule can be manipulated to force a person to agree to a concession, in what Cialdini refers to as the 'rejection then retreat rule,' whereby an extreme first request is turned down, but this is followed immediately by a smaller but real request that is accepted (Cialdini 2007 p.28). Although there is a danger in this tactic – if the initial request is too extreme as to appear unreasonable then it may backfire. However, Cialdini notes, a little appreciated by-product of this type of concession is that it

engenders feelings of greater responsibility for and satisfaction with the arrangement. This is as a result of that feature of the human psyche, which is the desire to behave consistently with any choices that we make (Milgram's 1974 *sequential action*). This pressure to behave consistently, writes Cialdini, causes us to respond in ways that justify our earlier decisions. This, he argues, is because most people prefer to avoid the labour of thinking hard, and consistency can function as a shield against thought as well as any unpalatable consequences of our actions. Therefore the offering of motives such as self-defence or provocation to a murder suspect plays to this consistency of the suspect as a honourable man and one he may be willing to maintain, thereby permitting the reframing of choices into personally congruent factors to be acceptable.⁶⁹² While people are more averse to losing something they already have than gaining something they do not have (see also Kahneman and Tversky 1979, Kern and Chugh 2009), such 'foot-in-the-door' tactics are regularly used in a more benign way by charitable organisations who also use progressively escalating commitments to induce favours, with even agreeing to be interviewed the first small step on a 'momentum of compliance' (Cialdini 2007 2007 p.55, see also Waller 2007).

Ofshe and Leo argue that the detectives in an interrogation room can become so zealously committed to a preconceived idea of the suspect's guilt that they mistakenly extract an erroneous and false confession (Ofshe and Leo 1997 p.193, Leo 2008). Specifically, the detective believes that the suspect subjected to interrogation is always guilty, he or she will lie about his or her guilt and the detective must use whatever means and tricks he can legally get away with to obtain not just a confession, but an orchestrated narrative that will guarantee a conviction. Leo thus argues that the third-degree era taught police departments that the easiest and most expedient way to investigate a case was to coerce a confession from a suspect at the very beginning of an investigation. This had the effect of making police investigators lazy and in turn hampered the development of their broader investigative skills, while it encouraged the habit of leaning on the full confession to clear their crowded case dockets. Leo asserts that this over-reliance on confessions, learned during the earlier era, continues to remain a hallmark of American police interrogation today.

However, US police officers also identify rapport with a suspect as an essential element in obtaining admissions from a suspect (Leo et al. 1996 p.381, Kassin et al. 2007). Rapport is evidently important as one study reported that 81 per cent of suspects waived their Miranda rights (Kassin et al. 2007 p.383, Leo 1996 p.276 claims 78%). Brooks (2001 p.41) notes that in the US the key to a successful interrogation is when “an adversarial relationship is turned into a symbiotic one.”

PEACE

While not as commercial as REID, it is a business with a lot of books sold on its success (Dixon 2010 p.430). Dixon further suggests that its success is sometimes exaggerated and some studies have found little differences between trained and untrained interviewers (see Clarke and Milne 2001, Clarke, Milne, and Bull 2011). Furthermore, many studies on the effectiveness of the CI are taken from laboratory experiments with students without significant time delay or an emotionally engaging scenario (Griffiths and Milne 2010 p.80). Clarke and Milne, in their 2001 study, raised serious concerns over the continued lack of effectiveness of interview skills, with basic communication skills remaining poor and a lack of proper planning before the interview. Rapport-building was particularly poor, a situation which has not improved (Vanderhallen, Vervaeke, and Holmberg 2011). However, it can often be difficult to establish rapport in the interview room with the relatively short time frame of most suspect interviews (Dixon 2009). Initially objections were raised by solicitors about the validity of rapport forming questions such as those about family, welfare and interests, with advice contained in a 1995 solicitors guide suggesting intervention if such questioning was attempted, but further editions omitted the objection (Schollum 2005 p.48). Clarke and Milne concluded that up to ten per cent of studied police interviews were rated as possibly in breach of PACE guidelines. They concluded that the weeklong training course adequately covered the legal requirements of interviewing as regards avoiding coercion, but failed to significantly improve interviewing skills. Nevertheless, police interviewing overall had improved and become more ethical, if even by osmosis to untrained officers resulting in an absence of coercive and oppressive tactics in police interviewing (Clarke, Milne, and Bull 2011, Clarke and Milne 2001, Gudjonsson 2003, Walsh and Bull 2010). Similarly, Milne and Griffiths (2006 p.187) concluded that training had been

effective at reducing the use of oppressive techniques but that it had been less successful at teaching how to probe and obtain accounts and evaluating the account given. The three-week training course made available for serious cases was more successful, but the skills taught are time sensitive and tend to deteriorate quickly unless regular refresher courses are attended (Milne and Griffiths 2006 p.176, Walsh and Bull 2010, Clarke, Milne, and Bull 2011, Smith, Powell, and Lum 2009).

The extended time required to properly interview witnesses is considered a major drawback of the CI, especially in volume crime (Dando, Wilcock, and Milne 2008 p.61, Dando and Milne 2009). It also requires committed cooperation from interviewees and some are unlikely to consent to closing their eyes to assist in the visualisation and imagery memory jogging processes. One author described the ideal CI interview as being similar to a pre-hypnosis session (Niehaus 1998 p.121). One possible inhibition for interviewees is that many witnesses expect the police to be knowledgeable about the crime and to control the interview, and subsequently find it difficult to accept control. Importantly, the PEACE interview is very effective in decreasing suggestibility in vulnerable persons (Milne and Bull 2003, Gudjonsson 2003). For some vulnerable interviewees – for instance, the intellectually disabled – open-ended questions are particularly important as these interviewees are prone to answer ‘yes’ to questions, irrespective of content, as a result of the negative effects of social demand factors (Holliday et al. 2009, Zimbardo 2007, Bull 2010). An authoritarian questioning style can also produce more inaccurate information with this group, as the witness may be reluctant to contradict (Bull 2010 p.13). But vulnerable witnesses may find the cognitive probing aspects of the CI particularly difficult (Holliday et al. 2009). However, as it is cognitively demanding, recalling an event in reverse order offers an important additional advantage as it increases cognitive load, and, as lying is also a cognitively demanding task, any increase in cognitive load may debilitate liars and be apparent; as verbal signs such as increased pauses, and/or physically by reduced blinking and hand movements (Vrij et al. 2008, Vrij, Mann, and Fisher 2006, Vrij 2008b, DePaulo et al. 2003, Hartwig et al. 2006, Frank, Yarbrough, and Ekman 2006, De Paulo and Morris 2004). The CI is also physically and psychologically demanding on the interviewer, for as well as actively listening, the interviewer has to formulate questions and maintain these in memory

(Fisher and Geiselman 1992). As a result, many CI traits are rarely fully or properly utilised except for the ‘report everything’ and memory recontextual elements. Particularly in volume crimes, memory enhancement techniques are absent (Griffiths and Milne 2010, Dando, Wilcock, and Milne 2008, Clarke and Milne 2001, Kebbell, Milne, and Wagstaff 1999). Police cite work and time pressures as the reason, as well as managers imposing pressure to complete interviews quickly (Dando, Wilcock, and Milne 2008 p.65, Jansson 2005 p.42). This is of particular concern, as the Association of Chief Police Officers in the UK reports that convictions for volume crime (robbery, assault, thefts) has fallen by half over the previous 20 years and poor quality interviewing is directly implicated in failing to gather available evidence (NPIA 2009 p.9, 2004 also see Janssen 2005).⁶⁹³ Uniform police conduct the vast majority of investigations for volume crime in the UK and are generally the least experienced and “least equipped” to undertake such investigations (Dando, Wilcock, and Milne 2008 p.61). As a result, witness interviews are of a much lower standard than suspect interviews with important information often disregarded (Clarke and Milne 2001 p.53). Unfortunately, even in the UK, the focus on witness interview training still lags far behind suspect interview training (Clarke and Milne 2001, Dando, Wilcock, and Milne 2008).

As it is not guilt-presumptive, the PEACE model is believed to be less likely to produce false confessions although no definitive evidence either way is available. Confession rates (full confessions and/or partial admissions) in England have been given as between 55 per cent (Moston, Stephenson, and Williamson 1992) and low sixties (Softley 1980, Irving and Hilgendorf 1980, Baldwin 1993). Studies vary considerably, often utilising different criteria (for discussion see Gudjonsson 2003 p.137). It appears, however, that confession rates remained on par following the introduction of PEACE (Gudjonsson and Pearse 2011). In relation to suspects, Walsh and Bull (2010) noted the absence of studies that have investigated the effectiveness of PEACE interviewing in investigation outcomes. To address this they analysed welfare benefit fraud interviews and concluded that PEACE techniques can in fact lead to better results. It should be noted, however, that the authors themselves admit that welfare fraud is a soft underbelly of crime and that even though prosecutions can occur, a range of other less severe sanctions is also

possible (Walsh and Bull 2010 p.308). Nevertheless, they failed to note that good evidence is normally available in such cases and, more importantly, suspects in such cases who avail of 'no comment' responses would see an automatic loss of welfare entitlements.

Initial criticism of PEACE focused on its inability to respond to and challenge those subjects who provide a false account to police (Morris 2008 ch.15). PEACE may even have been overly successful in removing any element of confrontation from the interview room. Pearse and Gudjonsson (1997) had noted in their study of interviewing at two London police stations as far back as 1996 that many police were reluctant to challenge suspects accounts, whether they had evidence to refute the accounts or not. Only a fifth of suspects faced a challenge (Pearse and Gudjonsson 1997 p.69). Suspects who denied the allegations were not even challenged in almost 40 per cent of cases. One 2006 study of PEACE training by the New Zealand Police found that, while police trainees were generally confident about conducting witness interviews using the cognitive interview structure, they found using and comprehending the CM techniques for uncooperative witnesses more difficult (Schollum 2006 cited in Heydon 2012). Lord Laming (2003 at 14.78) suggested that police officers require a healthy skepticism together with an open mind to perform their duty; he concluded that the unquestioning acceptance of information is an unacceptable trait in a police officer. It appears interviewers continue to lack the necessary confidence to "ethically and effectively challenge a suspect's account" and it remains an obstacle to establishing the truth (Shaw 2012 p.57). Hawkins (2012) notes that police can be overly reticent to challenge with some even so polite as to thank suspects for their honesty (even when they have evidence they are lying) thereby making themselves vulnerable to being called as defence witnesses at trial.

The strongest criticism of PEACE, however, is its inability to respond to those subjects who are resistant to interrogation (Dixon 2010). However, little research has been conducted on interview resistant suspects (Beune, Giebels, and Sanders 2009). Generally, there is little research available in all the high stake criminal areas such as murder, sexual offences or terrorism (Oxburgh, Walsh, and Milne 2011).

Shepherd's (2010) CM advice when confronting an uncooperative and silent suspect amounts to little more than an exhortation to maintain a professional attitude and continue asking questions. Moreover, there has been little field-testing of CM and that which has been done has not demonstrated any great effectiveness (Griffiths and Milne 2010 p.82). In one earlier study of crime interviewing, Pearse and Gudjonsson (1997) found that many PEACE police interviewers used a limited number of tactics to induce suspects to confess, with a more recent study suggesting the continued absence of any new techniques (Gudjonsson and Pearse 2011). Serious cases lacking alternative evidence, such as forensics or eyewitness evidence, are especially difficult interviews. These may frequently arise in terrorist cases where the need to protect life⁶⁹⁴ may often lead to a premature arrest – that is, one based on intelligence but where insufficient prosecution evidence has been gathered (Pearse 2009 p.77). Pearse notes that lack of evidence often has a deleterious effect on the ability of interviewers to engage meaningfully with suspects, leading to sterile interviews met by 'no comment' answers often following advice by "resolute legal advisors" (*ibid*). This creates a negative frame of mind in the interviewers that serves to create an enduring self-fulfilling prophecy resulting in interviews that "can best be described as polite, non-threatening and often non-productive" (Pearse 2009 p.81, 2015). However, Pearse's (2009) study also revealed that even in such serious cases where accounts have been given, interviewers inability to challenge effectively remained an issue; with over half (52.5%) of interviews resulting in no serious challenge to any account given, there were no intrusive questions and what evidence existed was often presented in an automated manner with little variation. In other words, interviewers made no serious effort to engage the range of psychological techniques that are available in the literature, even in the most serious cases, preferring, it seems, to keep the encounter friendly and non-confrontational.

6.5 Conclusion

This chapter examined in some detail two very different models of interrogation: the Reid method relying on persuasion but suitable for silent suspects; and the PEACE method, which involves building rapport and information gathering, but is challenged by silent suspects. The Reid model is one that begins with a dangerous assumption and seeks to convince the suspect of the merits of making admissions. As a result, this model is often associated with incidences of false confessions,

where innocent persons are unable to withstand the psychological manipulation employed and confess to bring it to an end. Lazy policing, combined with cognitive biases, where corroboration of the confession is never sought can compound this.

Nevertheless, the common thread of police work is that most crime that is solved is solved relatively quickly and unremarkably (Mawby 1979, Haggerty and Ericson 1997). The majority of those arrested for questioning, where the offences are relatively minor, choose to answer police questions, with most interviews being productive, unremarkable and lacking confrontation. The issues with interview effectiveness become more pronounced with more serious crimes and criminals. Complex, serious and premeditated crimes require an investigative skillset that most police never acquire.

Good police interviewers should be able to build rapport with an interviewee and be excellent communicators who listen well but who can also detect deceit and challenge it. Pearse (2009 p.86) suggests that the absence of any challenges or confrontation may result not just from the PEACE police training but also from its underlying philosophy or ethos. Perhaps, this demonstrates that police are not inherently anxious to convict at any cost but take their cue from the situational environment and ethos of the police organisation, and that training 'how to' is more effective than proscriptive court judgments in securing a suspect's rights. Whether this has now created an interview system that is now so ineffective in serious crimes as to be virtually useless is the subject of the next chapter, which also examines how Ireland can learn and adapt from the English experience.

7: Irish Interviewing Developments since 2014

7.1 Introduction

This penultimate chapter begins by examining the model of interrogation recently introduced by An Garda Síochána (AGS). The model is an adapted PEACE model as recommended by the Morris Tribunal with adaptations and alterations that have met with approval from international experts in investigative interviewing. These have attempted to rectify some of the shortcomings of the PEACE model. It is intended that all operational Gardaí will receive training in some aspects of this model.

The chapter further seeks to examine relevant literature to identify other skills that will enhance interview skills to possibly develop the model further, especially in the difficult area of interviewing subjects who are uncooperative or are interview resistant. In some criminal investigations, especially in serious crime, both witnesses and suspects may be reluctant to cooperate, with some suspects utilising counter-interrogation tactics (CITs) that they have been taught or adapted over years of interaction with the criminal justice system. Literature from areas such as therapeutic interviewing and hostage negotiating has been examined to identify pertinent interviewing skills that may enhance the ability of investigative interviewers to obtain information from even initially uncooperative subjects. Many of the most useful skills involve interpersonal skills, which would also benefit police officers in most routine public interactions. Maximising the strategic use of available evidence is also considered, especially in combination with the adverse inference provisions.⁶⁹⁵

Nevertheless, even with the utilisation of such techniques, a suspect may continue to remain uncooperative. This situation may, on occasion, involve a conflict between the right of the suspect to remain silent and potential life-threatening consequences for other people. Commonly referred to as the ‘ticking bomb’ dilemma, this is sometimes used as justification for physical torture.⁶⁹⁶ This chapter concludes by examining situations where ethical and moral duties to protect life deviate from an obligation to gather evidence to prosecute criminals before a court. By utilising real

case studies, the chapter seeks to examine the difficult decisions – though rare – that sometimes have to be made by investigative interviewers, potentially having to choose between obtaining information and preserving the integrity of the prosecution case.

7.2 PEACE in Ireland: the G.S.I.M.

The Morris Tribunal examined and criticised Garda suspect interviews in the remit of its report, adversely commenting on, *inter alia*, the use of foul abusive language. As a consequence, it recommended the implementation of the PEACE interview model subject to any necessary adaptations to improve its effectiveness in challenging suspects' accounts (Morris 2008 p1231-32). The Tribunal stressed that the full implementation of any interview model, to include an ongoing assessment of training, would require the commitment of trained manpower and resources (*ibid* p.1226). In May 2007, shortly before the Tribunal prepared its sixth report, it was handed a prospective 'Manual of Guidance for Investigative Interviewing' that would be made available to Garda criminal interviewers. The Tribunal commented that international experience suggested that a manual, of itself, is inadequate as an engine to deliver the necessary far-reaching changes (*ibid* p.1239). Nevertheless, the Tribunal was happy to see the production of such a manual, which once finalised, would be distributed throughout the force. In the event, it would be April 2014 before such finalised manuals for different interviewer levels and an accompanying policy document were made available to the force.

These manuals introduced the Garda Síochána Interview Model (GSIM) to the force. The model is based almost entirely on the PEACE method but takes cognisance of the law in Ireland including the conclusion that an interrogation is not to be a "genteel encounter"⁶⁹⁷ and therefore interviewers may treat different interviewees differently,⁶⁹⁸ in assertively challenging any discrepancies in accounts given. International experts have praised the GSIM as a timely improvement on the original PEACE model (Gudjonsson and Pearse 2011). However, the only current published account of the GSIM available is one by a former Garda trainer, Geraldine Noone.

Key Elements of GSIM

The GSIM consists of three key elements: the generic phases, the interview subject-specific approach and a competency framework for interviewers.

Generic Phases

The components in these six phases are taken almost directly from the PEACE model:

1. Planning and preparation

Any interview conducted as part of an investigation should add value to the investigation with preserving and strengthening the existing evidence a key objective in any investigative interview (Noone 2015 p.110). The identifying of all objectives in an interview will help to inform the strategic interview plan used as well as providing a measure by which to judge the success of the interview. This phase should also be used to tailor the interview to any particular individual characteristics of the interviewee. Moreover, attention should focus on factors that may inhibit confessions or cooperation – for instance, the circumstances of the arrest. On occasions, where an early morning ‘hard’ arrest is conducted, the consequence may be heightened physiological and psychological arousal in the interviewee, hindering efforts to establish rapport. The investigators also need to have awareness of other external factors such as work and family situations. The GSIM emphasises that success should not be measured by confessions obtained and that the pressure to obtain confessions can be counterproductive. An “interviewee’s decision-making is driven by their perception of what is happening” and any attempts at manipulation or unfair practices may thus irrevocably distort the interviewee’s perception of the process (Noone 2015 p.111).

2. First contact between the interviewer(s) and interviewee

This phase is when introductions are made and an explanation of the matter under investigation, what the interviewee’s role is, the time frame involved and the ground rules are all outlined. As well as striving to remove uncertainty from the process for the interviewee, it further serves to obtain a baseline of the interviewee: in abilities, level of understanding and attitude.

3. Rapport

While this a distinct phase, care should also be taken to ensure that rapport is nurtured throughout the interview. Its purpose is multifunctional – it encourages compliance, reduces resistance and obtains an insight into characteristics of the interviewee as well as abilities and possible motives. The identifying and reflecting back of the emotional needs of the interviewee can save time and possible conflict. More importantly, it facilitates the eliciting of an account in response to the allegation. “Rapport building is about creating a non-judgmental, non-coercive atmosphere conducive to disclosure” in the interview (Noone 2015 p.112). It is characterised by empathy and active listening.

4. Account of knowledge

This phase designed to elicit an account in the interviewee’s own words and based on the free narrative or ‘report everything’ instruction. The interviewer’s purpose is to encourage and guide through this account by a combination of active listening, skilled questioning and adherence to the strategic interview plan.

5. Assess, corroborate and challenge

The purpose is to evaluate the account given by the interviewee, clarify any ambiguities arising and corroborate the account from existing evidence. If necessary, then discrepancies should be challenged. This applies as much to witnesses as suspects, as witnesses’ accounts can often be crucial at trial. Consequently, it is preferable that a witness is challenged on his or her account at the interview stage rather than at trial where a loss of credibility may have a detrimental effect on the whole trial. For example, an eyewitness may be assessed through the mnemonic ADVOKATE: A is for the amount of time the witness had the person under observation; D is for distance away; Visibility and any obstructions represent V and O; K stands for previously known or seen before; The next A stands for any particular reason to remember; T is for time elapsed and E is for errors or material discrepancies noted. It is important that any potential in the witness for bias or veracity be fully explored and any possible affecting disabilities of the witness need to be noted. Each topic should be comprehensively dealt with before moving on as topic skimming or allowing interruptions can result in a failure to notice that only superficial information is being provided.

Where challenges are considered necessary, the GSIM suggests that they be characterised by persistence and patience combined with active listening and a deep understanding of the file. The challenge should not be in cross-examination manner or in any manner designed to oppress, intimidate or humiliate. Rather, it should be in the manner of a problem solving exercise (Noone 2015 p.114).

6. Closure

This final generic phase serves both a legal and psychological function. It involves a review of the account given, with the possible need to revert to a mini-account. An explanation of what happens next should be provided as well as answering any questions from the interviewee. The objective is to leave the interviewee in a positive frame of mind and the door open for any future contact, especially if additional information later comes to mind.

Interview subject-specific considerations

The GSIM categorises interviewee types into four broad subject types: cooperative interview subject, uncooperative interview subject, interview-resistant subject and vulnerable subject.

The majority of witnesses are in the cooperative category, as witnesses cannot be compelled to make a statement.⁶⁹⁹ Nevertheless, the standard of witness statements can generally be of a much lower standard than suspect statements with incidences in some criminal cases of key witnesses having to be interviewed up to 11 times (Noone 2015 p.116, also Dando, Wilcock, and Milne 2008). But some witnesses may be reluctant and uncooperative for one reason or another as are many suspects. These subjects may engage with the interview process to some extent but display reticence in offering information.⁷⁰⁰ Some witnesses may attempt to avoid being interviewed altogether. When being interviewed, they may display evasiveness or refuse to answer certain questions. Others may be deceitful. The GSIM suggests that an understanding of the subject's motivation for his or her behaviour may overcome this reticence. A witness may fear recriminations, for example, or may be attempting to save face for bad behaviour or be protecting others. Therefore in such cases,

interviewers should retain control of the interview and work to the pre-planned strategy.

Interview resistant subjects are those who engage in counter-interrogation tactics (CITs). These vary from the self-tailored and pre-planned strategies of the career criminal to the detailed instructions and indoctrination of terrorists or those involved in organised crime (Noone 2015 p.117). Noone suggests that sometimes the preconceived assumptions of interviewers as regards silence on the part of a suspect can result in a self-fulfilling prophecy. Instead, she suggests, resistance may often be overcome with understanding and planning. The AGS model utilises rapport building, motivation and theme development to overcome resistance. Noone emphasises that GSIM theme development differs from the Reid method theme development in that the GSIM “is not about minimisation but rather is a conduit through which interviewers display an understanding of the interviewee’s perspective” (*ibid*). The interviewer needs a comprehensive awareness of the evidence as well as factors that may fuel resistance, along with skills that minimise and overcome further resistance.

Training, throughout, retains a particular focus on interviewees who may be particularly vulnerable because of age, physical or psychological issues to ensure that such subjects are treated fairly and the necessary accommodations are made in taking their statements.

Competency framework for interviewers

The GSIM utilises a similar tier-training programme as PEACE. Level one training is for all operational gardaí dealing with volume crime, the duration of which is eight hours. Level two is also for all operational gardaí, but especially relevant to more serious crimes such as burglary, sexual assaults and drug offences and training is of two days duration. This does not compare favourably with the training regimes in the UK where foundation training is of two weeks duration and tier two lasts one week (Schollum 2005 p.98). Level three is for pre-selected investigators, investigating serious and complex crime, and training lasts three weeks, spread over two separate modules. Level four training is one week long and for pre-selected and trained gardaí who will be advisers or consultants in complex crime interviews or

multiple subjects. Training in the approved levels one and two began in 2014 and is slowly being rolled out to undertake the task of upskilling an entire police force. Some level three training had begun the previous year. As the level three training is of three weeks duration and split over two modules, it involves a serious time commitment from operational Gardaí.

Gudjonsson (involved as an advisor to AGS) has praised the GSIM as a more dynamic model than PEACE in challenging uncooperative interviewees (Gudjonsson 2012 p.705). Furthermore, the GSIM has the “flexibility to adapt to the motivation and characteristics of interviewees rather than to their status as a witness, suspect, or victim” thus allowing a better approach than the more formulaic PEACE method (Gudjonsson and Pearse 2011 p.35). Noone does note the importance of management allowing investigators the time necessary to properly prepare for interviews and facilitate the workload management required for this. She further notes that the interview training is time sensitive and can dissipate within weeks to become redundant within six to eight weeks without adequate monitoring and feedback from (suitably-trained) supervisors (Noone 2015 p.120, also Vrij 2008a p.207, Milne and Griffiths 2006). Moreover, even immediately after training, research has found that many of the psychological techniques taught are used incompletely, if at all (Griffiths and Milne 2010 p.82). As noted by Noone, feedback from competent supervisors is essential to prevent newly acquired interviewing skills rapidly deteriorating (see also Schollum 2005 p.51). While detectives generally use interviewing skills more regularly than uniform police, which results in a higher performance with less mistakes made (Hawkins 2012 p.32, also Jansson 2005 p.42 on experience), the lack of ongoing monitoring and competent feedback could mean that any newly acquired skills quickly revert to old practices. Therefore, the pace and type of current training seems unlikely to achieve the critical mass required to see it properly implemented.

The Garda Inspectorate (2014 at 9.11) has found it necessary to recommend training for all operational Gardaí in appropriate interview techniques and in particular, to include training in the use of the adverse inference provisions, which were essential to counter their current and limited use (*ibid* at 9.36). Currently, level three interviewer training only includes a lesson of three hours duration on the adverse

inference provisions, including all practical lessons, discussion, case study and feedback. The effectiveness of these provisions can be demonstrated by pointing out that since the introduction of inferences in sections 34 to 37 of the CJPOA 1994, the numbers of suspects in the UK refusing to answer some or all questions has fallen from 23% to 16% and no comment interviews have decreased from 10% to 6% (Pearse 2009 p.73, Moston and Stephenson 2009 p.19, Phillips and Brown 1998 p.75). Nevertheless, Pearse (2009 p.82) has noted that even in counter-terrorism interviews insufficient use was made of adverse inference provisions, partly because of lack of evidence from premature arrests, but mainly as CT officers expressed “little faith in the probity of these valuable provisions.” Similarly, another author has also commented on what “appears to be an unhealthy general apathy concerning the use of the adverse inference provisions” amongst investigators in the UK (Shaw 2012 p.57). It would appear that the legacy of the right to remain silent paradigm has been unchanged simply by the introduction of these adverse inference provisions. It appears, therefore, that training is necessary to address the underlying theoretical basis as well as the practical application of these provisions.

7.3 Minimising Resistance

Rapport

The personal skillset of investigative interviewers is often taken for granted. Certainly, it is true that many of the relevant competent skills cannot be taught but must first exist in some innate form. Training then serves to focus and sharpen these skills. This section seeks to focus on building good interpersonal skills. Rapport, trust and cooperation are essential components of successful interviewing (Williamson 2006b p.28). Effective interviewers need to be interpersonally competent and good at rapport building but rapport is often an elusive concept to define, observe or measure (Alison et al. 2013 p.412). Moreover, while rapport is an essential skill, it is one rarely taught to police (St. Yves 2006 p.88, Gudjonsson and Pearse 2011, Porter and ten Brinke 2010). It also remains difficult to establish the necessary rapport in the short time frame of criminal justice interviews (Dixon 2009 p.97). First impressions at first contact are therefore critical in creating an environment in which to communicate and have a lasting effect. The most influential technique is establishing credibility immediately through a combination

of expertise, knowledge and goodwill (Wells 2015p.152). Consequently, a confident introduction outlining the purpose of interview as well as enquiring after the welfare of the interviewee is essential. Attention should also be paid to mirroring the profile of interviewer to interviewee in terms of gender, age, appearance and attitudes as closely as possible, as the greater the perceived similarity, the greater the influence (Roberts 2015 p.212).

Everyone utilises his or her own collection of knowledge, experiences and attached emotional values to establish his or her unique identity or identities. With these, an individual attempts to make sense of his or her world and his or her place within it (Roberts 2015). A person may have many different identities, not all of which are consistent with each other. These identities have certain behavioural scripts attached and a person is likely to behave in the manner consistent with whichever identity is most salient. Therefore, if an investigator can tailor his or her own behaviour to “make certain cooperative identities salient at the expense of other, more challenging identities” then he or she may be able to maximise compliance and minimise confrontation (Roberts 2015 p.212). For instance, an interview with a terrorism suspect who is also a father should focus on the father identity because as well as increasing cooperation, it may also expose to the interviewer doubts or uncertainties that that identity has about the terrorist identity. It is also important in such cases to minimise as much as possible the negative custodial elements of close security and invasive surveillance as both can heighten the salience of the combatant identity.

Listening

Listening is the first essential skill in rapport building. People often do not say exactly what they mean, as meaning has to be, often imperfectly, encoded into words. As a result, a listener has to then both accurately hear and decode the meaning in those words (Miller and Rollnick 2002 p.69, McMains and Mullins 2010 p.256). Active listening, then, is essential in relaying to the other person that their words are important and, in turn, that they themselves are being treated respectfully. It begins by looking interested, maintaining eye-contact, leaning forward and nodding or using encouraging words such as ‘yes’ ‘uh huh’ or ‘ok.’ Voice tone should be gentle and non-threatening. The interviewer should be comfortable with

silence. The skill is to listen to what is being said and avoid interrupting, disagreeing or evaluating (McMains and Mullins 2010). The next technique involves echoing back what the person has just said, either by paraphrasing or repeating some of his or her own critical words. This is a dangerous technique if overdone, and simply parroting back should be avoided. Done correctly, it demonstrates a concerned and interested listener. It also helps to find common meaning in words or terms used. Timely feedback is essential to avoid miscommunication and eliminate misunderstandings (McMains and Mullins 2010 p.247). Where the echo has a questioning intonation (voice raised at end), the echo is converted to a question requiring clarification (Wells 2015 p.154). At various stages, this technique is extended to summarising a relevant section of dialogue, and sometimes an effort to interpret what has been said can be made, for example – ‘I get the feeling’ or ‘it sounds from what you said that...’ Where emotions are displayed or an ‘energy’ word used, it is important to reflect back and label those emotions, for example, ‘you sound upset by that’ or ‘that must make you feel angry.’ Emotional labeling has been shown to reduce confrontation, but the technique relies on correctly recognising emotions and commenting on them in a non-judgmental manner (Wells 2015 p.156, McMains and Mullins 2010). The interviewee may correct minor errors in the interpretation offered but it helps opens the dialogue and demonstrates empathy on the part of the interviewer. A closely allied skill is reflection; skillful reflection is not simply an echo but should move a little past what the person has said, although it is useful to understate the emotion displayed (Miller and Rollnick 2002 p.72). Negative feedback is likely, on the other hand, to increase resistance (Bull 2014 p.168).

The use of open questioning is critical to active listening as it encourages a fuller response than closed or leading questions do, as these discourage dialogue. Closed questions can usually only be answered with a ‘yes’ or ‘no’ but they do have advantages, as they can put an interviewer in control of a situation, help to obtain specific facts quickly, are useful for testing understanding and summarising or allowing the interviewer to get agreement. Allowing pauses is another critical technique in interviewing. Pausing can be used to encourage someone to keep talking, as emphasis, or to de-escalate an emotional situation.

Motivational Interviewing

While there has been little research in investigative interviewing into countering CITs, in the therapeutic arena there has been more research into successful and effective interviewing skills. Alison et al (2013 p.412) have identified key parallels between therapeutic and investigative interviewing, as both should "seek to establish an empathetic, respectful and non-judgmental atmosphere." Denial is frequently the characteristic shared between these interviewees and criminal suspects. Motivational Interviewing (MI), developed by Miller and Rollnick, is an effective therapeutic technique that may have an application in developing rapport and reducing maladaptive behaviours in interview-resistant subjects. This technique is a form of intervention to change entrenched behaviour and strives to create an environment that is collaborative rather than confrontational.⁷⁰¹ It encourages the offender to define the negative elements of his or her own behaviour and to define more constructive ways forward. A large number of clinical trials as well as meta-analysis have demonstrated conclusively the effectiveness of the MI approach in therapeutic areas (McMurran 2009).

Principles of Motivational Interviewing

Express Empathy (adapted from Miller and Rollnick 2002): Empathy is about having the ability to understand the perspective of the interviewee, to appreciate his or her emotions and distress, and to communicate that directly or indirectly to the interviewee (also Oxburgh and Ost 2011 p.181, Frank, Yarbrough, and Ekman 2006, McMains and Mullins 2010). The first principle therefore is to understand the feelings and emotions that the interviewee is experiencing and to let the interviewee know that you know. The attitude is one of acceptance and a willingness to listen without judging or criticising. The aim is to understand the interviewee's perspectives as comprehensible, at least within his or her worldview or cognitive framework.

Develop Discrepancy: Draw out the inconsistencies in the different accounts the interviewee has given, or in the evidence available, or emotions expressed (also Frank, Yarbrough, and Ekman 2006 p.234). MI assumes that the interviewee will experience equivocation during the process where he or she will hold two opposite views at the same time, which can result in uncertainty, confusion and discomfort.

The interviewer's task is then to tip the motivational balance in favour of compliance. There are different types of ambivalence: choosing between two good things, choosing between two bad outcomes, or losing something while gaining something useful or keeping something valued while losing something needed. It is important to raise awareness of consequences, and to create and amplify any discrepancy between behaviour and broader values and goals – in effect, attempt to create cognitive dissonance in the subject. Help the subject present arguments for change. “When skillfully done, M.I. changes the persons perceptions [of discrepancy] without creating any sense of being pressured or coerced” (Miller and Rollnick 2002 p.39).

Avoid Arguments: Arguing is counterproductive and allowing someone to defend his or her behaviour or values encourages defensiveness. Other experts similarly have noted that using theoretical challenges to the beliefs of an interviewee is not only unlikely to ever be successful, but rather it is more likely to actually strengthen those beliefs (Roberts 2015, Ross and Anderson 1982 (2008), Lord, Ross, and Lepper 1979). Resistance is a signal to change strategies. High levels of anger or frustration can bring dissonance at the outset of the process. Listening carefully is vital as a misunderstanding can likewise bring dissonance. There are certain types of behaviour that function as roadblocks to a positive relationship (Miller and Rollnick list 12):

1. Ordering, directing or commanding.
2. Warning, cautioning or threatening.
3. Giving advice, making suggestions, or providing solutions.
4. Persuading with logic, arguing or lecturing.
5. Moralising or telling suspect what to do.
6. Disagreeing, fudging, criticising or blaming.
7. Agreeing, approving or praising.
8. Shaming, ridiculing or labeling.
9. Interpreting or analysing.
10. Reassuring, sympathizing or consoling.
11. Questioning or probing.

12. Withdrawing, distracting, humouring or changing the subject.

There are, of course, times when some of the above can and must be used in open questions to set the direction of the interview. Further examples of investigative roadblocks might be relying on experience or myths and a lack of critical thinking (Cooper, Herve, and Yuille 2009).

Roll with Resistance: There are four common types of resistant behaviour: arguing, interrupting, negating and ignoring. The energy of this resistance can be used to change perceptions and assumptions. New perceptions can be invited and the interviewee can be used as a resource to find solutions. Reluctance and ambivalence are rational and understandable. Resistance can be reframed to create a new momentum in changing perceptions. Invite subject to consider new information and offer a new perspective.

Support Self-Responsibility: Keep the interviewee responsible for choices and choosing. Turn questions or problems back on the interviewee. Help identify the range of options available. Support with and affirm positive statements.

Studies of effectiveness of Motivational Interviewing in investigations

As noted in the previous chapter, suspects are more likely to confess when they are treated humanely and with respect (Oxburgh and Ost 2011, Holmberg and Christianson 2002, Kebbell, Hurren, and Mazerolle 2006). Some research is now being conducted on the positive effects that rapport and respect can have on interview resistant criminal suspects. Utilising an adaptive rapport-based interrogation style where suspects are treated with respect, dignity and integrity is an effective approach for reducing use of counter-interrogation tactics by suspects with the use of MI techniques demonstrably shown to have a positive effect on interview yield, that is, the amount of information obtained (Alison et al. 2014 p.421). Research has identified five general CITs that are used by suspects, particularly terrorism suspects: passive (refusing to look at interviewers, remaining silent), passive verbal (monosyllabic responses, claiming lack of memory), verbal (discussing an unrelated topic, providing well-known information, providing a

scripted response), retraction of previous statements and the 'no comment' interview (Alison et al. 2014 p.421-2).

Alison et al examined the recordings of 181 real-life counterterrorism interviews. They found that interviewers who were interpersonally versatile and able to adapt to the different interaction styles of an interviewee were able to use motivational interview skills to reduce maladaptive behaviour. Generally, the interviewer should seek to be adaptively cooperative (social, warm and friendly) rather than its maladaptive variant (overfamiliar, obsequious and desperate) to encourage adaptive responses from the other party. Therefore, interviewers should avoid coercion. If a suspect is being sarcastic, punitive, attacking and unfriendly, then the interviewer should adopt an adaptive confrontation mode of being frank, forthright and critical to encourage adaptive suspect behaviour (Alison et al. 2014 p.423). MI skills had a direct effect on some CITs, appearing to reduce interviewee passive, verbal and 'no comment' responding and an indirect effect on passive and verbal CITs by increasing adaptive behaviour and reducing maladaptive behaviour (Alison et al. 2014 p.427). However, in many instances, it only reduced CITs by suspects who replaced them with still unhelpful responses in terms of interview yield. In other words, determined suspects merely altered their tactics to take advantage of the civil interactions. Paramilitaries in particular revealed the least information across all categories and showed themselves adept at deploying more varied CITs (Alison et al. 2013 p.423).

Nevertheless, skills to avoid the maladaptive behaviours that can reduce suspect cooperation from the beginning were found to be important. Interestingly, although trained interviewers, none of the interviewers in the study had any awareness of formal MI skills, and the skills they used were as the result of intuitive responding to challenging interviews. Moreover, none of the examined interviews showed any coercive behaviour. This raises the question of whether some interviewers are fundamentally suited to the interviewing task, whereas training for others can at most strive to eliminate maladaptive behaviours (see also Smets 2009 p.324).

The interview with a suspect should avoid confrontation, instead focusing on a problem-solving approach. The skills of motivational interviewing, particularly active listening encourage the development of rapport between interviewer and interviewee and facilitates the extending of empathy to the interviewee. This in turn enhances the influence of the interviewer and may accomplish behavioural change. These communication skills are beneficial in other areas of policing practice including negotiation and conflict resolution. Another important interview technique is utilising any available evidence to maximum effect for both cooperative and uncooperative interviewees.

Using Evidence

Research has concluded that the strength of available evidence is the single most important determinant in obtaining admissions (Moston, Stephenson, and Williamson 1992 p.34, Pearse 2015). In the US, Leo found that one of the most effective tactics used by police interviewers, in almost 85 per cent of cases, was to confront the suspect with existing evidence (Leo 1996 p.278). Furthermore, there is a strong correlation between strength of evidence and admission – when evidence was weak 77 per cent denied; when strong, 67 per cent made admissions (Williamson 2006b p.153, St. Yves and Deslauriers-Varin 2009 p.6, Milne and Griffiths 2006, Gudjonsson and Petursson 1991, Moston, Stephenson, and Williamson 1992 p.34). Therefore, the “decision over which information to disclose and what to withhold has become pivotal to a successful interview” (Milne and Griffiths 2006 p.173). Baldwin’s 1993 study found almost a third of suspects admitted culpability from the outset, partly as the evidence was all disclosed at the outset. However, such a tactic risks exposing the weakness of the police case from the beginning; consequently, presenting all the evidence at the beginning of the interview and asking for an account is not the best strategy. It is also a very confrontational approach that damages rapport.

The GSIM interview process also suggests that the strategic disclosure of evidence should be carefully planned at the planning stage as evidence is often disclosed prematurely. This may then simply require the suspect to provide an explanation reasonable in the circumstances or an alibi (Noone 2015 p.111). There is no rule in Irish law that a suspect must have the material that the Gardaí have based their

suspicion on or witness statements put to him or her, but it is desirable that a suspect be given an opportunity to proffer an explanation (Morris 2008 p.51).⁷⁰² It is good interviewing practice to keep a suspect uncertain of what evidence police have gathered (Vrij 2008a p.385). Withholding the evidence in the early stages of the interview can also safeguard against false confessions by helping to identify false accounts. Innocent explanations for a given piece of evidence should be explored and eliminated before revealing the evidence and challenging the interviewee. One study confirmed the effectiveness of this method in using evidence (Hartwig et al. 2006). This study, using students, interviewed suspects by taking a free account before then questioning them, using the available evidence but without revealing it. The account was then fully explored and probed before the evidence was revealed all at once and contradictions exposed. This is the Swedish Strategic Use of Evidence (SUE) technique and it further assists in establishing the veracity of the account, establishing truth/lie accuracy significantly greater than chance. Similarly, in the Netherlands, the emphasis is on getting a full statement of denial before introducing any evidence (Sleen 2009 p.38). However, the method places considerable cognitive load on interviewers who need to continue questioning while simultaneously developing all discrepancies with the information known to them (Dando and Bull 2011 p.192).

As a result, Bull (2014) has sought to improve the PEACE model by introducing an evidence based questioning method known as GRIMACE. This mnemonic stands for Gathering Reliable Information, Motivating an Account and then Challenging this Effectively. Bull emphasises that the successful interviewing of guilty suspects involves the minimum use of 'negative feedback' (repeated accusations of lying) as well as the careful revealing of evidence (Bull 2014 p.168). The GRIMACE technique employs a 'drip feed, gradual' approach to revealing information, in which revelation occurs throughout the questioning phase of an interview rather than at the very end (Dando and Bull 2011 p.191). Once the free account has first been given, questioning then incrementally introduces the evidence, either incriminating or not, in a tactical way. While both the SUE method and GRIMACE increase cognitive load in interviewees, Bull claims that GRIMACE is more effective (McDougall and Bull 2015 p.516). This places the deceptive interviewee in a tactically weak and difficult position, often exposing his deception (Dando and Bull

2011 p.192). Another author agrees that from a prosecutor's viewpoint, the best method of disclosing evidence is "drip-feeding information to see the effect it has" (Carter 2015 p.84, see also Sleen 2009). This information should further be used to determine what possible 'defences' the suspect might use. When the free account is finished, the interviewer should first confine himself or herself to questions based only on that account before moving on to other questions. Only at that stage should information be gradually introduced that has not yet been mentioned by the suspect. The interviewer should then challenge separately for each piece of information or evidence disclosed along with any contradictions and inconsistencies disclosed in the account. Asking questions "related to the evidence before confronting the suspect with the evidence affects the suspect's perception of proof," thereby increasing his or her internal pressure (Sleen 2009 p.46). The closure stage should carefully summarise and highlight all these contradictions or inconsistencies revealed. It may also be appropriate to consider using the adverse inference provisions following the introduction of each individual evidence exhibit to get an account where the suspect is interview-resistant and not engaging (see also Hawkins 2012 p.33). This tactic is an alternative to waiting until the end of the interview process and having one adverse inferences interview to put all exhibits or evidence. Normally, the section 19A alibi inference is ideally used at the conclusion of the interview process, unless full admissions are made. This is particularly important in 'no comment' interviews. However, both the section 18 and 19 adverse inference provisions in the 1984 Act could potentially be used tactically throughout the interview process after disclosing information or evidence, especially with uncooperative suspects where no account is forthcoming.

Both methods of evidence production require considerable efforts devoted to the planning stage to uncover as much information and evidence as possible. Such evidence potentially permits a situation such as Hawkins (2102 p.32) describes where "if you can't get a confession, then get demonstrable lies" and tie the suspect to a version of events you can disprove. Nevertheless, it is important to be aware that some apparently valuable evidence may be flawed and, in such circumstances, aggressive questioning may be counterproductive. For example, in recent DNA exonerations, more than 70 per cent of innocent suspects had been convicted on the basis of positive, but flawed, eyewitness misidentification.⁷⁰³

A good example of the effectiveness and synergy of all techniques utilised in unison is found in *DPP v Doyle*,⁷⁰⁴ concerning the gangland murder of a misidentified victim in Limerick. The suspect had initially refused to comment or anyway engage with his interviewers. In dismissing the subsequent appeal against conviction, it was noted that the interviewers:

“[P]urpose was undoubtedly to get him [the suspect] talking and once they had got him talking, to get him talking about Shane Geoghegan [the victim] and the crime in the hope that they would get information from him and they would also get details about other people who were involved and confirmation about other features of the circumstances.”⁷⁰⁵

Through an initial appeal to his humanity, to which the suspect responded and which the interviewers, who dealt with him in a courteous and professional manner, further developed the suspect eventually provided a full confession, corroborated with unknown facts. The trial judge commented that the available evidence had been gradually revealed throughout the interview to the suspect. This judgement makes clear that an investigative interview should be about more than simply posing formulaic questions in a routine manner.

Training

One New Zealand review has suggested that interview training should avoid trying to combine teaching the relevant criminal law at the same time as the process and psychology of interviewing (Schollum 2005 p.98). Whether sufficient additional training time to train for both elements separately could then be made available is another question. Ultimately, any training programme is only as good as its delivery methods and the interest from students along with its subsequent adoption leading to a change in practice. Training programmes need engagement from both the trainers and students while needing to appeal to actual police practices and meet the actual needs of interviewers (Smets 2012 p.72). A number of factors influence any subsequent adoption of new methods learned; these include the predisposition of the learner, support mechanisms and incentives in place and the characteristics of the environment that enable or hinder progress (Schollum 2005 p.99). The transfer of skills from the learning environment to the real-world application therefore requires

both practice and support (Cooper, Herve, and Yuille 2009 p.318). Furthermore, despite the use of training courses, most police practitioners still find “learning from field practice the most effective way to study police interviewing” (Smets 2009 p.312). Smets has accordingly developed a new programme for training Belgian police interviewers that focuses on an individual centred approach. Individual characteristics of each interviewer are enhanced to produce a learner-centred approach rather than a teacher-centred one (Smets 2012 p.73). This is developed as a peer expert providing guidance and feedback in the real-time work environment. Her study concluded that long-term personalised coaching had a clear long-term positive effect on interviewing quality (Smets 2012 p.79). This dovetails with the need “for active, knowledgeable and committed supervisors” (Schollum 2005 p.99), who can actively evaluate, encourage and advise interviewers to ensure that knowledge learned is used and used correctly. Without the direct involvement of supervisors to monitor standards any training system will ultimately be wasted, as was established by the Clark and Milne (2001) study that examined both suspect and witness interviews in the UK. These evaluations along with relevant videotapes from any evaluation process could help adapt and direct further training through a centralised process working towards a national standard.

In summary, this part has examined the new GSIM interview model, which is based on the PEACE model but with some modifications designed to overcome some of the weaknesses inherent in PEACE including the lack of challenges to deceptive accounts. Further possible enhancements, particularly in helping to overcome interview-resistant subjects, have been explored. This interview model is suitable for the vast majority of investigative interviews including suspect interviews under the detention provisions. It strives to get the maximum amount of information and minimise false confessions using techniques including open questioning, a funnel type questioning style and active listening. Many of these techniques are transferable skills not specific to interviewing, but an awareness of their interaction allows a focus and concentration of this interaction to deliver powerful results even in initially hostile subjects. Additional enhancements include the motivational interviewing skills from therapeutic interviewing to develop rapport and the development of a strategy for presenting available evidence during an interview. A training regime that offers a different delivery method for skills was discussed.

Ultimately, the quality of any interview model adopted is only as good as the interview practice in the real world environment. Unfortunately, building rapport and relationships takes time and will rarely be achieved quickly; it also relies on overcoming CITs. Both PEACE and GSIM implicitly require engagement from the suspect and, where this is not forthcoming, neither model can elude any information or evidence, other than through the adverse inference provisions. Suspects may remain interview-resistant throughout and not cooperate with the interview process. In such cases, is an alternative strategy available or necessary?

7.4 Continuing Challenges

Is a Chief Constable or any policeman the servant of none save of the law itself (Newburn and Reiner 2002 p.921)?⁷⁰⁶ It is indeed true that prosecution is often formally expressed as the only legitimate option available to the police and the primary function of the police is presented as evidence gatherers for the courts. However, police operate in a far broader domain than this. In reality, non-criminal justice outcomes are far more commonplace in certain areas of crime, particularly so in counterterrorism activity (Walker and McKay 2015 p.215). Indeed, police are obliged to act to save lives.⁷⁰⁷ While all police interviewing is subject to Irish and European legislation where suspects are entitled to certain rights and protections, in cases where a suspect's use of his right to silence can endanger another life and where police have a duty to protect life, what strategy do interviewers have? This part focuses on investigative interviewing where more information than a simple admission is required from a suspect. Three case studies are used to illustrate the potential dilemma occasionally facing interviewers. In each case the arrested person was in possession of vital information that could save the life of others. Under normal evidential rules, anything the suspect would say in such a situation to help the police would potentially be adverse to any defence used later in court, as it would be given in evidence. However, these situations may be described as examples of extraordinary excusing circumstances.⁷⁰⁸

Under such circumstances, the PEACE type interview model offers little assistance. The GSIM and PEACE models accept that some persons will avail of their right to silence and will not cooperate with interviewers. In the vast majority of such cases, unless there is sufficient alternative evidence available to convict, such interviews

are regarded as failures as nothing of evidential value is produced. This is a regular outcome as everyone enjoys the presumption of innocence and the Irish Constitution guarantees that those rights are respected. Nevertheless, the Irish Supreme Court when faced with the dilemma of vindicating one person's right at the expense of another sought to elaborate that rights exist within a hierarchy with some rights taking precedence over others. As in *DPP v Shaw*,⁷⁰⁹ where concern over two missing women led to the arrest and detention of the two suspects.

Shaw

On Sunday, September 26 1976, John Shaw and Geoffrey Evans were both arrested on suspicion of stealing a motorcar. In reality they were suspected of involvement in the disappearance of Mary Duffy and Elizabeth Plunkett during August and September who both had been abducted, and later raped and murdered. However, instead of being brought before a court at the earliest opportunity, which would have been 10.30 a.m. on Monday morning, both were questioned even though no formal detention legislation that permitted such questioning then existed. Admissions were made which also led to items of clothing being recovered. The admissions were later ruled admissible at trial. An appeal against the use made of the admissions was made to the Supreme Court where it was held that, in the extraordinary excusing circumstances that had existed, the police had acted justifiably. Griffin J., in delivering the majority opinion stated:

“In my opinion, where such a conflict arises, a choice must be made. It is the duty of the State to protect the more important right [Right to Life], even at the expense of another important, but less important, right.

...if a balance is to be struck between one person's right to personal liberty for some hours or even days and another person's right to protection against danger to his life, then in any civilised society, in my view, the latter right must prevail in circumstances such as those that confronted Superintendent Reynolds.”⁷¹⁰

In concurring with Griffins J., Kenny J. stated that "there is a hierarchy of constitutional rights and, when a conflict arises between them, that which ranks higher must prevail."⁷¹¹ The conviction against Shaw therefore stood even though he had not been legally detained when questioned.

Nevertheless, while it is apparent that the right to life of another person should take precedence over other rights, possibly even the right to legal advice or liberty in certain circumstances, this situation remains of limited use within the framework of the PEACE type interview model. Denying those rights to the suspect is unlikely to encourage any change in a ‘no comment’ interview. It does, however, suggest that an alternative strategy might be considered. Without a planned alternative strategy being prepared in advance of such a critical situation, investigators will often resort to one of two strategies – hopelessness or physical intimidation, as the next example from Germany demonstrates.

Gäfgen

In September 2002, Magnus Gäfgen kidnapped 11-year-old Jakob von Metzler but murdered him almost immediately by wrapping his mouth and nose in duct tape. Four days later, Gäfgen was arrested after he went to pick up the ransom, but after hours of interrogation he was still refusing to disclose where Jakob was being kept. Wolfgang Daschner, the deputy police chief of Frankfurt, unaware that Jakob was already dead, but fearing for Jakob's life and desperate to save him, ordered a subordinate to extract the necessary information from Gäfgen by threatening to torture him and, if necessary, to carry it out. The threat was exclusively aimed at rescuing Jakob rather than furthering the prosecution case.⁷¹² Fearing torture, Gäfgen disclosed the location of Jakob's body and led investigators to the scene. Daschner then immediately admitted his actions to a prosecutor. The resultant criminal case against Daschner split German public opinion with a great deal of support for his actions (Bernstein 2003). He and his subordinate received suspended fines on conviction, while Gäfgen was subsequently jailed for life.⁷¹³ Evidence from the crime scene, the location that was disclosed by Gäfgen, was admitted at trial. Crucially however, Gäfgen also made admissions before the trial court.

Gäfgen took a case to the ECtHR on the basis of his coerced confession. The ECtHR concluded that such a threat was indeed a breach of Article 3 of the ECHR.⁷¹⁴ However, real evidence gathered from the disputed confessions, including Jakob's body and personal possessions, was considered justifiably admissible at the trial. The ECtHR distinguished the particular circumstances of the present case as Gäfgen had also confessed in court at his trial, and other corroborating evidence existed

other than that tainted by the breach of Article 3. Therefore, the ECtHR concluded that the use of such tainted real evidence at trial was fair under Article 6. The ECtHR stated that while Article 3 is absolute, Article 6 is not.⁷¹⁵ Similarly, Irish courts have never accepted the strict position that American courts have adopted under the ‘fruit of the poisonous tree’ doctrine.⁷¹⁶ It would appear, however, that if such a trial confession or alternative evidence did not exist, but the case was instead solely based on the real evidence obtained by threats, it might then have been excluded.⁷¹⁷

In terms of admissions, Gäfgen’s initial admissions under coercion as well as subsequent admissions to interrogators were ruled inadmissible.⁷¹⁸ Nevertheless, the ECtHR noted:

“The procedural irregularity caused by the use of a prohibited method of investigation could only have been remedied if the applicant had been informed before his subsequent questioning that his earlier statements made as a consequence of the threat of pain could not be used as evidence against him.”⁷¹⁹

The ECtHR further commented that the punishment that the police officers received did not reflect the seriousness of the breach committed.⁷²⁰ Therefore, it would appear that under a ‘ticking bomb’ scenario, not only will any confession obtained through threats be excluded but also any evidence that is recovered as a result may likewise be inadmissible. Furthermore, those responsible will also be subject to criminal sanction and could see their careers over, no matter how well-intentioned the reasons behind the threat. Nevertheless, it appears that the ECtHR could permit two different questioning strategies; once a clear demarcation is established before an evidence gathering strategy is employed.

The decision to act outside the law and potentially undermine any criminal prosecution is a serious one. Therefore, an alternative to threats of physical violence in interrogation to potentially save lives needs to be considered. It is also worth noting that while the threat of torture is effective in some cases, actually proceeding to torture is often counterproductive. Aside, that is, from any legal, ethical or moral considerations. One CIA manual suggests that while the fear generated by threats is effective, many subjects discover their personal strength when pain begins. Subjects,

especially those who are highly motivated, can actually find their resistance strengthened. It noted that often “direct physical brutality creates only resentment, hostility and further defiance” (Kubark 1963 (2012) p.91). In a sad demonstration of this fact and the absence of institutional memory, the Senate Committee Report on Torture (2014 p.83-95) notes that in 2003, one person, Khalid Shaykh Muhammad, had been, amongst other things, waterboarded on 189 separate occasions, but was still able to retain secret information.

‘Ticking bomb’

A clear example of a stressful investigative interview occurred in London in 2005. Following an attack on July 7 2005, 52 people died as a result of suicide bombings on public transport. On July 21, another group attempted to replicate this attack. Four out of five bombs placed were detonated but all failed to explode properly. Jean Charles da Silva e de Menezes was wrongly shot the following day as a suspect. Yassin Hassan Omar, the first of this group of bombers, was arrested on July 27 2005, when an expectation existed that the group would try again. Under current English legal provisions, there exists the concept of urgent interviews also known as public safety interviews. These provide that a senior officer, on reasonable grounds, may suspend the entitlement of a consultation with a solicitor.⁷²¹ Omar was later convicted, along with the others group members – using denials of involvement given during these interviews. At trial the accused had claimed in defence that the devices were all an elaborate hoax.⁷²² An appeal was lodged before the ECtHR, as public safety interviews appeared to contradict the ECtHR’s stance in cases such as *Salduz v Turkey*. In its decision, the ECtHR upheld the public safety interviews in the circumstances as existed and with the appropriate safeguards and guidelines in place in its judgment of December 16 2014.⁷²³ It was further appealed to the Grand Chamber, which delivered its judgment in September 2016, holding that no violation of Article 6 had occurred in respect of the applicants who had been denied solicitors advice.⁷²⁴

An Irish legislative provision provides for the questioning of a suspect without waiting for a solicitor in certain urgent circumstances, but has not as yet been implemented.⁷²⁵ However, this provision appears to mean not delaying an interview for the arrival of the solicitor as opposed to excluding him or her. Of more interest is

the opinion of Clarke J. in his judgment in 2014, who when considering the importance of legal advice for the suspect, noted that there could be exemptions that would be “wholly exceptional” and “involving a pressing and compelling need to protect other major constitutional rights such as the right to life” where a solicitor could be excluded from the interview room.⁷²⁶ But no law or guidelines currently exist or are envisaged in the near future that would be comparable to the UK provisions and comply with EU Directive 2013/48.

But the presence or absence of a solicitor is irrelevant if the interview strategy continues to follow the PEACE model. Pearse (2015) had full access to the audiotapes and transcripts of Omar’s interviews with no solicitor present. In these cases, even with the solicitor absent from the interview room, these interviews were neither confrontational nor effective. Pearse argues that as the PEACE training system has resulted in formulaic approaches to interviews, there is little or no challenging of accounts or suspects (Pearse 2015 p.46). As a result, Pearse claims that in the interviews, opportunities to obtain information from Omar were lost. From the transcript, Omar on a number of occasions clearly attempts to establish what the benefits of cooperation would be to him personally, but the interviewers failed to recognise the opportunities or exploit them. Pearse claims that experience from the Middle East demonstrates that failed suicide bombers will often enter dialogue and that in many jurisdictions it is perfectly acceptable to grant limited immunity by instructing the suspect to ‘tell us where the bomb is and we won’t use the answer against you’ (Pearse 2015 p.63). Pearse notes that under section 71 of the Serious Organised Crime and Police Act 2005, offers of immunity are permitted but are rarely, if ever, used. Furthermore, the Crown Prosecution Service has relevant guidelines in place since 1981 that allow the police to make a clear and unambiguous offer.⁷²⁷ Instead of such an offer, claims Pearse, the interview process in Omar’s case was merely “often a support mechanism for the officers and a stress-free episode for the detainee” instead of an opportunity to negotiate for information (Pearse 2015 p.60). Max Hill QC (2015) agrees that such negotiation is acceptable and suggests that the English Court of Criminal Appeal appeared to have accepted the possibility in the bombers appeal regarding the condition of the non-use of answers made by a suspect, which discloses vital life-saving information in an interview.⁷²⁸

An alternative strategy therefore that presents itself may be negotiation. Negotiation is a skill frequently used in policing – whether in hostage situations or everyday dealings with the public, police need to have good communication skills, as they frequently encounter persons in crisis situations. A crisis situation can be defined as a situation where a person faces an insurmountable obstacle through the utilisation of their customary methods of problem solving, thereby exceeding the person's ability to cope (Caplan (1961) cited in McMains and Mullins 2010 p.25). Negotiation has long been a part of Irish interviewing and indeed has been crucial in the recruitment of informants. It has been estimated that 84 per cent of police informers were in custody or had proceedings against them when recruited (Sanders and Young 2002 p.965). Where there exists sufficient and extraordinary circumstances in an interview room situation, the use of negotiation should be considered. In the interview room, negotiation risks becoming an inducement to a suspect to confess and may endanger the entire prosecution. Therefore, its use should be carefully considered, as any gain must outweigh such potential risks. This type of negotiation may only be considered in cases where the threat to the life of one person is so high as to seriously consider potentially sacrificing one aspect of the criminal prosecution. While such situations as these are rare, they illustrate the difficult and stressful decisions that must be made in some suspect interviewing.

Police are accustomed to regularly facing novel situations that do not have rules prescribing behaviour. But negotiation in an interview context differs from business negotiation. Business negotiation is about interchange between two independent people with mutual benefits and costs in the exchange where the goal is to minimise costs and maximise rewards. However, police negotiation differs from this rational model. There may be little good faith, it takes place in a highly stressful environment and saving face is a critical element (McMains and Mullins 2010 p.45). People need to maintain a favourable self-concept (see also Mazar, Amir, and Ariely 2008). It is important to adapt to the perspective of the suspect culturally, ethnically, educationally or motivationally (McMains and Mullins 2010 p.244). As discussed previously, the ability to persuade a suspect to disclose such vital information is enhanced by liking, authority, reciprocity, the need to be consistent, social validation and scarcity (Cialdini 2007, Cialdini and Goldstein 2004). The need to be consistent

with previous decisions means small agreements can be built on incrementally. Social validation is the need to conform to social norms or to respond to what others, particularly significant others, will think. The scarcity principle works because opportunities appear more valuable the less available they appear. Furthermore, people are more motivated by a potential loss than a gain and there is usually a strong emotional reaction to a thought of a loss (see also Kahneman and Tversky 1979, Wells 2015). Critically, where such a negotiating strategy is pursued, it should be clearly distinguished from normal questioning to minimise any contamination of the prosecution evidence.

There is some evidence that a Reid type strategy evolved in Ireland, possibly with some awareness of American procedures, but adapted to the Irish situation and aided by the sharing of experiences between investigators. Moreover, recent judgments in Irish Courts do appear to accept a more robust approach to questioning in serious criminal investigations. For example, in the case of *DPP v Bryan Ryan*,⁷²⁹ the trial judge commented: “it is clear from the video footage that the accused’s interrogation alternated between being vigorous and robust and being sympathetic and cajoling.”⁷³⁰ Such techniques clearly involve a combination of the reasons or themes of rationalisation, projection of blame, maximisation and minimisation. Obviously, interview subjects must be differentiated and it is a critical element in interview planning to identify vulnerable subjects and adapt the interview accordingly. However, the Reid method is more adaptable and elements of it are more suited to a negotiation strategy in such extraordinary circumstances where information, rather than admissions, is necessary and the suspect is initially uncooperative. Nevertheless, the building of rapport and respect remain critical elements to success.

In Ireland, a precedent of sort exists for the obtaining of information but with a restriction being placed on subsequent usage of such information. In dealing with criminal assets, section 9 of the Proceeds of Crime Act 1996 required, in certain circumstances, respondents to furnish affidavits outlining their property, income and sources of income. The Criminal Assets Bureau has given undertakings not to subsequently pass such information disclosed in such affidavits on to the DPP.⁷³¹ This de facto position has now been legislated for in section 11 of the Proceeds of Crime Act, 2005.

Real world situations can often pose difficulties for deontic reasoning where different rules are in conflict (Beller 2010 p.124). It has been claimed that police consider that what is not expressly forbidden by law is permissible (Cheney et al 1999 in Ainsworth 2005 p.168). However, rules can never conceivably cover every possible situation. In such cases ethics that are internalised, instead of being merely imposed as deontic regulations, will be more effective in regulating behaviour (Dixon 2006). Consequently, Dixon (2006) suggests that while police culture is frequently accused of being change resistant, better results will be achieved if, instead of prescribing the list of prohibited activities, interviewers are shown how to improve their practices. This is particularly so for those difficult and stressful life-threatening situations, which occur too infrequently to be a part of most investigators personal experience but which require decisive action.

This section has examined the rare occasions when police interviewing must do more than gather prosecution evidence for a trial court. As such, it adds an additional layer of complexity to any training course and increases the challenges from the training perspective. As can be seen from the fact that adverse inference training currently receives only three hours instruction, the current training course in the Garda College is already insufficiently long. The alternative training model from the Belgian police offers a possible solution, where additional skills can be taught onsite. However, as noted by the Morris Tribunal (2008 p.1226) it is essential that adequate resources be put into the proper training of interview skills. This should include regular evaluations to gauge the effectiveness of the training in real life situations and develop enhancements or modifications. In reality, the current financial situation in AGS is detrimental to such a programme. There remains current management and resource issues in AGS (O'Higgins 2016). Management are reluctant to even release manpower for training from operational duty where a critical shortage of manpower in all areas has resulted from the recruitment embargo. The result has been the disbanding of some specialised units because of manpower restrictions. In this reality, there will always be inducements to cut training to an absolute minimum to achieve just enough as necessary to allow another box to be ticked. The proper training regime requires buy in from managers, adequate resources in terms of time and trainers, as well as directed and focused

training programmes to be interesting and relevant to the operational users, who ultimately are those who put the material into practice.

7.5 Conclusion

This chapter has examined the new Garda interviewing model, based on the PEACE model but improved to develop flexibility and encourage more challenges of accounts given by interview subjects. The chapter has examined literature from other relevant disciplines to suggest further potential enhancements to this model, particularly important in countering interview-resistant subjects. Suspects may still, however, retain a right to silence and where this is used this type of interview strategy can be of little use. The GSIM model proposed is now being delivered throughout the country. Unfortunately, in a time of constrained resources and growing operational requirements, the model may not receive the necessary support to achieve all that it needs to. As the situation in United Kingdom makes clear, simply providing a training model is insufficient; no matter how well conceived. It is the change in interviewing practices that determine how well the model serves the criminal justice system and the police force itself.

The difficult interviews in stressful situations that can occur in real-world situations have been examined to discuss methods of breaching the silence of a suspect who may hold vital life-saving information. It demonstrates that threats of physical violence may be effective with some suspects but that they will, at the very least, end the careers of those investigators who deploy them. Moreover, some suspects may resist even the most violent physical force, thereby achieving nothing.

An alternative is suggested. The building of rapport with a suspect may permit an offer to the suspect, providing for the information necessary to protect or save lives to take place without damaging future defence prospects at trial. Currently, in Ireland, no such concept as public safety interviews or a legal provision to exclude legal advice for this purpose exists but previous case law suggests that where the circumstances are of such gravity as to warrant normally prohibited actions the courts will view and judge those actions from the standpoint of the investigators at the time, from the information then in their possession. Nevertheless, the creation of

the necessary legal framework, with the attendant training necessary, should be accomplished before the inevitable situation arises again in an Irish interview room.

8: Conclusion

This thesis has sought to increase the current store of knowledge available in understanding the role of police interrogation in the modern Irish criminal justice system. My belief is that, outside the relevant case law and legislative changes, the interrogation of suspects is little understood in Ireland. I believed that a deeper understanding of what is involved in police interrogation needed to be undertaken. To achieve this, the central research question was divided into two parts, with the first part asking about the legal architecture providing for police interrogation with the advent of the 1984 Act and the second part questioning how the police have responded to this new function. I have attempted to demonstrate that this function is a critical change in the Irish legal landscape, aligning it much more closely to the European inquisitorial model. Nonetheless, the seminal change to a quasi-judicial role by the police where questioning of a suspect in custody may serve to extend the trial process into the stationhouse, has passed relatively unnoticed in Ireland, most especially by the police themselves. One could assume that such a critical change resulted in a major training revision and preparation. Unfortunately, as I have demonstrated, that has not been the case. This thesis has sought to highlight the importance of both the questioning process and the need for corresponding training to ensure that the provisions are used fairly and effectively. I have sought to demonstrate that the fair questioning and the effective questioning of suspects need not be diametrically opposed to each other. I believe that the questioning of criminal suspects where the rules are clearly set out is a better model of criminal justice than one where subterfuge is accepted tradecraft. The structure I have used divides the thesis into two parts corresponding to the research question. This permits different methodologies and perspectives to be employed to deepen the understanding of the importance of this topic. It clearly divides the perspectives, the first part focusing on the suspect's perspective. The second part then adopts the perspective of a crime investigator and examines what skillset and knowledge of investigative interviewing is required in addition to the jurisprudence of the first part.

The first part of the research question sought to examine the legal architecture that has created the power of police to arrest suspects for the purpose of questioning them. The methodology principally used was doctrinal analysis but efforts were

made to utilise a sociolegal approach to contextualise this legal architecture. The provisions to arrest suspects for questioning overturned over two hundred years of accepted practice that the purpose of an arrest was solely to bring an accused swiftly before a court. The new framework created an alternative option that now permitted Gardaí to arrest a suspect to question him or her, simply because he or she was a suspect in a serious crime. The thesis examines the legislative changes that have created this framework. Following on from the introduction of the first detention provision in the 1984 Act, other provisions that target specific crimes have followed. These provisions are invariably focused on the more serious crimes and have extended the detention times out to a week in some cases. In introducing these provisions, cognisance was taken of the vulnerability of suspects in such detention. Consequently, safeguards were introduced to protect those in custody. Such safeguards included the establishment of the post of ‘member in charge,’ a set of Custody Regulations and strict rules on the treatment of prisoners. Questioning safeguards include audiovisual recording and access to legal advice. Legal advisors have lately been permitted to accompany clients into the interview room. The right to silence has been altered in some instances where adverse inferences may be drawn when the suspect refuses to provide an explanation. Generally, the right to silence continues to exist and a combination of old rules and new rules continue to protect the voluntariness of any admission or confession made.

Prior to 1984, if a crime suspect was approached by a Garda to be questioned about a crime, the suspect could refuse to talk to the Garda. The Garda then had one of two options – walk away if he or she played by the written rules or alternatively, take the suspect to the station to help with his or her enquiries. This was accepted practice but left a suspect unable to contact family or friends, unable to obtain legal advice, and with no guarantee of the duration of the custody or conditions therein. Unfortunately, this subversion of the idealised law was necessary and accepted by practitioners in order to have a functioning criminal justice system. Now, with a tight regulatory system in place, there is more congruity between the written law and its operation on the ground. The form and duration of detention is laid out and anyone being detained can know and generally access his or her rights. Questioning is recorded, solicitors can be present, durations are set and special attention is afforded children or other vulnerable suspects. It is no longer a twilight zone into

which suspects disappear. This work has highlighted many instances of abusive treatment in custody before regulations including the audiovisual recording were introduced. While these safeguards have not eliminated all issues, it has certainly raised expectations about the proper treatment of suspects. The new legal architecture has changed the focus onto the questioning of the suspect, thereby creating potential new evidence, which is scaffolded by a comprehensive legislative framework. An investigator must be fully conversant with these safeguards and must respect them as well as strive to ensure that any resultant admissions are freely given. This means that all investigators should be fully trained in the law surrounding questioning. The audiovisual recording provisions and the potential presence of a legal advisor also work to ensure that these safeguards are protected. However, in addition, the investigator needs an ethical skillset to provide the tools to ensure that the questioning is not just fair but is also effective in addressing the facts under investigation.

Therefore, the second part of the thesis sought to evaluate how well Irish police are trained to conduct their newly legitimised role. It sought to examine what training AGS has received to undertake this new investigative and quasi-judicial function to ensure it is both fair and effective. This part used a variety of methodologies including doctrinal examination of government reports and comparative analysis, which established that Irish police are not currently adequately trained for their roles as interrogators or interviewers. For police there is often a huge chasm between the reasonable suspicion necessary to arrest a suspect and the evidence subsequently required to prove the case at trial beyond a reasonable doubt. It has been established that the vast amount of arrests and subsequent questioning to gather evidence pose little difficulties. The major challenge in this area appears to be the reticence and unfamiliarity of many police officers with interviewing practice, often appearing very nervous. Most run-of-the-mill cases therefore progress through the system with little fanfare. It is in the high profile cases, particularly homicides and terrorist offences, that pressure to get results is visited upon investigators. This pressure can be either from public outcry or from local management, or a combination of both. Training can potentially assist in not only sharpening the inherent interviewing skills of investigators but can also encourage a certain level of resistance to such outside pressure. However, despite new expectations and investigative burdens being placed

on the shoulders of the police, little has changed in the way they are trained to deliver services. A new questioning technique has only recently been developed in AGS, building on the PEACE model developed in the United Kingdom. This PEACE model was developed by police, psychologists and lawyers to reduce or minimise incidences of false confessions, and has set the benchmark in international techniques. Unlike the American Reid model, the PEACE model does not strive to get confessions; rather it focuses on fact-finding and building rapport with the suspect. The Reid model uses persuasion to obtain a confession, increasing the risk of a false confession. PEACE type methods rely on the active cooperation of the suspect with the questioning process. PEACE utilises an open questioning style and rapport-building to obtain accounts based on the known facts. In the majority of investigations, suspects will cooperate and answer questions. Nonetheless, PEACE has been criticised for avoiding any challenging confrontation when false accounts are given.

While the Garda interview model, GSIM, enhanced the PEACE model to make it more realistic in confronting serious criminals, it retains the fundamental PEACE weakness of requiring active cooperation from the suspect. In more serious cases and with more serious criminals such cooperation may be absent. Nevertheless, this is the first time that any effort to train investigators for their questioning function has been undertaken in AGS. It represents an ethical and effective approach for the majority of interviews. No effective training programme for investigative interviewing existed until the recent development of GSIM in Ireland in 2014. Therefore, investigators had no technical training to perform this important function. As a result, there have been many examples of inappropriate interrogation behaviour that has damaged both police and criminal justice integrity. Nevertheless, alongside the development of such an interviewing model is the need for a realistic training programme to deliver the method to those who need it. Unfortunately, it appears that training programmes face an uphill struggle to train all current operational personnel in Ireland. While the training courses have been developed, they are not currently being delivered in any large scale way. Gardaí, as a result, even at this time of writing, are primarily questioning suspects and witnesses with no training. There needs to be an alignment between the underlying legislation, the appropriate questioning techniques and delivery of the necessary training. In conjunction with

the delivery of training, the outcomes will also need evaluation with possible refinement if necessary. A regulatory system also needs to be in place. Williamson (2006a p.355), for example, recommends three basic requirements for a regulatory regime over interrogation practices. First is the setting of standards and guidelines, followed by a process to monitor compliance. Finally, there should be a mechanism to enforce standards. Unfortunately, the common sense interviewing model, considered sufficiently functional to deliver appropriate and satisfactory outcomes has been demonstrated to be fundamentally flawed and overly optimistic in expectations.

The underlying criminal law is a major determinant in the success of any interview technique, with the PEACE style model imminently suitable for civil law countries or for common law countries that adopt elements of inquisitorial methods such as the adverse inference provisions. A PEACE style interview model will clearly contribute to minimising false confessions but it is ill equipped to deal with uncooperative suspects. Consequently, it can be inadequate to respond to the very criminals the detention provisions were created to deal with. There is evidence that its underlying ethos may have moved interviewers to strive to avoid any conflict in the interview room, moving to the other extreme from desperately seeking confessions at any cost. In most interviews this does not impact on the interview, as the suspect is cooperative. It is only in the more serious crime investigations that it has a drastic effect. However, interviewers receive no training for these types of interviews. The adverse inference provisions provide some hope of offering a successful strategy, but in Ireland they are currently underused and the provisions in the 1984 Act as amended are sufficiently weak to mean that any type of account is sufficient to fulfill the obligation to provide an account. The English provision of section 34 is applicable from arrest and is incorporated into the PACE caution, while inferences can also be drawn from the failure of the accused to give evidence at trial.⁷³² It appears in essence that that jurisdiction has concluded that once the appropriate safeguards are in place for the rights of an accused, ultimately the use of the shield of silence should no longer offer the same protection. Therefore, while the pre-trial process is now also tightly regulated, it is apparent that the interview and trial process are now a continuous process.⁷³³ In England, credit is also given to guilty pleas at the first reasonable opportunity.⁷³⁴ These different interpretations are

contributing to the divergence of the Irish and UK criminal law systems, which was emphasised by the contrasting opinions of *R v Howell*⁷³⁵ and *DPP v Finnerty*⁷³⁶ in this regard. In line with the jurisprudence of the ECtHR, it could be of benefit to the proper administration of justice in Ireland to strengthen the adverse inference provisions in the 1984 Act, by expressing a requirement for a full account that is not false or misleading.

In relation to police training, it would be important that it does more than deliver only technical knowledge. Interview training has existed in the UK since 1993, but deficiencies and issues remain. But generally, as noted by Dixon (2006 p.323), if the police are shown how to improve rather than told what not to do, the response has been more positive. Indeed, evidence of this can be seen in the reluctance of police to challenge using the PEACE method. Therefore, training for investigators should encompass not only the how-to of the trade, but also an underlying ethical awareness of the vulnerabilities of certain suspects, for instance, particularly those who have in similar circumstances confessed falsely. Conway (2013) suggests that human rights should provide the framework for how police perform their duties and not be seen as something that they do. It is only in this way that human rights values become embedded and not simply a language that is used to frame and justify actions that are taken. It is not possible to have sufficient rules to cover every conceivable situation and novel situations are a regular occurrence in policing. Therefore, it is this adherence to a fundamental set of underlying ethical principles that will serve a police force in a democracy better than the outlawing of forbidden practices that is always reactive. Police need to be trained in fundamental respect for individual dignity from the very beginning and it is this that should ground all decisions, actions and further training. This respect must be carried through all ranks and encouraged. I suggest that a deeper understanding of human rights other than as another formal set of rules is to understand the origin of European human rights. It is an understanding of the fallibility of human cognition that can lead to genocide and the holocaust. It is the appreciation of the universality of human nature and the threatening power of dogmatism. Such an understanding should be grounded in cognitive and social psychology. This grounding will also serve later in communications skills and conflict resolution as well as investigative interviewing. Using this knowledge, a set of guiding principles can be created upon which respect

for human rights as a principle is built. To assist in this, a recent report into English police training recommended a move away from their current foundation-training model, broadly similar to the Irish Walsh system. The Neyroud Report (2011) recommended greater partnerships with Higher Education institutions and greater engagement with scientific research to develop a professional body. It suggested that the recruitment of graduates from specially designed university courses would encourage a minimum standard. This would encourage and instill lean thinking along with a process of continuous improvement and personal responsibility for learning from the outset (*ibid* p.80-90). The need to have a very broad based knowledge approach to policing is vital. Added to this, I would suggest a focus on the selection of graduates who possess what Stanovich (2011) describes as an active open minded thinking disposition. The proper selection and training of candidates is the key to a fair and respected police force capable of providing the police service needed in a democracy.

Aside from general police training, interview training is particularly important to the detectives whose primary function is the investigation of crime. Even amongst detectives, some investigate more serious crime than their colleagues and therefore gather greater experience in dealing with serious crime and criminals. The training and role of detective should, therefore, be the subject of far greater attention than it currently receives. The lack of detective skills is one of the major challenges facing many police services, with not enough people trained sufficiently well to develop the necessary skills in questioning to do it effectively (Williamson 2006a p.353). Academic training in this area is particularly important, not just simply as an input into training but by taking academic courses. Training, once complete, should therefore equip some detectives to undertake the most complex interviews, including ‘ticking bomb’ interviews. Interview skills need to be practised regularly and to do so, interview teams, utilising such detectives, should be based at specialised custody centers where they are used to exclusively interview all detained suspects even those arrested by uniform police. The Belgian police training method for investigative interviewers that focuses on the individual characteristics of the interviewer and develops these through a personal coach or supervisor who provides guidance in real world situations could then be used effectively. This builds on individual skills and develops competencies in all areas (Smets 2012), but also allows enhanced learning

and feedback opportunities. It would also facilitate the regular external monitoring of interviews to ensure compliance, feedback and training.

This interviewing expertise could then be shared with a national centre to promote excellence in this and other policing areas. The lack of research or ongoing professional curiosity in Ireland compared to some other countries is compounding training problems. In the UK, the Police and Justice Act 2006 led to the creation of the National Police Improvement Agency (NPIA) which was later absorbed into the National Centre for Policing Excellence (NCPE). Many of the NPIA functions were transferred to the newly created College of Policing in 2012. The NPIA had itself replaced the Centrex agency in 2007. These, together with the Home Office Policing Standards Unit, Her Majesty's Inspectorate of Constabulary, the Audit Commission and the Association of Chief Police Officers, make recommendations to develop good practice, policy and training in policing (McGrory and Treacy 2012 p.118). The Home Office in the UK actively encourages and assists police and crime research. In Ireland, although the CSO now processes and disseminates crime data, it was unable to assist with such basic information as the average number of arrests made annually in Ireland. A large amount of valuable data and vital statistics exists in AGS. Custody records contain demographic information, access to solicitors, waiting times for legal advice and various outcomes. Audiovisual tapes contain information on commonly used strategies and failings, successful interviews and information on various personality interactions. All this information could inform legislative strategies at the highest levels.

The combination of both parts of the central research question permits some broader perspectives to be taken on the Irish criminal justice system. The reasoning behind the introduction of the detention provisions in the 1984 Act was the rise in organised criminal gangs and associated serious crime. Ultimately, in evaluating whether the provisions could be called a success, one needs to examine what effect they have had on preventing and detecting such crime. Such crimes have not been eliminated and therefore it can be inferred that the effect of detention provisions to question suspects in preventing crimes cannot be great. The effect on the detection of such crimes is harder to evaluate, as no research has been done to determine if or why such suspects speak during interview. Where training is not provided to ensure new

legislation is implemented then any subsequent failures of the objectives of the legislation cannot be surprising. For instance, failures to utilise the broad tactical advantages offered by the new adverse inference provisions have resulted from the failure to make the Gardaí aware of and familiar with such provisions. In response to continuing crime, politicians are under pressure by their electorate, with apparent failures of current laws resulting in further strengthening of legislation to stem the criminal tide as appears on the nightly news. It is difficult to escape the mediaization of crime. Unfortunately, as Williamson (2006c p.149) argues, too often the police are held to account for the inherent weaknesses in the criminal justice system. As this work demonstrates, changes in the criminal justice system often have unintended and little understood outcomes. Laws are introduced that are not followed up on or examined to see their effect. This work attempts to highlight some of the inconsistencies that have developed around the interrogation of those suspected of committing criminal offences under the common law criminal justice system in Ireland. Nevertheless, this work is a very narrowly-focused examination of just one area of police operation and should be considered in the broader context of an organisation that is committed to many simultaneous tasks, going through major structural changes – driven mainly by economic motives – and often misunderstood by its political masters. Police abuse is often not the product of “malevolence constantly bursting at seams of whatever rules” exist; rather it is based on the “pressure to achieve results” (Dixon 2006 p.332). If police can achieve what they need to within the law then that strain disappears (Reiner 2010). Unfortunately, the underlying conflict between what is expected of the police and how they can legally achieve it is too often a paradox, left to individual investigators to solve on a rainy Tuesday morning.

This work has taken a broad and interdisciplinary approach to examining an important facet of the Irish criminal justice system. It has examined the legal framework and changes permitting the questioning of crime suspects in police custody and the consequent safeguards put in place to protect those suspects. It exposes the fundamental confusion that has reigned for two centuries around the questioning of criminal suspects. The conflict in the criminal law between what was necessary versus what was desirable previously created a large grey area that resulted in a great deal of abuse and false confessions before the introduction of

strict regulations. However, while now protecting the rights of suspects, it is apparent that many police officers have become extremely reluctant to challenge suspects in any way. This creates an alternative problem for the criminal justice system, which is that many guilty suspects are escaping justice entirely. This thesis then examined the training and practice of those expected to perform these important and complex tasks in the criminal justice system and the effects of failing to provide such training. The results have invariably caused significant damage to the credibility of the criminal justice system. The thesis evaluated alternative training models available elsewhere to identify strengths and weaknesses in order to evaluate the new Garda model adopted. The new Garda model GSIM is adapted from the PEACE model but has sought to improve on the model to address the lack of challenge inherent in it. In so doing, it has improved on the benchmark of PEACE. The carry through to its widespread use is not yet evident, however. This thesis then identified possible enhancements in the GSIM that could further increase its effectiveness, especially in difficult interviews. The thesis has also identified potential changes to the type of training delivered and has examined how any training could be most effective in implementing changes in practice, which is the long-term objective of any training. Consequently, in conclusion, interrogation techniques have been unattended to in academic literature and indeed in Garda practice. These interrogation techniques need to become a much greater focus of attention as detention practices have altered in Ireland.

9: Government Reports, Cases and Legislation

9.1 Official Irish Government Reports

Conroy Report: Report of the Committee on the Remuneration and Conditions of Service of the Garda Síochána. 1970; Dublin.

O'Briain Report: Report of the Committee to Recommend Safeguards for Persons in Custody and for Members of the Garda Síochána. 1978; Dublin.

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12: Chapter Endnotes

Chapter One Introduction

¹ Section 7(1) of the *Gárda Síochána Act 2005*.

² Paraphrased. The full quote states “The JP was half magistrate, half policeman and in the latter capacity acted very like a detective of the present time, except he was not so scrupulous.”

³ 1 Anne, st. 2, ch.9.

⁴ Star Chamber was established in 1487 by Henry VII. It primarily operated as an appeal court or as remedy when other courts considered insufficient. It dealt with corruption, fraud, and the wrongdoing of officials. It operated under King’s privileges, not the common law having no jury or death sentence.

⁵ High Commission dealt with religious offences. It was reinvigorated under Archbishop Laud, a nominee of King Charles I. Gentlemen Puritans was frequently punished as a result of their beliefs and it contributed to tensions with a largely Puritan parliament. Both Courts were abolished in 1641 by parliament.

⁶ See Blackstone (1765) *Commentaries on the Laws of England*, vol. 1, pp. 217 - 219 for discussion of the formation, history and roles of these institutions. Blackstone comments that the fact that members of the Privy Council also served as members of Star Chamber did attract the jealousy of the common courts as they were able to and frequently did interfere in matters before the common courts. In Ireland Star Chamber existed as Castle Chamber. See G. Crawford, *A star chamber court in Ireland: the court of castle chamber, 1571-1641* (2005, Four Courts Press).

⁷ From the beginning, disputes between ecclesiastical and secular authorities over jurisdiction were frequent and secular authorities were anxious to limit the use by ecclesiastical authorities of ex officio oaths, especially where they interfered with secular authorities. See Morgan (1949) for discussion. The power to investigate heresy was granted to Church authorities in 1382 by Richard II in 1401 and 1414 by Henry IV. Henry VIII in 1533 restored the offence to common law procedures.

⁸ Blackstone was one contemporary who often criticised the reluctance of jurors to convict from perceived sympathy. Sympathy was strongly correlated to the offence; for example, 62 per cent of those convicted of property offences in the Surrey courts between 1660 and 1800 received a pardon (Beattie 1986 p.431) while highwaymen were rarely so fortunate.

⁹ The Criminal Evidence Act 1898 in England. In Ireland, the Criminal Justice (Evidence) Act 1924.

¹⁰ Eligibility for office meant value from land and tenancy should provide an income of not less than £20 annually up to 1745 (Lander 1989).

¹¹ 1 Ed. III, st.2, c.16 1327

¹² 7 Richard II, c.5, 1383.

¹³ 15 Richard II, c.2 1391.

¹⁴ 3 Hen. VII, c.3 1487.

¹⁵ The procedure as set out in 1&2 Philip & Mary, c.13 1554 and in 2&3 Philip & Mary, c.10, 1555 remained the procedure for the bailing and examination by JPs.

¹⁶ The granting of bail required the presence of two JPs or one if he was of the *Quorum*. The JP was prohibited from discharging anyone accused of felony as the matter had to be sent forward for trial.

¹⁷ For example, in *Prosecuting Crime in the Renaissance*, Langbein (1974 (2007)) examines surviving examinations taken from suspects before the Mayor and Aldermen of the town of Norwich who as such were commissioned as JPs (chapter 4).

¹⁸ The vast majority of almost 30,000 magistrates in England and Wales today are likewise lay-people, see *Delivering Justice*, 1987 Open University, Milton Keynes at p.103.

¹⁹ Lambard also wrote a manual for constables: *The Duties of Constables, Borsholders, Tythingmen, and such other low and lay ministers of the peace* in 1604.

²⁰ This last sentence is frequently cited from Blackstone (*Commentaries*, at p.296, 1st ed. 1769) and is used to support the right to silence, for example, in *R v Rothman* [1981] 1 S.C.R. 640 per Estey J. at p.653. Influentially, Glanville Williams (1955 p.35) also citing Blackstone used it to demonstrate the rule of court he described as “the accused’s right not to be questioned.”

²¹ Burns manual was last published in 1869 (Landau 1984). Blackstone (1765) in *Commentaries*, p. 345, recommends the study of Eirenarcha and Burns manual for the study of the duties and powers of JPs.

²² The Indictable Offences Act 11&12 Vict. c. 42 (1848), in Ireland known as the Indictable Offences (Ireland) Act 12&13 Vict. c. 69 (1849).

²³ Discussed in detail in chapter four under the Judges Rules.

²⁴ Established by the Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015 and operational from January 1, 2016. Its responsibilities include making high-ranking appointments, overseeing the policing plan, determining priorities and producing a code of ethics.

²⁵ Volume crime refers to crimes such as burglary, car crime, assaults and the misuse of drugs, which occur on a frequent and regular basis.

²⁶ *DPP v Fitzpatrick* [2012] IECCA 74 at para.22; see also *J. McD v P.L.* [2010] 2 IR 199 at 252-253.

²⁷ Section 2 and 4 European Convention on Human Rights Act 2003.

²⁸ Directive 2013/48/EU to be achieved by November 27, 2016.

²⁹ Section 12 and 16(1)(b) of the Criminal Evidence Act 1992 relates to children under 14yrs or persons with intellectual disabilities in relation to sexual or violent offences. Section 16 (1)(b)(ii) relates to children under 18yrs in relation to human trafficking.

³⁰ Section 117 of the Garda Síochána Act 2005.

³¹ Accessed on June 10 2016 at <http://www.garda.ie/Controller.aspx?Page=93&Lang=1>. Response rate to 2014 Staff Survey was 11.4 per cent, survey available at <http://www.garda.ie/Documents/User/AGS%20Survey%20High%20Level%20Report.pdf>

Chapter Two Arrest and Detention

³² For example, European cases such as *Saunders v United Kingdom* (1997) 23 EHRR 313 and Irish cases such as *Re NIB* [1999] 3 IR 145.

³³ Sections 18, 19 & 19A Criminal Justice Act 1984 as amended and inserted by Criminal Justice Act 2007.

³⁴ Section 2 Offences Against the State (Amendment) Act 1998.

³⁵ Section 72A Criminal Justice Act 2006.

³⁶ *DPP v Shaw* [1982] 1 IR 1 at 29; see also *Dunne v Clinton* [1930] IR 366.

³⁷ Legislation in Ireland included an interrogation provision, in section 30 of the Offences against the State Act 1939 for battling subversion. But, it was the exceptional statute for almost half a century and was not designed to cater with ‘ordinary’ crime. However, as it was the only detention statute available to investigators, it was frequently pressed into service in novel ways.

³⁸ Detention provisions include Section 30 of the Offences against the State Act 1939 (as amended), Section 4 of the Criminal Justice Act 1984 (as amended), Section 2 of the Criminal Justice (Drug Trafficking) Act 1996, Section 50 of the Criminal Justice Act 2007, Section 42 of the Criminal Justice Act 1999 (in relation to person in custody in a prison) and Sections 16 and 17 of the Criminal Procedure Act 2010 that relate to an arrest where a person has been previously acquitted. Detentions under s.42, s.16 and s.17 require the issuance of a judicial warrant to permit questioning and are treated the same as s.4 detentions.

³⁹ Section 24 of the Criminal Justice (Public Order) Act 1994 contains the power of arrest most widely used.

⁴⁰ Section 4(3) states that: where a member of the Garda Síochána, with reasonable cause, suspects that an arrestable offence has been committed, he or she may arrest without warrant anyone whom the member, with reasonable cause, suspects to be guilty of the offence. An arrestable offence is defined by s.2(1) (as amended) of the act which states that an ‘arrestable offence’ means an offence for which a person of full capacity and not previously convicted may, under or by virtue of any enactment or the common law, be punished by imprisonment for a term of five years or by a more severe penalty and includes an attempt to commit any such offence.

⁴¹ Section 15 of the Criminal Justice Act 1951 as substituted by s.18 of the Criminal Justice (Miscellaneous Provisions) Act 1997.

⁴² Section 18(6) of the Criminal Justice (Miscellaneous Provisions) Act 1997.

⁴³ For example, *DPP v McCreesh* [1992] 2 IR 239 per Hederman J. at 250.

⁴⁴ *Oladapo v Governor of Cloverhill Prison* [2009] 2 ILRM 166; and *DPP v Madden* [1977] IR 336.

⁴⁵ *Birdd v Jones* (1845) 7 QB 742.

⁴⁶ *DPP v Mooney* [1992] 1 IR 548; see also *Christie v Leachinsky* [1947] AC 573.

⁴⁷ *Christie v Leachinsky* [1947] AC 573; see also *DPP v McCormack* [1999] 4 IR 158.

⁴⁸ *DPP (Lanigan) v Freeman* [2009] 1 IR 794 per Charleton J.

⁴⁹ *DPP v Towson* [1978] ILRM. 122; *Christie v Leachinsky* [1947] AC 573.

⁵⁰ *DPP v Walsh* [1980] IR 294. For example, see custody regulation no. 8, information to be given to a person in custody.

⁵¹ *Christie v Leachinsky* [1947] AC 573.

⁵² *DPP v Bolger* [2013] IECCA 6.

⁵³ Section 4(5) Criminal Law Act 1997.

⁵⁴ *DPP v Cash* [2010] 1 ILRM 389 per Fennelly J. at 399, where he noted that the expression ‘with reasonable cause’ equates to ‘reasonable suspicion.’

⁵⁵ *O’ Hara v Chief Constable of the RUC* [1997] 1 AC 286.

⁵⁶ *Hussein v Chong Fook Kam* [1970] AC 942.

⁵⁷ *Walsh and Bedford v Fennessy* unreported, Supreme Court, July 28 2005; see also *DPP v Tyndall* [2006] 1 ILRM 1.

⁵⁸ *DPP v Cleary*, unreported, Central Criminal Court, Dec 7, 2001.

⁵⁹ *DPP v Keogh* [1998] 4 IR 416.

⁶⁰ *O’Hara v Chief Constable of the RUC* [1997] AC 286.

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- ⁶¹ DPP v Cash [2008] 1 ILRM 443; DPP v Cash [2010] 1 ILRM 389. In relation to suspicion in s.30 arrests see also DPP v Mc Caffrey [1986] 1 ILRM 687 and DPP v Tyndall [2006] 1 ILRM 1.
- ⁶² DPP v Cash [2010] 1 ILRM 389.
- ⁶³ DPP v Kenny [1990] 2 IR 110.
- ⁶⁴ See also DPP v McDonnell [2014] IEHC 35.
- ⁶⁵ DPP v O’Driscoll [2010] IESC 42.
- ⁶⁶ See also McKee v Chief Constable of the RUC [1997] AC 286.
- ⁶⁷ O’Hara v U.K [2002] 34 EHRR 32 at par.34.
- ⁶⁸ Walsh v Fennessy [2005] 3 IR 516 at 543; See also O’Hara v Chief Constable of the RUC [1997] AC 286; DPP v McCaffrey [1986] 1 ILRM 687.
- ⁶⁹ For example, Trimbole v Governor of Mountjoy [1985] ILRM 465; DPP v Quilligan [1986] IR 495.
- ⁷⁰ *Ibid.*
- ⁷¹ DPP v Healy [1990] ILRM 313; See also DPP v Shaw [1982] IR 1; DPP v McCann [1998] 4 IR 397.
- ⁷² Lynch v Fitzpatrick (No.2) [1938] IR 382.
- ⁷³ McCann and others v United Kingdom [1996] 21 EHRR 97.
- ⁷⁴ See DPP v Cullen [2014] IESC 7; DPP v Davies, unreported, Court of Criminal Appeal, October 23 2000; Reed v Wastie [1972] Crim LR 221.
- ⁷⁵ Raininen v Sweden [1998] 26 EHRR 563 at para 56.
- ⁷⁶ DPP v Pires [2015] IEHC 671.
- ⁷⁷ Thomas v Sawkins [1935] 2 KB 249.
- ⁷⁸ DPP v Delaney [1998] 1 ILRM 507.
- ⁷⁹ For example, Robson v Hallet [1967] 2 QB 939 and DPP (Dooley) v Lynch [1998] 4 IR 437.
- ⁸⁰ DPP v Gaffney [1987] IR 173 per Henchy J. at 181.
- ⁸¹ Section 6 of the Criminal Law Act 1997 where exceptions include that the person ordinarily resides at that dwelling.
- ⁸² Section 6 of the 2006 Act provides for a warrant to search for evidence in relation to an arrestable offence.
- ⁸³ DPP v Laide and Ryan [2005] 1 IR 209; as a consequence of *Damache v DPP* [2012] IESC 11, which saw the validity of the provision of a search warrant in section 29 of the 1939 Act held to be unconstitutional, a number of cases have since been held to have included an unconstitutional arrest. For example, in *DPP v Barry O’Brien* [2012] IECCA 68, the arrest under the provisions of s. 30 of the 1939 Act while in the house under the s. 29 search warrant was found to be unlawful as the Gardaí were in effect trespassers in the house. This had the result that the interviews themselves were inadmissible. In a similar case, *Hardiman J. in DPP v Cunningham* [2012] IECCA 64 has described the ‘intrinsic importance’ of Art. 40.5 of the Constitution to a free and democratic society. However, see also the recent decision in *DPP v JC* [2015] IESC 31.
- ⁸⁴ DPP v Kenny [1990] 2 IR 110; DPP v JC [2015] IESC 31.
- ⁸⁵ *Dunne v Clinton* [1930] IR 366 at 372.
- ⁸⁶ DPP v Coffey [1987] ILRM 727.
- ⁸⁷ An increase in time was introduced in s.9(c) Criminal Justice Act 2006.
- ⁸⁸ Available at www.crimecouncil.gov.ie/statistics_cri_crime_murder.html#table6b.
- ⁸⁹ See also see *DPP v. Quilligan* [1986] IR 495; *DPP v. Howley* [1989] ILRM 629; *DPP v Walsh* 3 Frewen 260.
- ⁹⁰ *The State (Bowes) v Fitzpatrick* [1978] ILRM 195.

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- ⁹¹ DPP v. McLoughlin [1979] IR 85.
- ⁹² DPP v Coffey [1987] ILRM 727.
- ⁹³ DPP v. Shaw [1982] IR 1, per Walsh J. at p. 29; see also Balance in the Criminal Law Review Group at p.24.
- ⁹⁴ DPP v Lynch [1981] ILRM 389 per O’Higgins C.J. at 391.
- ⁹⁵ *Ibid* at 392.
- ⁹⁶ *Ibid* at 396 per Walsh J.
- ⁹⁷ *Ibid* at 400 per Walsh J.
- ⁹⁸ Dáil Éireann Debate Vol. 296 No. 12 col.1760-1775.
- ⁹⁹ For example Mr. P. De Rossa Bill Comm. stage. Dáil Debates. Vol.350 col.1748.
- ¹⁰⁰ Dáil Debates Vol.347 col.451-468.
- ¹⁰¹ Introduced by the Garda Síochána (Complaints) Act 1984.
- ¹⁰² Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987.
- ¹⁰³ S.I.150 of 1987.
- ¹⁰⁴ S.I.119 of 1987.
- ¹⁰⁵ Section 4(1) of the 1984 Act.
- ¹⁰⁶ Section 4(1) 1984 Act and s.52 of the Children Act 2001 as amended by s.129 of the 2006 Act.
- ¹⁰⁷ Freeman v DPP [1996] 3 IR 565.
- ¹⁰⁸ DPP v Cleary unreported Central Criminal Court December 7, 2001 and DPP v Boylan [1991] 1 IR 477. See also DPP v ES [2012] IECCA 27 where liberty denied can impact on detention times.
- ¹⁰⁹ DPP v O’Toole [1990] unreported CCA July 20 1990.
- ¹¹⁰ Section 4.3(b).
- ¹¹¹ Section 9(c).
- ¹¹² Finnegan v Member i/c, Santry Garda Station [2007] 4 IR 62. With the exemption where the suspect is before a court to hear an application introduced as a result of this decision, for example Criminal Justice Act 2007 s. 50(9).
- ¹¹³ DPP v Reddan [1995] 3 IR 560; see also DPP v O’Toole and Hickey CCA 20 July 1990.
- ¹¹⁴ Section 4(4) of the 1984 Act; see also s.2(5) Drug Trafficking Act 1996, s.50(6) of the 2007 Act.
- ¹¹⁵ "Control of drugs empire at centre of families' feud" (referring to the Keane-Ryan feud), Irish Times, December 22 2003.
- ¹¹⁶ "A case of 'collective amnesia'" Irish Times, November 8 2003.
- ¹¹⁷ Dáil Debates, November 4, 2003, Vol.573, col.579.
- ¹¹⁸ "Why this hit man holds the key to beating crime" The Sunday Times, November 20, 2005.
- ¹¹⁹ "Homicide: A year of violent deaths" Irish Examiner, December 28, 2006.
- ¹²⁰ National Crime Council statistics available at http://www.crimecouncil.gov.ie/statistics_cri_crime_murder.html#table6b.
- ¹²¹ For example see "Six unsolved murders linked to Kinahan gang" The Irish Times, February 18, 2016.
- ¹²² Justice Minister, Mr. Michael McDowell 16 Feb 2005. Dáil Debate.Vol. 597 No. 6, p.75.
- ¹²³ This Act contained, inter alia, the following parts: Pt.2; Investigation of offences containing s.5 designation as crime scene. s.6 search warrants in relation to evidence of arrestable offences. s.8 arrestable offences extended to common law as well as statute

offences. Pt. 3; Admissibility of witness statements. Pt. 7; Organised Crime Offences containing, s.71 offence of conspiracy, s.72 organised crime activities. Pt. 8 Misuse of Drugs Act.

¹²⁴ Section 9(c).

¹²⁵ Section 2(1)(b).

¹²⁶ Section 8 of the 2011 Act inserting s.4(A) after s.4 in the 1984 act. The offence created is liable on summary conviction to a class A fine or to imprisonment for a term not exceeding 12 months or to both.

¹²⁷ Section 9 of the 2011 Act.

¹²⁸ Section 70 Children Act 2001.

¹²⁹ Sections 55 to 70 excluding 59 and 61(1)(b) came into operation in May 2002, S.I 151 of 2002. Sections 59 and 61(1)(b) came into effect in March 2007, S.I 64 of 2007.

¹³⁰ Art. 22 Criminal Justice Act 1984 (Treatment of Persons in custody) Regulations 1987 as amended by Amendment Regulations 2006.

¹³¹ Section 56 Children Act 2001.

¹³² See also s.5 of the 1984 Act as amended by s.67 Children Act 2001.

¹³³ DPP v Cleary unreported Central Criminal Court December 7 2001; DPP v O'Toole unreported Court of Criminal Appeal July 20 1990.

¹³⁴ Mr John O'Donoghue T.D. July 02, 1996, Dáil Éireann Debate Vol. 467 col. 2405.

¹³⁵ Section 2(b) as amended by s.22 of the Criminal Justice (Amendment) Act 2009 which substituted superintendent for a chief superintendent necessary to extend the period of detention by a further period not exceeding eighteen hours in s.2(2)(b).

¹³⁶ Section 2(c).

¹³⁷ Section 2(g)(i).

¹³⁸ Section 2(g)(ii).

¹³⁹ Section 2(h)(i).

¹⁴⁰ Amended by insertion of s.22(b) of The Criminal Justice (Amendment) Act 2009, permitting the exclusion of accused from the court.

¹⁴¹ Justice Minister, Mr. McDowell, Dáil Debate March 22, 2007 Vol. 63 col. 390-391.

¹⁴² Mr. Brendan Howlin TD, Dáil Debate 22 March 2007 Vol. 634 col. 400-401.

¹⁴³ Mr. J. O'Keefe: Dáil Éireann Debate March 22, 2007 Vol. 634 col. 394-395.

¹⁴⁴ Irish Army Annual Reports available at <http://www.military.ie/info-centre/publications>.

¹⁴⁵ "Gangland weapon shoppers are jailed" Irish Independent February 28 2008 and DPP v Geasley [2009] IECCA 22.

¹⁴⁶ S.I.165 of 2009.

¹⁴⁷ Murder known as a capital offence, such as murder of a Garda or prison officer in the course of their duty or of a foreign diplomat.

¹⁴⁸ Possession of Firearms with intent to endanger life.

¹⁴⁹ False Imprisonment.

¹⁵⁰ Section 2(b).

¹⁵¹ Section 3(b) and s.3(c).

¹⁵² Section 3(g)(i).

¹⁵³ Section 3(h)(i).

¹⁵⁴ Section 50 ss.6 & 7.

¹⁵⁵ In the 2009 Act, s.23(1) inserted an offence in s.50(1)(e) of an offence under Part 7 of the 2006 Act.

¹⁵⁶ Section 23(2) of the 2009 Act inserting a new s.50(4A). Section 21 of the 2009 Act inserted a new subs.4(B) in s.30 of the 1939 Act to allow exclusion of the suspect and incamera.

¹⁵⁷ Conway (2013) p.67, cites Manning that in 1934 there were a total of 451 convictions before the military tribunals: 359 for Blueshirts and 102 for the IRA.

¹⁵⁸ 3 May 1939. Seanad Éireann Debate Vol. 22 No. 17 p.8.

¹⁵⁹ 7 March 1939. Dáil Debate Vol. 74 col.20.

¹⁶⁰ Germany sent a number of agents to liaise with the IRA and to encourage military action against Britain see (Hastings 2015 p.330).

¹⁶¹ Section 30 of the 1939 Act, ss(1)-(3).

¹⁶² S.I 334 of 1940 Offences against the State (Scheduled Offences) (No 3) Order, 1940.

¹⁶³ S.I 205 of 1947 Offences against the State (Scheduled Offences) (No 4) Order, 1947.

¹⁶⁴ ‘14 August 1969 British Troops sent into Northern Ireland’ available at www.news.bbc.co.uk/onthisday/hi/dates/stories/august/14/

¹⁶⁵ DPP v Kelly [2006] 3 IR 115 per Geoghegan J. at 120.

¹⁶⁶ The Offences against the State (Scheduled Offences) Order 1972.

¹⁶⁷ Two reports into the Garda investigation of these bombings were highly critical of Garda ineptitude as well as many basic problems such as the loss of vital evidence and simple failures to follow investigative leads. See Barron Report (2004) and McEntee Report (2007).

¹⁶⁸ Re Article 26 of the Constitution and in the Matter of The Emergency Powers Bill [1977] 1 IR.

¹⁶⁹ Year Arrested Charged

1981 2,303 323

1982 2,308 256

1983 2,334 363

1984 2,216 374

1985 1,834 366

1986 2,387 484

¹⁷⁰ Figures supplied by the Minister for Justice in written answers to parliamentary questions on 14 November 1986 (369 Dáil Debates at col. 2562) and 31 March 1987 (371 Dáil Debates at col. 714) in Hederman Report, p.153: See also O’Mahony (2002 p.284) who cites 27,000 arrests between 1972 and 1989.

¹⁷¹ People v Towson [1978] ILRM 122.

¹⁷² DPP v Quilligan (No.1) [1987] ILRM 606

¹⁷³ *Ibid* per Walsh J. at 622.

¹⁷⁴ DPP v Byrne [1989] ILRM 613.

¹⁷⁵ The People v Eccles 3 Frewen 36.

¹⁷⁶ DPP v Quilligan (No.1) [1987] ILRM 606 per Walsh J. at 625.

¹⁷⁷ DPP v. Quilligan (No.3) [1993] 2 IR 305.

¹⁷⁸ DPP v Tyndall [2005] 1 IR 593.

¹⁷⁹ Dáil Debate September 2, 1998, Vol.494 col.5.

¹⁸⁰ For example s.6 directing an unlawful organization, s.8 unlawful collection of information, s.9 withholding information.

¹⁸¹ Section 10 of the 1998 Act which amended s.30 of the 1939 Act by the substitution of subs.(4) with a new subs.(4).

¹⁸² Table created from annual figures presented in annual Dáil Debates as part of government motions to move the continuance of the Act. Available from Oireachtas library.

¹⁸³ Available from Oireachtas Library. However, Europol TE- SAT 2015 EU Terrorism and Trend Report for 2014 lists fewer arrests for terrorism with only 27 arrests for terrorism offences in Ireland during 2014. Report available at <https://www.europol.europa.eu/content/european-union-terrorism-situation-and-trend-report-2015>.

¹⁸⁴ *O'Brien v The Special Criminal Court* [2007] IESC 45; *DPP v Varian* unreported CCA May 6 2008.

¹⁸⁵ Section 21 of the Criminal Justice (Amendment) Act 2009 inserted subs.(3A) after subs.3 of s.30 of the 1939 Act.

¹⁸⁶ Section 5 Criminal Justice (Terrorist Offences) Act 2005.

¹⁸⁷ TE-Sat Europol Reports; number of Irish terrorism arrests per year; 2007=24, 2008=52, 2009=31, 2010=62, 2011=69, 2012=66, 2013=41. By comparison, in 2013 France arrested 225 suspects, UK arrested 77 while Spain arrested 90. TE-Sat Europol.

¹⁸⁸ The Criminal Justice (Terrorist Offences) (Amendment) Act 2015 provides for additional offences in recruiting (s.5) and training for terrorism (s.6).

¹⁸⁹ The 2011 census figures show 49,204 Muslims in Ireland; see also Irish Independent, December 30, 2013 at <http://www.independent.ie/irish-news/islam-to-become-irelands-second-religion-by-2043-29874239.html>. That figure may have risen considerably in recent years.

¹⁹⁰ ICSR 2015 report at <http://icsr.info/2015/01/foreign-fighter-total-syriairaq-now-exceeds-20000-surpasses-afghanistan-conflict-1980s>; see also “30 Irish citizens left to fight in Syria and Iraq” Irish Examiner, January 30, 2015.

¹⁹¹ *Ibid*; see also TE-Sat 2013; also ICSR 2014 report at <http://icsr.info/wp-content/uploads/2014/04/ICSR-Report-Greenbirds-Measuring-Importance-and-Influence-in-Syrian-Foreign-Fighter-Networks.pdf>.

¹⁹² “Jihadis using Ireland as a transit base due to soft laws and lack of counter terrorism police” Irish Independent, January 17, 2015.

¹⁹³ Section 7(1) of the 1984 Act required the Minister to make these regulations. The regulations created were the Criminal Justice Act 1984 (Treatment of Persons in Custody) Regulations 1987 (S.I. 119 of 1987) as amended by Criminal Justice Act 1984 (Treatment of Persons in Custody) (Amendment) Regulations 2006 (S.I. 641 of 2006). See also EU Council Resolution for strengthening procedural rights of persons in custody of November 2009 (2009/C 295/01) and EU Directive 2012/13/EU on information to be given to accused.

¹⁹⁴ Regulation 5(1).

¹⁹⁵ *DPP v ES* [2012] IECCA 27. The deprivation of liberty may be a de facto arrest, see (Orange 2014).

¹⁹⁶ Regulation 4(1) and *DPP v McGuire* [1996] 3 IR 586.

¹⁹⁷ *The DPP v O'Shea* [1996] 1 IR 556; *DPP v Van Onzen* [1996] 2 ILRM 387.

¹⁹⁸ Regulation 7.

¹⁹⁹ Regulations 6, 7 & 23.

²⁰⁰ Regulation 6 & 23.

²⁰¹ Regulation 5(3).

²⁰² Garda Síochána (Discipline) Regulations 2007.

²⁰³ Regulation 14.

²⁰⁴ Regulation 11.

²⁰⁵ Regulation 18.

²⁰⁶ Regulation 20.

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- ²⁰⁷ See also *Salman v Turkey* (2000) 54 EHRR 17 and *Korobov and others v Estonia* application no. 10195/08 28 June 2013 ECHR.
- ²⁰⁸ Regulation 12 re: questioning between midnight and 8AM. See s.4(6) the 1984 Act. Regs.19 to 20 re: rest and facilities. Reg. 21 re: access to medical treatment.
- ²⁰⁹ Regulation 21.
- ²¹⁰ Regulation 22.
- ²¹¹ *DPP v Spratt* [1995]1 IR 585.
- ²¹² *DPP v Spratt* [1995]1 IR 585; see also *DPP v Diver* [2005] 3 IR 270.
- ²¹³ *Ibid*; see also *DPP v McFadden* [2003] 2 IR 105.
- ²¹⁴ *DPP v D'Arcy*, unreported, Court of Criminal Appeal, July 23 1997.
- ²¹⁵ Following the introduction of s.10 of the Forensic Evidence and Database Systems Act 2014, the member in charge also has a special responsibility to assess as soon possible after detention whether the person detained is a 'protected person.' A 'protected person' is a person under 14 years of age or a person who by reason of mental or physical disability lacks the capacity to understand the taking of a sample under the Act. A doctor must be contacted under such cases to assess the person detained.
- ²¹⁶ Regulation 11(1).
- ²¹⁷ *DPP v Reddan* [1995] 3 IR 560.
- ²¹⁸ *DPP v O'Toole*, unreported, Court of Criminal Appeal, July 20 1990.
- ²¹⁹ *DPP v Birney* [2007] 1 IR 337.
- ²²⁰ *Ibid*.
- ²²¹ *Ibid*.
- ²²² Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 as amended.
- ²²³ Regulation 12(2) of the Custody Regulations.
- ²²⁴ Section 117 of the Coroners and Justice Act 2009.
- ²²⁵ Death of T. Wheelock, Report by the Garda Síochánaana Ombudsman 2010.
- ²²⁶ Adequate training should include first aid training. Gardaí receive a basic level of this training while in Templemore only. Essential items should include cardiac defibrillators available in the station. See also "Jury urges CPR refresher courses for gardaí" Irish Examiner May 10, 2014.
- ²²⁷ *DPP v Gormley* [2014] ILRM 377 per Hardiman J.
- ²²⁸ Re Emergency Powers Bill 1976 (1977) IR 159.
- ²²⁹ *DPP v Healy* [1990] 2 IR 73.
- ²³⁰ *DPP v Gormley* [2010] IECCA 22 at para.7 per Finnegan J.
- ²³¹ Regulation 9.
- ²³² The Garda Station (Legal Aid) Scheme, however, only covers certain persons under its qualifying criteria, which currently are persons on Social Welfare or earning less than an annual gross of €20,316. The number of authorised claims under the scheme in 2012 was 4,155. See (Working Group p.12-1)5.
- ²³³ *DPP v Gormley* [2010] IECCA 22; *DPP v Bryan Ryan* (2011) IECCA 6.
- ²³⁴ In the UK telephone advice is provided in 19% of cases, see (Phillips and Brown 1998 p.66).
- ²³⁵ See also *Dayanan v Turkey* (no 7377/03), 13 October 2009.
- ²³⁶ *Murray v United Kingdom* (1996) 22 EHRR 29.
- ²³⁷ *Salduz v Turkey* (2009) 49 EHRR 19.
- ²³⁸ For example, see *DPP v Cullen*, unreported, CCA, March 30 1993.
- ²³⁹ Recommendations no.3&8 and ch.3.

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- ²⁴⁰ PACE Code of practice C at para.3.2; see also (Wycherley 2010).
- ²⁴¹ For example Guardian newspaper 2013 available at www.theguardian.com/lifeandstyle/2013/jun/10/legal-aid-cuts-deny-women-justice;
- ²⁴² DPP v Gormley [2014] ILRM 377. See also EU Directive 2012/13/EU.
- ²⁴³ Miranda v Arizona, 384 U.S. 436 (1966) at 448.
- ²⁴⁴ Editorial Irish Law Times (1992) 10 at 125.
- ²⁴⁵ S.I. 74 of 1997.
- ²⁴⁶ S.I. 168 of 2009 introduced the Criminal Justice Act 1984 (Electronic Recording of Interviews) (Amendment) Regulations 2009 which amended Regulation 3 to include a detention under s.50 2007 Act. While s.3(b) of s.42 CJA 1999 states that a person should be dealt with as if detained under s.4 of the 1984 Act.
- ²⁴⁷ The Steering Committee on Audio and Audio/Video Recording at p.5.
- ²⁴⁸ DPP v Holland unreported, Court of Criminal Appeal, May 15 1998.
- ²⁴⁹ DPP v Diver [2005] 3 IR 270.
- ²⁵⁰ DPP v Murphy [2005] 4 IR 504 at para.43; see also DPP v Connolly [2003] 2 IR 1; DPP v Kelly unreported, SCC, November 26 2004; DPP v Cunningham [2007] IECCA 49.
- ²⁵¹ DPP v O'Reilly [2009] IECCA 18.
- ²⁵² Section 56 of the 2007 Act.
- ²⁵³ Section 16(1)(b) Criminal Evidence Act 1992, permits the electronic recording of evidence, in the following crimes, when the victim is either a child under 14 years or of intellectual disability: a sexual offence, an offence involving violence or threats of violence, child trafficking offences or pornography offences, human trafficking or attempts. This may be played in lieu of court testimony.
- ²⁵⁴ Section 19 of the 2006 Act. Part 3 of this Act covers the admissibility of witness statements into evidence in court when the witness refuses to give evidence in court or gives evidence that contradicts their written statement given to the Gardaí.
- ²⁵⁵ Section 24 of the Criminal Justice (Amendment) Act 2009.
- ²⁵⁶ In DPP v Cooney [1998] 1 ILRM 321 evidence of a formal identification parade was ruled inadmissible as the suspect was in unlawful custody at that time as he should have been released at 8.35 a.m. His custody was extended at 12.45 p.m., almost four hours later.
- ²⁵⁷ Regulation 12 (i)(ii)(iii).
- ²⁵⁸ S.I. 411 of 2011 Commencement Order introduced Part 1 of the Act, (except s.5), s.7 (except part (c) the suspension of questioning after midnight), s.8, part 3 and schedules 1 and 2.
- ²⁵⁹ Section 9 of the 2011 inserts a new subs.5A into the 1984 Act. Section 9 also allows provision to be made for a form of waiver of legal advice and amends ss.18. 19 and 19A of the 1984 Act accordingly.
- ²⁶⁰ Section 10(1) the 1984 Act.
- ²⁶¹ Amendment to s.10 by s.24 of the Criminal Justice (Amendment) Act 2009.
- ²⁶² Section 10(2) of the 1984 Act, 30(A) of the 1939 Act, s.4 CJ (Drug Trafficking) Act 1996, s.51 of the 2007 Act, all sections which also deal with rearrest where a warrant is issued by a district court judge on information of Superintendent. See also DPP v District Justices Early, O'Riordain Kelly and Maguire [1998] 3 IR 158 where McGuinness J. noted that it was essential to distinguish between arrest for the purpose of detention for investigation, and arrest for the purpose of charging with the bringing of procedures leading to a trial.
- ²⁶³ Massoud v Watkins [2005] 3 IR 154.

²⁶⁴ Art. 5(2). See also European Directives 2010/64/EU and Directive 2012/13/EU.

²⁶⁵ The European Code of Police Ethics Recommendation 2001 at par.53; Council of Europe, Strasbourg.

²⁶⁶ *Kangasluoma v Finland* no (48339/99), 20 Jan 2004; see also *Corigliano v Italy* (1983) 5 EHRR 334.

²⁶⁷ Art. 5(3) - 5(4).

²⁶⁸ This judicial intervention is to comply with the decision of the ECHR in *Brogan v United Kingdom* [1989] 11 EHRR 117.

²⁶⁹ 1984 1465 UNTS 85. Given effect in Irish Law by the Criminal Justice (United Nations Convention Against Torture) Act 2000.

²⁷⁰ Irish Human Rights and Equality Commission Act 2014.

²⁷¹ An Garda Síochána Human Rights Audit by Ionann Management Consultants available at

http://www.garda.ie/Documents/User/garda_human_rights_audit.pdf.

²⁷² For example s.12 Mental Health Act 2001; s.4 Air Navigation and Transport Act 1975; s.5 Immigration Act; Art 7 Aliens Order 1946.

Chapter Three Right to Silence

²⁷³ For example see Blackstone (1765). However, between the years 1540 to 1640, 81 torture warrants were officially issued in England, applying mainly to State matters, see Langbein (1976), however, evidence of its use for less serious offences exists (Morgan 1949). Torture should be strictly understood as an attempt to gather information. In England, a failure to plead before a common law court could result in the penalty of *peine forte et dure* or pressing, the applying of weights if necessary until death if no plea. This was abolished in 1772 by 12 Geo. III. See Morgan (1949) for discussion.

²⁷⁴ *R v Director of Serious Fraud Office, ex p. Smith* [1993] AC 1 per Lord Mustill at 30.

²⁷⁵ *DPP v Coddington*, unreported, Court of Criminal Appeal, May 31, 2001; see also *DPP v Brazil*, CCA, March 22, 2002.

²⁷⁶ *DPP v Finnerty* [1999] 4 IR 364.

²⁷⁷ See also, for example, dissenting opinion of Judge Martens at para.4 in *Saunders v United Kingdom* (1997) 23 EHRR 313.

²⁷⁸ Sections 18 & 19 THE 1984 ACT.

²⁷⁹ *Saunders v United Kingdom* (1997) 23 EHRR 313 at para.68.

²⁸⁰ *DPP v Finnerty* [1999] 4 IR 364.

²⁸¹ *Ibid* at 380.

²⁸² *Ibid* at 381.

²⁸³ *DPP v Bowes* [2004] 4 IR 223.

²⁸⁴ Repealed by s.3 Criminal Justice Act 2007. Section 7(1) stated that where in any proceedings against a person for a drug trafficking offence evidence is given that the accused at any time before he or she was charged with the offence, on being questioned by a Garda or customs, failed to mention any fact relied on in his or her defence in those proceedings.

²⁸⁵ *DPP v Bowes* [2004] 4 IR 223 at 238.

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- ²⁸⁶ Lord Mustill in *R v Director of Serious Fraud Office, ex p. Smith* [1993] AC 1 at 40; see also *Heaney v Ireland* (1996) 1 IR 580, [1997] 1 ILRM 117 per Flaherty J. at 124. Current examples include the Companies Act 1990, Bankruptcy Act 1988, Pensions Act 1990, and the Social Welfare (Consolidation) Act 1993.
- ²⁸⁷ Section 1(e) of the Criminal Justice (Evidence) Act 1924.
- ²⁸⁸ *Serves v France* (1999) 28 EHRR 267.
- ²⁸⁹ Section 1(e) of the Criminal Justice (Evidence) Act 1924, known as the Criminal Evidence Act 1898 in England at s.1(a); see also see (McEwan 1998 p.167).
- ²⁹⁰ *Ibid* at s.1(f).
- ²⁹¹ Section 52 is contained in Part V of the Act of 1939. Section 35 of the Act provides that Part V is to come into force by means of a proclamation by the Government when it is satisfied that the ordinary courts are inadequate to secure the effective administration of justice. The proclamation was last made in 1972 and currently remains in force. Part IV contains sections 26 to 34. This includes s.29 search warrants and s.30 arrest and detention.
- ²⁹² Section 52(2).
- ²⁹³ *DPP v McGowan* [1979] IR 45.
- ²⁹⁴ *The State (McCarthy) v Lennon* [1936] IR 485.
- ²⁹⁵ *In Re National Irish Bank Ltd* [1999] 1 ILRM 321 at 359, the Supreme Court stated that the decision in *State (McCarthy) v Lennon* is not a safe guide for any person seeking to establish the rights of the citizen under the Irish Constitution.
- ²⁹⁶ *Heaney v Ireland* [1997] 1 ILRM 117.
- ²⁹⁷ *Heaney v Ireland* [1994] 3 IR 593.
- ²⁹⁸ *Heaney v Ireland* [1997] 1 ILRM 117 at 119-120.
- ²⁹⁹ *Ibid* at 127-128.
- ³⁰⁰ See also Kelly, Hogan and Whyte, 'The Irish Constitution' 4th edition 2003. Dublin, Lexis Nexis Butterworths at p.1085, where it was stated that it was "one of the least impressive Supreme Court judgments of recent times."
- ³⁰¹ *Heaney and McGuinness v Ireland* (2001) 33 EHRR 12.
- ³⁰² *Ibid* at para.57-58; see also *Saunders v UK* (1997) 23 EHRR 313 at para.74.
- ³⁰³ *Saunders v UK* (1997) 23 EHRR 313; see also *Funke v France* (1993) 16 EHRR 297.
- ³⁰⁴ *Saunders v UK* (1997) 23 EHRR 313 at 329.
- ³⁰⁵ *Ibid* at 339.
- ³⁰⁶ *Re National Irish Bank Ltd* [1999] 3 IR 145.
- ³⁰⁷ *Re NIB* [1999] 3 IR 145 at 187; see also *Dunnes Stores Ireland Co.v Ryan* [2002] 2 IR 60.
- ³⁰⁸ *Re NIB* [1999] 3 IR 145 at 177.
- ³⁰⁹ *AG v Gilbert* [1973] IR 383.
- ³¹⁰ *Ibid* at 387.
- ³¹¹ *O'Halloran and Francis v UK* (2008) 46 EHRR 21.
- ³¹² *Ibid* at para.40.
- ³¹³ *Ibid* at para 53.
- ³¹⁴ *Ibid* at para.57.
- ³¹⁵ *Ibid* at para. O-III1. Wigmore and Levy (1971) considered abolition of the Star Chamber as critical for the privilege. See Langbein (1994) for methodological considerations of their conclusions including their use of State Trial Papers as their primary sources.
- ³¹⁶ *Ibid* at para.O-II20.

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- ³¹⁷ *Ibid* at para.O-II63-66.
- ³¹⁸ *Ibid* at para.O-II38-39.
- ³¹⁹ Quinn v Ireland (2001) 33 EHRR 334.
- ³²⁰ This section is repeated almost exactly in section 19 of the Criminal Justice (Theft and Fraud Offences) Act 2001 except s.1(a) states that the offences consist of stealing property or handling stolen property and the penalty fine was increased to £1,500 fine as well as 12 months imprisonment.
- ³²¹ Section 15(2) and s.16(2).
- ³²² Balance in the Criminal Law Report at p.91. See also Mr. McDowell, Minister for Justice, Equality and Law Reform. Dáil Éireann Debate Vol. 634 col.384; see also DPP v Fitzpatrick [2012] IECCA 74 at para.35.
- ³²³ Mr. J. O’Keeffe: Dáil Debate 22 March 2007 Vol. 634 col. 398.
- ³²⁴ Rock v Ireland [1998] 2 ILRM 35.
- ³²⁵ Heaney v Ireland 1997] 1 ILRM 117.
- ³²⁶ Rock v Ireland [1998] 2 ILRM 35 at 45.
- ³²⁷ *Ibid* at 47.
- ³²⁸ *Ibid* at 48.
- ³²⁹ Rock v Ireland, ECHR (App 41525/98) 11 May 2000.
- ³³⁰ Balance in Criminal Law Report at p.91.
- ³³¹ Balance in Criminal Law Report.
- ³³² *Ibid* at p.96.
- ³³³ Dáil Debate March 29 2007 vol. 634 No.6 Col 1523-1524.
- ³³⁴ S.I. 236 of 2007.
- ³³⁵ Section 3 of the 2007 Act repealed s.7 Criminal Justice (Drug Trafficking) Act 1996 and s.5 of the 1998 Act.
- ³³⁶ Section 18(1).
- ³³⁷ Section 18(2).
- ³³⁸ Section 18(3) & (6).
- ³³⁹ Section 19(A)(1).
- ³⁴⁰ An arrestable offence is defined by section 2(1) of the Criminal Law Act, 1997 (as amended by s.8 of the 2006 Act).
- ³⁴¹ DPP v Byrne, unreported, SCC, November 17 2009.
- ³⁴² See DPP v Donnelly [2012] IECCA 78 at para.18 and 24, it was suggested that this was a domestic equivalent of the ‘sole and decisive’ test applied in European cases; See also Murray v UK (1996) 22 EHRR 29; Doorson v Netherlands (1996) 22 EHRR 330; and later in Al-Khawaja and Tahery (2011) 54 EHRR 23.
- ³⁴³ Murray v United Kingdom (1996) 22 EHRR 29 at para.47.
- ³⁴⁴ Rowe and Davies v UK (2000) 30 EHRR 1; see also R v Imran [1997] Crim. LR 754.
- ³⁴⁵ R v Imran [1997] Crim. LR 754.
- ³⁴⁶ R v Argent [1997] 2 CrAppR 27.
- ³⁴⁷ R v Ioannu [1999] Crim LR 586.
- ³⁴⁸ R v Cowan [1996] 1 CrAppR 1 per Lord Taylor C. J. at 7.
- ³⁴⁹ Averill v UK (2001) 31 EHRR 839.
- ³⁵⁰ *Ibid* at para.51.
- ³⁵¹ DPP v Devlin [2012] IECCA 70.
- ³⁵² *Ibid* at para.24.
- ³⁵³ *Ibid* at para.36.
- ³⁵⁴ *Ibid* at para.38.

- ³⁵⁵ DPP v Devlin [2012] IECCA 70 at para.19.
- ³⁵⁶ DPP v Bowes [2004] 4 IR 223.
- ³⁵⁷ R v Hearne, unreported, Court of Appeal, May 4 2000 at para.10.
- ³⁵⁸ R v Knight [2004] 1 WLR 340.
- ³⁵⁹ R v Nickolson [1999] Crim LR 61.
- ³⁶⁰ R v Webber [2004] 1 WLR 404 at para. 33 referring to s.34 of the CJPOA.
- ³⁶¹ See also DPP v Brazil, unreported, CCA, March 22 2002.
- ³⁶² Section 31 of the 2007 Act.
- ³⁶³ Section 21 of the 1939 Act.
- ³⁶⁴ Section 2(1).
- ³⁶⁵ See also DPP v Kelly [2006] 3 IR 115 per Geoghegan J. at 122.
- ³⁶⁶ See, for example DPP v Binead [2007] 1 IR 374; DPP v McCrossan unreported, CCA, March 25, 2011; DPP v Farrell, unreported, SCC, May 18, 2012; DPP v Kelly [2007] IECCA 110; DPP v Matthews [2006] IECCA 103; DPP v Birney [2007] 1 IR 337.
- ³⁶⁷ DPP v Kelly [2006] 3 IR 115; DPP v Connolly [2015] IESC 40; Donohoe v Ireland (No.19165/08) (2013) ECHR 1363.
- ³⁶⁸ DPP v Kelly (Vincent) [2007] IECCA 110.
- ³⁶⁹ DPP v Donnelly [2012] IECCA 78 at 37.
- ³⁷⁰ DPP v Devlin [2012] IECCA 70.
- ³⁷¹ DPP v Kelly [2007] IECCA 110.
- ³⁷² DPP v Doran [2009] IECCA 113.
- ³⁷³ DPP v Maguire [2008] IECCA 67.
- ³⁷⁴ Kelly v Ireland (2010) ECHR 2215 at 25; see also R v Lucas [1981] QB 720, R v O (A) [2000] Crim LR 617, R v Webber [2004] 1 WLR 404.
- ³⁷⁵ Compiled from Oireachtas Reports on annual renewal of 1998 Act. The report usually refers to cases in which it was used, although on occasion it is reported as charges laid.
- ³⁷⁶ 43 29 30 14 10 80 20 23 48 47 62 41 42
2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015.
- ³⁷⁷ Gilligan v CAB [1998] 3 IR 185 at para.152.
- ³⁷⁸ Minister for Justice, Mr. Dermot Ahern Criminal Justice (Amendment) Bill, July 14, 2009, Seanad Debate vol. 196 No.15 p.6.
- ³⁷⁹ Section 70(1) of the 2006 Act.
- ³⁸⁰ In the 12 months up to June 2013 there were a total of 41 arrests under the relevant provisions of the 2006 Act. The Dáil must approve the section annually.
- ³⁸¹ DPP v Bolger (no.2) [2014] IECCA 1 per Denham C.J. at para.40.
- ³⁸² DPP v Matthews [2006] IECCA 103; see also DPP v Bolger [2013] IECCA 6.
- ³⁸³ DPP v Bowes [2004] 4 IR 223 per Fennelly J.
- ³⁸⁴ Repealed by s.3 of the 2007 Act.
- ³⁸⁵ DPP v Heaney, unreported, CCA, 29 May 2006; see also DPP v Bolger (no.2) [2014] IECCA 1.
- ³⁸⁶ DPP v Fitzpatrick [2012] IECCA 74 at para.44; where it was stated that: “the question of the appropriate caution should be reviewed, and it ought to be possible to give simple guidance to interviewing gardaí so as to ensure that where it is considered appropriate to invoke the procedures under sections such as these, that such invocation is effective.”
- ³⁸⁷ DPP v Bolger (no.2) [2014] IECCA 1 per Denham C.J. at para.51-4.

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- ³⁸⁸ As far back as the debate in the Dáil on the Criminal Justice Bill 1984, then Minister for Justice, Mr. Noonan acknowledged the need to change the Judges Rules to amend the form of the caution in light of proposed inferences. Dáil Debates Vol.347 col.451-468.
- ³⁸⁹ Dáil Debate Vol. 714 col. 97.
- ³⁹⁰ DPP v Healy [1990] 2 IR 73.
- ³⁹¹ *Ibid* per Finlay C.J. at 81.
- ³⁹² Lavery v Member in charge Carrickmacross [1999] 2 IR 390 per O’Flaherty J. at 396; where it was stated: “The solicitor is not entitled to be present at the [police] interviews.”
- ³⁹³ DPP v Gormley [2014] ILRM 377. As a result of this case the DPP issued a directive to AGS to accede to such requests.
- ³⁹⁴ *Salduz v Turkey* (2009) 49 EHRR 19 at para.54.
- ³⁹⁵ *Murray v United Kingdom* (1996) 22 EHRR 29.
- ³⁹⁶ *Ibid* at para.58.
- ³⁹⁷ *Ibid* at para.48.
- ³⁹⁸ *Ibid* at para.47.
- ³⁹⁹ *Averill v UK* (2001) 31 EHRR 839.
- ⁴⁰⁰ *Ibid* at para.59.
- ⁴⁰¹ DPP v Fitzpatrick [2012] IECCA 74.
- ⁴⁰² Section 10 of the of the 2011 Act ensures legal advice before an inference is drawn and states: the accused was informed before such failure occurred that he or she had the right to consult a solicitor and, other than where he or she waived that right, the accused was afforded an opportunity to so consult before such failure occurred.
- ⁴⁰³ *Condron v UK* (2001) 31 EHRR 1.
- ⁴⁰⁴ *R v Betts* [2001] 2 Cr. App R 257.
- ⁴⁰⁵ *R v Howell* [2005] 1 Cr. App R 1.
- ⁴⁰⁶ *Ibid* at 13-14.
- ⁴⁰⁷ *R v Hoare* [2005] 1 WLR 1804.
- ⁴⁰⁸ *R v Beckles* [2005] 1 WLR 2829 at 2843.
- ⁴⁰⁹ DPP v O’Callaghan [2005] IECCA 72; see also DPP v Bolger (no.2) [2014] IECCA 1.
- ⁴¹⁰ *R v Hoare* [2005] 1 WLR 1804.
- ⁴¹¹ DPP v Birney [2007] 1 IR 337.
- ⁴¹² *Ibid* at 368.
- ⁴¹³ DPP v Cronin [2003] 3 IR 377 per Hardiman J. at 390.
- ⁴¹⁴ *R v Howell* [2003] 1 Cr App R 1 at 11.
- ⁴¹⁵ Mr. Richard Atkinson Chair Criminal Law Committee, Law Society England and Wales, addressing Law Society Seminar 9/5/14, Dublin. (Comments reproduced with permission); see also (Moston and Stephenson 2009 p.19).
- ⁴¹⁶ *R v Roble* [1997] EWCA Crim J0121-16 at 9.
- ⁴¹⁷ *R v Howell* [2005] 1 CrAppR 1 per Laws L.J. at 13.
- ⁴¹⁸ *R v Roble* [1997] EWCA Crim J0121-16 at 9.
- ⁴¹⁹ Directive 2012/13/EU on the Right to Information in Criminal Proceedings. This should include the known facts of the allegation but not information that may prejudice the ongoing investigation at s.28.
- ⁴²⁰ *R v Argent* [1997] 2 CrAppR 27.
- ⁴²¹ *R v Howell* [2005] 1 CrAppR 1 at 13.
- ⁴²² DPP v Meehan [2006] 3 IR 468 per Kearns J.at para.56.

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- ⁴²³ DPP v Hestor [1973] AC 296 per Lord Pearson at 321; quoted with approval in DPP v Meehan [2006] 3 IR 468.
- ⁴²⁴ DPP v Murphy [2013] IECCA 1 per McKechnie J. at para.68.
- ⁴²⁵ R v Baskerville [1916] 2 KB 658.
- ⁴²⁶ For example cases such as DPP v Binead [2007] 1 IR 374; DPP v Matthews [2007] 2 IR 169; DPP v Birney [2007] 1 IR 337.
- ⁴²⁷ DPP v Donnelly [2012] IECCA 78.
- ⁴²⁸ DPP v Kelly [2007] IECCA 110.
- ⁴²⁹ Donohoe v Ireland (No.19165/08) [2013] ECHR 1363.
- ⁴³⁰ *Ibid* at 84.
- ⁴³¹ DPP v Binead [2007] 1 IR 374.
- ⁴³² *Ibid* at 394-395.
- ⁴³³ R v Inhabitants of Eriswell (1790) 3 Term Rep. 707; see also R v Christie [1914] AC 545; R v Voisin [1918] 1 KB 531.
- ⁴³⁴ DPP v C, unreported, CCA, July 31 2001; see also DPP v Ward unreported, SCC, November 27, 1998.
- ⁴³⁵ Averill v United Kingdom (2001) 31 EHRR 839 at para.47.
- ⁴³⁶ R v Bowden [1999] 1 WLR 823 at 827.
- ⁴³⁷ DPP v Doran [2009] IECCA 113; see also DPP v Byrne, unreported, SCC, November 17, 2009.
- ⁴³⁸ DPP v Kelly [2006] 3 IR 115; see also Redmond v Ireland [2009] 2 ILRM 419; DPP v Donnelly [2012] IECCA 78.
- ⁴³⁹ Balance in the Criminal Law Report.
- ⁴⁴⁰ Report of the Garda Inspectorate 2014 at 9.36 found little evidence of use of adverse inference provisions in interviews examined.

Chapter Four Questioning and Confessions

- ⁴⁴¹ DPP v Buck [2002] IR 268.
- ⁴⁴² Rothman v R [1981] 1 SCR 640 at 645.
- ⁴⁴³ Such requirements continue to be necessary in the restorative justice paradigm, for example, see (Bazemore 2001, Wheeldon 2009).
- ⁴⁴⁴ With the following caveat, the torture warrant was issued by the King or his Privy Council and only rarely being used outside treason cases (Lowell 1897; Langbein 1976). Royal torture warrants granted immunity from civil suit (Langbein 1976 p.130, Lowell 1897) Langbein (1976) suggests that Elizabeth's reign was the time of most frequent torture, with 53 of the 81 cases documented. Langbein estimates that until it ceased to be used in 1640, that that is reasonable to conclude that the rate of torture was on average one case per year although he acknowledges it may have been at a slightly higher rate. Of the documented cases, Langbein suggests only 25% related to 'ordinary' felony crime, but the suspicion is that the victims involved may not have been anonymous members of the public, more likely that they were particularly important members of the aristocracy.
- ⁴⁴⁵ Miranda v Arizona (1966) 384 US 436 at 457.
- ⁴⁴⁶ Ibrahim v R [1914] AC 599 per Lord Sumner at 611.
- ⁴⁴⁷ R v Johnston (1864) 15 Ir CLR 60 per Lefroy C.J. at 130.
- ⁴⁴⁸ In Ireland an unarmed Dublin metropolitan police had existed since 1786. Countrywide this was followed in 1822 by four provincial forces created under Robert

Peel. Peel later created the modern London Metropolitan Police in 1829, followed throughout other areas of Great Britain.

⁴⁴⁹ The Indictable Offences Act 11&12 Vict. c. 42 (1848); in Ireland, known as the Indictable Offences (Ireland) Act 12&13 Vict. c. 69 (1849).

⁴⁵⁰ *Ibid* section XVIII.

⁴⁵¹ Lord Sumner in *Ibrahim v R* (1914) AC 599 at 612 also attributed to the 1885 case *R v Gavin* [1885] 15 Cox CC 656 as a watershed case for the denial of police produced confessions.

⁴⁵² *R v Johnston* (1864) 15 Ir CLR 60; *R v Hughes* (1840) 1 Cr & D 13 at 15; *R v Toole* (1856) 7 Cox CC 244 at 245.

⁴⁵³ *R v Green* (1832) 172 ER 990 at 991; see also *R v Arnold* (1838) 173 ER 645.

⁴⁵⁴ *R v Baldry* (1852) 2 Den 430.

⁴⁵⁵ *Ibid* at 444 per Parke B. referring to the Indictable Offences Act 11&12 Vict. c. 42 (1848) s.18.

⁴⁵⁶ The following cases were overruled; *R v Morton*, 2 Moo and Rob 514; *R v Parley*, 1 Cox 76; and *R v Harris* 1 Cox 106.

⁴⁵⁷ *R v Baldry* (1852) 2 Den. 430 at 445.

⁴⁵⁸ *Ibid* at 441.

⁴⁵⁹ *R v Johnston* (1864) 15 Ir CLR 60. Cases cited as judicial authority that allowed in confessions obtained from police questioning included; *R v Thornton* 1 Moo. CC 27 (1835); *R v Wild* 1 Moody CC 452 (1835); *R v Baldry* 2 Den. 430 (1852); *R v Gibney* *Jebbs Reserved Cases* 15 (1824); *R v Berriman* 6 Cox, 388; *R v Cheverton* 2 F. & Fin. 833; *R v Kerr* 8 C. & P. 176 (1837) received without caution but Parke J. stated it was desirable that caution should be given first; *R v Ellis Ry. & Moo.* 432; *R v Stripp* 1 Dear. CC 648.

Cases mentioned in support of not allowing police questioning include; *R v Gray* 7 Cox. CC 246; *R v Bodkin* 8 Ir. Jur. N.S. 340; *R v Pettit* 4 Cox 164 (1850) relating to magistrate questions inadmissible following 1848 Act; *R v Wilson* 1 Holt N. P. 597.

⁴⁶⁰ *R v Johnson* (1864) at 119.

⁴⁶¹ *Ibid* at 122-23; Generally, the RIC was an unpopular institution amongst all classes in Ireland and generally received little assistance from the public (e.g. see Hawkins 1991 p.25).

⁴⁶² *Ibid* at 118. This may have reflected the reality of the political situation as Bodansky (1981 p.127) also claims that the deep suspiciousness by Irish deputies of the British government motives for the introduction of the 1898 Criminal Evidence Act, allowing the accused be sworn to give evidence, meant that Ireland was exempted from the Act. Ireland did not introduce the measure then until 1924.

⁴⁶³ *R v Johnston* (1864) at 132-33.

⁴⁶⁴ *Ibid* per Lefroy C.J. at 130.

⁴⁶⁵ *R v Gavin* (1885) 15 Cox CC. 656; see also *R v Male* (1893), 17 Cox C C. 689; *R v Mick* (1863) 99 3F & F 822.

⁴⁶⁶ For example cases such as *R v Miller* (1895) 18 Cox CC 54 and *R v Brackenbury* (1893) 17 Cox CC 628; *R v Cheverton* (1863) 2F & F 833.

⁴⁶⁷ Langbein (2003 p.229) quoting from 3 Wigmore, Evidence no.829 at 238; see also discussion in (Brooke 2010).

⁴⁶⁸ *R v Thompson* (1893) 2 QB 12 at 18 quoted in Fennell (2009 p.395).

⁴⁶⁹ *Ibrahim v R* [1914] AC 599.

⁴⁷⁰ *Ibid* at 610-611.

⁴⁷¹ *Ibid* at 611.

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- ⁴⁷² R v Male (1893) 17 Cox CC 689.
- ⁴⁷³ R v Goddard, (1896) 60 J.P. 491.
- ⁴⁷⁴ Ibrahim v R [1914] AC 599 at 614.
- ⁴⁷⁵ R v Voisin [1918] 1 KB. 531 at 539-40. At this point only four rules were included, signed by Chief Justice Alverstone, dated October 1912.
- ⁴⁷⁶ *Ibid* at 539-540 per Lawrence J.; see also AG v Cummins [1972] IR 312 per Walsh J.; DPP v Farrell [1978] IR 13.
- ⁴⁷⁷ Adopted by Walsh J. in AG v Cummins [1972] IR 312, although with slightly different wording.
- ⁴⁷⁸ Miranda v Arizona 384 U.S. 436 [1966].
- ⁴⁷⁹ DPP v Lynch [1982] IR 64 at 87.
- ⁴⁸⁰ AG v Cummins [1972] IR 312; see also McCarrick v Leavy (1964) IR 225.
- ⁴⁸¹ DPP v Farrell [1978] IR 13 at 21.
- ⁴⁸² DPP v Casey [2004] IECCA 49.
- ⁴⁸³ *Ibid* at 13-16; see also DPP v Darcy, unreported, High Court, July 29, 1997.
- ⁴⁸⁴ McCarrick v Leavy [1964] IR 225.
- ⁴⁸⁵ DPP v O'Reilly [2009] IECCA 18 (unpaginated); see also Rothman v R [1981] 1 SCR 640 for statement against interest ruled admissible when made to undercover officer.
- ⁴⁸⁶ DPP v Breen, unreported, March 13, 1995 CCA.
- ⁴⁸⁷ DPP v McCann [1998] 4 IR 397.
- ⁴⁸⁸ Rule 7 states 'a prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said.'
- ⁴⁸⁹ DPP v McCann [1998] 4 IR 397 at 410 citing with approval Walsh J. in DPP v Shaw [1982] IR 1 at 30.
- ⁴⁹⁰ DPP v Yu Jie, [2005] IECCA 95 (unpaginated) per McCracken J.
- ⁴⁹¹ Dissatisfaction in England with the Judges Rules led to them being reformulated in 1964 (Brooke 2010). In particular, a series of articles by the legal theorist, Glanville Williams, in which he criticised the inadequacies of the Judges Rules and argued for changes to them, were particularly influential. Williams argued that tying the hands of the police on a 'sporting theory' of justice had a debilitating effect on police morale (Williams 1960 p.340). He argued that it was not custody per se that rendered confessions involuntary but the methods of questioning employed by the police. Rule one was, however, changed to explicitly allow the questioning of persons in custody. In 1981, the Royal Commission on Criminal Procedure reviewed the Judges Rules and concluded that they were an unsatisfactory amalgamation of "jigsaw pieces of two centuries of police and legal history." The Commission did, however, support the concept of police questioning of suspects in custody, viewing the procedure as essential in the investigation of crime, but insisted on the retention of the right to silence. Following its recommendations, in England and Wales, the Police and Criminal Evidence Act of 1984 introduced legislation to regularise the questioning of suspects, as well as introducing a code of practice to replace the Judges Rules. PACE Code C sets out the requirements for the detention, treatment and questioning of suspects not related to terrorism in police custody. The latest version came into effect on July 10 2012.
- ⁴⁹² Section 57 Criminal Justice Act 2007.
- ⁴⁹³ "Comprehending the Scottish Caution: Do offenders understand their right to remain silent?" David J. Cooke and Lorraine Philip (1998) Legal and Criminological psychology 13, quoted in McGowan v B [2012] HRLR 7.

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- ⁴⁹⁴ McCormack v Judge of the Circuit Court [2008] 1 ILRM 49 per Charleton J. at 55.
- ⁴⁹⁵ Section 57 Criminal Justice Act 2007 permits transcripts of the tapes to be used instead of handwritten notes; see also Report of the Garda Inspectorate 2014 at part 9.35.
- ⁴⁹⁶ DPP v Lynch [1982] IR 64.
- ⁴⁹⁷ S.I. 119 of 1987. Amended by the 2007 Act.
- ⁴⁹⁸ DPP v Darcy unreported, High Court, July 29, 1997.
- ⁴⁹⁹ Regulation 12 (10).
- ⁵⁰⁰ Regulation 12 (2).
- ⁵⁰¹ DPP v O'Connell [1995] 1 IR 244; see also DPP v Reddan (1995) 3 IR 560.
- ⁵⁰² DPP v Diver [2005] 3 IR 270.
- ⁵⁰³ S.I. 74 of 1997 in relation to section 4 Criminal Justice Act 1984, section 30 Offences Against the State Act 1939, section 2 Criminal Justice (Drug Trafficking) Act 1996. S.I. 168 of 2009 introduced the Criminal Justice Act 1984 (Electronic Recording of Interviews) (Amendment) Regulations 2009, which amended Regulation 3 to include a detention under s.50 of the 2007 Act. While s.3(b) of s.42 CJA 1999 states that a person should be dealt with as if detained under s.4 of the 1984 Act.
- ⁵⁰⁴ DPP v O'Reilly [2009] IECCA 18.
- ⁵⁰⁵ In DPP v Connolly [2003] 2 IR 1 the CCA held that as a matter of law there was no impropriety in only one member interviewing although it may later effect the reliability of any admission. Four members is the maximum number permitted under the regulations.
- ⁵⁰⁶ ERI no.6(1). Compact Discs are gradually replacing the VHS tapes.
- ⁵⁰⁷ ERI no.6(2)(a).
- ⁵⁰⁸ For example s.61 of the Children Act 2001 and Regs.12 and 22 of the Custody Regulations requires the presence at interview of a parent or guardian when the person is less than 18years. Other persons who may be present include interpreters in the case of foreign nationals.
- ⁵⁰⁹ ERI no.6(2)(b).
- ⁵¹⁰ ERI no.8, 9 & 10.
- ⁵¹¹ ERI no.8(3).
- ⁵¹² ERI no.12.
- ⁵¹³ ERI no.12, 8, 9, 10.
- ⁵¹⁴ ERI no.13.
- ⁵¹⁵ ERI no.16 originally allowed the interviewee to request a copy of the tape but following allegations of the misuse of the tapes, this facility was revoked and changed by s.56(2) of the Criminal Justice Act 2007.
- ⁵¹⁶ ERI no.15.
- ⁵¹⁷ DPP v Murphy [2013] IECCA 1.
- ⁵¹⁸ *Ibid* at para.55-56.
- ⁵¹⁹ DPP v Pringle [1981] 2 Frewen 57.
- ⁵²⁰ DPP v Buck [2002] IR 268.
- ⁵²¹ DPP v Healy [1990] 2 IR 73.
- ⁵²² DPP v Yu Jie [2005] IECCA 95, unpaginated; see also DPP v Binead [2007] 1 IR 374 at 394.
- ⁵²³ McCormack v Judge of the Circuit Court and the DPP [2008] 1 ILRM 49.
- ⁵²⁴ *Ibid* at 54.
- ⁵²⁵ See also (Fennell 2009 at 9.17). For discussion of the alternative American interpretation see Summers (2012) and (Murphy 2008 p.289).

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- ⁵²⁶ McCormack v Judge of the Circuit Court and the DPP [2008] 1 ILRM 49 at 52; see also Rothman v R [1981] 1 SCR 640.
- ⁵²⁷ R v Pearce [1979] 69 Cr App R 365.
- ⁵²⁸ DPP v Clarke [1995] 1 ILRM 355 at 367.
- ⁵²⁹ See also DPP v Ryan (2011) IECCA 6.
- ⁵³⁰ McCormack v Judge of the Circuit Court and the DPP [2008] 1 ILRM 49 at 55.
- ⁵³¹ *Ibid.*
- ⁵³² Children Act 2001 s.70(2) and Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Stations)(Amendment) Regulations 2006 (SI 641 of 2006).
- ⁵³³ Regulation 13.
- ⁵³⁴ Regulation 13(3).
- ⁵³⁵ Regulation 22(1) and 22(2).
- ⁵³⁶ Following the judgment in DPP v JC [2015] IESC 31; see also Conor O'Mahony, Supreme Court Relaxes Exclusionary Rule – Latest Shift in a Finely Balanced Debate, Constitution Project @UCC available at <http://constitutionproject.ie/?p=496>.
- ⁵³⁷ R v Sang [1980] AC 402 at 437.
- ⁵³⁸ Jeffrey v Black [1978] QB 490 per Lord Widgery at 498.
- ⁵³⁹ R v Warwickshall (1783) 1 Leach 263.
- ⁵⁴⁰ Cited in AG v McGrath [1965] 99 ILTR 59 at 69.
- ⁵⁴¹ DPP v JC [2015] IESC 31 per O'Donnell J. at 61.
- ⁵⁴² AG v O'Brien [1965] IR 142.
- ⁵⁴³ Kuruma v R [1955] AC 197.
- ⁵⁴⁴ AG v O'Brien [1965] IR 142 at 160.
- ⁵⁴⁵ *Ibid* at 170.
- ⁵⁴⁶ DPP v Shaw [1982] IR 1.
- ⁵⁴⁷ *Ibid* at 32-33.
- ⁵⁴⁸ DPP v Kenny [1990] 2 IR 110.
- ⁵⁴⁹ *Ibid* at 133 per Finlay C.J.
- ⁵⁵⁰ *Ibid* at 134.
- ⁵⁵¹ DPP v Shaw [1982] IR 1.
- ⁵⁵² DPP v Cullen unreported, March 30, 1993 CCA.
- ⁵⁵³ DPP v Buck [2002] ILRM 454.
- ⁵⁵⁴ *Ibid* at 466.
- ⁵⁵⁵ *Ibid* at 468.
- ⁵⁵⁶ DPP v O'Brien [2005] 2 IR 206 at 211-212.
- ⁵⁵⁷ DPP v AD [2012] IESC 33.
- ⁵⁵⁸ *Ibid* at para.5.3.
- ⁵⁵⁹ *Ibid* at para.5.9.
- ⁵⁶⁰ Criminal Law Review Group Report at p.159.
- ⁵⁶¹ *Ibid* at p.289.
- ⁵⁶² DPP v JC [2015] IESC 31.
- ⁵⁶³ *Ibid* at para.55.
- ⁵⁶⁴ *Ibid* at para.97.
- ⁵⁶⁵ Salduz v Turkey [2009] 49 EHRR 19.
- ⁵⁶⁶ DPP v Healy [1990] 2 IR 73.
- ⁵⁶⁷ *Ibid* at 81.
- ⁵⁶⁸ DPP v Conroy [1986] I R 460 at 478.
- ⁵⁶⁹ DPP v Finnegan unreported, July 15, 1997, CCA; DPP v Buck [2002] 2 ILRM 454.

⁵⁷⁰ O'Brien v DPP [2005] 2 IR 206.

⁵⁷¹ *Ibid* at 212 per McCracken J.

⁵⁷² DPP v Gormley [2010] IECCA 22 at para.7 per Finnegan J.

⁵⁷³ Regulation 9.

⁵⁷⁴ DPP v Finnegan unreported, Court of Criminal Appeal, July 15 1997.

⁵⁷⁵ DPP v Gormley [2010] IECCA 22; DPP v Ryan (Bryan) [2011] IECCA 6.

⁵⁷⁶ DPP v Buck [2002] IR 268.

⁵⁷⁷ DPP v Gormley [2010] IECCA 22.

⁵⁷⁸ *Ibid* at para.11.

⁵⁷⁹ DPP v Cullen unreported, CCA, March 30, 1993.

⁵⁸⁰ DPP v Ryan [2011] IECCA 6.

⁵⁸¹ Regulation 12 limits the people present to no more than two Gardaí who can question the suspect at one time with a maximum of four being present. Regulation 12(6) further provides that: Where an arrested person asks for a solicitor, he shall not be asked to make a written statement in relation to an offence until a reasonable time for the attendance of the solicitor has elapsed.

⁵⁸² DPP v Buck [2002] 2 ILRM 454 at 462.

⁵⁸³ Barry v Waldron unreported, High Court, May 23,1996; see also DPP v O'Connell [1995] 1 IR 244; DPP v Healy [1990] 2 IR 73.

⁵⁸⁴ Lavery v Member in Charge Carrickmacross Garda Station [1999] 2 IR 390.

⁵⁸⁵ *Ibid* at 396.

⁵⁸⁶ J.M. v Member in Charge of Coolock Garda Station, [2013] IEHC 251; see also DPP v Yu Jie, [2005] IECCA 95.

⁵⁸⁷ Salduz v Turkey [2009] 49 EHRR 19.

⁵⁸⁸ For example the Scottish Supreme Court in Cadder v Her Majesty's Advocate [2011] HRLR1.

⁵⁸⁹ DPP v Gormley & White [2014] ILRM 377.

⁵⁹⁰ DPP v Gormley [2014] ILRM 377 at 9.13-9.14.

⁵⁹¹ *Ibid*, for example at 9.10.

⁵⁹² DPP v Conroy [1986] IR 460 at 475 per Walsh J.

⁵⁹³ Callis v. Gunn [1964] 1 QB 495 at 501 per Lord Parker C.J; see also DPP v PO'C [2006] 3 IR 238 at para.21.

⁵⁹⁴ Noor Mohamed v The King [1949] AC 182.

⁵⁹⁵ Jeffrey v Black [1978] QB 490 per Lord Widgery C.J. at 498.

⁵⁹⁶ DPP v Shaw [1982] IR 1; DPP v Doyle [2015] IECA 109; AG v Galvin [1964] IR 325.

⁵⁹⁷ AG v Cummins [1972] I.R 312 per Walsh J. at 324; see also Canadian Supreme Court decision Rothman v R [1981] 1 SCR 640 where Justice Lamer stated that the investigation and detection of crime is not a game to be governed by the Marquis of Queensbury rules.

⁵⁹⁸ DPP v Shaw [1982] IR 1.

⁵⁹⁹ *Ibid* at 62.

⁶⁰⁰ Custody Regulation 12(2).

⁶⁰¹ DPP v C, unreported, CCA, July 1, 2001.

⁶⁰² DPP v Ward unreported, SCC, November 27, 1998.

⁶⁰³ DPP v Kelly, unreported, SCC, November 26 2004.

⁶⁰⁴ State (Healy) v Donoghue [1976] IR 325; see also in re Haughey [1971] IR 217 and The State (Royle) v Kelly [1974] IR 259; where it was held by the Supreme Court that the provisions of Article 38 of the Constitution, in requiring a criminal trial to be

conducted in due course of law, import the requirement of fair procedures which furnish an accused with an adequate opportunity to defend himself against the charge made. See also *Edwards and Lewis v UK* (2003) 15 EHRR at 417.

⁶⁰⁵ See also *DPP v Conroy* [1986] IR 460; *DPP v Hoey* (1987) IR 637; *Re National Irish Bank Ltd* [1999] 3 IR 145.

⁶⁰⁶ *R v Warickshall* (1783) 1 Leach, CC 263; see also (Beattie 1986 p.79) on a 1738 case and at p.346, the comments of Willes LCJ on the use of fallacious promises of pardon.

⁶⁰⁷ *Ibrahim v R* [1914] AC 599 at para.17; see also *AG v O'Brien* (1965) ILTR 59 per Davitt J. at 69.

⁶⁰⁸ English laws against witchcraft included 33 Hen.VIII, c.8 1542, and 5 Eliz., c.16 1563 and most importantly the law of James 1, Jas.1, c.12 in 1604.

⁶⁰⁹ He remained firmly convinced of the correctness of such obtained confessions, nonetheless.

⁶¹⁰ *Ibrahim v R* [1914] AC 599 at 609; Lord Matthew Hale was born in 1609, shortly before William Perkins book.

⁶¹¹ *DPP v Shaw* [1982] I.R. 1 at 60-61.

⁶¹² *R v Goldenburg* [1988] 88 CrAppR 285.

⁶¹³ *DPP v McCann* [1998] 4 IR 397.

⁶¹⁴ *Ibid* at 409.

⁶¹⁵ *Ibid* at 411.

⁶¹⁶ *Ibid* at 411 per O'Flaherty J.: see also *DPP v Doyle* [2015] IECA 109 at para.34.

⁶¹⁷ *AG v Cleary* [1938] 72 ILTR 84.

⁶¹⁸ *R v Smith* [1959] 2 QB 35.

⁶¹⁹ *R v Thompson* (1892) 2 QB 12.

⁶²⁰ *AG v Flynn* [1963] IR 255.

⁶²¹ *R v Reeve* (1872) 1 CCR 362.

⁶²² *State v Treanor* [1924] 2 IR 193 per Fitzgibbon J. at 208.

⁶²³ *DPP v Pringle* [1981] 2 Frewen 57.

⁶²⁴ *Ibid* at 82 per O'Higgins C.J.; see also *DPP v Doyle* [2015] IECA 109.

⁶²⁵ *R v Praeger* [1972] 56 Cr App R 151.

⁶²⁶ *DPP v McNally* [1981] 2 Frewen 43.

⁶²⁷ *DPP v Hoey* [1987] IR 637.

⁶²⁸ *Ibid* at 649.

⁶²⁹ *DPP v Doyle* [2015] IECA 109 at para.34.

⁶³⁰ *Ping Lin* [1976] AC 574.

⁶³¹ *Re NIB* [1999] 3 IR 145 at 187.

⁶³² *DPP v Buck* [2002] 2 ILRM 454 at 462.

⁶³³ *DPP v Ryan* [2011] IECCA 6.

⁶³⁴ *DPP v Ryan* [2011] IECCA 6, unpaginated, cited in judgment as Trial transcript Book 11, p.39.

⁶³⁵ *DPP v Shaw* [1982] IR 1.

⁶³⁶ *DPP v Ryan* [2011] IECCA 6.

⁶³⁷ *DPP v McNally* [1981] 2 Frewen 43 at 53.

⁶³⁸ *R v Baskerville* [1916] 2 KB 658.

⁶³⁹ *DPP v O'Neill*, unreported, CCA, January 28 2002.

⁶⁴⁰ *DPP v Meehan* [2006] 3 IR 468; see also *DPP v Timmons* [2011] IECCA 13.

⁶⁴¹ *Ibid* at 483 (emphasis in original).

⁶⁴² Citing *AG v. Levison* [1932] IR 158 per O'Byrne J. at 165.

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- ⁶⁴³ DPP v Meehan [2006] 3 IR 468 at 497.
- ⁶⁴⁴ DPP v Meehan [2006] 3 IR 468 per Kearns J. at para.56.
- ⁶⁴⁵ DPP v Murphy [2005] 2 IR 125 at 159.
- ⁶⁴⁶ DPP v. Gilligan [2006] 1 IR 107.
- ⁶⁴⁷ DPP v Cooke [2009] IECCA 55.
- ⁶⁴⁸ DPP v. Gilligan [2006] 1 IR 107 at para.78; see also DPP v Murphy [2013] IECCA 1 at para.69.
- ⁶⁴⁹ *Ibid* at para.84.

Chapter Five An Garda Síochána

- ⁶⁵⁰ The first 100 recruits began renewed training on September 8 2014. See Garda Review (2014), vol. 8:42 at p.10.
- ⁶⁵¹ 26 Geo. 3, c.24. In 1795, Dublin reverted to the Watch system. In 1808, the DMP was reformed under the Dublin Police Magistrates Act (48 Geo. 3, c.140), to consist of approximately 700 men (Law Reform 1985).
- ⁶⁵² Initially created in 1787 by Act of 27 Geo. 3, c.40. Later, Sir Robert Peel, appointed Chief Secretary in Ireland in 1812, worked to create four provincial forces established by the Constabulary Act (3 Geo. 4, c.103), followed by the Irish Constabulary Act 1836 (6 & 7 Will. 4, c.113) which consolidated the force into one body, the Irish Constabulary. Following the Fenian rising of 1867, the Royal was added. The DMP were an unarmed force unlike the RIC who were armed with pistols and rifles.
- ⁶⁵³ The force was known initially as the Civic Guard from February 1922 until July 1923. In 1925 the new force amalgamated with the Dublin Metropolitan Police.
- ⁶⁵⁴ There were 7476 indictable crimes reported in 1927 falling to 6497 in 1931.
- ⁶⁵⁵ For example the comments of Hanna J. in Lynch v. Fitzgerald and Others [1938] IR 382 at 390/391 where he suggested, in a civil suit against the Gardaí for wrongful death, that the Broy Harriers were selected for their prowess with the gun. The Garda Síochána Act 1937 was passed to regularise these almost 600 entrants to the force.
- ⁶⁵⁶ Interview with Irish Times on October 2, 2014 available at <http://www.irishtimes.com/news/crime-and-law/you-could-not-get-into-fortress-garda-says-former-gsoc-commissioner-1.1948532>.
- ⁶⁵⁷ Garda homepage available at <http://www.garda.ie/Controller.aspx?Page=12698>.
- ⁶⁵⁸ The Garda Code 5th Edition was published in 2005 replacing the 1995 Edition.
- ⁶⁵⁹ Following criticisms in the Morris Tribunal on a lack of discipline, the Garda Síochána (Discipline) Regulations, 2007 replaced the Garda Síochána (Discipline) Regulations, 1989.
- ⁶⁶⁰ See also Garda Staff Survey of 2014 available at <http://www.garda.ie/Documents/User/AGS%20Survey%20High%20Level%20Report.pdf>.
- ⁶⁶¹ See also addendum 6 of the report. It concluded that the surge in recruitment post 2005 had resulted in a serious deterioration in foundation training delivered.
- ⁶⁶² “Clear and ambitious vision of Ireland’s police training” Irish Times April 23, 2015.
- ⁶⁶³ See also cases such as DPP v Wall (2005) IECCA 140. In this case, it was accepted that the key prosecution witness was unreliable and had admitted lying to a friend.
- ⁶⁶⁴ “Jury urges CPR refresher courses for gardaí” Irish Examiner, May 10, 2014.
- ⁶⁶⁵ In the U.S. the programme is structured as the Field Training Officer Program (FTO) see (Haberfield 2002 p.80).
- ⁶⁶⁶ See also Garda Staff Survey 2014.

⁶⁶⁷ The Criminal Justice Act, 1984 (Treatment of Persons in Custody) Regulations 1987-2007; Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997.

⁶⁶⁸ *Dunne v Clinton* [1930] IR 366.

⁶⁶⁹ *DPP v Bryan Ryan* (2011) IECCA 6 per Murray CJ; see also *People (DPP) v Michael Murphy* unreported CCA 5 May 2005.

⁶⁷⁰ “Gardaí using North-style brutality in interrogation techniques” *Irish Times*, February 14 1977. The Irish Government had complained to the European Commission of Human Rights about its use and this led to an ECHR case in *Ireland v United Kingdom* (1978) 2 EHRR 25.

⁶⁷¹ “Claustrophobia Victim says Gardaí Shut Him in Locker” *Irish Times* February 2, 1977.

⁶⁷² TD Joe Costello on debate of 2004 Criminal Justice Bill later the 2006 Act, 2nd stage. *Dáil Debate Vol. 598 No.1*, p.8.

⁶⁷³ “Mark Nash jailed for life over 1997 Grangegorman murders” *Irish Times*, April 20, 2015.

Chapter Six Models of Interrogation

⁶⁷⁴ *Brown v. Mississippi* 297 U.S. 278 (1936). Subsequently decided by US Supreme Court that the use in courts of coerced confessions is in violation of the Fourteenth Amendment; See also *Watts v. Indiana*, 338 US 49 (1949); *Ashcraft v. Tennessee*, 327 US 274 (1946).

⁶⁷⁵ See also The Wickersham Commission Report 1931, Report on Lawlessness in Law Enforcement.

⁶⁷⁶ The introduction of polygraph, while remaining particularly popular in the US remains technically of limited success, being only 65% accurate and more likely to err in mistaking truthful persons for liars.

⁶⁷⁷ Information on the training, including responses to critics, can be found at www.reid.com. This has been through a number of editions since it was first published in 1947 when it developed from the experiences of successful police interrogators. It is claimed by John E. Reid and Associates, itself a commercial company, that using the Reid Method, they train most of the police forces in the United States and around the world from Germany to Asia to the Middle East.

⁶⁷⁸ This is largely irrelevant in Ireland as there has to be reasonable grounds of suspicion for an arrest which is a prelude to any interrogation, which is subject to objective analysis by the court, for example, see *Trimbole v Governor of Mountjoy* [1985] ILRM 465.

However, believing a suspect to be lying can have implications for the type of interviewing technique employed and may lead to a more aggressive approach. The ability to detect deceit would be useful in dealing with other witnesses, including victims.

⁶⁷⁹ For a discussion of the BAI see also Gudjonsson and Pearse (2011, St. Yves 2006) and Kassin et al (2011, Kassin 2008) and (Vrij, Mann, and Fisher 2006, Bond and DePaulo 2006).

⁶⁸⁰ Adapted from (Inbau et al. 2001 p.209, Gudjonsson 2003, Buckley 2006).

⁶⁸¹ The most recent principles were published in the National Investigative Strategy (2009). This was established by the Police and Justice Act 2006, in consultation with ACPO, HO and Police Service, to develop policing doctrine including practice advice.

It has since been superseded by the Police College. The principles of Investigative Interviewing set out are:

- “The role of investigative interviewing is to obtain accurate and reliable information from suspects, witnesses or victims in order to discover the truth.”
- “Investigative interviewing should be approached with an open mind.”
- “Information obtained from the person being interviewed should always tested against what the interviewing officer already knows...”
- “When questioning anyone a police officer must act fairly...”
- “Vulnerable people, whether victims, witnesses or suspects, must be treated with particular consideration at all times.”
- “Investigators are not bound to accept the first answer given. Questioning is not unfair merely because it is persistent.”
- “Investigators have a responsibility to put questions to suspects, even when they exercise their right of silence.”

⁶⁸² The National Investigative Strategy (2009) at p.8 reformats these tiers somewhat, level 1 is renamed foundation while level 2 is separated into core function equivalent to tier 2 and specialist function equivalent to tier 3.

⁶⁸³ Adapted from (Fisher and Geiselman 1992, Dando et al 2008, 2009, Schollum 2005 and Shepherd 2010).

⁶⁸⁴ Adapted from Shepherd (2010).

⁶⁸⁵ Adapted from Shepherd (2010, p.239).

⁶⁸⁶ Heuristics are adaptive and evolved in humans to provide a powerful tool in maximising response times to recurring situations or challenges (Gigerenzer 1991, Gigerenzer 2008, Marewski, Gaissmaier, and Gigerenzer 2010, Gigerenzer 2006). They can also be trained, or practiced to automaticity, for example in CCU departments with doctors (Gigerenzer 2006, Stanovich 2011, Hertwig 2006). See also Malcom Gladwell’s 1995 book *Blink*. However, while biases can manifest themselves in all areas of human behaviour, in the criminal justice system they can manifest, for instance, in criminal trials themselves (Saks and Kidd 1980), in juries deciding to acquit on the basis of good looks or juries deciding cases on their own emotional responses to lawyers and witnesses they either like or dislike or their most credible version of events (Hastie and Wittenbrink 2006, Pennington and Hastie 1986, 1990, Brennan 2010), and in the way judges themselves reach decisions (Kassin, Goldstein, and Savitsky 2003b, Dhimi 2003, Haidt and Baer 2006), or parole boards make decisions (Hertwig 2006). Lawyers can further manipulate facts to make them more memorable and emotional for their side to jurors, the act of getting clients to dress well is also an influence (Piperides 2006). In this area of psychology, a debate between Gerd Gigerenzer from the Max Plank Institute who promotes the positive ecological value of heuristics and others such as Daniel Kahneman who analyses inherent weaknesses and resultant biases in heuristics has arisen. See, for example, Evans and Over (2010, also Tobena, Marks, and Dar 1999, Doherty 2003) for a discussion of some of the issues differentiating the two approaches, but both may, and appear compatible. However, while new heuristics can be taught, it is very difficult to retrain the mind to refrain from using old heuristics (Kahneman 2003b).

⁶⁸⁷ For example see *Lavery v Member in Charge Carrickmacross Garda Station* [1999] 2 I.R. 390; *People (DPP) v McCann* (1998) 4 IR 397 at 410; *People (DPP) v Yu Jie*, unreported, Court of Criminal Appeal, July 28 2005.

⁶⁸⁸ *Miranda v Arizona* 384 U.S. 436 [1966].

⁶⁸⁹ *Ibid* at 468-472.

⁶⁹⁰ *Ibid* at 478-479.

⁶⁹¹ *Edwards v Arizona* 451 U.S. 477, 101 S.C. 1880 (1981).

⁶⁹² Chinese interrogators used such principles very effectively during the Korean War, Cialdini p.61; see also Edgar Schein 1956 ‘The Chinese Indoctrination Program’ *Psychiatry* 19; Gudjonsson et al (2010) discuss theories of why innocent suspects confess including coerced-compliant where the suspect internalizes the behaviour ascribed to him.

⁶⁹³ See also “Half of police forces 'failing to investigate crime properly', says watchdog” *The Telegraph*, November 27, 2014.

⁶⁹⁴ Based on Art. 2 of the ECHR which includes the Right of Life and the duty of the State to protect life.

Chapter Seven Developments since 2014 GSIM

⁶⁹⁵ Sections 18, 19 & 19A of the 1984 Act.

⁶⁹⁶ Under such circumstances Alan Dershowitz (2002, 2008) has suggested ‘torture warrants.’ For discussion see Seidman (2005) and Scarry (2004).

⁶⁹⁷ *DPP v McCann* (1998) 4 IR 397 per O’Flaherty J. at 410.

⁶⁹⁸ *DPP v Pringle* [1981] 2 Frewen 57 at 82.

⁶⁹⁹ In certain offences the power of arrest and detention exists for witnesses who withhold information interfering with an investigation or prosecution. See ss.2&3 Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 and s.9 Offences Against the State (Amendment) Act, 1998.

⁷⁰⁰ Where a witness statement is made, s.16 of the 2006 Act makes provision for the use of those statements in court where the witness wishes to retract or alter their evidence.

⁷⁰¹ Personal communication with Mike Octigan, Motivational Interview trainer, June 2012.

⁷⁰² EU Directive 2012/13 on Right to Information in Criminal Proceedings provides that suspects should be made aware of the facts of the allegation against them, s.28 states “The information provided to suspects or accused persons about the criminal act they are suspected or accused of having committed should be given promptly, and at the latest before their first official interview by the police or another competent authority, and without prejudicing the course of ongoing investigations. A description of the facts, including, where known, time and place, relating to the criminal act that the persons are suspected or accused of having committed and the possible legal classification of the alleged offence should be given in sufficient detail, taking into account the stage of the criminal proceedings when such a description is given, to safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defence.” Section 30 specifies that any relevant documents, audio or videotapes should be given to the defence before the trial date.

⁷⁰³ Figure from Innocence Project, accessed on 6/10/201 available at <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide>; (see also Garrett 2008, Conway and Schweppe 2012).

⁷⁰⁴ *DPP v Doyle* [2015] IECA 109 at para.25.

⁷⁰⁵ *Ibid* per Birmingham J. at para.64.

⁷⁰⁶ Citing *R v Commissioner of Police for the Metropolis, ex parte Blackburn* (1968) 2 QB 118 per Lord Denning at 136.

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- ⁷⁰⁷ *Osman v United Kingdom* (2000) 29 EHRR 245.
- ⁷⁰⁸ *DPP v Kenny* [1990] 2 IR 110 at 134.
- ⁷⁰⁹ *DPP v Shaw* [1982] IR 1.
- ⁷¹⁰ *Ibid* at 54.
- ⁷¹¹ *Ibid* at 63.
- ⁷¹² *Gäfgen v Germany* (Application no. 22978/05) at para.20.
- ⁷¹³ BBC 2004. "German officer guilty of threats." available at <http://news.bbc.co.uk/2/hi/europe/4111483.stm>.
- ⁷¹⁴ *Gäfgen v Germany* at para.131.
- ⁷¹⁵ *Gäfgen v Germany* at para.178.
- ⁷¹⁶ *DPP v JC* [2015] IESC 31 per O'Donnell J. at para.65.
- ⁷¹⁷ See also *Jalloh v Germany* (Application no. 54810/00) at para.105.
- ⁷¹⁸ *Gäfgen v Germany* at para.28.
- ⁷¹⁹ *Ibid* at para.30.
- ⁷²⁰ *Ibid* at para.124-7.
- ⁷²¹ Applies to all suspects under s.58 PACE 1984 and to terrorism suspects specifically under Schedule 8 Terrorism Act 2000. PACE Code H applying only to Terrorism suspects came into effect on July 25 2006. EU Directive 2013/48 on Right of Access to a lawyer does provide exemptions to derogate temporarily from certain rights in exceptional circumstances and under strictly defined conditions.
- ⁷²² *R v Ibrahim* [2008] 2 CrAppR 23.
- ⁷²³ *Ibrahim v UK* (2015) 61 EHRR 9.
- ⁷²⁴ *Ibrahim v UK* (Applications nos. [50541/08](#), [50571/08](#), [50573/08](#) and [40351/09](#)).
- ⁷²⁵ Section 9 of the 2011 Act inserting a new s.5(A)(4) into the 1984 Act.
- ⁷²⁶ *DPP v Gormley* [2014] ILRM 377 at 405.
- ⁷²⁷ Current guidelines available at http://www.cps.gov.uk/legal/s_to_u/socpa_agreements_-_practical_note_for_defence_advocates/; see also CPS; Queen's Evidence - Immunities, Undertakings and Agreements under the Serious Organised Crime and Police Act 2005. An average of 7 total immunities are granted per annum, for example see https://www.cps.gov.uk/publications/performance/socpa/dpp_letter_ag_on_socpa.pdf.
- ⁷²⁸ *R v Ibrahim* [2008] 2 Cr App R 23 at para.36.
- ⁷²⁹ *DPP v Bryan Ryan* (2011) IECCA 6 as discussed in section on voluntary statements in chapter four.
- ⁷³⁰ *Ibid* cited in judgment as Trial transcript Book 11, p.39.
- ⁷³¹ For example see *Murphy v GM. PB* [2001] 4 IR 113.

Chapter Eight Conclusion

- ⁷³² Section 35 Criminal Justice and Public Order Act 1994.
- ⁷³³ *R v Howell* [2005] 1 CrAppR 1 per Laws L.J. at 13.
- ⁷³⁴ Section 144 Criminal Justice Act 2003 and Sentencing Guidelines Council Policy 2007 recommends up to 1/3 reduction in sentence.
- ⁷³⁵ *R v Howell* [2005] 1 CrAppR 1.
- ⁷³⁶ *DPP v Finnerty* [1999] 4 IR 364.