Submission to the Offences Against the State Acts Independent Review Group

Prof Yvonne Daly, Professor of Criminal Law and Evidence, Dublin City University

with Dr Aimée Muirhead (postdoctoral researcher) and Ciara Dowd (research assistant)

yvonne.daly@dcu.ie

This submission focuses on a specific aspect of the Offences Against the State Acts and the operation of the Special Criminal Court, namely provisions which allow for incursions on the right to silence of those suspected or accused of offences. It is based on the findings of a recently-completed 130-page report on the Right to Silence in Ireland, which was undertaken by the authors as part of an EU-funded project (EmpRiSe – Project ID: 802102) on the right to silence in police interrogations in four European Jurisdictions – Italy, Belgium, the Netherlands, and Ireland. This Report can be accessed here, and the project website contains additional material which may be of interest to members of the Independent Review Group, including a Policy Brief on Ireland, and a 45-minute video detailing the Irish findings overall.

1. Introduction

The EmpRiSe Project (Right to Silence and related rights in pre-trial suspects' interrogations in the EU: Legal and empirical study and promoting best practice) is an EU-funded study, examining the law and practice relating to the right to silence during suspect interrogations at the investigative stage of the criminal justice process. By comparing the different processes and issues in four European jurisdictions (Belgium, Ireland, Italy and the Netherlands), the EmpRiSe Project hopes to identify good practice in relation to safeguarding the right to silence in the pre-trial phase of criminal proceedings. A review of the law on the right to silence has been carried out in each jurisdiction, followed by qualitative empirical research that used interviews and focus groups to unpick the perceptions held by professionals working within the criminal process in relation to the right to silence. This has facilitated the development of recommendations that aim to improve the practice of suspect interviewing and decision-making in the criminal justice system.

In the Irish context, legal analysis of relevant legislation and case law was first conducted. Then, from March 2020 to April 2021, the empirical phase of the research consisted of 2 focus groups with 19 criminal defence solicitors and interviews with 10 barristers, 11 staff from the Office of the Director of Public Prosecutions, 4 judges (covering the Circuit Criminal Court, the Central Criminal Court and the Special Criminal Court), and 6 recently retired members of An Garda Síochána (AGS).

Through these focus groups and interviews with 50 professional actors across various roles within the Irish criminal process this study has garnered previously unrecorded insights into the operation of the right to silence in cases relating to the Offences Against the State Act and trials in the Special Criminal Court.

Of particular concern is the use of adverse inference provisions in the Special Criminal Court. Our findings show that these types of provision are much more frequently used in trials before the Special Criminal Court than in the "ordinary" courts (i.e. non- Special Criminal Court courts), and they also appear to have a much more significant impact in such trials. This is a cause for concern because first, an inference drawn from a pre-trial failure or refusal to provide certain information is a weak form of evidence, and, as discussed below, it can have a definitive impact on convictions in the Special Criminal Court, particularly on the

The EmpRiSe Project Research was funded by
the European Union's Justice Programme (2014-2020)
Project ID: EmpRiSe - 802102
Call: Just-JACC-AG-2017

offence of membership of an unlawful organisation. Secondly, given the nature of the cases which come before the Special Criminal Court, both under the OASA and those relating to organised crime, there is a higher likelihood that suspects and accused persons in such circumstances may be dissuaded from cooperating with gardaí during the interview process through fear of repercussions from associates in the community. In such cases, failure to answer questions or provide information sought may be attributable to fear, rather than symptomatic of guilt. We are concerned about the fairness of allowing such silence to have evidential value. We are also concerned about the existence and operation of legislative provisions which criminalise a failure to provide certain information in certain circumstances. These issues will be discussed in further detail below. We begin with a brief overview of adverse inference provisions generally.

2. Adverse Inference Provisions

Introduction to the inference provisions

As members of the Independent Review Group will know well, the right to silence is constitutionally protected under the right to freedom of expression (Art 40.6), and the right to a fair trial (Art 38.1). Nonetheless, given that the right to silence is not absolute, the Oireachtas has enacted various types of legislative incursions thereon, for the purpose of investigating crimes and protecting the public. One such type of incursion is adverse inference provisions.

Adverse inference provisions allow the trier of fact at trial (i.e. the judge in the District Court, the jury in the Circuit or Central Criminal Courts, or the three-judge panel in the Special Criminal Court) to learn of the suspect's exercise of the right to silence, and to draw inferences from the failure of the accused to mention certain facts or provide certain information during police questioning, at the time of charging, or at any time in advance of the trial.

The legislation

The first provisions introduced were sections 18 and 19 of the Criminal Justice Act 1984, which allowed for the drawing of inferences from the accused's failure or refusal in the pre-trial period of investigation to account for the presence of any object, substance or mark on his person, clothing or footwear, or in his possession, or in the place where he is arrested[1] or for his presence at a particular place.[2] These provisions apply to all arrestable offences.

Section 19A[3] was inserted into the 1984 Act in 2007, and also applies to all arrestable offences. It provides that inferences may be drawn at trial from a suspect's failure in the pre-trial period to mention any fact, when he is being questioned, charged or informed that he might be charged with a particular offence, which he later relies on in his defence at trial, being a fact which in the circumstances existing at the time "clearly called for an explanation".

A number of safeguards, aimed at reflecting both constitutional and ECHR jurisprudence on the right to silence/privilege against self-incrimination, apply to section 18, 19, and 19A:[4]

[1] Section 18.
[2] Section 19.
[3] Criminal Justice Act 1984, section 19A as inserted by the Criminal Justice Act 2007, section 30. The general content of section 19A was proposed by the Balance in the Criminal Law Review Group, *The Right to Silence Interim Report* (31 January 2007) p.43, and *Final Report* (15 March 2007), p. 97.
[4] The safeguards were inserted into sections 18, 19 and the new section 19A of the Criminal Justice Act 1984 by sections 28, 29 and 30 of the Criminal Justice Act 2007.

The EmpRiSe Project Research was funded by
the European Union's Justice Programme (2014-2020)
Project ID: EmpRiSe - 802102
Call: Just-JACC-AG-2017

- The inference may not be the sole or main basis for a conviction but may serve as corroboration of any evidence in relation to which the failure is material;
- The accused must be told in ordinary language what the effect of any relevant failure or refusal to account for a pertinent matter might be;
- The accused must be afforded a reasonable opportunity to consult a solicitor prior to the relevant silence;
- The court or jury in deciding whether or not to draw inferences ought to consider when the account or fact concerned was first mentioned by the accused; and
- No inference shall be drawn in relation to a question asked in an interview unless either the interview has been electronically recorded or the detained person has consented in writing to the non-recording of the interview.

Other notable adverse inference provisions include section 2 of the Offences Against the State (Amendment) Act 1998, and section 72A of the Criminal Justice Act 2006. Section 2 of the Offences Against the State (Amendment) Act 1998 provides that in a trial for membership of an unlawful organisation, an adverse inference may be drawn where the accused failed to answer "any question material to the investigation". The section defines "material questions" extremely broadly, including any questions "requesting the accused to give a full account of his or her movements, actions, activities or associations during any specified period."

Section 72A of the Criminal Justice Act 2006, which was inserted by section 9 of the Criminal Justice (Amendment) Act 2009, operates in the context of the rather broad concept of participating in or contributing to any activity of a "criminal organisation".[5] In this regard, section 72A is significantly broader in ambit than section 2 of the 1998 Act, which only applies to the offence of membership of an unlawful organisation.

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

- a request that the suspect give a full account of his or her movements, actions, activities or associations during any specified period relevant to the offence being investigated;
- questions related to statements or conduct of the suspect implying or leading to a reasonable inference that he was at a material time directing the activities of a criminal organisation;
- and, questions relating to any benefit that the suspect may have obtained from directing a criminal organisation or committing a serious offence within a criminal organisation.[6]

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

[6] Criminal Justice Act 2006, section 72A(7).

The EmpRiSe Project Research was funded by
the European Union's Justice Programme (2014-2020)
Project ID: EmpRiSe - 802102
Call: Just-JACC-AG-2017

A question is not to be regarded as being material to the investigation of the offence unless the garda concerned reasonably believed that the question related to the participation of the defendant in the commission of the offence.[7] However, this threshold requirement in sections 2 and 72A seem significantly easier to satisfy than those in section 18 and 19 (where an account for very particular matters was "clearly called for") and 19A (failure to mention a fact (i) which at that time "clearly called for an explanation" and (ii) which they then sought to rely on at trial as part of his defence.)

Some of the relevant questions which may be asked by gardaí and may lead to inferences at trial under sections 2 or 72A might be backed by a certain level of evidence, e.g. a question related to statements or conduct of the suspect implying or leading to a reasonable inference that he was at a material time directing the activities of a criminal organisation,[8] while others seem to allow for very little grounding in evidence, e.g. a request that "the suspect give a full account of his or her movements, actions, activities or associations during any specified period relevant to the offence being investigated".[9]

While courts, including the Special Criminal Court, may be careful to ensure that no improper inferences are drawn, we recommend that these legislative provisions be reconsidered and reviewed to insist on grounding evidence in relation to all situations which might lead to a later inference at trial.

Inferences in the garda station

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

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

As detailed in the afore-mentioned Report on the Irish findings in the EmpRiSe project, we recommend the continuation of this practice of holding separate and distinct inference interviews, though we have suggested a review of the manner in which the inference provisions are explained to suspects.

Inferences at trial

Inferences from pre-trial silence can only be sought at trial if the inference provisions were invoked in the garda station, and this must have been done in a procedurally compliant manner. If the procedure was not correctly followed, the judge will deem the interview inadmissible. This may be because the incorrect administration of the caution, insufficiently focused questioning or insufficient pre-interview disclosure.

The findings from the EmpRiSe research show that, while their use is increasing somewhat, inferences only appear in a small proportion of trials in the ordinary courts, that is, non-Special Criminal Court trials. This is partly explained by the fact that they have not always been invoked by gardaí during the interview period, or there has been some procedural error in their usage, or indeed that the suspect has provided an account and therefore they cannot be invoked.

[7] *Ibid.*
[8] Criminal Justice Act 2006, section 72A(7)(b)(i) as inserted by the Criminal Justice (Amendment) Act 2009.
[9] Criminal Justice Act 2006, section 72A(7)(a) as inserted by the Criminal Justice (Amendment) Act 2009.

The EmpRiSe Project Research was funded by
the European Union's Justice Programme (2014-2020)
Project ID: EmpRiSe - 802102
Call: Just-JACC-AG-2017

Furthermore, while participants noted that inferences were useful in cases that turn on circumstantial evidence, many participants were of the view that adverse inferences were by their nature superfluous and added little value, given that they tend to be ancillary to strong pieces of evidence. Given this perception of their lack of value, and the fact that they were procedurally delicate, some participants reported that they were wary of them since they could heighten the risk of appeal.

3. Adverse Inferences in the Special Criminal Court

While inferences do not seem to be a very significant feature in "ordinary" trials for the most part, the EmpRiSe research found that they seem to play a much more significant role in the Special Criminal Court in the context of organised crime offences and paramilitary offences, such as membership of an unlawful organisation ("membership").

This increased use may be due to the fact that detained suspects in these cases are more likely to give "no comment" responses because of fear of reprisal from organised crime associates as well as distrust of gardaí; they are more likely to be investigated by specialised and highly-trained gardaí (e.g. from the Special Detective Unit); and longer detention periods apply, giving greater time for gardaí to invoke the inference provisions.

Furthermore, the nature of the offences being tried in this Court also may be causing the increased reliance on inferences. Membership cases, for example, often lack other physical evidence so inferences play a much greater role. In fact, a conviction for the offence of membership can be based on an inference from silence under section 2 of the Offences Against the State Act 1998 combined with another unusual type of evidence – the belief of a Garda Chief Superintendent that the accused was at a material time a member of an unlawful organisation[10] – and nothing more. One judge participant in the EmpRiSe study went so far as to state that without inferences there would not be convictions in membership cases.

Unusual evidence in an unusual court for an unusual offence

There is cause for concern that inferences are so weighty in the Special Criminal Court, as compared with their impact in trials in the "ordinary" courts, especially in the context of the offence of membership of an unlawful organisation. The Special Criminal Court, as a non-jury court, is an extraordinary court in the Irish criminal process; the offence of "membership of an unlawful organisation" is an extraordinary type of offence, which lacks clear definition and *actus reus*; the belief of a Garda Chief Superintendent that the accused is a member of an unlawful organisation can be accepted as evidence by the court, often based on privileged information which is unchallengeable by the defence; and such belief, combined with evidence that the accused failed to answer "any question material to the investigation of the offence" during garda interrogation, can lead to conviction and a possible sentence of up to 8 years imprisonment. Two weak forms of evidence, before an unusual court, leading to conviction on an unusual offence.

The experience in such cases might be compliant with a literal reading of section 2 of the 1998 Act, which requires that the inference not be the sole or main basis for a conviction, but it seems that the inference can be definitive in a way that is not experienced in relation to most other offences, or in other courts.

[10] Offences Against the State (Amendment) Act 1972, section 3(2). See further Harrison, Alice "Disclosure and Privilege: The Dual Role of the Special Criminal Court in Relation to Belief Evidence" and Heffernan, Liz and O'Connor, Eoin "Threats to Security and Risks to Rights: 'Belief Evidence' under the Offences Against the State Act" in Mark Coen (ed.) The Offences Against the State Act 1939 at 80 (Hart Publishing, 2021).

The EmpRiSe Project Research was funded by
the European Union's Justice Programme (2014-2020)
Project ID: EmpRiSe - 802102
Call: Just-JACC-AG-2017

Duress

Layered on top of these general concerns around the heightened impact of inferences on the outcome of trials before the Special Criminal Court is an additional uneasiness around the use of inferences from a silence based on fear. Persons with involvement in organised criminality at any level may legitimately be fearful that any engagement on their part with gardaí during custodial interrogation could expose them or their family members to the risk of serious harm.

This is recognised as an issue within the criminal justice system, and certain arrangements have been put in place to minimise the risk including, for example, altering the previous practice of providing a suspect with a copy of their recording of interview as they left garda custody.[11] Participants in our study reported concerns around access to the Book of Evidence, noting that criminal associates often seek to get the Book of Evidence when served on the accused, to ensure that they did not disclose any incriminating information. One retired garda interviewee said:

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

However, outside of the formal CHIS (Covert Human Intelligence Source) system, and reliance on prosecutorial discretion, a suspect in such circumstances may well face a charge, and prosecution in the normal way, including through reliance on inferences from interview silence. There may be no safe way for them to explain the reasons for their silence, and their silence may count, significantly in the Special Criminal Court, towards their conviction. One solicitor participant in our study put the issue very clearly, in the following way:

> "…everybody knows, who has been reading a newspaper for the last twenty years, that invariably the low hanging fruit ends up in custody. These are people who are frightened, they're a lot more frightened of the bad boys outside than they are of the police…" (S3B)

4. Offences of Failing to Provide Information

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

Section 52 of the Offences Against the State Act 1939 makes it an offence for a detained suspect to fail to account for his movements and actions during a specified period and to give all the information which he

[11] Section 56 of Criminal Justice Act 2007 introduced a requirement for a court order to obtain the recording of the garda interview of the suspect. Prior to this, tape recordings were given to suspects at the end of their detention, and members of criminal groups would seek to obtain and watch those tapes to ensure that the suspect did not divulge any information to the gardaí.

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

The EmpRiSe Project Research was funded by
the European Union's Justice Programme (2014-2020)
Project ID: EmpRiSe - 802102
Call: Just-JACC-AG-2017

possesses in regard to the commission or intended commission by another person of a specific offence. Such failure is punishable by up to six months' imprisonment. The constitutionality of this provision was tested in *Heaney v Ireland.*[13] The Supreme Court considered the right to freedom of expression under Article 40.6 and the proviso thereunder that freedom of expression may be curtailed where the exigencies of public order or morality so require. Using the proviso to Article 40.6, in the context of the threat posed by paramilitary activity to public order, the Supreme Court deemed section 52 a proportionate interference with the right to silence.

The *Heaney* case went on to the European Court of Human Rights (ECtHR) where it was held that the right to silence/privilege against self-incrimination is protected under Article 6 European Convention on Human Rights (ECHR), the fair trial provision of the Convention, and that section 52 "destroyed the very essence of [the accuseds'] privilege against self-incrimination and their right to remain silent".[14] A virtually identical finding was made in *Quinn v Ireland*,[15] the judgment in which was handed down on the same day as *Heaney*.

It was held by the Supreme Court in *Re National Irish Bank (under investigation) (No.1)*[16] that a statement obtained from a suspect under the compulsion of a legislative provision which deemed the failure or refusal to answer particular questions to be an offence would not generally be admissible, unless the trial judge was satisfied that it was voluntary. The admission of an involuntary statement would be in breach of the right to a fair trial, under Article 38.1. Walsh has noted that "it is difficult to see how information obtained from a person pursuant to a demand under section 52 would be admissible against him in a criminal trial for an offence other than that created by section 52 itself."[17] The judgment in *Re National Irish Bank*, along with the ECtHR judgment in *Heaney* reasserted the link between the right to silence and the right to a fair trial, and made provisions which criminalise silence largely undesirable.

While section 52 seems to have largely fallen into disuse, perhaps as a result of *Heaney* and *Quinn*, and/or the decision in *Re National Irish Bank*, it has not been removed from the statute book. Indeed, the legislature amended section 52, to add a requirement that its impact be explained to a detained suspect in ordinary language, under the Offences Against the State (Amendment) Act 1998. We think this is not an appropriate reaction to a finding of the European Court of Human Rights, and that it ought to be repealed.

In 2019, in *Sweeney v Ireland*,[18] the Supreme Court was called upon to consider the constitutionality of a provision which had been declared unconstitutional by the High Court on the basis of interference with the right to silence as well as impermissible vagueness. The Supreme Court, however, upheld its constitutionality. Section 9(1)(b) of the Offences Against the State (Amendment) Act 1998 provides that a person shall be guilty of an offence if s/he has information which s/he knows or believes might be of material assistance in (a) preventing the commission by any other person of a serious offence, or (b) securing the apprehension, prosecution or conviction of any other person for a serious offence, and fails without reasonable excuse to disclose that information as soon as it is practicable to a member of An Garda Síochána. Potential punishment ranges from a fine to 5 years' imprisonment.

The accused in this case had been, at one time, a suspect in a violent murder. He was not ultimately charged with the murder, but was charged under section 9(1)(b) as it was suspected that he had information relating to the involvement of others in the offence. The Supreme Court, in upholding the constitutionality of the

[13] [1996] 1 IR 580; (2001) 33 EHRR 12.
[14] (2001) 33 EHRR 12, para. 55.
[15] (2001) 33 EHRR 264.
[16] [1999] 3 IR 145; [1999] 1 ILRM 321.
[17] Walsh, Dermot *Walsh on Criminal Procedure* (2nd Edition, Round Hall: Dublin, 2016), p. 334.
[18] [2019] 3 IR 431.

The EmpRiSe Project Research was funded by
the European Union's Justice Programme (2014-2020)
Project ID: EmpRiSe - 802102
Call: Just-JACC-AG-2017

provision, held that the privilege against self-incrimination was not invoked within the provision, and that the risk of self-incrimination would be a "reasonable excuse" for non-disclosure of the relevant information.

Charleton J held that:

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

The more practical concern as to how a witness could outline their reason for not giving information about others without drawing suspicion on themselves was not addressed in the Supreme Court judgment. In the High Court, on the other hand, Baker J, who had found the provision to be unconstitutional, considered the matter somewhat more pragmatically. She wondered, for example, how a solicitor might advise a person with regard to section 9(1)(b) when that person was detained in regard to another offence, noting that while a suspect has a right to silence, in this context "… should that right be exercised in pursuance of a choice not to speak, the actual exercise of the right could give rise to a separate charge and the commission of a separate criminal offence..." The Supreme Court judgment in this case is somewhat confusing, and does not offer very strong protection for the right to silence in such circumstances. Furthermore, it has been suggested by Harrison that "[t]he offence created by section 9 has been utilised as an investigative tool, where acquaintances or relatives of a suspect are arrested in order to put pressure on a suspect or obtain information."[19] The realities of the sorts of cases in which section 9 might be used needs to be considered.

5. Conclusion and Recommendations

Inferences from pre-trial silence are now so embedded within the Irish criminal process that it seems futile to recommend their removal. Indeed, research emerging from our partners in other jurisdictions on the EmpRiSe project seems to suggest that inferences from silence are a feature elsewhere also, even in the absence of legislative provision for same.[20] The benefit of providing for inferences in legislation is that there is transparency around their operation and safeguards attached to ensure the provision of related procedural protections, such as access to legal assistance specific to the drawing of inferences, audio-visual recording of interviews, and an explanation of the operation of the inferences. It is important to ensure that such protections are practical and effective, however, and in that regard, in our full Report on the right to silence we recommend certain improvements, including, for example, the placing of the right to have a solicitor present throughout garda interview on a statutory footing, and the need to update the special caution/explanation given to suspects at the beginning of inference interviews to ensure that it is understandable and accurate. We also recommend that inferences should only be allowable in relation to a failure to respond to evidence which exists at the time of questioning and is disclosed to the suspect, and that this requirement of grounding evidence be clarified in the legislation relating to all inference provisions.

In the specific context of this Independent Review, we are concerned that the legislative threshold for the invocation of the inference provisions under section 2 of the Offences Against the State (Amendment) Act 1998 is too low, and its evidentiary value too weak, to justify its serious incursion on the constitutionally

[19] Alice Harrison, *The Special Criminal Court: Practice and Procedure* (Bloomsbury Professional, 2019) p. 114.
[20] Daly, Yvonne, Pivaty, Anna, Marchesi, Diletta and ter Vrugt, Peggy (2021) "Human rights protections in drawing inferences from criminal suspects' silence," forthcoming in Human Rights Law Review. Available at: https://doi.org/10.1093/hrlr/ngab006.

The EmpRiSe Project Research was funded by
the European Union's Justice Programme (2014-2020)
Project ID: EmpRiSe - 802102
Call: Just-JACC-AG-2017

protected right to silence. Moreover, this weak evidence is being used often and to serious effect in the Special Criminal Court to secure convictions for the offence of "membership of an unlawful organisation", a particularly unusual offence.

We are similarly concerned about the operation of section 72A of the Criminal Justice Act 2006, as amended, which arises in trials relating to organised crime before the Special Criminal Court.

We have noted the specific circumstances of suspects who may be under external pressure to avoid any and all engagement with gardaí, and whose failure or refusal to answer questions or provide accounts may be attributable to fear for their safety or that of their family members. It is important for both gardaí and judges to remain conscious of this issue, and to insist that inferences should only be drawn where the trier of fact is satisfied beyond a reasonable doubt that there is no innocent explanation for the relevant silence.

We are also concerned about the ongoing existence of section 52 of the 1939 Act, despite the disapproval of the European Court of Human Rights, and the practical application of section 9 of the 1998 Act in individual cases.

We recommend that:

1. Section 2 of the Offences Against the State (Amendment) Act 1998 should be amended to
    a. expressly require evidence to ground the adverse inference questioning, and
    b. state that an inference may only be drawn at trial where the trier of fact is satisfied beyond a reasonable doubt that there is no innocent explanation for the relevant silence.

2. A conviction for any offence should not be based upon the belief evidence of a member of An Garda Síochána, plus an inference from silence, and nothing more.

3. In the investigation of offences against the state and in trials in the Special Criminal Court, both gardaí and judges should be alive to the fact that a failure or refusal to answer garda questions may be influenced by factors other than guilt, including a suspect's concern for their safety and that of their family members, particularly in the context of organised criminal groups. Inferences from silence in such circumstances ought not to be relied on as evidence at trial in any court.

4. Section 52 of the Offences Against the State Act 1939 should be repealed.

5. A review of the judgments of the Special Criminal Court should be carried out to get a clearer picture of the impact of the inference provisions in convictions.

6. Related to that, we advocate for the publication of all Special Criminal Court judgments, to enhance the transparency of the Court's decisions and ensure fairness and consistency. This should be done whether or not the Independent Review Group decides to recommend the abolition of the Court.

7. We recommend a review of the garda use of section 9 of the 1998 Act and a consideration of the practical reality for suspects in protecting their own privilege against self-incrimination/right to silence thereunder.

For more detailed analysis in relation to any of the foregoing, including quotations from our research participants, please consult the Report at https://empriseproject.org/publications/

The EmpRiSe Project Research was funded by
the European Union's Justice Programme (2014-2020)
Project ID: EmpRiSe - 802102
Call: Just-JACC-AG-2017