RIGHT OF SILENCE DEBATE:

THE NORTHERN IRELAND EXPERIENCE

JUSTICE

JUSTICE is an all-party organisation which assists victims of miscarriages of justice and also seeks to reform the law and its administration in order to protect human rights and uphold the rule of law. It is the British section of the International Commission of Jurists.

The **COMMITTEE ON THE ADMINISTRATION OF JUSTICE** (CAJ) is an independent civil liberties organisation formed in 1981 to work for the highest standards of justice in Northern Ireland. CAJ is affiliated to the Federation Internationale des Droits de l'Homme, an international human rights organisation which has consultative status at the United Nations.

This report is based on research undertaken by Ellen Weaver, a solicitor and freelance researcher, on behalf of JUSTICE and CAJ.

This report is informed by the experience of a number of solicitors and barristers practising in the criminal courts of Northern Ireland. We are grateful for their generosity in sharing their experiences of the working of the 1988 Order in detailed and lengthy interviews.

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INTRODUCTION

On 8 November 1988, the House of Commons approved an Order in Council to remove the absolute right of suspects in Northern Ireland to remain silent under police questioning and at trial. The proposals were based on the proposition that investigation into serious offences in Northern Ireland was being severely hampered by the deliberate non-co-operation, particularly of terrorist suspects. Tom King, Secretary of State for Northern Ireland, assured the House that there was

> 'a formidable body of persuasive evidence for change, including the acknowledged difficulties faced by the police and prosecuting authorities in bringing to justice hardened, professional criminals - often assisted by able legal advisers.'
> (Hansard, 8.11.88, col. 185)

Part of this evidence came from the Royal Ulster Constabulary: its figures apparently showed that over 50% of suspects in terrorist offences refused to answer police questions. This cast doubt on the recommendation of the 1981 Royal Commission on Criminal Procedure, that the right of silence should remain intact: its research (in England and Wales) had shown that only 4% - 8% of suspects remained silent.

The proposals approved by Parliament are set out at Annex 1 of this report. In brief, they permitted the drawing of inferences by judge, jury or magistrates on a suspect's failure, under police questioning, to mention facts which were material to the defence, and for failure to account, at the earliest possible time, for presence, marks or objects which connected an accused to a crime. They also required courts to call on defendants to give evidence at trial, and gave them the power to draw adverse inferences from a failure to do so. Silence could be treated as corroboration of other relevant evidence against the accused.

There was considerable opposition to the proposals, not only from the Opposition, but also from Conservative MPs. Those who opposed the measure were sceptical about its effect, either in enabling the police to charge more serious criminals, or in convicting more of those who were brought to court. Furthermore, they were concerned about the possible dangers of the change: the likely pressure on suspects, particularly vulnerable suspects, in police stations; the difficulty of devising an intelligible caution to alert suspects to the possible effect of non-cooperation; the difficulty of assessing what is and is not 'evidence material to the defence'; and the impact on the burden of proof and the prosecution's duty to prove its case.

In December 1993, the Home Secretary, Michael Howard, introduced almost identical provisions for England and Wales as part of the Criminal Justice and Public Order Bill. He commended them to MPs because 'the present system is abused by hardened criminals' (Hansard, 11.1.94, col.26).

Like Mr King in 1988, Mr Howard was also faced with a Royal Commission report, from the 1993 Royal Commission on Criminal Justice, which had recommended, by a majority of 9 to 2, against any change to the right of silence. He, too, had police evidence which seemed to contradict the limited use of silence which the Commission's research had produced: a study undertaken by the Association of Chief Police Officers, which showed a 22% overall use of silence under police questioning, as compared with the 6-10% outside London and 15% within London put forward in a Home Office research study for the Royal Commission. Furthermore, Mr Howard was able to point to Northern Ireland, where the changes now recommended for England and Wales had been in operation for five years.

Opposition to the changes, both within and outside Parliament, echoed that of 1988: the pressures they would create under police questioning, especially for the naive or ill-represented; and the danger of undermining the burden of proof and the presumption of innocence.

No evidence was forthcoming, on either side, to show whether the provisions, as operated in Northern Ireland, had had the desired effects, or led to the feared dangers. JUSTICE, in conjunction with the Committee on the Administration of Justice (CAJ) in Northern Ireland, therefore commissioned a short research project, with the help of funding from the Joseph Rowntree Charitable Trust, briefly to examine three areas: the change in rates of charge and conviction, particularly in serious and terrorist cases; the experience of legal practitioners, particularly in regard to suspects cautioned and questioned by the police; and the way in which the provisions were interpreted by judges at trial, in the light of concerns about a shift in the burden of proof.

It has not been possible, in the time and with the information available, to produce a comprehensive analysis of the effect of the abolition of the right of silence in Northern Ireland. The statistics which exist show only crude 'clear-up' (i.e. charge) and conviction rates: the only attempt at an analysis of silence and its impact on criminal proceedings was a short research project by the Northern Ireland Office, which was apparently abandoned and the results of which were only made known after they were leaked (see Chapter 1). Research is now being commissioned by the Northern Ireland Office: too late to affect decisions on the desirability or likely efficacy of extending the provisions to England and Wales.

The JUSTICE/CAJ research therefore provides a preliminary assessment of all three areas. For the effect on catching criminals, we have relied on the figures which did emerge from the brief NIO project, and the criminal statistics released annually. For experience in police stations and at trial, a researcher carried out interviews with a number of solicitors and barristers with substantial criminal law practices: this material is necessarily anecdotal, but is remarkably consistent as to the concerns of lawyers representing suspects and defendants. To assess the impact of silence in verdicts, we have analysed judicial decisions in the Diplock (non-jury) courts; as judges in those courts are bound to give reasoned decisions, those judgments are a clear indication of the evidential weight which is given to silence under police questioning and at trial. In the absence of detailed research work into cases tried by juries or heard in magistrates courts, this was the only available evidence of the inferences actually drawn in court proceedings.

Consequences and comparisons

It must be said at the outset that the judicial system, the rate of non-terrorist criminal activity and the circumstances in which crimes are investigated and tried differ between Northern Ireland and England and Wales. A third of Crown Court cases in Northern Ireland are 'scheduled' under the Northern Ireland (Emergency Provisions) Act, as offences dealt with under the Prevention of Terrorism Act and triable by a judge sitting without a jury in the so-called Diplock courts. Criminal activity in Northern Ireland is significantly lower than in England and Wales, except for homicide and robbery; and detection and conviction rates have been higher since 1985 (34% in 1992 compared with 26% in England and Wales). In certain sections of the community in Northern Ireland, non-co-operation with the police is the norm; this may be due to distrust of the police, or fear of intimidation.

The Police and Criminal Evidence (Northern Ireland) Order came into force in Northern Ireland in early 1989, but its provisions do not apply to those held for terrorist offences; in such cases solicitors cannot sit in on interviews, access to clients may be deferred for 48 hours at a time, and interviews are not tape-recorded.

However, the report draws conclusions which appear to cast grave doubt on the efficacy and the safety not only of the provisions as they now apply in Northern Ireland, but of the consequence of extending them, in the form now proposed, to England and Wales.

Effects

First, the statistical evidence shows that, far from an increase in detection or conviction rates, there has been a drop in both clear-up and conviction rates in Northern Ireland since 1988, which has exactly mirrored that in England and Wales over the same period. The number of recorded crimes has increased significantly, but the proportion of criminals caught and convicted has dropped. Clear-up rates dropped by 11% between 1988 and 1992; conviction rates both for scheduled and unscheduled offences in the four years after the Order were on average 3-4% lower than those in the four years preceding it.

The limited evidence available on the use and effect of silence after the Order came into effect shows a high proportion (38%) of terrorist suspects continuing to remain silent despite the new provisions; however, this had little effect on the proportion brought to trial: 30% of those remaining silent were charged, compared with 37% of those who co-operated. Nothing in the statistics therefore indicates that the provisions of the Order have strengthened the fight against serious, terrorist crime in the way that Tom King hoped, and Michael Howard hopes.

Police questioning of suspects

The information provided by practitioners in Northern Ireland appears to confirm the concerns raised in England and Wales by the Law Society and the Bar Council. The new caution is little-understood and widely misinterpreted by suspects and, it is claimed, police. The consequent pressure on suspects to speak is felt to impact unfairly on the vulnerable and on those who are suspicious of the police, wish to protect families, or fear intimidation. In those circumstances, pressure does not necessarily produce the truth. While some of this background is specific to Northern Ireland, some has clear parallels in England and Wales. Vulnerable and naive suspects exist; certain communities (for example black youth, or the gay community) have a historic distrust of the police; intimidation in drug-related crimes (one of the main targets of the changes) is significant, and growing.

The conflicts for lawyers, representing at the police station or taking decisions at trial, are real. Solicitors face the prospect of being called to give evidence if they have advised, or are said to have advised, silence. They face an extremely difficult task in advising their clients without knowing the evidence against them. Barristers at trial feel forced to advise defendants to take the stand, even though they may be psychologically unable to withstand the pressure of cross-examination.

The concern among practitioners is particularly strong for those accused of terrorist offences, where solicitors are unable to be present at interviews, there is no taped record, and information about evidence and charge are minimal. This is particular to Northern Ireland. But in England and Wales, suspects are also interviewed without lawyers, in 'informal' interviews which are not tape-recorded, and without being told the case against them. It is in those circumstances, as JUSTICE's report, *Unreliable Evidence?* showed, that false confessions can arise; it is clear from Northern Ireland that these are also the circumstances in which it is unsafe and unfair to penalise silence.

Judicial decisions

From the beginning, there was concern that tampering with the right of silence could do no other than affect the burden of proof, by inferring guilt;

> '[the Secretary of State] said that no guilt was to be presumed from silence. He said that a man's silence would not advance the case against him. That is untrue. If inference can be drawn against a suspect from his silence, the case is advanced against him, however carefully defined these occasions are'
> (Barry Porter, Conservative MP, Hansard 8.11.88)

The question this report addresses is the extent and effect of those inferences. It is clear from the study of reasoned judgments in Diplock courts that judges were initially cautious in drawing inferences from silence under police questioning or at court, but that they are now much more ready to do so. Initial judgments considered that silence was of probative value only if it allowed a case which was on the verge of being proved beyond reasonable doubt to meet that test. Since the, however, the gap which silence can be inferred to fill has grown, to the extent that in some cases silence is almost taken as presumptive of guilt.

It is of particular concern that, in considering submissions of no case to answer, judges have used silence under police questioning as evidence that there is a prima facie case: in other words, that a case in which there is otherwise insufficient evidence even to withstand trial is allowed to do so because of the silence of the suspect. It is of even greater concern that the same silence can then be used again at trial to bring a case up to the necessary standard of proof on which to found a conviction.

As an opinion obtained by JUSTICE from Roy Amlot QC has said, judicial comment on silence is potentially a shift in the burden of proof, as silence can never be used to attest innocence, only guilt. The use of the provisions in Northern Ireland show that over time that shift is real and pronounced, with consequences for the right to a fair trial, as guaranteed in Article 6 of the European Convention of Human Rights.

This report therefore provides cause for concern about the provisions which now apply in Northern Ireland and, by definition, any attempt to extend them to England and Wales. JUSTICE and CAJ have drawn attention to the arguments of principle against the abolition of the right of silence. This report shows that these concerns are justified in practice and it shows the need for more detailed, research into the impact and effect of the provisions; now that such research has finally been commissioned, it would be only prudent to await its conclusions before legislating to extend them.

The report also draws attention to the safeguards which are essential if the provisions remain in force in Northern Ireland, or are extended to England and Wales. It shows the need for competent, available legal advice and safeguards for all suspects held and questioned by the police; it is neither safe nor fair to draw inferences from silence unless those safeguards are in place and suspects know the case they are answering. Finally, it shows the need, at the very minimum, for statutory guidance for judges on the inferences which can properly be drawn and the matters to be taken into account, to prevent an insidious erosion of the burden of proof; in particular, silence should never be capable of bringing a weak case to a hearing, or a conviction.

1. THE EFFECT OF THE PROVISIONS

The arguments for the introduction of the Northern Ireland Order in 1988 were precisely the same as those advanced in 1994 for extending the proposals to the remainder of the United Kingdom: the fact that the use of silence, particularly by suspects in serious crimes, was more widespread than generally realised, and would be substantially reduced by the provisions of the Order; and the belief that the introduction of the new provisions would assist in bringing such people before the courts and convicting them.

Some MPs were sceptical. Ivan Lawrence MP was unconvinced:

> 'If there is evidence from eye witnesses, forensic experts, evidence of letters, maps, diagrams and fingerprints, the defendant is likely to be convicted whether or not he has admitted his own guilt....[the need to fight terrorism] should not blind us into thinking that any interference with the right to silence, however limited or closely defined, will lead to the conviction of more who are guilty. It cannot, and it will not.'
> (Hansard, 8.11.1988, cols 210-11)

The use of silence before and after the Order

Tom King, then Secretary of State for Northern Ireland, discounted the recommendation of the 1981 Royal Commission on Criminal Procedure, in much the same terms as the present Home Secretary has done the 1993 Runciman Royal Commission. Referring to research carried out for the 1981 Commission, which showed that only 4% of suspects remained wholly silent and only 8% partially silent, Mr King compared this with recent statistics in Northern Ireland:

> 'I have been asked if I have any figures. The RUC informs me that of all those detained for questioning in connection with serious crimes, including terrorist offences in Northern Ireland, just over half refused to answer any substantive questions while in police custody' (Hansard, 8.11.88, col.189).

This was repeated by the then Solicitor-General (Sir Nicholas Lyell), in winding up the debate. No figures were released in support of these contentions.

The Northern Ireland Office began what was described as a 'modest research programme...in relation to the operation of the Order' in 1990. The research analysed data on 526 suspects interviewed by police during the first half of 1990 at three police stations (Strandtown, Portadown and Castlereagh) in connection with serious arrestable offences (carrying the possibility of 5 years or longer in prison). Yet that research was never completed, or released. In late 1993, copies of its broad conclusions were, however, being circulated without the authority, and to the great concern, of the Northern Ireland Office. In March 1994, the NIO finally confirmed that 'a statistical analysis' had been carried out in 1990, and confirmed the broad percentage results of that analysis. There are three interesting facts about the aborted research project. First, it lasted longer than the NIO's recent Parliamentary responses indicate. In December 1991, Kevin McNamara MP was told in a Parliamentary answer that the programme was still under way and its results were 'not yet available'. JUSTICE and CAJ have been informed that the research had moved on, to follow those police station cases through the courts. If so, no results of this second phase have been released. This means that the figures so far released, whatever their limitations, are the only information on the effect of the right of silence proposals in practice. Yet they formed no part of the information provided to MPs in deciding whether to extend those provisions to the remainder of the UK.

Secondly, the research was held to be 'of limited value' because it refers only to the police investigation process and, in the words of Sir John Wheeler, 'because of the absence of any pre-1988 data with which to compare it'. Yet it was on the basis of pre-1988 figures, apparently provided by the RUC, and showing that over 50% of terrorist suspects were substantially silent, that Tom King and Sir Nicholas Lyell argued the necessity for the Order in the House of Commons.

Thirdly, the research, when finally released, showed interesting provisional findings on the use of silence and the effect it had on bringing suspects to court. 38% of terrorist suspects were 'essentially silent' in the months succeeding the coming into force of the Order. Two out of every five terrorist suspects therefore continued to make significant use of silence, even in the face of the Order. Yet the difference in outcome between those who continued to choose silence and those who co-operated was very small. 30% of silent suspects were sent for trial, compared with 37% of those who answered questions.

Silence was used much less by non-terrorist suspects of serious crimes. Only 6% (15 people) remained essentially silent. It appears however to have been more significant in determining whether proceedings were taken: 29% of those remaining silent (4 people) were charged, compared with 80% of those who co-operated (178 people). However, it must be said that the percentage for silent non-terrorists is based on a very small sample.

What the research appears to have shown is that, outside those arrested under the emergency provisions, figures for the use of silence were of the order that the 1981 and 1993 Royal Commission research had indicated. For those arrested on suspicion of being involved in terrorist offences, silence was exercised to a much greater extent, even after the Order, but to only marginal effect, so far as instituting proceedings against suspects.

The effect on clear-up and conviction rates

Tom King justified the Northern Ireland Order to Parliament with reference to

> 'the acknowledged difficulties faced by the police and the prosecuting authorities in bringing to justice hardened, professional criminals - often assisted by able legal advisers'.
> (Hansard, 8.11.88, col.185)

The Solicitor-General, at the end of the debate, set out the aim of the changes:

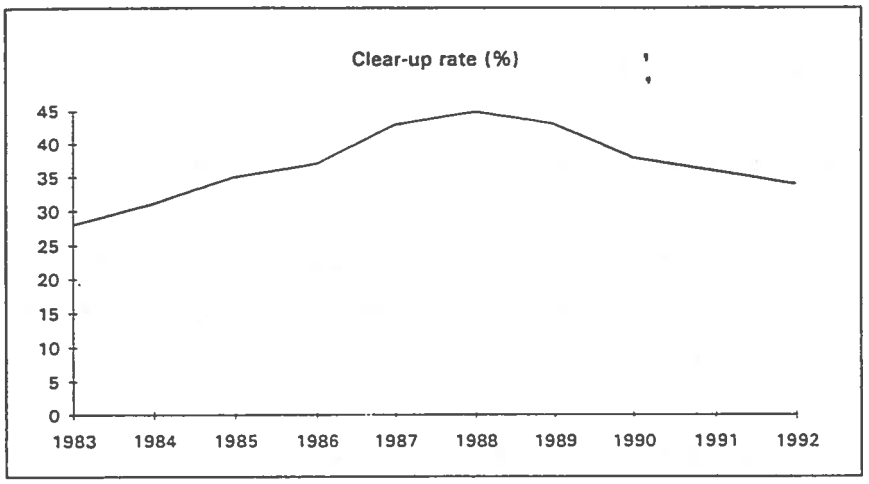
> 'The measures proposed in the draft order are founded in common sense, they will restore some of the balance of fairness between prosecution and defence, they will increase the likelihood that justice will prevail in our courts and, by doing so, they will make the path of serious crime more hazardous for those striving to undermine the rule of law.'
> (Hansard, 8.1.88, col. 223).

Criminal statistics are produced every year by the Northern Ireland Office. They do not, of course, show the use of silence under police questioning. But they do show the changes in rates of charge ('clear-up rates') and conviction for scheduled and non-scheduled offences, crown courts and magistrates courts, in the period before and since the coming into effect of the Order.

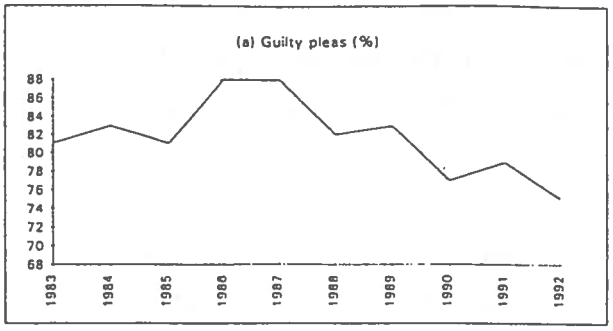
The figures to 1992 show that neither the police nor the courts have been any more successful in charging or convicting criminals of any kind since the Order came into effect at the very end of 1988. The 'clear-up rate' has dropped, for all categories of crime, both serious and petty. Indeed, the Northern Ireland Office, in commenting on the 1992 criminal statistics (the last comprehensive set of statistics to be released), said:

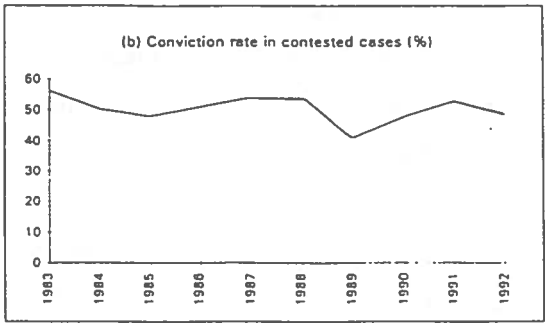
> 'Clear-up rates had been steadily improving up to a record high of 45% in 1988 after which they have fallen in each successive year'
> (Commentary on the Northern Ireland criminal statistics 1992, Northern Ireland Office, p.15)

Clear-up rates have in fact dropped by 11% since 1988. The graph below shows the movement in clear-up rates both before and since the Order came into operation. It shows almost exactly the same movement since 1988 as the graph for clear-up rates in England and Wales, where the right of silence remained untouched.



Nor have those brought before the courts been more likely to be convicted of the offences with which they were charged. The percentage of guilty pleas has declined. In the four years to the end of 1988, 85% of defendants in the Crown Court pleaded guilty; in the four years after the Order came into effect, that percentage dropped to 79%.

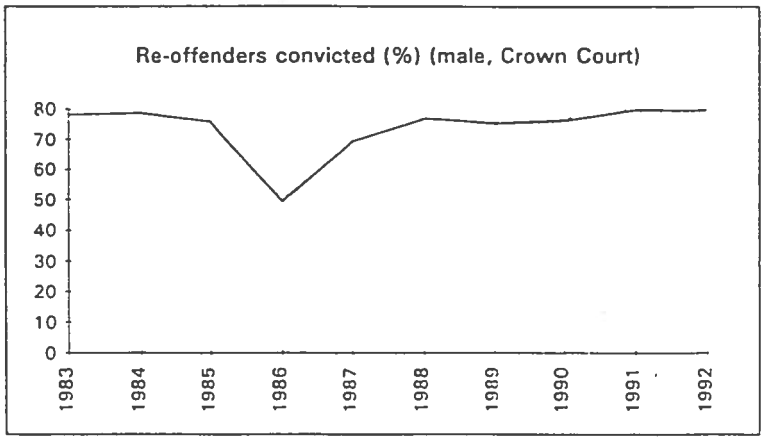




Conviction rates of those pleading not guilty have also dropped. Of those who pleaded not guilty in Crown Courts during the four years before the changes, an average of 52% were found guilty; in the four years after 1988, those figures dropped to 48%. Overall comviction (taking into account guilty please) follow the same pattern: for scheduled offences they fell by an average of 3% between the two 4-year periods, and for non-scheduled offences by an average of 4%.

Statistics released for 1993, for scheduled offences only, show a sudden rise in the proportion of those who are convicted on not guilty pleas before the Diplock Courts. 71% were convicted, as compared with an average of 54% in the four previous years. Overall conviction rates in such cases since 1989, however, remain lower (by 2.5%) than the same period before the Order came into force. No figures are available for 1993 clear-up rates, or for convictions in non-scheduled cases, or cases heard by magistrates. It is therefore not clear whether the 1993 scheduled figure represents the beginning of a change in the overall post-1988 trend, and if so whether it is confined to Diplock trials. If there is such a change, given that there has been no change in the law since 1988, it would underline the concerns expressed in Chapter 3, that judges are now giving greater weight to silence, in a way which risks undermining the presemption of innocence. It is as yet too early to draw any firm conclusions; further research is needed.

Another interesting fact emerging from the Northern Ireland statistics is the extent to which the changes have succeeded in catching those 'hardened criminals' whom the Secretary of State in 1988, and the Association of Chief Police Officers in 1993 believed were particular targets, in that they were much more likely to use (and abuse) the right of silence. Yet once again, the statistics do not support any conclusion that the Order has made it significantly easier to convict those with previous criminal offences. As the graph below shows, there has been little measurable change in the percentage of males convicted who have previous criminal records (percentages for females do show a rise, but these are based on very small figures, and a significant rise in female criminality over the period).



The Government's main arguments for change, in 1994 as in 1988, rest on the likelihood of charging and convicting more people, particularly hardened and serious criminals. The available evidence from Northern Ireland gives no grounds for supposing that has been the case there, or will be in England and Wales. On the contrary, the statistics support the opposing views advanced during the debate, and supported by all the research evidence into the actual effect of silence in the

United Kingdom: that as a weapon in the fight against crime, the abolition of the right of silence is of little use. Crime in Northern Ireland has continued to rise, and the rate of charge and overall conviction has fallen. 1993 conviction rates in scheduled offences are higher, but have still not brought the overall conviction rate to its pre-1989 level.

The Northern Ireland Office has now, apparently, commissioned a more extensive research study into 'the use of silence by suspects in serious crimes from interview to court proceedings. It will also review key legal judgments, the operation and effect of the legislation, and take views of criminal practitioners' (NIO, Statistics and Research Programme for 1993/94). It is hoped to complete this by March 1995. It is unfortunate that this research was not commissioned earlier, or the previous research completed. Without it, there can be no grounds for confidence that the proposals have had a significant effect in the Solicitor-General's aim, of 'making serious crime more hazardous for those striving to undermine the rule of law'.

Yet, as predicted by the Order's opponents in the 1988 debate, its provisions have given rise to serious concern in terms of the effect on suspects and their legal advisers when cautioned and questioned by the police, and the effect on the presumption of innocence during the trial process. While in general terms the provisions do not significantly affect the chance of bringing criminals to justice, in specific cases, particularly with regard to vulnerable suspects, this carries grave risks of miscarriages of justice.

2. OPINIONS OF PRACTITIONERS

In the absence of detailed research into the effect of the Order in police stations or at trial, the JUSTICE/CAJ research carried out detailed interviews with 12 experienced solicitors and 7 barristers, who between them represent a large number of clients from both communities in Northern Ireland. They were asked for their experiences on the effect of the Order. Their evidence is necessarily anecdotal, and does not pretend to be comprehensive. It does, however, provide a consistent picture: all the legal practitioners interviewed are concerned about the impact of the provisions on vulnerable suspects and defendants; about the conflicts inherent for lawyers giving advice or providing representation; and the use of the provisions by police and the judiciary. Most of those concerns echo the concerns expressed in the 1988 debates, and re-stated by the Law Society and Bar Council in England and Wales in their opposition to the 1994 proposals. The interviews were given on the basis that views and opinions expressed would not be attributable to individuals.

Understanding the caution

Under guidance given to police officers on the 1988 Order, the following general caution must be given before a person is questioned in relation to an offence both at the time of arrest and at the police station:

> 'You do not have to say anything unless you wish to do so but I must warn you that if you fail to mention any fact which you rely on in your defence in court, your failure to take this opportunity to mention it may be treated in court as supporting any relevant evidence against you. If you do wish to say anything, what you say may be given in evidence'.

There is a different caution when the person is being asked by a police officer to explain on arrest or at the police station the presence of some object, substance, or mark (Article 5) or to explain his or her presence at a particular place (Article 6):

> 'You do not have to say anything unless you wish to do so but what you say may be given in evidence.
> On [ ] at [ ] was found on your person/in or on your clothing or footwear/in your possession/ in [ ] where you were at the time/a mark was found on such object, that is [ ] / and I have reason to believe that this was attributable to your participation in an offence of [ ].

or:

On [ ] at [ ] about the time the offence of [ ] is alleged to have been committed I have reason to believe your presence at that time may be attributable to your participation in the commission of that offence.

I therefore request you to account for this [ ].

I must warn you that if you fail to do so, a court, judge or jury may draw such inferences from your failure or refusal as appear proper'.

Code C of the PACE (Northern Ireland) Order 1989 comments that cautioning a suspect in these terms 'will ensure that he is left in no doubt as to the consequences of his failure to mention any material fact...'

It was the unanimous view of the solicitors interviewed that suspects do not understand the caution under the Order when it is read to them by the police and that only a small minority, estimated at around 5%, actually appreciate its significance. This is despite the fact that clients will usually claim that they have understood it when asked. As the solicitors emphasised, this complex information is invariably being given to clients who are vulnerable and under stress at finding themselves in a police station.

Understanding is not helped by the fact that, in many solicitors' view, the police routinely follow up the formal caution with such phrases as: 'Now is the time to speak' or 'You have to speak to us now or we'll charge you'. This is criticised as 'misrepresenting' and 'over-emphasising' the effect of the Order.

This low level of understanding of the caution by suspects is perhaps not surprising. As one solicitor remarked: 'Very few lawyers understand its complexity, never mind clients'. At the same time, it is consistent with the findings of a research study carried out for the recent Royal Commission which looked at the ability of suspects to take in information at the police station. In particular, the study examined suspects' understanding of the comparatively simple caution used in the rest of the United Kingdom: 'You do not have to say anything unless you wish to do so, but what you say may be given in evidence'.

This research found that the caution was only fully understood by 42% of suspects, although a higher percentage (52%) understood what is arguably the most important part - the right to remain silent. It also emphasised the point that the most intellectually disadvantaged people were least able to understand their rights. In acknowledging that the level of understanding was too low and

following a successful pilot scheme, the researchers recommended that the information on the caution (and rights generally) needed to be written more simply into everyday language which accords with that used in the most popular daily tabloid newspaper. ('Devising and Piloting an Experimental Version of the 'Notice to Detained Persons' ', Research Study No 7, RCCJ 1993)

Overwhelmingly, the Northern Ireland solicitors believed that the new caution was taken to mean that there is an obligation to answer any accusation put. In those circumstances, clients may get into difficulties by telling lies to cover up other, minor, illegalities, or to protect family members:

> A. lied to avoid her highly nervous married daughter having to deal with the police after her house was taken over by the IRA. A. said she, and not her daughter, was in the house. This was eventually discovered and she was charged with obstruction.

Reasons for silence

One of the main assumptions behind the proposals to modify suspects' right to remain silent is that the innocent suspect will have nothing to hide and should be willing to provide information which may be able to be used to prove innocence. Experience from Northern Ireland casts doubt on this.

A number of explanations were put forward by solicitors as to why suspects remain silent under police questioning. These included the fear of incriminating others, being labelled as an informer, being unsure of what is being alleged and wishing to consult a solicitor first. It was strongly emphasised by practitioners that there are reasons other than guilt for suspects refusing to answer questions.

All those interviewed stressed the particular context of the operation of the Order in Northern Ireland, where there is great suspicion of the police. Some solicitors said that they had clients who would deny anything put to them, even entirely innocent matters. This may be because there is a genuine fear that any information, even quite unrelated to an offence, may be used for other reasons by the police.

One solicitor illustrated this by saying: 'I can understand why people don't say anything. There can be a number of reasons why you would not want to tell the police where you were at a particular time. Supposing you were having an affair. You lay yourself open to great dangers if the police have something like that on you. It would be suicide to let them know something about you such as if you were gay'.

What is more, there may be questions put by the police to which the suspect genuinely has no answer. One solicitor cited the following case:

> 'B. was re-arrested after the results of forensic tests had been obtained, cautioned and required to explain the presence of fibres of a very common type at the scene of the offence, given that he had a garment of those fibres. There was no contamination from the victim or the car allegedly used onto the suspect. It was clearly unreasonable for the suspect to appreciate the importance of the common occurrence of the fibres and the absence of two-way contamination. An adverse inference was drawn from his silence under police questioning, which, together with very weak forensic evidence, circumstantial evidence and an inference from his failure to give evidence at trial, led to a conviction. The conviction was overturned at appeal, after B. had served two and a half years in prison.'

Access to legal advice

Under article 59 of the 1989 PACE (Northern Ireland) Order, a person arrested and held in custody is entitled to consult a solicitor privately at any time. This may be delayed for up to 36 hours on grounds including

* that the exercise of the right will lead to interference of evidence or witnesses, or to the alerting of other suspects; or
* it will hinder the recovery of property or the proceeds of crime.

This delay may be up to 48 hours (with further periods of delay up to 48 hours after each consultation) under the Northern Ireland (Emergency Provisions) Act 1991 (EPA). The grounds for doing so are broader and include interference with gathering information or arresting others in connection with acts of terrorism.

The PACE safeguards in Northern Ireland in respect of rights of access to solicitors, presence of solicitors during interviews and tape-recording of interviews are similar to those applicable in England and Wales. However, in Northern Ireland, they do not apply to suspects held under the emergency legislation. These suspects do not have solicitors present during interviews and interviews are not tape-recorded.

There is nothing in the Order which requires the trial judge or the jury to take account of whether the suspect requested or received legal advice before deciding on whether to draw an inference from silence. As discussed below, the Court of Appeal in Northern Ireland in the case of Quinn has made it clear that the Order was not intended to be read subject to any right to legal advice and therefore there is no necessary relationship between rights of access to legal advice and the drawing of inferences. This is one of the issues which is presently before the European Commission on Human Rights in the Murray v UK case. It is argued that the question of access to legal advice is an aspect of the right to a fair trial under Article 6 of the Convention, particularly in the light of inferences that may be drawn under the Order whilst a person is in police detention.

The ban on allowing solicitors to be present at interviews of those detained under emergency legislation is a serious inhibition on their ability to assist clients. An example was given of an interview under PACE where the solicitor was allowed to attend the interview and intervene to assist the client. In this case the police were recording a statement under caution but omitted to put several vital matters to the suspect: such as, the presence of witnesses and medical evidence which appeared to support a claim that the suspect had been assaulted on arrest. The suspect did not volunteer the information as he was aware that the police already knew it. He failed to appreciate that it was important under the Order for him to provide answers during the interview. Had the solicitor not intervened and explained the possible consequences, adverse comment could have been made on the apparent failure to mention material facts at interview.

Problems are compounded by the lack of tape-recording of interviews in PTA cases. Solicitors reported a number of instances where the arguments at trial centred on 'non-verballing' - that is, the police failing to write down what the suspect has said. This was also raised in the context of events prior to arriving at the police station. Solicitors reported instances of police cautioning 'in the back of the landrover' and replies not being noted down. During subsequent interviews these exchanges were not recorded until prompted by the detainee or solicitor.

Dilemmas for legal advisers

The solicitors interviewed raised a number of matters in relation to their role as legal advisers at police stations. Two particular concerns stand out: the way that the police are using the Order to put pressure on suspects to talk and the difficulty of advising in the absence of knowing the allegations.

One solicitor said: 'The police are using the Order to frighten the living daylights out of people...'. This was supported by others who reported that it was common for the police to inform suspects

that there is evidence against them which requires an explanation, but that the evidence then fails to materialise. The Order therefore places additional pressure on suspects to make statements which may not always be true. This has to be understood within the context of conditions in detention generally: for example, for those held under emergency legislation, the police power to delay access to a solicitor for 48 hour periods, to hold the person incommunicado for this time, the practice of arresting people very early in the morning, sleep deprivation, lack of exercise and movement, and frequent interviews.

Other inhibiting factors were also mentioned, from the nature of the facilities provided to the treatment of the solicitors themselves. For example, at Gough Barracks, the consultation between solicitor and client takes place through a 'cubby hole', which is a window about one foot square with iron bars across. In fact, the first report from Sir Louis Blom-Cooper, Independent Commissioner, is generally critical of the detention conditions in Castlereagh and Gough holding centres (1994). As to treatment of solicitors, many felt that police attitudes towards solicitors attending at police stations were wholly distrustful and negative.

There was consensus amongst the solicitors that the Order places them in 'an impossible position professionally'. First, they must give advice before they know the case against the suspect. In PTA cases, for example, solicitors are given no idea of the evidence or allegations against their client Somewhat ironically, some practitioners commented that their own professional position was improved, in fact, when the client had been interviewed at least once before seeing them. In these circumstances, the client might be able to elucidate the nature of the police allegations. In both PTA and ordinary PACE cases, information given by the police may be minimal or incomplete. One solicitor cited the following case:

> C. was arrested and injured in the course of arrest. He is a diabetic and was held for 14 hours before his solicitor saw him. He alleged that the police waved a statement by someone else at him, saying he was named in it; that they told him that he was sunk and that it would be the worse for him if he said nothing; and that they had threatened to arrest his wife. No written caution had been administered but the suspect had made a statement on the basis of what the police had told him by the time the solicitor gained access.

Moreover, solicitors are left with a serious professional dilemma: 'You cannot advise the client not to speak because of the risk of an adverse inference, but you cannot advise them to speak because of the risk that they'll incriminate themselves'; 'It is a fine line, the decision as to how much the defendant should say: you feel like a doctor with a knife, knowing the advice is grave'. One solicitor put it bluntly:

'Because of the nature of circumstantial evidence, the full extent of the strength and amount of evidence available is extremely difficult to evaluate at the early stage of arrest and detention ... the cumulative effect of the evidence at trial is strengthened by the effect of Article 3. The only option therefore is for the practitioner to tell the suspect he must provide an explanation at the police station, therefore in fact removing the right of silence.

'To add to the difficulty, it has long been police practice to play cat and mouse with the suspect when questioning ... In consequence, the full nature of the police case is often withheld quite legitimately (as the courts have held) from the accused in the hope that he or she will begin to believe that the police know a lot more than they are saying. The difficulty, therefore, for the practitioner is that he does not know what the police case is in its entirety. He cannot advise the suspect how to react in these circumstances to a sufficient degree to avoid adverse inferences being drawn.'

This dilemma has been heightened in the light of comments made by Lord Justice MacDermott in the case of Kinsella (see below). He did not believe that an 'experienced solicitor' would have advised silence, as alleged by the defendant. Although there has always been the risk, solicitors are aware of the greater possibility of being placed in a compromised position if their clients claim to have acted on their advice. if they do give such advice, a defendant will still be at risk of an adverse inference being drawn against them. if the suspect has misunderstood, or misrepresents the advice, and the solicitor is called to give evidence, this will raise enormous problems of privilege and professional duty.

D. was advised by his solicitor to give an explanation of the things which were found in his car, and to answer any subsequent questions relating to the things found; but not to go any further. He answered a few questions but then refused to answer others, even those which were relevant to the evidence found. In court, he claimed that he had acted on his solicitor's advice. The judge did not believe him.

It was suggested that solicitors now need to record the advice they have given, because of the possibility that it may become part of the evidence at trial.

At trial

Many of the barristers interviewed supported the general view that the Order 'has changed the nature of the process and the whole concept of a criminal trial'. Examples of how this has happened ranged from the view that the burden of proof has been 'shifted away' from the prosecution to the

fact that rules of evidence are now being decided on a 'common sense' approach rather than on legal principles. One leading QC viewed the Order as 'the most dreadful piece of legislation over all the administration of justice which creates uncertainty and severe potential injustice'. These claims were discussed in more detail at various points in the trial process.

Directions hearings

It is commonly accepted that since the Order was introduced there has been a greater emphasis on applications for directions and submissions that there is no case to answer. The reason given is that barristers are aware that a finding of a prima facie case, combined with an inference under the Order, is likely to result in a conviction.

The possibility of an inference being drawn from silence at this stage was particularly criticised. The case of McLernon [April 1992] confirmed that the trial judge, when deciding on a submission of no case to answer, can draw an inference under Article 3. An adverse inference can be used to bolster the prosecution evidence both at the preliminary inquiry and at the directions stage in order to provide a prima facie case. It was felt that this chain of using the inference can finally result in a conviction which is based on a less-than prima facie case combined with an inference under the Order (see page 27).

Fact relied upon

It was argued that the ruling in the case of Devine [1992] has created a 'legal tightrope'. This case says than an Article 3 inference can be triggered whether or not the accused gives evidence at trial. If, for example, during cross-examination of prosecution witnesses, something is put by defence counsel which could amount to an innocent explanation, the judge can rule that this is 'a fact relied upon in his defence' (see page 33).

Many barristers commented on the difficulties this decision has caused in deciding the conduct of the defence case. However astute defence counsel is in the course of cross-examination, there is always the chance of prejudicing their client's case by triggering Article 3. This is, in part, because there is no applicable objective test, leaving defence counsel to assess the particular judge's likely response.

Testifying at trial

As the cases show, where a defendant does not testify at trial, the judge is likely to draw the damning inference under Article 4 that this is because he or she is not innocent. The fact that the defendant has made a statement to the police giving an explanation does not appear to provide a safeguard against implementing Article 4.

This apparent uniformity of approach by judges was of concern to a number of practitioners who believe it indicates that the order, at least in terms of Article 4, is not being applied to the facts of individual cases. They point out that, as with silence under police questioning, there are numerous reasons why defendants choose not to testify at trial. The fact that many defendants feel unable to withstand giving evidence in chief, let alone being cross-examined, was mentioned by several solicitors and barristers. One said: 'This is not because they have anything to hide and not because they lied to the police. They just cannot handle it and succumb under skilful cross-examination, intended to goad them into an argument'. Another major reason cited for defendants' reluctance to testify is the fear of repercussions, particularly if their testimony implicates another person.

These factors have to be weighed against the consequences of an inference being drawn under Article 4. Although ultimately it is a matter for the defendant to decide whether or not to testify, the absence of certainties on which counsel and the solicitor can advise was felt to be unacceptable by those interviewed. Where a suspect has failed to answer some or all questions during police questioning, the decision whether to testify at trial poses a particular 'Catch 22' problem. If the defendant goes into the witness box, a defence case is then being relied upon, triggering Article 3 as any explanation given for silence at the police station is unlikely to be believed; on the other hand, if the defendant does not give evidence, Article 4 is triggered. 'They are damned if they do and damned if they don't.' Some practitioners take the view that they are 'actually helping the prosecution case of we don't advise the client to give evidence', thus illustrating the perceived shift in the burden of proof.

Inference drawn

The general view is that the inference drawn from a defendant's silence is uniformly one of guilt: defendants are rarely believed in asserting innocent reasons for silence. 'This contributes to the system of prosecution not to the administration of justice', said one QC. Another said: 'It is almost for the accused to prove his innocence, especially if there is any sort of suspicious circumstance'.

Although the Order was directed at hardened criminals, many practitioners commented that it is more likely to affect vulnerable and naive suspects. While it was the view that the proportion of cases in which the Order was central was relatively small, it was felt that it was among those cases that there was most cause for concern: one barrister said that those cases 'create perhaps 95% of injustice'. It can encourage a court to be less cautious than it otherwise might be, with convictions being founded on less evidence.

3. JUDICIAL INTERPRETATION

In addition to obtaining the experiences of practitioners, we undertook an analysis of some of the key judgments in order to look at judicial decision-making and interpretation of the Order in detail. We considered that it was of particular importance to assess the nature and extent of the evidential value that silence is being held to bring to cases. At the same time, this analysis pays attention to how the courts have responded to some of the issues raised by practitioners.

The judgements referred to are cases heard in the Belfast Crown Court and on appeal to the Northern Ireland Court of Appeal during the period March 1989 to February 1994. They all involved scheduled offences which were tried on indictment before a Diplock court.

It is important to note that the 1988 Order contains no statutory guidance on the bounds of when it is reasonable to draw inferences from silence. Apart from providing that a court may draw such inferences as 'appear proper', the Order allows the courts considerable discretion on whether to draw an inference or not and exactly what that inference might be. In 1989 the Home Office Working Group report recommended that any such law limiting a suspect's right to silence should statutorily bind trial judges to take account of a number of factors in deciding whether to draw an inference from silence. These included whether there is an innocent explanation for silence and whether it is reasonable to expect the suspect to have disclosed the fact, particularly in light of what was known about the prosecution case at the time.

The only 'guidance' given on the introduction of the Order was a short Practice Note issued in the Northern Ireland Court of Appeal on the 15 December 1988 when Lord Chief Justice Hutton announced the rescinding of the 1976 Judges' Rules on interrogation of suspects. He referred practitioners to the Guidance issued by the Chief Constable of the Royal Ulster Constabulary on the new Order; it deals with the procedures to be followed by the police, including the use of the new caution.

Initial cautious approach

The early cases have been well covered in previous articles and publications (see Jackson, "Inferences from Silence: From Common Law to Common Sense" NILQ, Summer 1993 and Amnesty International, " Fair trial concerns in Northern Ireland: the right of silence" February 1992). Initially the judges took a cautious approach to the drawing of adverse inferences from an accused's silence at trial. In a number of cases, the prosecution's invitation to draw inferences from a defendant's refusal to give evidence at trial was refused on the grounds that Article 4 was not to

be used to bolster a weak prosecution case. For example, in the case of McDonnell [March 1989], Mr Justice Nicholson ruled:

> ' the refusal to give evidence may be used by the court as supportive of other evidence from which at least the accused's probable guilt can be inferred or as corroborative of such other evidence and thus enable the court to conclude beyond reasonable doubt that the accused is guilty. But there must be other evidence which at least established *the probable guilt* of the accused'. (Our emphasis)

An even stricter approach was adopted by Lord Justice Kelly in the case of Smyth [October 1989]:

> 'It seems to me in some cases the failure of an accused to give evidence may justify a finding of guilt where the weight of the Prosecution evidence just rests *on the brink of the necessary standard of proof.* In other cases the failure to give evidence may merely heighten suspicion for it is nothing novel to say that courts have long recognised that there may be reasons innocent as well as sinister for the refusal of an accused to give evidence' (Our emphasis)

In one of the first cases where an inference was drawn from the failure to give evidence, the silence was used to undermine the defence case rather than bolster the prosecution case. In the case of Gamble [October 1989], the defendants were charged with a punishment shooting which resulted in the death of the victim. The prosecution case was based on alleged admissions of the defendants at the police station. In particular, one of the defendants, Douglas, admitted collecting three men who were to beat up the victim. He overheard a threat that the victim would be knee-capped, but he did not believe this to be serious. When Douglas did not give evidence at trial, Mr Justice Carswell ruled:

> 'For present purposes, I think it is sufficient to say that where the extent of the knowledge of an accused may be ambiguous or uncertain on the wording of the admissions made by him, the court may be entitled to draw an adverse inference about the true extent of that knowledge in consequence of his refusal to give evidence...when Douglas refused to give evidence...the court is entitled to discount the exculpatory part of these remarks'

In another case, McGrath [February 1990], which involved a disputed oral confession, Lord Justice Kelly said that he could not give full weight to the confession because of 'unnatural features' in the interview notes, and he went on to comment on the failure of the defendant to give evidence at trial:

'This is not a case in which I would feel justified in using the failure of the accused to give evidence in the main trial as an additive to reach that standard [proof beyond reasonable doubt], although it is of course open to me'.

As commentators have said, these cases indicate that in the initial stages the judges were only prepared to use the drawing of adverse inference from silence to support the prosecution cases where the other evidence was so strong as to be *on the brink of the necessary standard of proof.* One of the first signs of a different approach came with the ruling of Mr Justice Carswell in March 1990 in the case of Kane & Others concerning the Casement Park killings of two British soldiers. In this case the judge admitted to some reservations about accepting the identification evidence against one of the defendants because of its poor quality. Nevertheless he used the defendant's refusal to give evidence as a factor in reaching the decision that he took part in the events that occurred inside Casement Park. As Amnesty International have said, given the weakness of the identification evidence, the prosecution's evidence in the case was arguably not 'on the brink of' the necessary standard of proof but of a lower standard.

The 'common sense' approach

However, it was the case of McLernon [December 1990] which confirmed that the initial approach was to be altered. In this case Lord Justice Kelly drew adverse inferences from a defendant's silence before trial and at trial. He drew the most unfavourable inference - that no innocent explanation was available to him - from the defendant's failure to account for his presence in a house where firearms were later found. He also inferred guilty knowledge from his refusal to testify. In his judgment, he made it clear that his words in the case of Smyth (see above) were not intended to limit the application of the Order:

'Once the court has complied with the preliminaries in Article 4, para. 2, and called upon the accused to give evidence and a refusal is made, the Court has then a complete discretion as to whether inferences should be drawn or not... In Raymond Smyth I gave such instances in broad and general terms as what may be the consequence of the application of Article 4, but I add to these another instance only to show the width of the parameters of Article 4 that is that in certain cases a refusal to give evidence under the Article may well in itself with nothing more increase the weight of a *prima facie case to the weight of proof beyond a reasonable doubt.*' (Our emphasis)

A month later in January 1991, Lord Justice Kelly again made an equally significant judgment concerning the Order in the case of Kevin Sean Murray. The defendant was charged with the attempted murder of a part-time member of the Ulster Defence Regiment. He made a brief statement to a constable while his home was being searched in connection with the shooting. After his arrest, he remained silent and did not testify at trial.

In relation to Articles 3 and 5 of the Order, Mr Justice Kelly decided not to draw the strongest inference because the defendant had disclosed in general terms some facts relied on in his defence before being arrested. However his failure to give evidence reduced his credibility. In relation to Article 4, he held, that it was 'common sense' to infer from the fact that the accused had not been prepared to assert his innocence on oath that this was not the case. (This approach was subsequently upheld by the Court of Appeal and the House of Lord: see below).

In May 1991 the Lord Chief Justice Sir Brian Hutton took a similiar 'common sense' approach in the Daniel Morrison trial (Martin and Others). Mr Morrison, who was the Press Officer for Sinn Fein, was charged with false imprisonment and conspiracy to murder a man whom the prosecution claimed was being held and interrogated by the IRA for being a police informer. When found in the next-door house he gave no explanation after being cautioned under Article 3 at the scene. At Castlereagh Holding Centre he replied to a caution under Article 6: 'I have been advised by my solicitor not to say anything and to exercise my right to silence'. At trial, he gave evidence admitting that he had been in the house where the alleged informer was just before the police arrrived, but that he did not know that the man was being held against his will. He had gone to the house to arrange a press conference to publicise the man's claim that the RUC had forced him to turn informer. He also said that his refusal to answer questions during interrogation was, in part, a political decision, as he had previously publicly advised others to remain silent and had therefore to maintain this stance himself.

At trial the defence argued that the Order does not permit an adverse inference being drawn where there is a reasonable explanation of the accused's conduct consistent with innocence. In dismissing this, the Lord Chief Justice held that the intention of the Order was to enable ordinary 'common sense' to be exercised in drawing inferences. In this case, the defendant's failure to account for his presence in the house and his silence in response to cautions at the police station gave rise to the strong inference that there was not an innocent purpose for his presence.

In particular, the judge rejected the explanation that Morrison had not answered police questions on principle. In his view he had done so:

'not by any political attitude or matter of principle on his part, but by his desire to see the evidence which could be adduced against him in court before he gave an explanation of his conduct and from a tactical desire not to reveal his line of defence at that stage'.

In October 1991 the Court of Appeal heard the Murray appeal (see above) and upheld the 'common sense' approach. However, it stressed:

'The refusal of the accused to give evidence on his own behalf does not in itself indicate guilt. Under Article 4 it would be improper for the court to draw the bare inference that *because* the accused refused to give evidence in his own defence he was *therefore* guilty. But where common sense permits it, it is proper in an appropriate case for the court to draw the inference from the refusal of the accused to give evidence that there is no reasonable possibility of an innocent explanation to rebut the prima facie case established by the evidence adduced by the Crown, and for the drawing of this inference to lead on to the conclusion, after all the evidence has been considered, that the accused is guilty.'

The House of Lords in affirming this approach in the same case in October 1992 has set some guidance on the working and interpretation of Article 4 of the Order - that is, in relation to the accused's failure to testify:

* The prosecution must establish a prima facie case which calls for a rebuttal/explanation by the accused; and
* The court may, as a matter of common sense, draw the proper inference that the accused is guilty in the absence of any explanation which the defendant ought to be in a position to give, if there is one.

There are a number of issues arising from the Murray decision and subsequent Court of Appeal judgments which warrant closer scrutiny.

Prima facie case

In proposing identical amendments to limit a suspect's right to silence, the Criminal Law Revision Committee (1972) stressed the importance of there being a prima facie case against the accused - that is, a case for the accused to answer:

'We would stress that our proposals depend on there being a prima facie case against the accused. Failure to give evidence may be of little or no significance if there is no case against him or only a weak one...' (Paragraph 110)

The difficult question remains as to the standard of evidence required before a threshold of a prima facie case can be said to have been reached. In the Murray appeal, Lord Mustill considered the importance of this issue in a separate judgment. He defined his understanding of a prima facie case in this way:

'It seems to me therefore that the expression "a prima facie case" was intended to denote a case which is strong enough to go to a jury - i.e. a case consisting of direct evidence which, if believed and combined with legitimate inferences based upon it, could lead a properly directed jury to be satisfied beyond reasonable doubt (or whatever formula is preferred) that each of the essential elements of the offence is proved.'

In a later passage he describes the stage reached at the end of the prosecution case as when 'the trial is in a state of balance'. At this point when the accused must decide whether to testify or not, the prosecution has 'erected a case which, absent rebuttal, the fact-finder may (but will not necessarily) accept as proved'. The drawing of an adverse inference in the absence of a rebuttal 'may be sufficient to convert a provable prosecution case into one which is actually proved'.

It follows from this that a prima facie case is merely a case which the fact-finder*may* accept as proved. As legal commentators have emphasised, the importance of this issue is not just academic; it has a critical effect on the long-established rules around the burden and standard of proof. The onus on the prosecution is not only to produce a prima facie case against the accused but to prove its case beyond reasonable doubt. By allowing an adverse inference to bolster a less-than-strong prima facie case, the prosecution's traditional burden is being greatly lessened.

In addition, this issue is complicated by the fact that the Order permits the court to draw an inference from silence at the stage of an application for a direction on a submission of no case to answer. In other words, an adverse inference from silence may be used to supplement the prosecution evidence in order that it reaches the required standard of a prima facie case.

The Court of Appeal in the case of McLernon [April 1992] confirmed that the trial judge can draw an inference against the accused under Article 3 in ruling on an application that there is no case to answer. And this is even before the accused or any witness on his behalf has been called to give evidence (see also the case of Devine below).

It is probably fair to say that this provision is open to even greater criticism in terms of its effect on established rules. First, it has an even more obvious effect on the traditional arguments around the burden and standard of proof. Although it is clear that an inference drawn from silence cannot be the sole evidence in support of a prima facie case, there are few safeguards against it being able to supplement a piece of inadequate prosecution evidence. such as weak identification, so as to provide a prima facie case. Furthermore, there is nothing to prevent the *same* inference from being used again to convert the prima facie case into one which is of the required standard for conviction at the end of the trial.

Second, it is said that an inference cannot properly (let alone fairly) be drawn at a stage before the defence has formally presented its case. At this stage, it may well be difficult to say exactly what facts the defence are relying upon, if any at all. And yet this is crucial to the operation of Article 3, which only permits an inference to be drawn when the accused on being questioned by police fails to mention 'any fact relied on in his defence in those proceedings'. The Court of Appeal in McLernon stated that where defence counsel suggests a fact, which assists the accused, to a prosecution witness in the course of cross-examination this fact then becomes one which is 'relied on in his defence in those proceedings'. The unsatisfactory nature of this ruling and the subsequent decision in Devine (see below) have been severely criticised by practitioners (see page 19).

Explanations for silence

From the beginning the courts have taken the view that it is not their function to 'conjure up reasons' for an accused's silence (see case of Murray above). Nevertheless, insofar as it is part o the defence case, it is their duty to consider the explanations advanced.

It is now widely accepted that silence is equivocal and that there can be a number of reasons why a person remains silent in the face of police questioning. It may be because people are intimidated or confused or do not know exactly what they are being questioned about; or they may be fearful of incriminating themselves or others over some other matter. Also, as pointed out by the solicitors interviewed, there are additional reasons particularly applicable to Northern Ireland. For example, many people have a justifiable fear of the police knowing details about their personal lives. This is in the context where informers may be recruited as a result of police questioning and then placed at serious risk of harm. For others, there is a perceived danger in being labelled an informer if anything is said to the police at all.

This was one of the reasons put forward in the case of Kinsella [December 1993]. The defendant was arrested whilst driving his taxi with a back-seat passenger carrying bags containing firearms

and ammunition. At trial he gave several reasons for remaining silent at the police station. First, he wished to have legal advice before answering police questions (see below). Second, that people from the Bogside did not talk to the police as they were distrusted. Third, that he was working 'on the side' and did not want to be prosecuted. Fourth, that he was suffering extreme pain during the detention as a result of being 'brutalised' on arrest. In the event, the judge rejected these explanations.

In the case of Murphy & Others [November 1991] it was accepted that Mr Murphy had said to the police that he refused to answer questions because he had been 'verballed' on a previous occasion. The trial judge ruled that no inferences were drawn under Article 3 as Murphy 'was a victim of a conspiracy to pervert the course of justice'. However, his failure to testify at trial led the judge to rule that an adverse inference would have been drawn under Article 4, if this had been necessary to support the conviction.

Mr Justice Kerr in the case of Gallen [November 1993] acknowledged that where the court is faced with more than one possible explanation for silence, it may be 'less easy' to draw an adverse inference. In this case, the defendant was facing charges relating to a series of terrorist incidents. He was acquitted on a charge of murder after the judge ruled that his failure to testify might have been prompted by a reluctance to face questioning on other incidents not under consideration. In these circumstances, the judge did not think it proper to draw adverse inference under Article 4.

It is hard to draw any firm conclusions as to how the courts are approaching the question of explanations for silence. Certainly, they have not adopted an approach that requires them to seek out, consider and eliminate the possibility of innocent explanations for silence before drawing an adverse inference. They take the view that it is incumbent upon the defence to satisfy the court of the reasons. According to the practitioners interviewed, defendants are rarely believed in the reasons that are advanced (see page 20).

Legal advice

There are also those people who do not wish to answer questions before they have had access to legal advice. In its Fourteenth Report (1989) the Standing Advisory Commission on Human Rights in Northern Ireland considered that the suspect should have an absolute right to legal advice before being confronted with the decision whether or not to answer specific questions and that the person should not be cautioned without having had the opportunity to receive legal advice. Similiar recommendations were made by the minority members of the 1993 Royal Commission who supported amendments to the right to silence and the Home Office Working Group.

The last chapter identified the problems that solicitors enounter when advising at police stations: for example, the deferred access to clients, the lack of information about the case and the inability to sit in on interviews. These difficulties are underlined in the case law.

In September 1993 in the case of Quinn, the Court of Appeal considered the relationship between the suspect's right to consult a solicitor and the requirements to answer questions under the Order. Mr Quinn had originally been arrested and questioned in April 1988 on suspicion of the attempted murder of two RUC officers. He was later discharged by Armagh Magistrates Court in September 1988 after three prosecution witnesses were unwilling to give evidence. Over two years later in the early morning of 16 July 1990 Mr Quinn was re-arrested in connection with the same incident. Two developments had occurred in the intervening period: the introduction of the 'right of silence' Order and the Criminal Justice (Evidence etc) Order 1988 in October of the same year. This allows the courts to admit statements from witnesses who refuse to testify out of fear.

On being arrested for the second time, Mr Quinn was taken to Gough Barracks Holding Centre where he asked to consult a solicitor. He remained silent throughout two interviews. In evidence at trial, he said that he had heard of people going to the police station and being forced to make a statement. And as he had been arrested for something very serious, he did not want to say anything until he had seen his solicitor. In dismissing these reasons the Lord Chief Justice Sir Brian Hutton said :

> '....it is quite clear that he would not have needed the advice of a solicitor before giving an account to the police which, if true, would have cleared him of the offences of which he was accused'.

He also went on to rule against a defence submission that no adverse inference should be drawn against the accused under Article 3 because he had asked to consult a solicitor when he first arrived at the police station. Section 15 of the Northern Ireland (Emergency Provisions) Act 1987 gave him the right to consult a solicitor but the police interviewed him before his solicitor arrived.

> 'I consider it to be clear that Parliament did not intend that the change in the law brought about by Article 3 which permits and contemplates the drawing of a common sense inference in an appropriate case should be stultified by the existence of the right to legal advice given by section 15 of the 1987 Act'.

On appeal, it was said by defence counsel that 'if ever there was a case in which legal advice was needed by the suspect before he was interviewed, this was it'. Further points were made in support

of the submission. First, the law had materially changed between Mr Quinn's first and second arrest. Second, one of the interviewing officers had accepted that it was a case in which the advice of a solicitor was important. In rejecting these arguments, the Court of Appeal affirmed the view that the Order was not intended to be read subject to any right to legal advice.

During the course of this hearing the Court was referred to the 'Guide to Emergency Powers' issued on 26 July 1990. Para. 33 states the general rule that a person who asks for legal advice may not be interviewed or continue to be interviewed until it is received. However, this does not apply in a number of circumstances including where unreasonable delay would be caused by awaiting the solicitors arrival. Although it was accepted that Mr Quinn's interview took place just before the Guide came into force, the Court of Appeal nevertheless considered it and dismissed its relevance to the Order on the basis that: 'in any event the Guide is not effective in law otherwise than as a guide and does not itself have the force of law'.

There are also cases where defendants say that they have been advised by their solicitor to remain silent or that they are not obliged to answer. This was raised in the recent case of Kinsella [December 1993]. As mentioned above, the defendant in this case was arrested whilst driving a taxi with the co-defendant sitting in the back seat with bags containing rifles. He was interviewed some 31 times at the police station. He saw a solicitor after the fourth interview. During the fifth he made the statement that he had not noticed that the co-defendant had bags and he knew nothing about the rifles and ammunition in the car. When he was asked why he had not mentioned this earlier, he said: 'I wanted to confirm with my solicitor first because I was brutalised on arrest'. Mr Kinsella remained silent throughout the subsequent interviews. In evidence at trial, he said that this was on the advice of his solicitor who had told him that he did not have to say anything more. The solicitor was not called to give evidence.

Lord Justice MacDermott dismissed both explanations. He said that Mr Kinsella's prior failure to give the information 'was because he had not devised the story sooner'. And he had this to say about the solicitor's alleged advice:

> 'Mr X is a very experienced solicitor practising in this field and I am sure that he would have made it clear to Kinsella that he could remain silent but if he did adverse inferences could be drawn from his failure to answer relevant questions to which the Articles applied'.

In the case of Mathers & Hillen [July 1992 and CA 1993] the solicitor did testify to confirm that he had privately and separately advised the defendants on a particular date whilst they were being detained at the police station. Both defendants were arrested on suspicion that they were intending

to activate a remote-controlled explosive device on the Dublin Road on the outskirts of Newry. At the police station, Mathers was interviewed on eighteen occasions and Hillen on seventeen over a period of 4 days. The police alleged that both remained silent during interviews on the first day. On the other hand, the defendants alleged that, after seeing their solicitor on the first day, they told the police during the next interview that they had been coming from Barcroft and were going to work. The trial judge disbelieved them:

> 'Regarding the interviewing of the accused by the detectives, I do not accept that each accused in the first interview he had after seeing his solicitor, said he was coming from Barcroft and going to work. If this had been said it would, after six negative interviews, have been a reply which surely would have been recorded and led to a whole series of follow up questions. Yet both sets of interviewing officers failed to record such a reply'.

The judge came to this conclusion even though he found as a fact that the defendants had given this explanation earlier when arrested by soldiers. He used Article 3 to rule that their failure to give any relevant information to the police - 'even after each had seen his solicitor' - strengthened the prosecution case that their presence in the place where they were arrested was not innocent.

This question of the relationship between the Order and a suspect's right to legal advice is currently being argued in the case of Murray v UK before the European Commission on Human Rights. The defendant was arrested under emergency legislation early in the morning of 7 January 1990 in connection with the incidents in the Martin case mentioned on page 26. On being taken to Castlereagh Holding Centre he indicated that he wished to see a solicitor. Authority was given to delay access for 48 hours, during which time he was interviewed 12 times. He maintained his silence throughout the interviews. When he saw his solicitor for the first time at 6.33pm on 9 January, he was advised to remain silent, which he did during the following two interviews. His solicitor was not permitted to be present during these interviews.

On convicting the defendant, the judge drew 'very strong inferences' from his silence under police questioning and this was endorsed by the Court of Appeal.

The case before the European Commission alleges that the limitations on a suspect's right of silence under the Order and the way in which access to legal advice is delayed and limited is in breach of the defendant's right to a fair trial under Article 6 of the European Convention of Human Rights. By its admissibility ruling in January 1994, the Commission has said that the case raises serious issues of fact and law under the Convention. These are likely to be adjudicated upon by the European Court in due course.

'Fact relied upon'

Either at the directions stage on a submission of no case to answer or at the conclusion of the case, the court may draw an adverse inference against the accused under Article 3 even if no evidence has been presented on behalf of the defence. But such an inference can only be drawn where, on being questioned, the accused 'failed to mention any fact relied on in his defence in those proceedings'.

As previously mentioned, the Court of Appeal in the case of McLernon said that in some circumstances matters put by defence counsel in cross-examination of prosecution witnesses may satisfy this requirement. But as Mr Justice Nicholson acknowledged in the case of Carroll it may not be an easy task to distinguish between 'facts relied on in his defence' and cross-examination designed to establish fact or to show that a witness for the prosecution is lying or mistaken. The Court of Appeal had to consider this point in the case of Devine [1992].

Mr Devine was arrested in a house where explosives and firearms were in the process of being moved between a car outside and the store at the back of the house. On being cautioned under Article 3, both on arrest and at the police station, Mr Devine made no reply. He did not answer material questions relating to his presence in the house during the course of 29 subsequent interviews and he did not testify at court. The trial judge drew adverse inferences under Article 3 (and possibly Article 4) in support of the conviction. On appeal the Court of Appeal accepted the submission that the defence had been conducted on the basis of probing the prosecution evidence and had not put forward facts upon which the defence sought to rely. On this basis, it ruled that Article 3 did not apply. However, it went on to say:

> 'In our opinion there is a contrast to be drawn between Article 3 on the one hand and Articles 5 and 6 on the other. In the circumstances set out in Articles 5 and 6 the failure to account for certain matters when requested to do so by a constable may permit the court to draw an adverse inference against the accused. But for an adverse inference to be drawn under Article 3 there must be more than a failure to mention a fact when questioned by a constable, there must be reliance on that fact in the defence of the accused at the trial'.

The difficulties posed by this decision were highlighted during interviews with defence barristers. It was pointed out that without an objective test on what 'triggers' Article 3 in these circumstances, defence counsel may unknowingly risk their client's case in the way that cross-examination is pursued: practitioners are being asked to walk a 'legal tightrope' (see page 19).

Failure to testify

The cases show that a failure to testify at trial is likely to result in a simpler and yet more potent adverse inference being drawn. The common approach by judges is that if the accused is not prepared to assert his innocence on oath it is because he or she is not innocent. This is so even where the evidence is that the accused has made a statement or given an explanation to the police whilst in detention.

In the case of Hamil [March 1991] the evidence was that the defendant had at all times answered police questions in connection with offences relating to the possession of a sawn-off shotgun. According to the Court of Appeal judgment, the defendant 'refused to go into the witness box'. The defence barrister submitted that the defendant had done enough by way of explanation and should not be penalised for not giving evidence. The Court of Appeal endorsed the trial judge's approach:

> 'But the giving of an explanation to the police, which may be quite specious and which will not have been subjected to testing by cross-examination, clearly does not absolve an accused person from the consequences of Article 4 after he has been expressly called upon by the court to give evidence in his own defence and has been warned of the consequences if he does not do so'.

Mr Justice Kerr took a similiar approach in the case of Gallen [November 1993]:

> 'The purpose of Article 4 in such circumstances, in my opinion, is to require an accused to submit his explanation to the test of presentation and cross-examination in the witness box or alternatively face the consequence that his failure to do so may allow the court to draw an adverse inference against him. It would be wholly incongruous if the accused could escape these consequences by the recital of an exculpatory explanation in interview'.

Proper Inferences

The Order gives no statutory guidance on the kind of inferences to be drawn. It merely states that a court may draw such inferences as 'appear proper'. The only restriction is that a person may not be convicted solely on an inference drawn from silence.

The case judgments show that in endorsing a simple 'common sense' approach, there is a great temptation to rely on the simple equation that silence means guilt. In the absence of any statutory guidance on how to approach the task of drawing inferences and what matters should properly be taken into account, it is perhaps not surprising that this is the inference drawn. As Roy Amlot QC, a leading criminal lawyer at the Old Bailey, said in a recent Opinion written for JUSTICE, this is an inevitable conclusion:

> 'It would be unrealistic to suggest that a jury was not being asked to draw the inference of guilt in cases where an accused had been warned by way of caution and had nevertheless failed to mention a significant fact in his defence'.

It is this positive inference of guilt that is at the heart of the contention that the Order offends the principles of self-incrimination and the presumption of innocence. As Mr Amlot points out:

> 'Once silence can provide an inference of guilt the presumption of innocence disappears or is a long way towards disappearing. Once the judge or prosecutor can say of the defendant he has not provided an explanation and by law you can therefore infer guilt, he is effectively saying he had not, by explanation, established his innocence and you can infer guilt'.

This raises serious considerations on whether the provisions of the Order can be compatible with the right to a fair trial enshrined in Article 6 of the European Convention of Human Rights.

SUMMARY OF CONCLUSIONS

The report draws conclusions which cast grave doubt on the efficacy and the safety of the provisions of the Criminal Evidence (Northern Ireland) Order 1988 as they apply in limiting a suspect's right to silence in Northern Ireland; and therefore the consequences of extending such provisions, in the form now proposed in the Criminal Justice and Public Order Bill, to England and Wales.

Statistics and research

1. Nothing in the statistics indicates that the 1988 Order strengthened the fight against serious crime. The statistical evidence shows that, far from an increase in detection and conviction rates, there has been a drop in both clear-up and conviction rates in Northern Ireland since 1988. Clear-up rates dropped by 11% between 1988 and 1992; conviction rates in the four years after the Order were on average 3-4% lower than those in the four years preceding it. Recently released 1993 figures, for scheduled offences only, show a rise in conviction rates, which nevertheless remain below pre-1988 averages. It is too early to say whether this is a trend.

2. The limited research evidence available from the Northern Ireland Office shows that silence by suspects held under emergency legislation has little effect on the chance of being brought to trial: 30% of those remaining silent were charged, compared with 37% of those who co-operated.

Police questioning of suspects

3. The new caution is little-understood and widely misinterpreted by suspects. Police rountinely follow up the formal caution with such phrases as: 'Now is the time to speak' or 'You have to speak to us now or we'll charge you'.

4. The Order is being used to put pressure on suspects to speak. This impacts unfairly on the vulnerable and on those who may have reasons for not speaking: because they are suspicious of the police, wish to protect families, or fear intimidation.

5. The conflicts for lawyers, representing at the police station or taking decisions at trial, are real. Solicitors face an extremely difficult task in advising their clients without knowing the evidence against them. They face the prospect of being called to give evidence if they have advised, or are said to have advised, silence. Barristers at trial feel forced to advise defendants to give evidence, even though they may be psychologically unable to withstand the pressure of cross-examination.

6. The courts have held that the Order is not subject to the right to consult a solicitor whilst detained at the police station. A request to see a solicitor before answering questions, or answering questions in apparent accordance with legal advice, provides no safeguard against the drawing of an adverse inference for failing to mention a material fact.

At trial

7. Judicial decisions in the Diplock courts show that the shift in the burden of proof when applying the Order is real and pronounced. The initial caution of judges in drawing inferences from silence only where a case was on the verge of being proved beyond reasonable doubt has been replaced by a 'common sense' approach which almost takes silence as presumptive of guilt.

8. An inference from the same incident of silence may be used to support prosecution evidence at a preliminary inquiry, at trial in order to provide a case to answer and at the point of conviction. This chain of use can result in a conviction which is based on a less-than prima facie case combined with an inference under the Order.

9. Not testifying at trial is likely to draw the inference of guilt. This is so even where the defendant has given a full explanation to the police.

ANNEX.1

STATUTORY INSTRUMENTS
1988 No. 1987 (N.I. 20)
NORTHERN IRELAND

The Criminal Evidence (Northern Ireland) Order 1988

Made 14th November 1988
Coming into operation in accordance with Article 1

At the Court at Buckingham Palace, the 14th day of November 1988
Present,
The Queen's Most Excellent Majesty in Council

Whereas a draft of this Order has been approved by a resolution of each House of Parliament:

Now, therefore, Her Majesty, in exercise of the powers conferred by paragraph 1 of Schedule 1 to the Northern Ireland Act 1974 [FOOTNOTE a] and of all other powers enabling Her in that behalf, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:-

Title and commencement

1.-(1) This Order may be cited as the Criminal Evidence (Northern Ireland) Order 1988.

(2) Articles 2 and 4 shall come into operation on the seventh day after the day on which this Order is made and the other provisions of this Order shall come into operation on the expiration of one month from the day on which it is made.

Interpretation and savings

2.-(1) The Interpretation Act (Northern Ireland) 1954 [FOOTNOTE b] shall apply to Article 1 and the following provisions of this Order as it applies to a Measure of the Northern Ireland Assembly.

(2) In this Order-
"child" means a person under the age of fourteen;
"place" includes any building or part of a building, any vehicle, vessel, aircraft or hovercraft and any other place whatsoever;
"statutory provision" has the meaning assigned by section 1(f) of the Interpretation Act (Northern Ireland) 1954.

(3) In Articles 3(2), 4(4), 5(2) and 6(2), references to an offence charged include references to any other offence of which the accused could lawfully be convicted on that charge.

(4) A person shall not be committed for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in Article 3(2), 4(4), 5(2) or 6(2).

(5) A judge shall not refuse to grant such an application as is mentioned in Article 3(2)(b) solely on an inference drawn from such a failure as is mentioned in Article 3(2).

(6) Nothing in this Order prejudices the operation of any statutory provision which provides (in whatever words) that any answer or evidence given by a person in specified circumstances shall not be admissible in evidence against him or some other person in any proceedings or class of proceedings (however described, and whether civil or criminal).

In this paragraph the reference to giving evidence is a reference to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.

(7) Nothing in this Order prejudices any power of a court, in any proceedings, to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion.

Circumstances in which inferences may be drawn from accused's failure to mention particular facts when questioned, charged, etc.

3.-(1) Where, in any proceedings against a person for an offence, evidence is given that the accused-

(a) at any time before he was charged with the offence, on being questioned by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, paragraph (2) applies.

(2) Where this paragraph applies-

(a) the court, in determining whether to commit the accused for trial or whether there is a case to answer;

(b) a judge, in deciding whether to grant an application made by the accused under Article 5 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 [FOOTNOTE c] (application for dismissal of charge where a case of fraud has been transferred from a magistrates' court to the Crown Court under Article 3 of that Order); and

(c) the court or jury, in determining whether the accused is guilty of the offence charged,

may-

(i) draw such inferences from the failure as appear proper;

(ii) on the basis of such inferences treat the failure as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material.

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

(4) This Article applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in paragraph (1) "officially informed" means informed by a constable or any such person.

(5) This Article does not-

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this Article; or

(b) preclude the drawing of any inference from any such silence or other reaction of the accused which could be drawn apart from this Article.

(6) This Article does not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this Article.

Accused to be called upon to give evidence at trial

4.-(1) At the trial of any person (other than a child) for an offence paragraphs (2) to (7) apply unless-

(a) the accused's guilt is not in issue; or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to be called upon to give evidence;

but paragraph (2) does not apply if, before any evidence is called for the defence, the accused or counsel or a solicitor representing him informs the court that the accused will give evidence.

(2) Before any evidence is called for the defence, the court-

(a) shall tell the accused that he will be called upon by the court to give evidence in his own defence; and

(b) shall tell him in ordinary language what the effect of this Article will be if-

(i) when so called upon, he refuses to be sworn;

(ii) having been sworn, without good cause he refuses to answer any question;

and thereupon the court shall call upon the accused to give evidence.

(3) If the accused-

(a) after being called upon by the court to give evidence in pursuance of this Article, or after he or counsel or a solicitor representing him has informed the court that he will give evidence, refuses to be sworn; or

(b) having been sworn, without good cause refuses to answer any question,paragraph (4) applies.

(4) The court or jury, in determining whether the accused is guilty of the offence charged, may-

(a) draw such inferences from the refusal as appear proper;

(b) on the basis of such inferences, treat the refusal as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the refusal is material.

(5) This Article does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a refusal to be sworn.

(6) For the purposes of this Article a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless-

(a) he is entitled to refuse to answer the question by virtue of any statutory provision, or on the ground of privilege; or

(b) the court in the exercise of its general discretion excuses him from answering it.

(7) Where the age of any person is material for the purposes of paragraph (1), his age shall for those purposes be taken to be that which appears to the court to be his age.

(8) This Article applies-

(a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this Article;

(b) in relation to proceedings in a magistrates' court, only if the time when the court begins to receive evidence in the proceedings falls after that commencement.

(9) Where the accused gives evidence in pursuance of this Article, section 3 of the Criminal Evidence Act (Northern Ireland 1923) [FOOTNOTE d] (right of reply) shall have effect as if he had given evidence in pursuance of that Act.

(10) In section 1 of the Criminal Evidence Act (Northern Ireland) 1923-

(a) proviso (a) and in proviso (b) the words "of any person charged with an offence, or" are repealed;

(b) in provisos (d) to (g), references to that Act shall be construed as including references to this Order.

Inferences from failure or refusal to account for objects, marks, etc.

5.-(1) Where-

(a) a person is arrested by a constable, and there is-

(i) on his person; or

(ii) in or on his clothing or footwear; or

(iii) otherwise in his possession; or

(iv) in any place in which he is at the time of his arrest,

any object, substance or mark, or there is any mark on any such object; and

(b) the constable reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of an offence specified by the constable; and

(c) the constable informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark; and

(d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence so specified, evidence of those matters is given, paragraph (2) applies.

(2) Where this paragraph applies-

(a) the court, in determining whether to commit the accused for trial or whether there is a case to answer; and

(b) the court or jury, in determining whether the accused is guilty of the offence charged,

may-

(i) draw such inferences from the failure or refusal as appear proper;

(ii) on the basis of such inferences, treat the failure or refusal as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure or refusal is material.

(3) Paragraphs (1) and (2) apply to the condition of clothing or footwear as they apply to a substance or mark thereon.

(4) Paragraphs (1) and (2) do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in paragraph (1)(c) what the effect of this Article would be if he failed or refused to comply with the request.

(5) This Article does not preclude the drawing of any inference from a failure or refusal to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could properly be drawn apart from this Article.

(6) This Article does not apply in relation to a failure or refusal which occurred before the commencement of this Article.

Inferences from failure or refusal to account for presence at a particular place

6.-(1) Where-

(a) a person arrested by a constable was found by him at a place at or about the time the offence for which he was arrested is alleged to have been committed; and

(b) the constable reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence; and

(c) the constable informs the person that he so believes, and requests him to account for that presence; and

(d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence, evidence of those matters is given, paragraph (2) applies.

(2) Where this paragraph applies-

(a) the court, in determining whether to commit the accused for trial or whether there is a case to answer; and

(b) the court or jury, in determining whether the accused is guilty of the offence charged,

may-

(i) draw such inferences from the failure or refusal as appear proper;

(ii) on the basis of such inferences, treat the failure or refusal as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure or refusal is material.

(3) Paragraphs (1) and (2) do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in paragraph (1)(c) what the effect of this Article would be if he failed or refused to do so.

(4) This Article does not preclude the drawing of any inference from the failure or refusal of a person to account for his presence at a place which could properly be drawn apart from this Article.

(5) This Article does not apply in relation to a failure or refusal which occurred before the commencement of this Article.

G. I. de Deney
Clerk of the Privy Council

EXPLANATORY NOTE
(This note is not part of the Order)

This Order amends the law relating to evidence in criminal proceedings in Northern Ireland. Article 3 specifies circumstances in which inferences may be drawn from an accused's failure to mention particular facts when questioned about or charged with an offence. Under Article 4, an accused person may be called upon by the court to give evidence at his trial, and certain inferences may be drawn if he refuses to do so. Article 5 authorises inferences to be drawn from an accused person's failure or refusal to account for objects, substances or marks in certain circumstances. Article 6 allows inferences to be drawn from an accused person's presence at a place about the time when the offence in respect of which he was arrested was committed, if specified conditions are satisfied.

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FOOTNOTES

(a) 1974 c.28.

(b) 1954 c.33 (N.I.).

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