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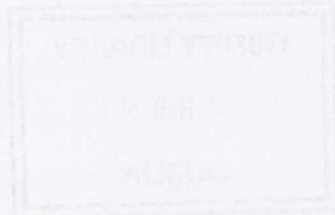
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The Investigation and Prosecution of White-Collar Crime in Ireland

**A thesis submitted in fulfilment of the requirements for the award of the
degree of Doctor of Philosophy by the University of Dublin**



Mark Andrew Byrne

LL.B. (Dublin), Barrister-at-Law (King's Inns)

2016



Thesis 11180

Declaration

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Summary

This thesis explores the investigation and prosecution of white-collar crime in Ireland with a view to evaluating current law and practice and presenting a vision for reform. The focus of the enquiry is core aspects of the investigative and prosecutorial process, namely adjectival laws and doctrines, legislative and common law powers, and constitutional rights. The position taken in the thesis is that the investigation and prosecution of white-collar crime should be the subject of a dedicated statute that consolidates beneficial aspects of the current regime, amends areas that are in need of reform, and provides a context for the future development of law and practice.

The thesis adopts a doctrinal methodology in its analysis of relevant rules of law, procedure and evidence and their implementation in practice. The thesis acknowledges the prevailing human rights architecture in this jurisdiction and the need to operate within this framework but this is secondary to a methodology of pragmatic doctrinal analysis that has regard to due process and crime control models of criminal theory.

Chapter 1 contextualises the subject matter of the thesis by noting the topicality of the issue of white-collar crime in contemporary Irish society. The research question of the thesis is clarified and there is a description of the methodology adopted in the course of the thesis. The original nature of the thesis is explained and the structure of the thesis is outlined.

Chapter 2 considers the parameters of the classification referred to as 'white-collar crime' in order to frame the investigative powers and prosecutorial rules associated with that form of crime. The chapter argues that the most appropriate understanding of the term 'white-collar crime' for present purposes is arrived at from a perspective that has regard to the approach taken by the legislature in the Criminal Justice Act 2011.

Chapter 3 addresses the appropriateness of existing powers concerning the investigation of white-collar crime in Ireland. The chapter begins by situating investigative powers in the context of the human rights architecture in this jurisdiction. The chapter then explores the various powers of investigation that may potentially arise in a white-collar crime context.

The chapter describes a number of shortcomings in the way that relevant powers of investigation are applied in this jurisdiction and identifies how they should be rectified.

Chapter 4 evaluates existing rules and doctrines concerning the prosecution of white-collar crime in Ireland. The chapter assesses the role of various entities in the prosecution of white-collar crime in Ireland. The uncertain state of the law on the question of attributing direct liability is examined. The place of documentary evidence in the prosecution of white-collar crime is analysed. Consideration is given to the extent to which current rules promote expedition in the conduct of white-collar crime trials. A final section in the chapter assesses the role of the jury in trials of white-collar crime in this country.

Chapter 5 addresses issues concerning two privileges of particular relevance to investigations and prosecutions of white-collar crime, namely the privilege against self-incrimination and legal professional privilege.

The final chapter in the thesis, Chapter 6, produces findings and recommendations that contribute to a synthesis of the ideas formed in the preceding chapters. The thesis argues that some existing rules, doctrines and practices operate adequately but a number of deficiencies and lacunae are also identified and recommendations are made as to how they should be rectified. These recommendations are complemented by proposals that provide safeguards for suspects and defendants and result in a thesis that has regard to due process and crime control models of criminal theory. A number of justifications and imperatives for a more concerted and coherent approach to the investigation and prosecution of white-collar crime in Ireland are identified, including: the complexity associated with the commission, investigation and prosecution of white-collar crime; the comparatively substantial harm caused by this form of crime; and the societal value of coherent legal responses that redress the historical misconception that white-collar crime is not as serious a form of crime as crimes of violence. It is argued that the optimum model for future engagement with the matters in question entails the housing of relevant powers, rules and doctrines in a dedicated statute of a similar model to that adopted by the legislature in the Offences Against the State Act 1939 or, more recently, in the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014.

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The 1937 postgraduate reading room was my favoured place for reading, writing and reflection. However, I found the support of librarians to be just as important as a quiet place for study. I renewed acquaintanceships with staff behind the counter in the Berkeley Library that I remembered from my undergraduate days; I wish to make particular mention of Aisling Dunlea, an old friend from my time at secondary school. Staff of the library in King's Inns, led by Renate Ní Uigín, were similarly obliging in dealing with my requests and queries. Ms Jean Scanlon of the Department of Justice and Equality helped me negotiate freedom of information requests and Mr Brian Purcell of the Law Reform Commission replied promptly to my email queries.

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For Jamie

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Chapter 1

Introduction

1 White-Collar Crime as an Issue in Contemporary Irish Society

The global economic and financial crises that came to a head in 2008, and which had a particularly devastating effect in Ireland, saw the issue of white-collar crime come to the fore of political and public discourse in this jurisdiction. It was the early 1990s before white-collar crime entered the public and official consciousness in any significant way as Ireland made the transition from an agrarian economy to a more industrialised and developed model.¹ Up until that point, there were offences such as fraud on the statute book but it has been observed that they were prosecuted infrequently.² The Garda Bureau of Fraud Investigation was established in 1995 in response to the growth of this breed of crime and the number of relevant regulatory agencies with powers of investigation and summary prosecution proliferated.³ The period from the 1990s until the crises of 2008 was marked by an increase in the volume of white-collar crime prosecutions but the prevailing policy towards corporate wrongdoing was one of cooperative regulation and civil enforcement as opposed to criminal prosecution and there was no particular appetite in Irish society for an approach that was more oriented towards criminal prosecutions.⁴

¹ J McGrath, *Corporate and White-Collar Crime in Ireland: A New Architecture of Regulatory Enforcement* (Manchester University Press 2015) Ch 2.

² M McDowell, *Report of the Working Group in Company Law Compliance and Enforcement* (Stationery Office 1998) [2.5].

³ A precursor to the GBFI, the 'Garda Fraud Squad', had been in existence since the 1950s as a specialist subgroup of An Garda Síochána but was criticised for having neither the resources nor the skills to conduct effective investigations into company law provisions: M McDowell, *Report of the Working Group in Company Law Compliance and Enforcement* (Stationery Office 1998) [2.14]. Relevant regulatory agencies and their date of establishment include: the Competition Authority (1991); the Environmental Protection Agency (1992); the Health and Safety Authority (1995); the Office of the Director of Corporate Enforcement (2001); the Central Bank of Ireland (2010).

⁴ J McGrath, *Corporate and White-Collar Crime in Ireland: A New Architecture of Regulatory Enforcement* (Manchester University Press 2015) Ch 6.

The collapse of Anglo Irish Bank plc in 2008 had a seismic impact on the fortunes of the Irish banking system and the economy more generally.⁵ Some of the Irish commentariat expressed the view that white-collar crime was a major contributory factor in the demise of Anglo Irish Bank plc and, in turn, in the creation of the financial and economic crises that befell the country.⁶ These opinions stoked public debate of the issues and added to a hardening of society's attitudes to white-collar crime. In reaction to the role that white-collar crime is perceived to have played in the crises of 2008, there has been a re-evaluation by policy makers of the approach to white-collar crime in this jurisdiction as they seek to respond to, and quell, public disquiet.⁷ A further mark of the societal interest in this form of crime has been the intense media attention on criminal prosecutions resulting from the failure of Anglo Irish Bank plc, which resulted in an order of the High Court in August 2015 adjourning the trial of former Anglo Irish Bank CEO, Seán FitzPatrick, from October 2015 until May 2016 in order to allow for a fading of the media attention that might otherwise negate the fairness of the trial.⁸ This is the, sometimes febrile, broader contemporary societal context for the instant thesis, which seeks to examine the suitability of existing

⁵ The impact of the crises has been documented in a series of reports, including: K Regling and M Watson, *A Preliminary Report on the Sources of Ireland's Banking Crisis* (Prn A10/0700, 2010); P Nyberg, *Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland, Report of the Commission of Investigation into the Banking Crisis in Ireland* (Stationery Office 2011).

⁶ F O'Toole, *Ship of Fools: How Stupidity and Corruption Sank the Celtic Tiger* (Faber & Faber 2010); S Carswell, *Anglo Republic: Inside the Bank that Broke Ireland* (Penguin 2011); S Ross, *The Untouchables: The People Who Helped Run Ireland into the Ground - and are Still Running the Show* (Penguin 2012).

⁷ A White Paper on Crime process was commenced by the Department of Justice and Equality in 2009 and included white-collar crime in the subject matter of the third of four discussion documents. The Criminal Justice Act 2011 contains measures that address some of the issues arising in connection with the investigation and prosecution of white-collar crime. In a message apparently designed to assuage increased public concern about this form of crime in the wake of the banking and financial crises that came to a crescendo in 2008, a press release from the then Minister for Justice and Equality issued in the days after the passing of the 2011 Act into law described the legislation as 'an important step in ensuring that the white-collar criminal will be vigorously pursued by the authorities of the State' (Department of Justice and Equality Press Release, 5 August 2011). In a further response to the crises of 2008, the Committee of Inquiry into the Banking Crisis, colloquially known as the Banking Inquiry, was formally established in November 2014 under the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013. The inquiry is due to conclude oral hearings in September 2015 and it will then move to produce its written report:

<<https://inquiries.oireachtas.ie/banking/banking-inquiry-to-conclude-public-hearings-and-start-final-phase-of-work-leading-to-inquiry-report/>> (accessed 7 September 2015).

⁸ E Edwards, 'High Court Dismisses FitzPatrick Application to Halt Trial' *The Irish Times* (Dublin, 29 August 2015). Mr FitzPatrick faces 27 charges contrary to the Companies Act 1990 and his trial had been due to commence in the Dublin Circuit Criminal Court on 5 October 2015. Moriarty J refused an application for an order permanently prohibiting the trial that was grounded in arguments that adverse publicity would deprive it of fairness, deciding instead to address the mischief in question by ordering a seven month adjournment of the trial.

laws, doctrines and practices associated with the investigation and prosecution of white-collar crime in this jurisdiction.

2 The Research Question

This thesis examines the appropriateness of the processes associated with the investigation and prosecution of white-collar crime in Ireland. In order to set a context and framework for the project, the thesis considers, in broad terms, the definitional issues associated with the field of white-collar crime. However, the emphasis of the thesis is on relevant adjectival laws and doctrines as opposed to substantive criminal law. The thesis notes that, although white-collar crime shares much of the procedural law that applies to other forms of crime, occasional legislative forays have created specialised powers that address the particular features of white-collar crime. Many of these initiatives constitute positive developments but they have arisen in a piecemeal fashion, with the consequence that there has been no coherent or comprehensive treatment of the core issues. The thesis contends that some existing rules, doctrines and practices operate adequately but it is also submitted that there are a number of deficiencies and lacunae that demand rectification in the manner suggested in the course of this work. The thesis further recommends measures that safeguard the interests of suspects and defendants in a way that results in a reconciliation of due process and crime control models of criminal theory. The thesis argues that there are a number of justifications and imperatives for a more concerted and coherent approach to the investigation of white-collar crime, including: the complexity associated with the commission, investigation and prosecution of white-collar crime; the comparatively substantial harm caused by this form of crime; and the societal value of coherent legislative responses that redress the historical misconception that white-collar crime is not as serious a form of crime as crimes of violence. The thesis concludes that the optimum model for future engagement with the matters in question entails the housing of relevant powers, rules and doctrines in a dedicated statute.

3 The Originality of the Thesis

This thesis constitutes an original and in-depth analysis of the key rules and doctrines surrounding the investigation and prosecution of white-collar crime. There is weighty literature that examines and analyses criminal procedure and laws of evidence in this jurisdiction that are of general relevance to the subject matter of this thesis.⁹ However, the focus of such works is on the broader fields of criminal procedure and evidence. It follows, therefore, that such analysis is not rooted in a perspective that has the suitability of relevant rules and doctrines in the context of white-collar crime as its primary concern.

A further category of works have substantive criminal law at the heart of their focus. Some of this literature is concerned with the full spectrum of criminal offences,¹⁰ while other scholarship concentrates on narrower ranges of offences, some of which fall squarely within the realm of white-collar crime.¹¹ More tangential to the concerns of the instant thesis, but still relevant in certain respects, is literature concerned with corporate governance and corporate regulation.¹²

Two recent works warrant specific mention for their arguable complementarity to the subject matter of the instant thesis. The first is Horan's tome on corporate crime.¹³ This deeply researched book overlaps to an extent with the concerns of the instant thesis in its

⁹ D Walsh, *Criminal Procedure* (Thomson Roundhall 2002); J Healy, *Irish Laws of Evidence* (Thomson Roundhall 2004); C Fennell, *The Law of Evidence in Ireland* (3rd edn, Bloomsbury 2009); T O'Malley, *The Criminal Process* (Thomson Roundhall 2009); I Bacik and L Heffernan, *Criminal Law and Procedure: Current Issues and Emerging Trends* (First Law 2009); V Conway, Y Daly and J Schweppe, *Irish Criminal Justice: Theory Process and Procedure* (Clarus Press 2010); G Orange, *Police Powers in Ireland* (Bloomsbury 2013); R Coen, *Garda Powers: Law and Practice* (Clarus Press 2014); L Heffernan with Ú Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury 2014); D McGrath with E Egan McGrath, *Evidence* (2nd edn, Thomson Roundhall 2014).

¹⁰ P Charleton, PA McDermott, M Bolger, *Criminal Law* (Butterworths 1999); F McAuley and JP McCutcheon, *Criminal Liability: A Grammar* (Roundhall Sweet and Maxwell 2000); C Hanly, *An Introduction to Irish Criminal Law* (2nd edn, Gill & Macmillan 2006); L Campbell, S Kilcommins and C O'Sullivan, *Criminal Law in Ireland: Cases and Commentary* (Clarus Press 2010).

¹¹ S Kilcommins and U Kilkelly (eds), *Regulatory Crime in Ireland* (First Law 2010); I Higgins, *Corruption Law* (Thomson Round Hall 2012). Some key company law texts include consideration of company law offences: R Keane, *Company Law* (4th edn, Tottel Publishing 2007); M Forde and H Kennedy, *Company Law* (4th edn, Roundhall Sweet and Maxwell 2007); TB Courtney, *The Law of Companies* (3rd edn, Bloomsbury 2012); TB Courtney (ed), *Bloomsbury Professional's Guide to the Companies Act 2014* (Bloomsbury 2014).

¹² N Cahill, *Company Law Compliance and Enforcement* (Bloomsbury 2008); N Connery and D Hodnett, *Regulatory Law in Ireland* (Bloomsbury 2009); B Clarke, "Corporate Governance" An Oxymoron? - The Role Of Corporate Governance in the Current Banking Crisis' in I McNeill and J O'Brien (eds) *The Future Of Financial Regulation* (Hart Publishing 2010).

¹³ S Horan, *Corporate Crime* (Bloomsbury Professional 2011).

consideration of certain issues bearing on the investigation and prosecution of white-collar crime. However, it is submitted that there are two key points of distinction between that work and the instant thesis: first, the primary purpose of Horan's book is to serve as an authoritative reference text and, second, although it deals to some extent with adjectival laws and doctrines of relevance to white-collar crime, the core of its focus is a rigorous exposition of substantive criminal law in the field. The second work of particular relevance is McGrath's study of the evolution of Irish corporate criminal liability, and its enforcement, from independence until the financial and economic crises of 2008.¹⁴ This monograph is an important contribution to the understanding of the influences that shaped the policy approach to the enforcement of company law offences in this jurisdiction during the material period.¹⁵

As regards contemporary contributions to the general subject area, Horan has made a substantial addition to the debate on the adequacy of the range and content of substantive criminal law offences in the field of corporate crime and McGrath has presented a convincing thesis on the models that might apply in balancing criminal law enforcement with regulatory and civil enforcement in the field of corporate and white-collar crime. Other literature has considered post-conviction considerations in a white-collar crime context, particularly the issue of sentencing.¹⁶ It is contended that this thesis addresses a further important dimension of the issue of white-collar crime and fits alongside the aforementioned scholarship in its argument for a focused, coherent and statutorily underpinned model that optimises the processes associated with the investigation and prosecution of white-collar crime.

¹⁴ J McGrath, *Corporate and White-Collar Crime in Ireland: A New Architecture of Regulatory Enforcement* (Manchester University Press 2015).

¹⁵ In essence, McGrath's thesis is that, until the 1990s, the approach to enforcement of corporate and white-collar crimes was marked by formally punitive, but practically lenient, criminal law enforcement, whereas from the 1990s until the time of the financial and economic crises of 2008, a model of enforcement took hold that favoured regulation and civil enforcement. This latter model is under pressure because of the political reaction to the crises of 2008 that saw it appropriate to revert to an emphasis on enforcement and punishment through the criminal law. This development arguably reduces the efficacy of the newer model, which relies on effective, but restrained, deployment of criminal law enforcement.

¹⁶ See T O'Malley, *Sentencing Law and Practice* (2nd edn, Thomson Round Hall 2006), Ch 14 and Ch 19; E Gallagher, "'Collaring' The White Collar Criminal' (1999) 6 CLP 263; J McGrath, 'Sentencing White-Collar Criminals: Making the Punishment Fit the White-Collar Crime' [2012] 22 (3) ICLJ 72; T O'Malley, 'Sentencing White-Collar Crime: Problems and Principles' (Criminal Law: Practice and Procedure Update, School of Law, Trinity College Dublin, 10 October 2013).

4 Methodology

This thesis adopts a doctrinal methodology in its critical analysis of relevant rules of law, procedure and evidence and their implementation in practice. Certain aspects of the thesis incorporate a multidisciplinary approach to research. In particular, the fields of sociology, criminology, and philosophy have a role to play in the examination in Chapter 2 of the definitional difficulties surrounding white-collar crime. A comparative methodology does not have a primary role in the instant research but the experience of some other common law jurisdictions contributes to some facets of the thesis, particularly the conclusions concerning the institutional structures in place for the investigation and prosecution of white-collar crime.

The thesis acknowledges and endorses the existing human rights architecture in this jurisdiction. The thesis seeks to work within the parameters of this framework but the relevant issues are not examined through a due process or crime control lens. Rather, the primary methodology of the thesis entails pragmatic doctrinal analysis that results, it is argued, in an appropriate balancing of due process and crime control considerations.

5 Structural Outline

Although the adequacy of the content and range of substantive white-collar crimes is not the focus of this thesis, Chapter 2 seeks to arrive at an understanding of the boundaries of the classification referred to as 'white-collar crime' in order to frame the investigative powers and prosecutorial rules associated with that form of crime. The chapter begins with an examination of the origins of the term 'white-collar crime', which was first coined in the 1940s by the US sociologist, Edwin Sutherland. The chapter explores the different ways in which white-collar crime has been deemed to amount to a discrete class of crime, depending on whether the term is viewed from a sociological, criminological, legal, or legal-philosophical perspective. The chapter then moves to consider the understanding that applies to the term in this jurisdiction. The chapter concludes by noting that the concept of 'white-collar crime' has been usefully elucidated in the academic commentary across a number of disciplines but that the most appropriate understanding of the term for present

purposes is arrived at from a perspective that has regard to the approach taken by the legislature in the Criminal Justice Act 2011.

Chapter 3 considers the appropriateness of existing powers concerning the investigation of white-collar crime in Ireland. The chapter begins by locating the consideration of investigative powers in the context of the normatively appropriate human rights architecture in this jurisdiction. The significance of the recent Supreme Court decision in *DPP v JC* for its attenuation of the exclusionary rule concerning unconstitutionally obtained evidence is noted at this point for its potential impact on the investigation and prosecution of white-collar crime in this jurisdiction.¹⁷

Chapter 3 then explores, in a linear fashion that follows the course of a standard investigation, the various powers of investigation that may potentially arise in a white-collar crime context. In circumstances where powers of investigation associated with white-collar crime are often shared with other forms of crime, each power of investigation is first considered in a general sense before moving to consider specific considerations arising in a white-collar crime context. The chapter analyses proactive powers of investigation that do not require any prior element of suspicion by investigators for their operation. Laws that both require and encourage disclosure of wrongdoing are then considered. The chapter assesses reactive powers of investigation that require a minimum level of suspicion on the part of investigators for their operation and the question of a common standard for the operability of such powers. The chapter then addresses powers of surveillance, entry, search, seizure, arrest and pre-charge detention. The chapter concludes with an analysis of measures in the Criminal Justice Act 2011 that have an impact on the constitutional right of reasonable access to legal advice.

Chapter 4 evaluates existing structures, rules and doctrines concerning the prosecution of white-collar crime in Ireland. It begins with an assessment of the role of bodies other than the Office of the Director of Public Prosecutions (DPP) in the prosecution of white-collar crime in this jurisdiction. The fact that regulatory bodies may launch summary prosecutions but only the DPP has discretion as to whether matters are tried on indictment is considered.

¹⁷ [2015] IESC 31.

The experience of some other common law jurisdictions that have adopted multi-agency approaches to the prosecution of white-collar crime is compared to the model that currently obtains in Ireland in order to assess whether a new approach to the issue might be adopted in this jurisdiction.

The next section of Chapter 4 examines the uncertain state of the law in this jurisdiction on the question of attributing direct liability to a defendant company and the consequences that flow therefrom. Chapter 4 then moves to analyse the place of documentary evidence in the prosecution of white-collar crime, given that such evidence is, generally speaking, central to the prosecution of most white-collar crimes. The fourth matter for consideration in Chapter 4 is the extent to which current rules promote expedition and efficiency in the conduct of white-collar crime trials. A final section in the chapter assesses the role of the jury in the prosecution of white-collar crime in this jurisdiction and considers the feasibility of alternatives to the traditional method of trial by jury that currently applies to white-collar crime trials in Ireland.

Chapter 5 addresses two key privileges of particular relevance to investigations and prosecutions of white-collar crime, namely the privilege against self-incrimination and legal professional privilege. For the reason that these privileges span both investigations and prosecutions, they are considered in this chapter rather than in the course of the aforementioned chapters. Consideration of the privilege against self-incrimination begins with the right of a defendant not to give evidence at trial before moving to address the right to silence of a suspect before considering, finally, the right of any person to invoke the privilege against self-incrimination. Conclusions are then drawn as to the impact of these facets of the privilege on the investigation and prosecution of white-collar crime. The part of Chapter 5 that engages in a treatment of legal professional privilege focuses on the relationship between two forms of legal professional privilege, namely legal advice privilege and litigation privilege, and the investigation and prosecution of white-collar crime. The relevance of waiver of legal professional privilege in a white-collar crime context is also considered, as is the exception to the privilege in cases of crime and fraud. The impact of the Criminal Justice Act 2011 on legal professional privilege in a white-collar crime context is assessed, as are the difficulties associated with legal professional privilege

in the context of disclosure in complex proceedings involving substantial amounts of documentary and digitally stored evidence.

Divided into two parts, the final chapter in the thesis, Chapter 6, produces findings and recommendations that emerge as part of a synthesis of the ideas formed in the preceding chapters. In the first part of the chapter, it is contended that there has, to date, been an absence of a purposeful approach by the legislature to the treatment of issues concerning the investigation and prosecution of white-collar crime, which constitutes a deficiency in existing legislative practice in the field. It is argued that the optimum model for future engagement with the matters in question entails the housing of relevant powers, rules and doctrines in a dedicated statute of a similar model to that adopted by the legislature in the Offences Against the State Act 1939 or, more recently, in the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014. Such a dedicated statute would respond to the lack of coherence and accessibility that arises from the current ad hoc, piecemeal legislative approach. The foundation for this aspect of the thesis lies in the findings made in relation to the complexity associated with the commission, investigation and prosecution of white-collar crime; the substantial, and often hidden, harm caused by this form of crime; and the societal value of a dedicated approach to white-collar crime. The second part of the chapter considers the measures that might be encapsulated in a statute dedicated to issues concerning the investigation and prosecution of white-collar crime and closes with a consideration of measures that would provide appropriate safeguards for suspects and defendants.

Chapter 2

A Definition of White-Collar Crime

1 Introduction

This chapter seeks to explore the meaning of the term 'white-collar crime'.¹ Although it is generally accepted that the term itself was first coined in the early part of the twentieth century, questions arise, and debate rages, as to its appropriateness as a descriptor of a discrete category of behaviour and, even where this is not in dispute, as to the type of behaviour it describes. Arriving at an understanding of the conduct encapsulated by the term 'white-collar crime' is necessary in order to identify with reasonable precision the scope of the core area of examination and analysis in this thesis, namely the range of adjectival law associated with the investigation and prosecution of such conduct.

The chapter will begin with the way in which the term 'white-collar crime' was used and understood by the sociologist who is generally credited with creating the label. Then there will be a consideration of the arguments for and against isolating certain types of behaviour under the separate heading of 'white-collar crime'. Amongst those who accept that 'white-collar crime' is a valid descriptor of certain behaviour, it will be seen that the term can be viewed in a number of different ways, depending, for example, on whether the term is approached from a sociological, criminological, legal or, indeed, philosophical perspective. While consideration of a definition of the term 'white-collar crime' from a purely legal perspective is justifiable for present purposes, a multi-disciplinary approach to the issue is adopted in order to provide a fuller context for the understanding of the term that is settled upon in this chapter and to acknowledge the role that other academic fields have had to play in shaping the different understandings of the term.

¹ A dictionary definition can be found in the Oxford English Dictionary (OED Third Edition, March 2015), which defines the term as follows: **white-collar crime** *n.* a crime, *esp.* a non-violent, financial crime, committed by a white-collar worker, typically involving the abuse of his or her professional status or expertise; (as a mass noun) crime of this type.

In finding that there is a rational basis for the original attempt to describe a discrete category of human behaviour known as 'white-collar crime', it will be argued that a legal perspective suits best for present purposes, and that the boundaries of the classification should be drawn differently to the seminal 1940s definition of the term, which originated from a sociological viewpoint. It will be contended that the appropriate definition should be narrower than the original understanding of the term, in that it should only cover behaviour that breaches the criminal law, but wider inasmuch as it should extend to crimes that may, on occasion, have only a tenuous connection with a workplace setting, or even lack one altogether. On this approach, the term 'white-collar' is understood loosely, while the word 'crime' is interpreted literally as denoting a breach of the criminal law. The chapter will conclude with a classification of white-collar crime that provides a foundation and justification for the selection of the range of issues concerning the investigation and prosecution of such crime that are examined in future chapters of the thesis.

It might be noted that, apart from arriving at an understanding of the term 'white-collar crime', it is outside the scope of the instant research to consider the substance of white-collar criminal offences in this jurisdiction or whether the existing range of such offences is adequate.² There is, for example, a debate to be had as to whether an offence of gross negligence in the management of major institutions or companies should be added to the statute book.³ Other possible additions to the statute book would be offences covering reckless trading⁴ and the activities of mail fraud and wire fraud.⁵ A view has also been

² The issues of corporate offences and regulatory enforcement in Ireland 'including whether the range of existing corporate offences are sufficient' are under consideration by the Law Reform Commission: Law Reform Commission, *Report on Fourth Programme of Law Reform* (LRC 110-2013) 1. Responding to a query raised by this author, it was stated in an email sent on behalf of the Law Reform Commission (April 2015) that the Commission intends to publish an Issues Paper on the project in 2015.

³ Mr Justice Frank Clarke of the Supreme Court, in remarks made at a conference in Dublin on 18 October 2013 commented: 'What we have not traditionally done, in Ireland and in many other countries, is treated even gross negligence in the management of important institutions or major companies as criminal activity... Whether that is a good idea or not is for others to decide and debate, but I think it is important, and perhaps hasn't been emphasised enough publicly, that if you don't have those laws - and they certainly couldn't be introduced retrospectively - there are consequences that go with that too... The amount of times you hear comment in the media... on "why hasn't more been done to bring people to book". There is a real question to be asked: what crimes is it being said might have been committed?' Remarks reported in *The Irish Times* (Dublin, 19 October 2013).

⁴ Department of Justice and Equality, *White Paper on Crime Consultation Process' Discussion Document No. 3, Organised and White Collar Crime, Overview of Written Submissions Received* (April 2011) 8, where it is noted

expressed that prosecutors in this jurisdiction should consider making greater use of the common law crime of conspiracy when drafting indictments in white-collar crime prosecutions.⁶

In a similar vein, it is also apposite to note at this juncture that it is beyond the scope of this research to consider whether the appropriate boundary lines have been drawn in this jurisdiction between behaviour that breaches the criminal law as opposed to civil or regulatory regimes.⁷ This point is of general relevance in a corporate and financial crime context, where various factors, including variations in the level of intent and culpability in certain negative behaviour, have led to different approaches by the authorities in the combatting and sanctioning of such behaviour.⁸

that such an offence is provided for in Australia by virtue of section 143 of the Australian Corporations Act 2001.

⁵ Travers, 'Mail and Wire Fraud: the United States Prosecutors "True Love" - Should Equivalent Offences Be Enacted in Ireland? - Part 1' (2014) 24(2) ICLJ 42; Travers, 'Mail and Wire Fraud: the United States Prosecutors "True Love" - Should Equivalent Offences Be Enacted in Ireland? - Part 2' (2014) 24(3) ICLJ 73.

⁶ Remarks of Patrick Gageby SC in a lecture delivered on 16th February 2012 as part of the Advanced Diploma in Corporate Crime course at The Honorable Society of King's Inns, Dublin.

⁷ Useful discussions of the issue in an Irish context can be found in: S Kilcommmins and U Kilkelly (eds), *Regulatory Crime in Ireland* (First Law 2010); J McGrath, *Corporate and White-Collar Crime in Ireland: A New Architecture of Regulatory Enforcement* (Manchester University Press 2015); B Vaughan, 'The Maginot Line of Irish Criminology. Part 1: The Rise of the Regulatory Impulse' (2009) 19(2) ICLJ 34; B Vaughan, 'The Maginot Line of Irish Criminology. Part 2: The Rise of the Regulatory Impulse' (2009) 19(3) ICLJ 66. In its *Consultation Paper on Criminal Liability in Regulatory Contexts* (LC CP195-2010), the Law Reform Commission of England and Wales argues that the criminal law should not be used as the primary means to promote regulatory objectives. As of autumn 2015, the consultation paper in question is at the policy development stage.

⁸ For an indication of contemporary debate on this issue in Ireland, see Department of Justice and Law Reform, *Report of Proceedings of Consultation Seminar on White-Collar Crime* (November 2010), which summarises presentations by Professor S Gopalan of the Department of Law in NUI, Maynooth, and Dr S Kilcommmins of the Department of Law, UCC, concerning this point. The thrust of Professor Gopalan's presentation was to the effect that the move to criminalise conduct that had previously been dealt with in the context of regulatory frameworks operating largely without recourse to the criminal law may not be the most sensible course of action and could have a number of negative effects, including: the undermining of the coercive power of the criminal law; the dilution of the criminal law's expressive power; over-deterrence of otherwise desirable business activities; conflation of blameworthiness with imprisonment; the creation of incentives for prosecutors to abuse their powers; the fuelling of a public appetite for enhancement of prison terms; and the social cost of punishing people for actions that may not even amount to civil wrongs. Dr Kilcommmins noted the advantages of compliance strategies that focus on persuasion and dialogue, including the use of administrative sanctions and civil penalties, but stated that there must also be a commitment to supporting strategies which signal to white-collar criminals that their wrongdoing is treated seriously by society and will, if warranted, result in imprisonment as it does for other forms of crime. He contended that any other approach would be an endorsement of a two-tier system of justice which would undermine the

2 The Origins of the Term 'White-Collar Crime'

Shover and Hochstetler observe that perhaps the earliest identification of the type of behaviour that would later become known as 'white-collar crime' was by the American sociologist Edward Ross in an article that appeared in the *Atlantic Monthly* periodical in 1907.⁹ Writing in an era when capitalism was beginning to enrich certain sectors of society in the USA to levels never seen before, but where government regulation was almost completely lacking, Ross described 'criminaloids' as 'those who prospered by flagitious practices which may not yet come under the ban of public opinion'.¹⁰ Ross viewed criminaloids as morally insensible and concerned with success, but not with the proper means of achieving it; he described such an offender as 'secure in his quilted armor of lawyer-spun sophistries'.¹¹ Likening criminaloids to 'wolves', he argued that:

[T]he villain most in need of curbing is the respectable, exemplary, trusted personage who, strategically placed at the focus of a spider-web of fiduciary relations, is able from his office-chair to pick a thousand pockets, poison a thousand sick, pollute a thousand minds, or imperil a thousand lives. It is the [criminaloid] that needs the shackle.¹²

It was not until 1939 that the term 'white-collar crime' was introduced into academic discourse. In that year, Edwin Sutherland made an address to the American Sociological Association in which he proposed 'a comparison of crime in the upper or white-collar class,

notion of equality for citizens before the law.

⁹ N Shover and A Hochstetler, *Choosing White-Collar Crime* (CUP 2006) 5. J Braithwaite, 'White Collar Crime' (1985) 11 *Annual Review of Sociology* 1, 2, argues that, in fact, the Dutch Marxist, Willem Bongers, 'was the first to develop a theory of crime which incorporated both "crime in the streets" and "crime in the suites"' when he contended in *Criminality and Legal Conditions* (Little Brown 1916) that a criminal attitude is engendered by the conditions of misery inflicted on the working class under capitalism, and that a similar criminal attitude arises among the bourgeoisie from the avarice fostered when capitalism thrives.

¹⁰ A E Ross, 'The Criminaloid', (1907) 99 *Atlantic Monthly* 44, 46.

¹¹ A E Ross, 'The Criminaloid', (1907) 99 *Atlantic Monthly* 44, 48.

¹² A E Ross, 'The Criminaloid', (1907) 99 *Atlantic Monthly* 44, 50. Writing in the 1950s, C Wright Mills used a similar notion to Ross of 'the higher immorality' to characterise this moral insensibility of the power elite: C Wright Mills, 'A Diagnosis of Moral Uneasiness' in IL Horowitz (ed), *Power, Politics and People* (Ballantine 1952) 330-339. Wright Mills took the view that this was an ongoing, institutionalised aspect of modern US society, involving corrupt, unethical, and illegal practices of the wealthy and powerful.

composed of respectable or at least respected business and professional men, and crime in the lower class, composed of persons of low socioeconomic status'.¹³ In a later, and fuller, exposition of his theory, he defined 'white-collar crime' as 'a crime committed by a person of respectability and high social status in the course of his occupation'.¹⁴ This might be regarded as the classic explanation of the term. Sutherland also said of such crimes that they are 'not as obvious as assault and battery, and can be appreciated only by persons who are expert in the occupations in which they occur'.¹⁵

Sutherland's work in the 1940s entailed an investigation using records of regulatory agencies, courts, and commissions of investigation in the USA. He found that every single one of the seventy industrial corporations that he studied over a forty year period had broken at least one law and had an adverse decision made against it for a variety of crimes, including false advertising, patent abuse, wartime trade violations, price fixing, fraud, or intended manufacturing and sale of faulty goods. Many of these corporations were recidivists with an average of roughly eight adverse decisions issued for each.¹⁶

The subject matter of Sutherland's work shows that, although he used the label 'white-collar crime' in a sense that suggested such crime could only be committed by individuals, he was, in fact, primarily interested in crime committed by corporate structures. Over the decades since Sutherland's original use of the term, one of the main expansions of the descriptor is to encompass the notion that white-collar crime can be committed not just by individuals, but also by legal persons in the form of corporations.¹⁷ This evolution of the

¹³ EH Sutherland, 'White-Collar Criminality' (1940) 5 *American Sociological Review* 1-12.

¹⁴ EH Sutherland, *White-Collar Crime* (Holt, Reinhart, Winston 1949); EH Sutherland, *White-Collar Crime: The Uncut Version* (Yale University Press 1983) 7. The 1983 version of Sutherland's work contains references to seventy private companies that he had studied for his 1949 work. These references had been omitted from the original 1949 version due to concerns that the publishers of that work that they may be sued for libel by the companies in question.

¹⁵ EH Sutherland, 'Is "White-Collar Crime" Crime?' (1945) 10 *American Sociological Review* 260-271.

¹⁶ EH Sutherland, *White-Collar Crime* (Holt, Reinhart, Winston 1949); EH Sutherland, *White-Collar Crime: The Uncut Version* (Yale University Press 1983).

¹⁷ H Bloch and G Geis, *Man, Crime and Society* (Random House 1970); M Clinard and R Quinney, *Criminal Behavior Systems: A Typology* (Holt, Reinhart & Winston 1973); LS Schrager and JF Short, 'Toward a Sociology of Organizational Crime' (1978) *Social Problems* 25 (4) 407; R Kramer, 'Corporate Crime: An Organizational Perspective' in P Wickman and T Dailey (eds), *White Collar and Economic Crime* (Lexington 1982). See also: S Horan, *Corporate Crime* (Bloomsbury Professional 2011) [10-15], [73-156].

understanding of the term white-collar crime, so that it captures crimes committed by both natural and legal persons, is true to Sutherland's original concerns and also accommodates the fact that the perpetrators of white-collar crime often take the form of legal persons.

Sutherland argued that while 'lower class crime' attracts headlines and police attention, extensive and far more costly business crime occurs in a way that is out of sight and relatively unnoticed.¹⁸ He contended that white-collar crime differed from 'lower-class' criminality only in the implementation of criminal law that segregated white-collar offenders administratively from other criminals.¹⁹

It is argued that there are strong parallels between the sense in which Sutherland used the term that he coined and the manner in which it is used in common parlance today.²⁰ Sutherland employed the term 'white-collar crime' to refer to behaviour that was somehow out of the reach of the criminal law as it was applied to other forms of crime. He meant the phrase to cover criminal behaviour, and yet he also intended it to encompass morally reprehensible behaviour which was not, at the time, prohibited by the criminal law and may, at most, have offended a civil code rather than a criminal code.²¹ Similarly, the term has often been used in times of recent economic turbulence to refer to morally culpable behaviour that is thought to be somehow untouchable, whether because the criminal law has failed to capture the morally questionable behaviour in issue or, where it does, is not adequately applied so as to impose appropriate sanctions on such behaviour.²²

¹⁸ EH Sutherland, 'Is "White-Collar Crime" Crime?' (1945) 10 *American Sociological Review* 260-271.

¹⁹ EH Sutherland, 'White-Collar Criminality' (1940) 5 *American Sociological Review* 1-12, 4.

²⁰ J Braithwaite, 'White Collar Crime' (1985) 11 *Annual Review of Sociology* 1, 3, argues that there is a phenomenological justification for locating contemporary criminological research in the white-collar crime construct, stating: 'The concept is shared and understood by ordinary folk as more meaningful than occupational crime, corporate deviance, commercial offenses, economic crime or any competing concept... Sutherland's Americanism soon became "crime en col blanc" in France, "criminalita in colletti bianchi" in Italy and "weisse-kragen-kriminalitat" in Germany.'

²¹ EH Sutherland, *White-Collar Crime: The Uncut Version* (Yale University Press 1983) 51.

²² Banking and economic crises engulfed Ireland, along with much of the global economy, in 2008 and formed the backdrop to increased public discussion about the place, if any, of white-collar crime in these crises. For insights and commentary on some of the causes and contexts for these crises, see: D Donovan and AE Murphy, *The Fall of the Celtic Tiger: Ireland and the Euro Debt Crisis* (OUP 2013); K Regling and M Watson, *A Preliminary Report on the Sources of Ireland's Banking Crisis* (Prn A10/0700, 2010); P Nyberg, *Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland, Report of the Commission of Investigation into the Banking Crisis in Ireland* (Stationery Office 2011); A Bergin, J Fitzgerald, I Kearney and C O'Sullivan, 'The Irish Fiscal

The significance of this approach to defining the concept of 'white-collar crime' lies in the fact that the word 'crime' does not carry its normal legal meaning, namely an act that breaches the current criminal law of the land. Arguably, Sutherland's coining of the term 'white-collar crime' was born of his frustration at the fact that, as he saw it, members of a wealthy stratum of society were abusing their economic power for gain in ways that were not amenable to sanction, or at least not at the time he was writing. On this view, the term 'white-collar', with its associations with higher-earning office work as opposed to lower-level 'blue collar' factory and manual work, snappily captured the elite that Sutherland sought to finger, while the word 'crime' was used in a very broad sense to encompass behaviour, much of which was not actually criminal under law, but which Sutherland felt should be criminal.²³ It might be said, then, that polemical and ideological considerations influenced Sutherland's coining of the term.

Motivated by a desire to challenge powerful elites in the USA in an era when their dominance and authority was rarely questioned, Sutherland's insight amounted to a breakthrough in criminological theory that prompted a wave of academic literature in an area that had hitherto been poorly defined and under-discussed. Volk describes Sutherland's pioneering effort at defining a discrete class of crime as 'the sign of a Copernican revolution in Anglo-Saxon criminology' and a radical reorientation in

Crisis' (July 2011) 217 National Institute Economic Review R47-R59; B Clarke and N Hardiman, 'Crisis in the Irish Banking System' in S Konzelmann (ed), *Banking Systems in the Crisis: The Faces of Liberal Capitalism* (Abingdon Routledge 2012). More informal and anecdotal commentaries on the same crises include: F O'Toole, *Ship of Fools: How Stupidity and Corruption Sank the Celtic Tiger* (Faber & Faber 2010); S Carswell, *Anglo Republic: Inside the Bank that Broke Ireland* (Penguin 2011); S Ross, *The Untouchables: The People Who Helped Run Ireland into the Ground - and are Still Running the Show* (Penguin 2012). For consideration of the association between white-collar crime and the global economic crisis during the same period, see: N Shover and P Grabowsky, 'White-Collar Crime and the Great Recession' (2010) 9(3) *Criminology and Public Policy* 429. In response to the aforementioned crises, the Committee of Inquiry into the Banking Crisis, colloquially known as the Banking Inquiry, was formally established in November 2014 under the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013. It is a joint committee of the Houses of the Oireachtas. According to the terms of reference of the inquiry (as agreed by Dáil Éireann on 25 November 2014 and Seanad Éireann on 26 November 2014), its purpose is to inquire into the reasons Ireland experienced a systemic banking crisis, including the political, economic, social, cultural, financial and behavioural factors and policies which impacted on or contributed to the crisis and the preventative reforms implemented in the wake of the crisis. The inquiry began its work in December 2014 and oral hearings concluded in September 2015. The report of the inquiry is awaited. The time period for matters that might be made the subject of the inquiry is 1 January 1992 to 31 December 2013.

²³ EH Sutherland, *White-Collar Crime: The Uncut Version* (Yale University Press 1983) 51.

theoretical views of the nature of criminality.²⁴ Mannheim suggested that if there were a Nobel Prize in criminology, Sutherland would deserve one for his effort.²⁵ Hagan adopts the language of Kuhn in describing Sutherland's approach as a 'paradigm revolution' in its creation of a new model that served to radically reorient future theoretical and empirical work in the field.²⁶

3 White-Collar Crime as a Discrete Category of Crime

3.1 A Criminological and Sociological Perspective

In the time since Sutherland first coined the term, it has been largely left to sociologists and criminologists, rather than legal academics, to consider the appropriateness of identifying a separate category of human behaviour known as white-collar crime. The issue has proved controversial: some have argued that the behaviour the term seeks to describe is not sufficiently distinguishable from more general descriptions of crime and, even amongst those who contend that it is a valid classification, there is disagreement as to how broadly the class should be drawn. Although this section of the chapter refers to different schools of thought for the purposes of identifying different perspectives, the points of difference between the various viewpoints are not always very distinct in a field that is characterised more by a rolling discourse among academics and commentators. Simpson notes that, 'Weaknesses in Sutherland's original definition of white-collar crime spawned new definitions over the years.'²⁷

²⁴ K Volk, 'Criminological Problems of White-Collar Crime' (1977) 4 *International Summaries* 13-21.

²⁵ H Mannheim, *Comparative Criminology* (Houghton Mifflin 1965).

²⁶ FE Hagan, *Introduction to Criminology* (8th edn, SAGE 2013) 296, citing TS Kuhn, *The Structures of Scientific Revolutions* (University of Chicago Press 1962). Notwithstanding the undoubted contribution of Sutherland to sociology, later academics have highlighted the difficulties with his definition of the term 'white-collar crime'. For example, Nelken has said that: 'If Sutherland deserved a Nobel prize, as Mannheim thought, for pioneering this field of study, he certainly did not deserve it for the clarity or serviceableness of his definition... The apparent success of the label in finding public acceptance may testify less to its coherence than to its capacity to name a supposed threat.' D Nelken, 'White Collar and Corporate Crime' in M Maguire, R Morgan and R Reiner (eds), *The Oxford Handbook of Criminology* (5th edn, OUP 2012) 738.

²⁷ SS Simpson, 'White-Collar Crime: A Review of Recent Developments and Promising Directions for Future Research' (2013) 39 *Annual Review of Sociology* 309

Hirschi and Gottfredson have argued that there is an insufficient basis for identifying a discrete form of criminal behaviour known as white-collar crime.²⁸ They based their argument on an analysis of US Uniform Crime Reports (UCR). Since 1930, the US Department of Justice has compiled national crime statistics, the UCR, with the Federal Bureau of Investigation (FBI) assuming responsibility as the clearinghouse and publisher. Local police departments in the US provide the necessary information on a voluntary basis, with police departments from large metropolitan areas generally the most reliable participants.

The authors worked with the then UCR definition of white-collar crime, which limited the category to fraud, embezzlement, forgery and counterfeiting. They found that, using those measures, most of the offenders were middle class and differed little from traditional offenders who committed other types of crime. There being no discernible difference between those offenders who committed other types of crime and those who committed crimes of the type in the UCR definition, they argued that designating a separate category of crime known as white-collar crime was not appropriate.²⁹

Other academics, including Nelken, have also argued that white-collar crime is not an appropriate classification on the basis that it attempts to describe crimes that are forms of economic crime but otherwise have no peculiarly distinguishing characteristics from, say, crimes of violence.³⁰

In what might be described as the classic stance of criminologists concerned with white-collar crime, certain scholars are in favour of classifying certain criminal behaviour as white-collar crime but with reference only to the characteristics of the offender.

²⁸ T Hirschi and MR Gottfredson, 'Causes of White-Collar Crime' (1987) 25(4) *Criminology* 949-974; T Hirschi and MR Gottfredson, 'The Significance of White-Collar Crime for a General Theory of Crime' (1989) 27(2) *Criminology* 359-371. See also, S Henry and W Einstadter, *The Criminology Theory Reader* (NYU Press 1998) 52-57.

²⁹ cf D Steffensmeier, 'On the Causes of "White-Collar" Crime: An Assessment of Hirschi and Gottfredson's Claims' (1989) 27 *Criminology* 345-358, who argued that the findings of Hirschi and Gottfredson were based on a flawed, overly narrow definition of white-collar crime.

³⁰ D Nelken, *White-Collar Crime* (Dartmouth 1994); J Gobert and M Punch, *Rethinking Corporate Crime* (Butterworths 2003); S Titus Reid, *Crime and Criminology* (13th edn, OUP 2011) 268.

Proponents of this approach have proposed substitutes for the term 'white-collar crime' that include 'avocational crime'³¹ and 'upperworld crime'.³² Simon, whose work concentrates on corporate crime and political corruption, proposes a class of behaviour that he describes as 'elite deviance' rather than 'white-collar crime', the label encompassing both criminal and non-criminal acts by corporate and political organisations and individuals defined as elite on account of their high levels of power and wealth.³³ Under this approach, it is the actor rather than the activity that makes a particular act elite.

Apart from the obvious difficulty that the 'elite deviance' school of thought uses the term 'white-collar crime' to cover non-criminal behaviour, there are further problems arising from this approach to the term 'white-collar crime'. One such issue is that there is a range of criminal conduct, specifically regulatory crime, which cannot easily be referred to as deviant. This is because a large amount of regulatory crime is conduct that might be described as *malum prohibitum*; such conduct is not criminal or wrong until it is regulated and only becomes wrongful by virtue of its being regulated.³⁴ Another difficulty with the 'elite deviance' approach is its assumption that all white-collar crime is committed by members of elites, however that label might be defined.

A further group of sociologists and criminologists takes the view that white-collar crime is deserving of a category of its own but that it is to be drawn at the overlap between the 'elite deviance' school of thought and the 'economic crime' school of thought and should have regard to both the characteristics of the offender and the nature of the crime committed.³⁵ This approach holds that white-collar crime arises where an offender with certain characteristics, namely in employment requiring a certain level of skill and training,

³¹ G Geis, 'Avocational Crime' in D Glaser (ed), *Handbook of Criminology* (Rand McNally 1974) 273-298.

³² G Geis, 'Upperworld Crime' in AS Blumberg (ed), *Current Perspectives on Criminal Behavior: Original Essays on Criminology* (AA Knopf 1974) 174-198.

³³ DR Simon, *Elite Deviance* (10th edn, Prentice Hall 2012). See also, CH McCaghy, TA Capron and JD Jamieson, *Deviant Behaviour: Crime, Conflict and Interest Groups* (5th edn, Allyn and Bacon 2000) 225-276; JMD Ermann and RJ Lundman, *Corporate and Governmental Deviance: Problems of Organizational Behaviour in Modern Society* (6th edn, OUP 2002); T Newburn (ed), *Key Readings in Criminology* (Willan 2009) 417-436.

³⁴ For further discussion of the features of regulatory crime, see: S Horan, *Corporate Crime* (Bloomsbury Professional 2011) Ch 2.

³⁵ P Wickman and T Dailey, *White-Collar and Economic Crime: Multi-Disciplinary and Cross-National Perspectives* (Gower 1982); JW Coleman, *The Criminal Elite* (3rd edn, St Martin's Press 1994).

commits a certain type of crime, specifically a crime associated with the employment and usually economic in nature. Croall has characterised white-collar crime as an 'abuse of a legitimate occupational role which is regulated by law'.³⁶ This perspective captures 'elite' crimes, such as a sophisticated fraud carried out by a highly qualified employee at the apex of an organisation, but also includes non-elite activities, such as, for example, employee theft and lower-level occupational crime.³⁷

Another school of thought focuses on the features of the crime in question rather than the characteristics of the perpetrators of such crime. The literature that is sympathetic with this viewpoint justifies the term 'white-collar crime' with reference to the characteristics of particular crimes or uses substitute terms such as 'economic crime'³⁸ and 'corporate crime'³⁹ to classify such crimes.

Clinard and Quinney suggest dividing white-collar crime into 'corporate crime' and 'occupational crime'.⁴⁰ Under this approach, 'corporate crime' refers to offences committed by corporations and their officials for the benefit of the corporation, whereas 'occupational crime' is crime committed by individuals in the course of activity in an otherwise legitimate enterprise. This approach has both advantages and disadvantages. On the one hand, it protects against having to include under the category of 'white-collar crime' situations in which a person of high social standing commits a presumptively non-white-collar crime

³⁶ H Croall, *White Collar Crime: Criminal Justice and Criminology* (Open University Press 1992) 9; H Croall, *Understanding White Collar Crime* (Open University Press 2001) 6.

³⁷ L Salinger, *Encyclopaedia of White-Collar and Corporate Crime* (London: SAGE 2005) viii, offers a definition of 'white-collar crime' in line with this approach, as follows: 'Any behaviour that occurs in a corporate and/or individual occupational context; and, that is committed for personal and/or corporate gain; and/or, violates the trust associated with that individual's and/or corporation's position and/or status; and that is a violation of any criminal law, civil law, administrative law, rule, ruling, norm or regulation condemning the behaviour.'

³⁸ H First, *Business Crime: Cases and Materials* (Foundation Press, 1990); F Bowman III, 'Coping with Loss: A Re-examination of Sentencing Federal Economic Crimes Under the Guidelines' (1998) 51 *Vanderbilt Law Review* 461; JW Barnard, 'Allocution for Victims of Economic Crimes' (2001) 77 *Notre Dame Law Review* 39.

³⁹ MB Clinard and R Quinney, *Criminal Behaviour Systems: A Typology* (Holt, Rinehart and Winston 1973). S Horan, *Corporate Crime* (Bloomsbury Professional 2011) [1.01], writing from both a criminological and legal perspective, acknowledges Sutherland's coining of the term 'white-collar crime' but favours the term 'corporate crime' as capturing all crimes that might be committed by corporations and persons involved in corporate life regardless of the type of crime involved or the class of the offender. A limitation of this approach is that it confines the range of crime it describes to a corporate setting.

⁴⁰ MB Clinard and R Quinney, *Criminal Behavior Systems: A Typology* (Holt, Reinhart & Winston 1973).

such as rape or murder. However, on the other hand, 'occupational crime' could capture crimes, such as simple theft of office equipment or a workplace assault, which would not commonly be regarded as 'white-collar crime'. One solution to the issue just identified would be to define 'occupational crime' more narrowly. For example, Friedrichs has proposed that the term should be confined to illegal activities committed for personal financial gain in the context of an otherwise legitimate occupation.⁴¹

Others seeking to establish a typology of 'white-collar crime' have adopted a broader approach as regards the list of crimes it might cover. In 1970, Edelhertz described white-collar crime as 'an illegal act or series of illegal acts committed by non-physical means and by concealment or guile, to obtain money or property, or to obtain business advantage'.⁴² Such a perspective is less centred on the characteristics of the offender, particularly their employment status, and captures the evolution of the term 'white-collar crime' to encompass the broader notion of corruption.

Edelhertz's categorisation of white-collar crime has been cited widely ever since it was first proposed. Within the general category of white-collar crime, he identifies the following:

1. Crimes by persons operating on an individual *ad hoc* basis (eg income tax violations, credit card frauds, bankruptcy frauds);
2. Crimes committed in the course of the occupations of those operating inside business, government, or other establishments, in violation of their duty of loyalty and fidelity to employers or clients (eg embezzlement, employee larceny);
3. Crimes incidental to, and in furtherance of, business operations, but not central to the purpose of the business (eg antitrust violations, commercial bribery, food and drug violations);

⁴¹ DO Friedrichs, 'Occupational Crime, Occupational Deviance, and Workplace Crime: Sorting Out the Difference' (2002) 2 Criminal Justice 243.

⁴² H Edelhertz, *The Nature, Impact and Prosecution of White-Collar Crime* (National Institute of Law Enforcement and Criminal Justice 1970).

4. White-collar crime as a business, or as the central activity (medical and health frauds, advance fee swindles and fake contests).

It has been argued that Edelhertz's fourth category better fits under the heading 'professional crime', with 'white-collar crime' more appropriately covering crime arising in the course of an otherwise legitimate organisation or business.⁴³

The purpose of this section of the chapter has been to capture the differing approaches of sociologists and criminologists to the classification of white-collar crime. An additional layer to the discussion, but one that is peripheral for present purposes, is the controversy in those fields of academia as to which criminological theory of crime sits most comfortably with 'white-collar crime'. While it is beyond the scope of this research to draw a conclusion in this regard, it might be noted that deterrence theory, rational choice theory and institutional anomie theory are to the fore in that particular debate.⁴⁴

3.2 A Legal Perspective

Although it was a sociologist who coined the term 'white-collar crime', and it has largely remained the preserve of sociologists and criminologists to shape the debate concerning the understanding of the phrase, legal academics have, occasionally, entered into the debate

⁴³ FE Hagan, *Introduction to Criminology* (8th edn, SAGE 2013) Ch 11.

⁴⁴ The basic assumption of rational choice theory and deterrence theory is that individuals are rational decision makers and would be deterred from committing crime if the penalties exceed the pleasure to be derived. Institutional anomie theory argues that profit at all cost has come to dominate all institutions in modern society. For discussion and debate as to the most apposite criminological theories in a white-collar crime context, see: WJ Einstadter and S Henry, *The Criminology Theory Reader* (NYU Press 1998) 57-72; R Paternoster and S Simpson, 'A Rational Choice Theory of Corporate Crime' in N Shover and JP Wright (eds) *Crimes of Privilege - Readings in White-Collar Crime* (OUP 2000) 329; N Leeper Piquero and A Piquero, 'Characteristics and Sources of White-Collar Crime' in N Shover and JP Wright (eds) *Crimes of Privilege - Readings in White-Collar Crime* (OUP 2000) 329; J Gobert and M Punch, *Rethinking Corporate Crime* (Butterworths 2003) Ch 1; A Walsh and L Ellis, *Criminology: An Interdisciplinary Approach* (SAGE 2007) 398-408; JE Conklin, *Criminology* (9th edn, Pearson, Allyn and Bacon 2007) 230-231; RL Akers and CS Sellers, *Criminological Theories: Introduction, Evaluation and Application* (5th edn, OUP 2009) 86, 319; FT Cullen and P Wilcox, *Encyclopaedia of Criminological Theory, Volume 1* (SAGE 2010) xli-xlvi; FE Hagan, *Introduction to Criminology* (8th edn, SAGE 2013) 337; S Titus Reid, *Crime and Criminology* (13th edn, OUP 2011) Ch 9; SP Jones, *Criminology* (5th edn, OUP 2013) 97; S Tombs, 'Corporate Crime' in C Hale, K Hayward, A Wahidin and E Wincup (eds), *Criminology* (3rd edn, OUP 2013) Ch 11.

as to what type of behaviour should be covered by the term. Uncomfortable with the proposition that the term might encompass non-criminal behaviour, Tappan argued that the term should only refer to conduct regarded as criminal by the law.⁴⁵ As Green observes, to lawyers, the term 'crime' denotes a legal category:

It refers to particular kinds of conduct that our legal institutions recognise as 'criminal'. Such conduct must be defined in a particular manner, employing certain characteristic concepts such as *actus reus* and *mens rea*; it must have a certain 'public' character in the sense that it is a wrong that concerns the public as a whole, or is committed against the public's defining values; criminal charges are usually brought in the name of the government or 'the People'; the question whether a crime has been committed must be adjudicated in a particular manner, with various actors playing distinctive roles, employing distinctive procedures and burdens of proof, and recognising distinctive procedural rights; and it must entail certain characteristic forms of punishment. To lawyers, therefore, it seems obvious that when one talks about 'white-collar' crime, one should be talking about some subcategory that reflects such criminal law-like characteristics.⁴⁶

That the word 'crime' refers to a legal category is less clear to sociologists and criminologists. In this regard, Green comments:

Sociologists and criminologists are concerned less with legal labels and categories than with describing patterns of behaviour, the causes of such behaviour, and society's attitudes towards it. Thus, for Sutherland and many of his fellow sociologists, white-collar crime is not 'crime' in the legal sense of the term. At the time he was writing, much of the activity with which he was concerned - including restraint of trade, violation of patents, unfair labour practices, and adulteration or

⁴⁵ PW Tappan, 'Who is the Criminal?' (1947) 12 *American Sociological Review* 96. See also: RG Caldwell, 'A Reexamination of the Concept of White-Collar Crime' in G Geis (ed), *White-Collar Criminal: The Offender in Business and the Professions* (Atherton Press, 1968).

⁴⁶ SP Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP 2007) 10. This perspective is consistent with the positivist and procedural approach to defining crime that has been adopted by the Irish courts, as exemplified in the seminal case of *Melling v Ó'Mathghamhna* [1962] IR 1.

misbranding of food and drugs - either was not subject to criminal sanctions at all, or, if it was, was rarely prosecuted as such. Indeed, this was precisely Sutherland's point: a good deal of conduct that is at least as, or even more, harmful or wrongful than what has traditionally been viewed as criminal is subject to a range of procedures and penalties that differ from those used for (and is largely excluded from official statistics on) traditional crime.⁴⁷

This analysis highlights the fluid nature of the conceptual boundaries of the term 'white-collar crime' when it is viewed from a sociological or criminological perspective. In an effort to bring a legal perspective to an understanding of the term, Green has proposed broaching the issue of arriving at a definition by posing three questions:

1. Should the term refer only to activity that is actually criminal, or also to other forms of non-criminal 'deviance'?
2. Should the term refer to behaviour (whether criminal or not) engaged in exclusively or primarily by particular kinds of actors, such as those who occupy certain jobs or have a high socio-economic status; or should it refer instead to some particular kinds of acts?

and

3. Assuming that the term should refer to a particular category of criminal behaviour or other deviant behaviour (rather than to actors), what factors should determine which acts will be included?⁴⁸

Green answers his own questions by stating that the term 'white-collar crime' should only apply to activity that is actually criminal; further, that it should only apply to certain kinds of acts; and, finally, that the determination as to what acts are to be covered by the term is to be achieved through the application of a 'family resemblance' theory, a somewhat

⁴⁷ SP Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP 2007) 11.

⁴⁸ SP Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP 2007) 10.

problematic moral theory (at least from the point of view of the instant research) that will be discussed in the next part of the chapter dealing with a legal-philosophical approach to defining 'white-collar crime'. Leaving to one side for the moment Green's method of enumerating white-collar crime offences, his responses to the first two questions he poses sit well with the positivist approach that will be argued for in this thesis.

The key feature of a legal perspective to the term 'white-collar crime' is that the focus is on the conduct, which must break a criminal law, and not the actor. This view lies behind Green's answers to the first two questions that he poses as a means of arriving at a particular understanding of the term 'white-collar crime'. The emphasis on the conduct rather than the actor fits alongside the organisation of modern society, where there is greater emphasis on mobility in employment and consequently less emphasis on position and status per se. Arguably this perspective has an edge over actor-focused sociological and criminological viewpoints that have their origins in an era when social and employment stratifications were far much rigid.

It might be said that arguing that the word 'crime' in the term 'white-collar crime' should be given its ordinary meaning and not be stretched to make it cover non-criminal activity is the easy part of defining the term from the legal academic's point of view; far harder a task is settling on the nature and range of criminal behaviour that the term should capture. Clearly the aim must be to attempt to draw the category as precisely as possible but there is as much risk that a given approach will be criticised as being under-inclusive as there is that it will be deemed to be over-inclusive. Sutherland's original sociological concern that certain wrongful behaviour was escaping appropriate classification and sanction is apposite at this point.

In the late 1980s, the FBI adopted a somewhat similar approach to that of Edelhertz in defining white-collar crime, describing it as:

[T]hose illegal acts which are characterised by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence. Individuals and organisations commit these acts to obtain money,

property, or services; to avoid the payment or loss of money or services; or to secure personal or business advantage.⁴⁹

A feature of this latter approach, which might be characterised as a 'law enforcement' definition of white-collar crime, is that it captures a large number of crimes that often have no obvious or immediate connection with either corporations or a defendant's occupation. The scope of the definition is potentially vast. It could apply to perjury, obstruction of justice, bribery, extortion and tax evasion, commercial crimes, fraud, environmental offences, occupational health and safety violations, antitrust issues, cartels, the activities of 'organised crime' that overlap with corporate crime, crimes of 'corporate violence', whereby, for example, a corporation has caused manslaughter,⁵⁰ and, in a modern context, 'cybercrime'.⁵¹ It might further apply to civil rights violations generating criminal liability or employment discrimination that involves some element of criminality.⁵²

On the FBI approach to defining 'white-collar crime', Hagan suggests the following ways in which white-collar crime may arise:

1. Individual vs Individual (eg Professional vs Client)
2. Employee vs Individual (eg an employee demands a corrupt payoff from member of public)
3. Organisation (or Corporation) vs Individual (eg a company produces an unsafe product that injures a member of the public)
4. Individual vs Employee (eg a 'sweetheart' contract whereby a professional dealing with a company leans on an employee to agree to a contract that is abnormally favourable from the professional's point of view)
5. Employee vs. Employee (eg a 'sweetheart' contract whereby one employee leans on another employee to agree to a contract that is abnormally favourable to the

⁴⁹ US Department of Justice, Federal Bureau of Investigation, *White-Collar Crime: A Report to the Public* (US Department of Justice 1989) 3.

⁵⁰ See: J Gobert and M Punch *Rethinking Corporate Crime* (Butterworths 2003) vi.

⁵¹ B Zagaris, *International White Collar Crime: Cases and Materials* (CUP 2010) 3: the term 'cybercrime' is used to describe a range of crimes that are committed using the internet.

⁵² See, for example, section 21 of the Criminal Justice Act 2011.

other employee)

6. Organisation (or Corporation) vs Employee (eg occupational health and safety violations)
7. Individual vs Organisation (or Corporation) (eg insurance fraud, tax fraud)
8. Employee vs Organisation (or Corporation) (eg inside trading)
9. Organisation (or Corporation) vs Organisation (or Corporation) (eg industrial espionage, unfair competition)⁵³

Difficulties with the 'law enforcement' approach to definition of white-collar crime arise from the vagueness of many of the terms used within the definition in question. Green argues that it is unclear, for example, as to what it means to commit a crime by 'non-physical' means. In this regard, he points to the debate amongst criminal law theorists as to whether every crime requires a physical act.⁵⁴ A further issue pointed out by Green is the uncertainty as to the meaning of the term 'non-violent'.⁵⁵ Other relevant terms lacking definitional precision include 'deceit', 'concealment', 'guile' and 'violation of trust'. The criticism might also be made of the FBI approach that it over-emphasises the aim or result of crime. On the other hand, the approach has the advantages of being broad in terms of the crime that it encompasses and of being based on conduct, rather than the characteristics of the actor, which sits well with the social and employment structures of modern society.

3.3 A Legal-Philosophical Perspective

In an effort to tackle some of the difficulties with other legal approaches, Green insists that behaviour must break a criminal law in order to be covered by the term 'white-collar crime' but, thereafter, he does not seek to create an exhaustive list of offences to be covered by the term 'white-collar crime', preferring to group offences through the application of a 'family resemblance' system of classification, which is advanced from a moral theory perspective.

⁵³ FE Hagan, *Introduction to Criminology* (8th edn, SAGE 2013) 301.

⁵⁴ See, for example, D Husak, 'Does Criminal Liability Require an Act?' in RA Duff (ed), *Philosophy and the Criminal Law: Principle and Critique* (CUP 1998) 60.

⁵⁵ See, for example, CAJ Coady, 'The Idea of Violence' (1986) 3 *Journal of Applied Psychology* 3.

Green's 'family resemblance' approach states that the term 'white-collar crime' should refer exclusively to a category of criminal offences that reflects some particular group of legal and moral characteristics. It might be said that his approach to a definition of white-collar crime combines a legal perspective with a philosophical perspective. He distinguishes between the Aristotelian or 'classical' approach to classification and the Wittgenstein-style 'family resemblance' approach to classification. Under the former, more traditional approach to classification, categories have clear boundaries and are grouped according to common properties, whereas, under the latter approach, the boundaries are fuzzy, and what characterises the category is not some single well-defined collection of common properties, but rather a collection of different resemblances, a whole series of similarities and relationships shared by the class.⁵⁶

Green's argument is that, although the 'classical' approach to classification may, on the face of it, be more desirable in the context of defining and classifying criminal offences, the reality with many concepts in the social sciences and humanities is that they are not susceptible to such precise in-or-out definition and that the 'family resemblance' approach is a more realistic approach to classification. He goes on to, as he puts it, 'ramble through a moral minefield' of eight kinds of wrongfulness: cheating, deception, stealing, coercion, exploitation, disloyalty, promise-breaking, and disobedience before looking at their place in a range of ten offences.⁵⁷ So, for example, he considers the concept of deception and its place in the crime of fraud, the place of disloyalty in the crime of bribe-taking, and the place of cheating in the context of the crime of insider-trading.

Green's theory is that a range of core white-collar crimes such as fraud, perjury, false statements, obstruction of justice, bribery, extortion, blackmail, insider trading, tax evasion, and regulatory offences, can be best understood when looked at through the prism of everyday concepts that includes not only lying, cheating, and stealing, but also coercion, exploitation, disloyalty, promise-breaking, and disobedience. It is the 'family resemblance'

⁵⁶ Green cites G Lakoff, *Women, Fire and Dangerous Things* (University of Chicago Press 1987) in outlining the 'classical' approach and L Wittgenstein, *Philosophical Investigations* (GEM Anscombe, translator) (3rd edn, Basil Blackwell 1968) 66-71 in describing the 'family resemblance' approach.

⁵⁷ SP Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP 2007) 51.

of the range of wrongs that permits the grouping of the offences in question as 'white-collar' offences.

As with other approaches to defining 'white-collar' crime, Green's perspective has its difficulties. A particular weakness is the way in which his approach emphasises everyday, broad-brush ideas, in arriving at an elucidation of the concept under discussion. Acknowledging this weakness in his approach, Green states:

In any such definitional enterprise, there is, of course, always the potential for circularity: in deciding which offences fall within the category of white-collar crime, we will be forced to assume that certain paradigmatic qualities define the category; and in determining which qualities define the category, we will have no choice but to assume that certain offences fall within it.⁵⁸

Green notes that the meaning of 'white-collar crime', like that of other abstract terms in legal, social science, and philosophical discourse, is deeply contested.⁵⁹ He observes that definitions vary both within and across disciplines and linguistic practices. He points out that white-collar crime scholars have sometimes sought to find an agreed-upon meaning of the term and that, other times, they have looked for substitutes. But, he argues, none of these efforts have been successful: whatever definitions have been offered have failed to find general acceptance; whatever alternatives have been suggested have proved inadequate.⁶⁰ He contends that the term persists and proliferates not so much in spite of its lack of definitional precision, but because of it, and that speakers attribute to it those meanings that correspond to their own particular analytical or ideological concerns.⁶¹ Ultimately, Green finds himself in agreement with Friedrichs, who has suggested that any

⁵⁸ SP Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP 2007) 20.

⁵⁹ SP Green *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP 2007) 9, citing Kip Schlegel, 'Recalling Status, Power and Respectability [sic] in the Study of White-Collar Crime', in James Helmkamp, Richard Ball and Kitty Townsend (eds), *Proceedings of the Academic Workshop, Definitional Dilemma: Can and Should there be a Universal Definition of White-Collar Crime?* (National White-Collar Crime Center 1996) 98, where he compared the controversy over the meaning of 'white-collar crime' to that over the meaning of 'privacy'.

⁶⁰ SP Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP 2007) 10.

⁶¹ SP Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (OUP 2007) 10.

definition of white-collar crime is ultimately meaningful only in relation to its stated purpose.⁶²

Green's observations in relation to the definition of 'white-collar crime' are sensible. It must be accepted that there can be no definitive definition of the term; to settle on one definition and hold that no other definition is valid or possible would be foolish and arrogant when dealing with a term that is the subject of consideration in a number of different fields and disciplines, including law, sociology, criminology, and philosophy. Clearly, each discipline will bring a different understanding of the term to the table, but a different understanding does not necessarily mean a misunderstanding. A pragmatic approach to the definitional problems associated with the term 'white-collar crime' is adopted here: the purpose and context of the instant research drives the elucidation of the term 'white-collar crime'. So while the view is adopted that, for present purposes, the term is best defined from a legal perspective, this thesis stops short of holding that this is the only valid approach to defining the term 'white-collar crime'.

4 A Definition of White-Collar Crime in Ireland

The question arises as to the extent to which 'white-collar crime' has been treated as a separate category of crime in this jurisdiction. Defining 'white-collar crime' was a topic for consideration in an Irish Government White Paper Discussion Document of October 2010.⁶³ While not having the status of legislation, a White Paper provides a high level statement of government policy, its rationale and the strategies to give effect to that policy. A discussion document is one step in the process toward producing a final White Paper on a particular topic. Although no White Paper has been produced as yet, the discussion document provides some insight into how 'white-collar crime' is regarded in Ireland.

As indicated by its title, the discussion document sought to consider 'white-collar crime'

⁶² DO Friedrichs, *Trusted Criminals* (2nd edn, Wadsworth Thomson 2004) [4-12]; DO Friedrichs, 'White-Collar Crime and the Definitional Quagmire: A Provisional Solution' (1992) 3 *Journal of Human Justice* 5.

⁶³ Department of Justice and Law Reform, *White Paper on Crime, Discussion Document No. 3, October 2010, Organised and White Collar Crime* (October 2010).

alongside 'organised crime'. The authors of the discussion document identified complexity as the factor common to these, on the face of it, disparate classes of crime:

These types of crime can often attract organised criminals, but can also involve individuals, companies or very *ad hoc* groups. While there are interconnections between several of these fields, each gives rise to its own discrete issues and law enforcement responses.

The various activities examined are diverse but have the common characteristic of being complex or requiring a high degree of organisation, in contrast to a great deal of volume crime. In light of their complexity, the crime control response to these offences typically involves additional strategies over and above those used in traditional law enforcement.

A further feature of these crimes is that they are rapidly evolving and increasingly enabled by new technologies. Accordingly, an important objective in this discussion document is to seek to identify emerging trends with a view to ensuring that the White Paper on Crime anticipates future challenges as far as possible.⁶⁴

While the word 'complexity' can be understood in many ways, it appears to be used in the instant context to refer to the level of sophistication in the *modus operandi* associated with the performance of the kind of crime under discussion. The concept that complexity is a factor that distinguishes 'white-collar crime' from 'street crime' or, to use the language of the discussion document, 'volume crime', chimes with the FBI definition of white-collar crime which, in its language, describes crimes requiring more organisation and sophistication in their execution than a standard 'street' crime, such as robbery.

Interestingly, the discussion document does not go beyond the observations regarding complexity set out above in seeking to distinguish 'white-collar crime' from 'volume crime'. The 'Organised Crime' section of the discussion document deals with, respectively: serious

⁶⁴ Department of Justice and Law Reform, *White Paper on Crime, Discussion Document No. 3, October 2010, Organised and White Collar Crime* (October 2010) 4.

armed gang crime in Ireland; drug trafficking and supply; fraud; human smuggling and trafficking of human beings; money laundering; intellectual property crime, and cybercrime. The 'White-Collar Crime' section of the document deals only with the following issues: bribery, corruption, and regulatory crime. However, there is an acknowledgement within the introductory part of the 'White-Collar Crime' section that certain crimes dealt with in the 'Organised Crime' section could just as easily fall into the 'White-Collar Crime' section, particularly certain types of fraud.⁶⁵

In April 2011, the Department of Justice and Equality issued a paper that summarised responses received on foot of invitation in the October 2010 'Discussion Document Number 3: Organised and White Collar Crime' for written submissions on issues covered in the document.⁶⁶ The document notes that the Department received twenty-nine submissions, comprising eighteen from organisations and eleven from private individuals and notes further that a number of submissions considered what exactly is meant by white-collar crime.⁶⁷ However, the only submission concerning a definition of white-collar crime that is specifically referred to in the paper is one which cited the FBI definition already considered in this chapter. The paper does not arrive at any conclusion as to the necessity for a definition of 'white-collar crime' or what such a definition might be.

The phrase 'white-collar crime' was used liberally by the then Minister for Justice and Equality on the passing into law of the Criminal Justice Act 2011, a piece of legislation designed to combat this form of crime. Presumably it was felt that this phrase would be useful in marketing the statute to a sceptical public that had become jaded by the impact of the economic crisis in the years preceding the enactment of the legislation. Use of the term conjures up images of besuited businessmen being led to prison in handcuffs.⁶⁸ At a time of significant public disquiet at the dearth of prosecutions of those perceived to have played a

⁶⁵ Department of Justice and Law Reform, *White Paper on Crime, Discussion Document Number 3, Organised and White Collar Crime* (October 2010) 47.

⁶⁶ Department of Justice and Equality, *White Paper on Crime Consultation Process, Discussion Document Number 3, Organised and White Collar Crime, Overview of Written Submissions Received* (April 2011).

⁶⁷ Department of Justice and Equality, *White Paper on Crime Consultation Process, Discussion Document Number 3, Organised and White Collar Crime, Overview of Written Submissions Received* (April 2011) 8.

⁶⁸ See n 20 concerning Braithwaite's observation on the impact of the term 'white-collar crime' on 'ordinary folk'.

criminal role in the horrendous banking crisis in this jurisdiction in the years leading up to the promulgation of the legislation, it was, perhaps, politically helpful to make frequent use of the term in suggesting that the legislation would help to imprison some of the authors of that crisis.

Notwithstanding his use of the term 'white-collar crime' during the unveiling of the 2011 Act to the public, the then Minister for Justice never sought to define the term 'white-collar crime' and it does not appear anywhere in the wording of the 2011 Act itself. Rather, the legislation refers to a list of 'relevant offences', which can be added to by ministerial order. The list of offences included in the schedule of the Act, and the basis on which the list of scheduled offences can be added to, provide guidance as to the understanding to be given to the class of offences intended to be covered by the legislation.

The schedule of relevant offences for the purposes of the 2011 Act is included as an appendix to this thesis. The offences are grouped under seven headings, namely: 'Offences relating to banking investment of funds and other financial activities'; 'Company law offences';⁶⁹ 'Money laundering and terrorist offences'; 'Theft and fraud offences, etc.'; 'Bribery and corruption offences'; 'Consumer protection offence'; 'Criminal damage to property offences'. Almost all of the offences have a financial, banking, or corporate backdrop, or at least the capacity for such a background.

As regards the basis on which the schedule to the 2011 Act can be extended, section 3(2) of the Act provides that:

The Minister may by order specify as a relevant offence an arrestable offence under a provision of an enactment, or at common law, relating to any of the following areas, namely—

(a) banking, investment of funds and other financial activities,

⁶⁹ The commencement on 1 June 2015 of most of the Companies Act 2014, which replaces the Companies Acts 1963 - 2013, is, in due course, likely to result in substantial amendment of the relevant part of the schedule to the 2011 Act.

- (b) company law,
- (c) money laundering and financing terrorism,
- (d) theft and fraud,
- (e) bribery and corruption,
- (f) competition and consumer protection,
- (g) criminal acts involving the use of electronic communication networks and information systems or against such networks or systems or both, or
- (h) the raising and collection of taxes and duties,

if the Minister considers that it is proper to do so and he or she is of opinion that the powers conferred by this Act in relation to the investigation of relevant offences are necessary for the investigation of such an offence by reason of the nature of the offence concerned and the prolonged period of time that is generally required for the investigation of such an offence as a result of the complexity that generally arises in such an investigation due to any one or more of the following factors, namely—

- (i) the number of witnesses,
- (ii) the volume of documents,
- (iii) the wide distribution and proliferation of documents arising from the use of electronic means of communication,
- (iv) the number of transactions,
- (v) the complexity of transactions, or
- (vi) other factor,

that may be expected to be involved.⁷⁰

It is noteworthy that, in line with the language of the White Paper on Crime discussion documents of 2010, section 3(2) of the 2011 Act emphasises complexity as the basis for adding to the list of relevant offences. However, in this case the complexity is that associated with the investigation and prosecution of such crime, rather than any

⁷⁰ Criminal Justice Act, s 3(2).

sophistication required for, or deployed in, the perpetration of such crime.

While most of the offences listed in the schedule to the 2011 Act would be commonly understood to have a connection with 'white-collar crime', it is also notable that some, on their face, would not appear to fit comfortably into such a category. In a Seanad Éireann debate of the Criminal Justice Bill 2011, Senator Ivana Bacik suggested that the inclusion of certain offences in the Criminal Justice (Theft and Fraud Offences) Act 2001 in the schedule to the proposed 2011 Act, namely the offences of theft, handling and possession contrary to sections 4, 17 and 18 of the 2001 Act respectively, had the capacity to fall outside the range of what would be generally associated with the term 'white-collar crime'.⁷¹ The then Minister for Justice and Equality responded in the following way to the concern raised:

Theft can be very simple and may not need the usage of the powers in this Bill. I do not envisage that in simple cases prosecuted in the District Court these powers will be required. Theft can also be complicated, and my advice from the Garda with regard to the offences raised by the Senator is that in some cases investigation can be very complex. I assume the Garda Síochána will use its discretion as to when it is appropriate to utilise the provisions in the Bill.⁷²

Senator Bacik appeared to express satisfaction with this response, stating:

I take the Minister's point and it is clear that we want to see white-collar crime covered by this legislation. It is an act that is quite difficult to define precisely and I accept there may be complex investigations involving section 4 theft offences, or those covered in sections 17 and 18. That may be particularly true if there is a range of different offences covered.⁷³

This parliamentary exchange highlights that, depending on the substance of what is alleged in a particular case, an allegation of, for example, theft contrary to section 4 of the Criminal

⁷¹ Seanad Deb 27 July 2011, vol 209, col 974.

⁷² Seanad Deb 27 July 2011, vol 209, col 975.

⁷³ Seanad Deb 27 July 2011, vol 209, col 976.

Justice (Theft and Fraud Offences) Act 2001, may or may not amount to an allegation of 'white-collar crime'. This example demonstrates the need for a broad, flexible approach to the classification of white-collar crime so as to avoid the creation of unintended hindrances to the investigation and prosecution of such crime.

It is argued that, in its coherence and flexibility, the wording of section 3(2) has much to recommend it as the basis for a classification of white-collar crime. While the language of section 3(2) has associations with traditional understandings of the term white-collar crime with its concentration on crimes with a financial component and its identification of the complexity often linked to such crime, perhaps its biggest omission in this regard is any reference to occupations or workplace settings.

In conclusion, the Irish position on a definition of 'white-collar crime', insofar as it can be divined from a discussion document in a process that has not yet culminated in the publication of a full White Paper and loose references to it on the passing into law of the Criminal Justice Act 2011 (but not within the Act itself), remains somewhat elusive. And yet there are, in the wording of section 3(2) of the 2011 Act, the bones of a classification of white-collar crime that suits for present purposes. On one view, the legislature acted shrewdly in refusing to tie itself to an overly precise definition of 'white-collar crime' in the drafting of the Criminal Justice Act 2011: the failure to define 'relevant offences' for the purposes of the Act does not fetter the hands of the executive in adding to the list of offences covered by the legislation, and yet there is enough specificity and guidance in the language of section 3(2) of the Act to create a meaningful class of crime that might be termed 'white-collar crime'.⁷⁴ However, it must also be acknowledged that this flexibility comes at the price of certainty and predictability.

⁷⁴ Section 3(3) of the 2011 Act serves as a further check on the operation of section 3(2) by requiring that 'an order under subsection (2) shall only be made after consultation by the Minister with any other Minister of the Government who, in the opinion of the Minister, having regard to the functions of that other Minister of the Government under the enactment concerned or in relation to the offence at common law concerned, ought to be consulted'.

5 Defining 'White-Collar Crime' for Present Purposes

While there is no widely accepted definition of the term 'white-collar crime', the concept has been usefully elucidated in the academic commentary across a number of disciplines. It is contended that Sutherland's original attempt to define 'white-collar crime' as a discrete category of crime was a valid one. His description of this class of crime, which extends to behaviour that is not strictly criminal, was arrived at from a sociological rather than legal perspective, which is not ideal for present purposes because of its capacity to encompass non-criminal conduct. However, the essence of his original definition, namely that white-collar crime is a crime committed by someone well qualified in their occupation, and in the course of that occupation, still has a place in any modern understanding of the term.

The evolution of Sutherland's definition in the work of later sociologists and criminologists so as to capture the behaviour of both natural and legal persons is helpful and is endorsed here. Of those academics approaching a definition of white-collar crime from a sociological or criminological perspective, it is suggested that the proposition that white-collar crime is found approximately at the overlap between the 'economic crime' and 'elite deviance' schools of thought is the most attractive, but, for present purposes, suffers from the weakness that this definition can potentially capture non-criminal activity.

Green's legal-philosophical approach to the term, involving the application of a legal and moral theory focusing on the act rather than the actor and categorising the acts (which must be crimes) according to a 'family resemblance' system of classification has appeal, particularly for its insistence that the label should only cover actual crimes, and yet the inexactitude of the 'family resemblance' approach to classification, with its origins in philosophical moral theory, is not entirely satisfactory for present purposes. A 'law enforcement' approach to a definition of 'white-collar crime', as exemplified by the FBI definition in the US, has its merits but is also open to criticism, particularly for the vagueness surrounding some of its terminology and its heavy focus on the aim or result of the crime it attempts to define.

It will be argued in the course of this thesis, particularly in Chapter 6, that there are robust

grounds for differentiating white-collar crime from other forms of crime. Chief among the justifications is the complexity associated with, on the one hand, the perpetration of white-collar crime, and, on the other hand, the investigation and prosecution of such crime. The significant, often hidden, impact of such crime, both in financial terms and in the number of victims of such crime, is a further basis for treating white-collar crime differently to other forms of crime. A third ground for categorising white-collar crime separately from other forms of crime arises from the social value of classifying, in statutory form, a type of crime that has given rise to contemporary public concern, while also redressing the historical societal misconception that white-collar crime is not as grave a form of crime as crimes of violence.

If later chapters of this thesis lay out a clear basis for differentiating white-collar crime from other types of crime, it remains for this chapter to settle on a reasonably precise definition of this form of crime. Although the wording of section 3(2) of the Criminal Justice Act 2011 Act does not define 'white-collar crime' explicitly, it is submitted that, notwithstanding the acknowledged issues concerning certainty and predictability, this statutory provision balances specificity with flexibility to mark out appropriate parameters for a crime classification with that very description. Furthermore, the classification captures, broadly speaking, the justifications and imperatives for a separate classification for white-collar crime that are identified in Chapter 6 of this thesis. While due regard is had to the rich influences of other disciplines on the understanding of the term 'white-collar crime', it is concluded that a functional, purposive approach to a framing of the term best meets the needs of the instant research.

The following assertions set out the boundaries of the understanding of the term 'white-collar crime' that is adopted in this thesis:

- (i) Only conduct that is subject to sanction by the criminal law should be covered by the term 'white-collar crime';
- (ii) Such crimes may be committed by natural or legal persons;
- (iii) Such crimes include those listed in the schedule to the Criminal Justice Act 2011 and,

for any crimes not included in the schedule, should fit the criteria outlined in section 3(2) of the Criminal Justice Act 2011. In particular, the crimes should fall within the fields outlined in section 3(2), which include banking, company law, fraud and corruption, and they should require dedicated powers for their investigation and prosecution by reason of the nature of the offences concerned and the prolonged period of time that is generally required for the investigation of such an offences as a result of the complexity that generally arises in such investigations.

Although the focus of the proposed research will be on the powers of investigation and procedural rules applying to the prosecution of white-collar crime rather than on what might be described as substantive white-collar crime, the definition of the term white-collar crime contended for in this chapter, which is influenced by the justifications for special treatment of white-collar crime that are identified in Chapter 6, serves to designate the sort of criminal activity that comes within the dedicated statute that is the vehicle for reform that is argued for in this thesis.

Chapter 3

Investigating White-Collar Crime in Ireland: The Appropriateness of Existing Powers

1 Introduction

The primary issues for analysis in this chapter will be the range, nature and depth of powers available to those entities responsible for detecting and investigating white-collar crime.¹ The appropriateness of an array of powers of potential relevance to the investigation of white-collar crime, including powers to seek information, place under surveillance, enter, search, seize, and arrest will be reviewed. The nature of the evaluation undertaken in this chapter is to assess whether the powers in questions are sensible, workable and faithful to their underlying rationales. It is also a concern of this chapter to consider whether a balance between effective investigations and prosecutions and relevant legal rights is apparent on the face of the applicable sources of law. The chapter opens with a section that summarises the context for any assessment of powers of investigation, specifically the centrality of respect for personal rights in the constitutional and legal framework in this jurisdiction. Consideration is given to the potential impact of the recent landmark decision of the Supreme Court in *DPP v JC* on the operation of powers of investigation.²

Powers of investigation are addressed in the balance of the chapter in the sequence in which they generally arise in the course of a standard investigation. When dealing with each power of investigation under consideration, it is proposed, for the most part, to consider the applicability of that power to crimes in general before considering the investigative power in question as it relates to white-collar crimes as defined in Chapter 2. This approach will allow for identification of differences, if any, in the investigative approach to white-collar crime as distinct from other forms of crime and, where such

¹ The issue of the appropriateness of the range and jurisdiction of bodies that currently investigate and prosecute white-collar crime in this jurisdiction is considered in Ch 4.

² [2015] IESC 31.

differences exist, to assess the usefulness or otherwise of such differences in approach.

It should be noted that issues concerning powers of investigation do not receive equal levels of analysis. Measures that oblige and encourage the disclosure of wrongdoing are examined in some detail with a view to gauging the extent to which they may result in the provision to relevant authorities of information concerning actual or suspected white-collar crime, thereby giving a basis for the triggering of criminal investigations. While only relevant for present purposes to certain white-collar crime investigations, powers of surveillance and interception of communications receive particular attention because the relevant law is somewhat underdeveloped and controversial and, therefore, ripe for critical assessment. Given its relatively recent promulgation and government-stated aim of tackling white-collar crime more effectively than heretofore, the impact of the Criminal Justice Act 2011 on the power to detain suspects before charge is the subject of close appraisal. Due to their limited relevance in a white-collar crime context, and the fact that the relevant law is in transition in advance of the commencement of most of the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014, powers that relate to forensic sampling are not considered in this chapter, although this area is pertinent in other contexts later in the thesis.³ While it is acknowledged that there is often a transnational dimension to white-collar crime, the breadth of the range of relevant issues and the intricacy of the pertinent law are such that the scope of the instant thesis is confined to a consideration of powers of investigation that operate on a national level.⁴

Although powers to demand the production of documentary and electronically stored

³ Jurisprudence concerning the connection between powers of forensic sampling and the privilege against self-incrimination is considered in Ch 5, while the possibility of the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 serving as a model for a dedicated statutory approach to issues concerning the investigation and prosecution of white-collar crime is addressed in Ch 6.

⁴ For analysis of powers that operate on a transnational level, see: M Forde and K Kelly, *Extradition Law and Transnational Criminal Procedure* (4th edn, Thomson Roundhall 2011); R Farrell and A Hanrahan, *The European Arrest Warrant in Ireland* (Clarus Press 2011). The following detail concerning the investigation of the Office of the Director of Corporate Enforcement into the collapse of Anglo Irish Bank plc in 2008 provides an example of a domestic white-collar crime investigation with a transnational dimension: 'For the first time in the Anglo investigation, the ODCE also initiated four requests under the Criminal Justice (Mutual Assistance) Act 2008. These requests were approved. In consequence, ODCE staff travelled to the UK on a number of occasions to attend interviews and Magistrates Court hearings at which statements and documents were received. In all relevant cases, orders were made by the Magistrates Court permitting the handing over of the statements and documents which were then transmitted to the ODCE via the UK Home Office.', Office of the Director of Corporate Enforcement, *Annual Report 2010* (Stationery Office 2011) 17.

material, found in section 15 of the Criminal Justice Act 2011 and a number of other provisions, could fit reasonably within the scheme of this chapter, they are considered instead in Chapter 4 as part of a general assessment of issues concerning documentary and digitally stored material in a white-collar crime context. Finally, it might be noted that two key privileges, namely the privilege against self-incrimination and legal professional privilege, loom large in any consideration of powers of investigation, particularly in a white-collar crime context. The significant impact of these privileges on both powers of investigation and prosecutions that flow from investigations is such that they receive separate treatment in Chapter 5.

2 Powers of Investigation in the Context of Protection of Personal Rights

The backdrop for any discussion of powers of investigation in this jurisdiction is, in the first instance, the various articles of the Irish Constitution that afford primacy to the personal rights of individuals.⁵ Ireland's acceptance of the Charter of Fundamental Rights of the European Union demands that personal rights are respected in the implementation of European Union (EU) law, a point of some significance given that the EU law doctrines of supremacy and direct effect dictate that, within its field of competence, EU law takes precedence over all law that has effect in the Irish legal system.⁶ A further important tier of protection for the personal rights of individuals in Ireland comes in the form of the European Convention on Human Rights (ECHR), which was ratified by Ireland in 1953. The incorporation of the ECHR into Irish law by the European Convention on Human Rights Act 2003 distinguishes it from other international treaties.⁷ International law protection for

⁵ Individual provisions of the Constitution will receive attention in the course of this chapter, as appropriate, but for a comprehensive analysis and discussion of the full range of personal rights provisions, the following authoritative text might be consulted: G Hogan and G Whyte, *Kelly: The Irish Constitution* (4th edn, Butterworths 2003).

⁶ Acceptance occurred with the entry into force of the Lisbon Treaty in 2009. See S Peers, T Hervey, J Kenner and A Ward (eds) *The European Union Charter of Fundamental Rights* (Hart Publishing 2014) for detailed analysis of the Charter. More generally, see P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (5th edn, OUP 2011); N Foster, *EU Law* (3rd edn, OUP 2012).

⁷ Section 3(1) of the European Convention on Human Rights Act 2003 provides that 'every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions'. Individual ECHR provisions, and associated European Court of Human Rights (ECtHR) jurisprudence, will be analysed in the course of this chapter where they are relevant to powers of investigation. The following provide a more comprehensive treatment of the personal rights provisions of the ECHR and the associated jurisprudence of the ECtHR: U Kilkelly (ed), *ECHR and Irish Law* (2nd edn, Jordans

personal rights is provided, inter alia, through Ireland's ratification of the International Covenant on Civil and Political Rights (ICCPR).⁸ Of course, it is important to distinguish the legal status of the various sources just mentioned. For the international measures, it is not ratification so much as incorporation that is significant in terms of litigation in the Irish courts, the EU being superior to the ECHR in this regard and the ECHR, in turn, superior to the ICCPR and other international instruments.⁹

Although detailed consideration of the issue is outside the scope of this research, it is argued by many historians and political theorists that the high degree of protection for individual rights in liberal democracies around the world has its roots in the influential thinking of European philosophers during the Age of Enlightenment of the seventeenth and eighteenth centuries.¹⁰ The ideas of these philosophers, which placed emphasis on democracy, personal liberty and equality at a time when the interests of the general population were subjugated to those of monarchical elites, were to the fore at the time of the American and French revolutions of the late eighteenth century and the subsequent drafting of the American Declaration of Independence (1776), the United States Bill of Rights (1789),¹¹ and also the French Declaration of the Rights of Man and the Citizen

2009); C Ovey and R White, *The European Convention on Human Rights* (5th edn, OUP 2010); AR Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (3rd edn, OUP 2012).

⁸ The International Covenant on Civil and Political Rights (1966) was ratified by Ireland in 1989. A weakness of the treaty, in comparison to the Irish Constitution and the ECHR in particular, is the inability of the individual in this jurisdiction to rely on it to enforce his or her rights. See the following for expert analysis of the treaty: M O'Flaherty and L Heffernan, *International Covenant on Civil and Political Rights: International Human Rights Law in Ireland* (Sweet & Maxwell 1995); S Egan, *The UN Human Rights Treaty System* (Bloomsbury Professional 2011) Ch 3 and Ch 7; S Joseph and M Castan, *International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd edn, OUP 2014).

⁹ For further consideration of these distinctions, see: C Keville and MC Lucey (eds), *Irish Perspectives on EC Law* (Thomson Round Hall 2003); U Kilkelly (ed), *ECHR and Irish Law* (2nd edn, Jordans 2009); E Fahey, *EU Law in Ireland* (Clarus Press 2010); S Egan, *The UN Human Rights Treaty System* (Bloomsbury Professional 2011); C Donnelly, 'EU Cases in the National Courts' (Irish Centre for European Law EU Litigation Update Conference, Dublin, May 2012); S Egan, L Thornton, J Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Professional 2014).

¹⁰ See, for example, R Porter, *Enlightenment: Britain and the Creation of the Modern World* (Penguin Books 2001); D Brewer, *The Enlightenment Past: Reconstructing Eighteenth Century French Thought* (CUP 2008); R Wokler, *Rousseau, the Age of Enlightenment, and Their Legacies* (Princeton University Press 2012); S James, *Spinoza on Philosophy, Religion and Politics: the Theologico-Political Treatise* (OUP 2012); J Israel, *Democratic Enlightenment: Philosophy, Revolution, and Human Rights 1750 - 1790* (OUP 2013).

¹¹ The Bill of Rights became the first ten amendments of the United States Constitution in 1791. These amendments guarantee personal rights to liberty and property and limit the power of government to interfere with these rights.

(1789).¹² Since this time, the constitutions of liberal democracies of the common law world, and beyond, emphasise individual freedoms, with encroachment upon those freedoms only extending to what is required to give effect to democratic collectivism.

A distinction can also be drawn between liberal democracies that afford positive protection for personal rights in the form of an instrument such as a Bill of Rights or written Constitution, and those that adopt a laissez-faire approach that entrusts the guardianship of personal rights to a supreme parliament subject to the inherent limitations of the rule of law. While Ireland falls into the former category, the UK is an example of the latter category. Whether a constitutional republic, such as Ireland, or a constitutional monarchy, such as the UK, a common feature of liberal democracies is the notion that the default position in society should be that a person is free to conduct his life as he wishes, with impingements on this freedom to be specifically provided for and only to the extent necessary in the interests of the common good.¹³ This situation might be contrasted with totalitarian jurisdictions, where the State seeks to control all aspects of public and private life, where necessary.¹⁴

For the purposes of the instant research, it is contended that the centrality afforded to individual freedoms in liberal democracies is preferable to political systems and jurisdictions that subordinate personal freedoms to other interests. Aside from any philosophical arguments arising, there is a historical and practical basis for working within this framework: first, this approach has been embedded here for at least the last few centuries and, second, it has popular support in the form of the Constitution and the various international treaties referred to above. While affording primacy to personal rights, all of the instruments in question also acknowledge that such rights are qualified rather than absolute. The personal rights of suspects must be upheld but regard must also be had to the

¹² The declaration guaranteed the 'natural rights' of all men, including rights to liberty, property and life. The declaration later became the preamble to the first French Constitution of 1791.

¹³ The following works are instructive in relation to the political theory of liberal democracy: R Congleton, *Perfecting Parliament: Constitutional Reform, Liberalism, and the Rise of Western Democracy* (CUP 2011); N Wolterstorff, *Understanding Liberal Democracy: Essays in Political Philosophy* (OUP 2012).

¹⁴ The following works might be consulted for expert analysis of the operation of totalitarianism as a form of rule: R Griffin, *Fascism, Totalitarianism and Political Religion* (Routledge 2005); G Meyer and S Fitzpatrick (eds), *Beyond Totalitarianism: Stalinism and Nazism Compared* (CUP 2009).

interests of society and victims in having white-collar crime detected and investigated.¹⁵

It is important to note at this juncture the significance of the recent Supreme Court decision in *DPP v JC* for its potential impact on the operation of powers of investigation associated with white-collar crime.¹⁶ By a majority of four to three, the Supreme Court overturned the exclusionary rule that emerged from the development in *DPP v Kenny*¹⁷ of a test first articulated in *People (AG) v O'Brien*,¹⁸ which dictated that evidence that flowed from a breach of the defendant's constitutional rights was deemed inadmissible in the absence of extraordinary excusing circumstances.

In a key judgment for the majority in *JC*, Clarke J examined the rule as first described in *O'Brien* and the later version of it in *Kenny*. Notwithstanding the adoption in *Kenny* of the phrase 'deliberate and conscious violation' from *O'Brien*, Clarke J took the view that the 'net effect' of *Kenny* was to overrule the decision in *O'Brien*.¹⁹ He characterised the rules set down in both cases as being on a spectrum: *O'Brien* is located at one extreme in holding that evidence should be admitted unless it can be shown that those gathering the evidence in question actually knew that their actions were in breach of constitutional rights, whereas *Kenny* is at the other end of the spectrum in providing that it is only necessary to show a breach of constitutional rights for evidence to be excluded.²⁰ Clarke J held that the question for the Court was 'as to whether either *O'Brien* or *Kenny* are correct, or, indeed, whether the proper test requires some further refinement by identifying a point along that spectrum

¹⁵ Legislative developments such as the Criminal Justice (Victims of Crime) Bill 2015, which aims to transpose into Irish law Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, are evidence of a trend towards greater acknowledgement of the interests of victims in the criminal justice system.

¹⁶ [2015] IESC 31. Only the core aspects of the new test that emerges from *JC* in relation to the admissibility of unconstitutionally obtained evidence are considered here; for more detailed analysis of this landmark judgment, see: C Ní Choileáin and A Bazarchina, 'Admissibility of Unconstitutionally Obtained Evidence After *DPP v JC*' (2014) 20(4) Bar Review 83.

¹⁷ [1990] 2 IR 110 (SC).

¹⁸ [1965] IR 142 (SC). The interplay between *O'Brien* and *Kenny* is uncertain and has been a source of controversy. For comprehensive discussion of the position that obtained before *JC*, see: T O'Malley, *The Criminal Process* (Thomson Round Hall 2009) Ch 19; L Heffernan with Ú Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury Professional 2014) Ch 8; D McGrath with E Egan, *Evidence* (2nd edn, Thomson Roundhall 2014) Ch 7; Y Daly, 'Unconstitutionally Obtained Evidence in Ireland: Protectionism, Deterrence and the Winds of Change' (2009) 2 ICLJ 40.

¹⁹ [2015] IESC 31 (Clarke J) [4.2].

²⁰ *DPP v JC* [2015] IESC 31 (Clarke J) [4.5]-[4.6].

which is to be found neither in *O'Brien* nor *Kenny*'.²¹ Having enumerated protection of personal rights and obligations arising from regard to the common good as relevant considerations, Clarke J took the view in relation to *O'Brien* and *Kenny* that 'neither position properly balances the legitimate competing interests involved'.²²

Having arrived at the conclusion that the existing law could no longer stand, Clarke J then embarked on the task of formulating a fresh test concerning the admissibility of unconstitutionally obtained evidence. He held that the onus rests on the prosecution to establish the admissibility of all evidence and that the new test would only be concerned with objections to the admissibility of evidence where the objection relates solely to the circumstances in which the evidence was gathered and does not concern the integrity or probative value of the evidence concerned.²³ Furthermore, where objection is taken to the admissibility of evidence on the grounds that it was taken in circumstances of unconstitutionality, the onus remains on the prosecution to establish either:

- (a) that the evidence was not gathered in circumstances of unconstitutionality; or
- (b) that, if it was, it remains appropriate for the Court to nonetheless admit the evidence.²⁴

The test provides that the onus in seeking to justify the admission of evidence taken in unconstitutional circumstances places on the prosecution an obligation to explain the basis on which it is said that the evidence should, nonetheless, be admitted and also to establish any facts necessary to justify such a basis.²⁵ Any such facts relied on by the prosecution must be established beyond reasonable doubt.²⁶

A further aspect of the test requires that where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be excluded save in

²¹ *DPP v JC* [2015] IESC 31 (Clarke J) [4.6].

²² *DPP v JC* [2015] IESC 31 (Clarke J) [4.14].

²³ *DPP v JC* [2015] IESC 31 (Clarke J) [5.1]-[5.2].

²⁴ *DPP v JC* [2015] IESC 31 (Clarke J) [5.3].

²⁵ *DPP v JC* [2015] IESC 31 (Clarke J) [5.5].

²⁶ *DPP v JC* [2015] IESC 31 (Clarke J) [5.7].

those exceptional circumstances considered in the existing jurisprudence.²⁷ In this context deliberate and conscious refers to knowledge of the unconstitutionality of the taking of the relevant evidence rather than applying to the acts concerned.²⁸ The assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights requires an analysis of the conduct or state of mind not only of the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned.²⁹ However, where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate in the sense previously appearing in the test, then a presumption against the admission of the relevant evidence arises.³⁰ Clarke J held that such evidence should be admitted where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments.³¹ The final part of the test provides that evidence which is obtained or gathered in circumstances where same could not have been constitutionally obtained or gathered should not be admitted even if those involved in the relevant evidence gathering were unaware due to inadvertence of the absence of authority.³²

Perhaps the most significant aspect of the rule articulated by Clarke J is that inadvertence leading to a breach of constitutional rights will not necessarily result in the exclusion of evidence. However, the judgment provides little guidance as to how inadvertence can be demonstrated; nor does it speak to the nature of the inadvertence that must be established: is the test subjective or objective? Given the uncertainties that surround Clarke J's test, it seems likely that it is only a matter of time before cases wend their way before the Supreme Court seeking clarification of the test. *DPP v JC* introduces unpredictability to the issue of the admissibility of unconstitutionally obtained evidence. Inasmuch as it attenuates the high degree of protection afforded to defendants by the *Kenny* test, it is disappointing from

²⁷ *DPP v JC* [2015] IESC 31 (Clarke J) [5.10].

²⁸ *DPP v JC* [2015] IESC 31 (Clarke J) [5.10].

²⁹ *DPP v JC* [2015] IESC 31 (Clarke J) [5.10].

³⁰ *DPP v JC* [2015] IESC 31 (Clarke J) [5.20].

³¹ *DPP v JC* [2015] IESC 31 (Clarke J) [5.20].

³² *DPP v JC* [2015] IESC 31 (Clarke J) [5.22].

a defence perspective;³³ conversely, to the extent that it is friendlier to investigators and prosecutors than the *Kenny* test, it goes some way to answering the call of a prominent actor in the field of white-collar crime for a reconsideration of the *Kenny* approach to the admissibility of unconstitutionally obtained evidence so that cases do not fail merely as a result of 'technicalities'.³⁴

3 Proactive Powers of Investigation

The question arises as to the extent to which investigators in this jurisdiction are entitled to be proactive in their efforts to uncover crime where there is, as yet, no indication of any criminal conduct. In other words, to what degree are investigators entitled to trawl for crimes that have not yet come to their notice? There are few examples in this jurisdiction of sources of law that afford coercive powers to An Garda Síochána where there is no suspicion that a crime has been committed. For example, until relatively recent times there was no general power at common law to stop a person. However, in *DPP (Stratford) v Fagan*, the Supreme Court confirmed that a member of An Garda Síochána could stop a driver even if there was no suspicion in relation to any offence and, further, that any evidence gathered as result of such a stop could be admissible at a subsequent trial.³⁵ Blayney J, commenting on statements of Lord Parker CJ in the English case of *Rice v Connolly*,³⁶ said:

It is clear from these statements in regard to the duties of the police at common law that part of the duties of the gardaí are to detect and prevent crime. It follows in my opinion that if, in order adequately to detect and prevent crime, they find it necessary to require motorists to stop, the common law gives them full power to do so.³⁷

³³ The dissenting judgments in the case were remarkable for their vigour. Commenting on the test formulated by Clarke J, Hardiman J stated: 'I believe that the application of this rule to the force publique has the effect of exalting that group and conferring a status of virtual, practical, unaccountability upon it. I deeply regret that this is being done.', *DPP v JC* [2015] IESC 31.

³⁴ Office of the Director of Corporate Enforcement, *Submission on White Collar Crime* (30 November 2010) 25.

³⁵ [1994] 3 IR 265 (SC).

³⁶ [1966] 2 QB 414, 419.

³⁷ [1994] 3 IR 265 (SC) 274.

O'Flaherty J clarified that the exercise of such a common law power of stop should be done in good faith and not in an arbitrary or capricious manner.³⁸

In *Hayes v Minister for Finance*, Kearns J affirmed the approach taken in *Fagan*, observing that '[the common law power to stop motorists] exists for practical reasons to allow gardaí to carry out their duties effectively and expeditiously without being concerned with the legality of their actions or that the performance of their functions may carry sanctions which in turn might deter them from their duties'.³⁹ While these cases arose in a road traffic law context, there is nothing in the language of the judgments to intimate that the principle that the gardaí may stop a person in order to make inquiries is necessarily limited to motorists.

Section 10 of the Road Traffic Act 2010 provides a further example of a power to stop, this time statutory in nature, afforded to gardaí in circumstances that do not, on their face, disclose the commission of a crime. It allows gardaí to set up checkpoints for the administration of random breath testing so as to detect drink driving offences.⁴⁰

Although not quite as coercive in nature as the powers just considered, An Garda Síochána enjoy rights of enquiry and communication at common law that arise from their general obligation to prevent, detect and investigate crime, even where there is no suspicion that a crime is being committed or has been committed. Indeed, in *Glasbrook Brothers Ltd v Glamorgan County Council*, Viscount Cave LC observed that 'there is an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, and for protecting property from criminal injury'.⁴¹

In *DPP v Cowman*, O'Hanlon J was asked to consider, in an appeal by way of case stated, whether the District Court judge in that case had been correct to find that a garda had no authority to approach a person where there was no objective basis for thinking that a crime

³⁸[1994] 3 IR 265 (SC) 273.

³⁹[2007] 3 IR 190 (SC) 204.

⁴⁰This section replaced a similarly framed power introduced into Irish law by section 4 of the Road Traffic Act 2006.

⁴¹[1925] AC 270 (CA) 270.

had been committed.⁴² On the facts of the case, the garda had approached the defendant because ‘he just had a feeling about him’. O’Hanlon J held that the decision of the District Court had not been correct on the basis that it would seem to envisage that an approach should not be made by a garda to a member of the public unless and until he had already formed an opinion that some grounds existed for suspecting that the person he was approaching was planning to commit some breach of the criminal law, or had already committed some offence. The High Court held that no such restriction is imposed by law on the right of a member of the Garda Síochána to approach members of the public from time to time as he thinks fit for the purpose of speaking to them and having communication with them on an informal basis.

Of course, ‘having a feeling’ about a particular person is suggestive of an instinctive, and subjective, suspicion of wrongdoing. Yet it is apparent from the language of O’Hanlon J’s judgment in *Cowman* that investigators may strike up communication with anyone without having any suspicion, subjective or objective, that the person has committed any wrongdoing, or, in fact, that any particular wrongdoing has taken place. In those instances where an investigator ‘has a feeling’, an important dividing line is the threshold at which an investigator’s ‘feeling’, or suspicion, triggers a more substantial investigative power provided for at common law or in statute such as, for example, a power of search or a power of arrest.

Crucially, the common law right of a garda to make contact with a person does not extend to a common law right to compel a person to respond to certain enquiries, although a statutory power of compulsion may arise if relevant conditions are met.⁴³ This is confirmed in *DPP v Mulligan*.⁴⁴ In that case Charleton J affirmed the approach in *Cowman* in relation to the entitlement of a garda to approach a person for the purpose of communication, adding the following observation:

Any suggestion to the contrary would be wrong. It would in addition prevent the gardaí from acting with the flexibility and informality that their investigative role

⁴² [1993] 1 IR 335 (HC).

⁴³ The privilege against self-incrimination is considered in Ch 5.

⁴⁴ [2008] IEHC 334, [2009] 1 IR 794.

within society requires and would amount to a declaration that in the investigation of crime they have lesser powers than an ordinary citizen.⁴⁵

However, he went on to say the following in the context of an informal request a garda might make of a person for details of their name and address:

In many cases, a simple request for a person's name and address will be sufficient to obtain that information without any necessity for recourse to statutory powers of compulsion. However, a person who fails to comply with such an informal request commits no offence.⁴⁶

It is clear, then, that a garda or other investigator may approach and communicate with a person. By extension, there would seem to be no difficulty with inviting a person to attend a garda station for interview, so long as it is made clear to a person that there is no obligation to do so. However, an obligation to cooperate with enquiries or answer questions can only be brought about through the invocation of an appropriate statutory power, assuming, of course, that the necessary circumstances are present to trigger the availability of such a power.⁴⁷ The approach of the court in *Mulligan* is consistent with English authorities dealing with the same issue.⁴⁸

In considering the rationale for this state of affairs, it would seem that respect for personal autonomy and the right to privacy of the individual in this jurisdiction informs a common law position whereby, in the absence of circumstances indicative of the commission of a crime by a particular individual, an investigator's powers do not extend beyond an entitlement to communicate with an individual.⁴⁹ However, it is to be noted that, while a person has the right not to respond to an enquiry from a garda, if the circumstances of such an approach or communication are such as to lead to a suspicion on the part of the

⁴⁵ [2008] IEHC 334, [2009] 1 IR 794, 798.

⁴⁶ [2008] IEHC 334, [2009] 1 IR 794, 798.

⁴⁷ In Ch 5 consideration is given to statutory powers that encroach upon the privilege against self-incrimination by, for example, making it an offence not to provide information or allowing for adverse inferences to be drawn from silence if certain conditions are met.

⁴⁸ *Kenlin v Gardiner* [1967] 2 QB 510; *R v Director of Serious Fraud Office, ex p Smith* [1993] AC 1 (HL).

⁴⁹ The right to privacy is an unenumerated right protected by Article 40.3.1° of the Constitution. The right to privacy is also afforded protection by Article 8 of the ECHR.

investigator that an offence has been committed or is in the process of being committed, or such a suspicion arises in the course of the communication, *DPP v Cowman* is also authority for the proposition that a garda may then rely upon such a suspicion to activate a further investigative power so long as the suspicion is at the level required to engage the common law or statutory power that provides for the relevant investigative power.⁵⁰

While the common law power to stop a person may not be of crucial significance in the context of white-collar crime, the entitlement of investigators to communicate with individuals is of relevance. Although it is feasible that informal communications with a person may cause them to volunteer certain information that discloses a sufficient basis for a reasonable suspicion that an offence has been committed, or is in the course of being committed, and, therefore, give an investigator a basis for invoking significant powers, including to search, seize, arrest and detain without charge, it seems unlikely that this approach will uncover white-collar offending to any great extent.

While it is arguably the instinct of most people to be guarded about responding to enquiries from officialdom, it seems fair to suggest that the targets of general enquiries that may, in theory, lead to the uncovering of white-collar crimes, will be even less forthcoming in response to such enquiries than the average person in circumstances where a white-collar offender's knowledge of their legal rights and entitlements will often be commensurate with the complexity and sophistication of the offending in which they are engaged. It is clear that people are entitled to keep their counsel in such circumstances, an issue that will be discussed further in Chapter 5, which considers the privilege against self-incrimination. From this perspective, investigators would not appear to enjoy much power to uncover white-collar-crime where nothing has occurred to trigger any kind of a suspicion that a crime has been committed.

On the other hand, the common law entitlement of investigators to approach people and make general enquiries may bear fruit if the subjects of such communications are not implicated in any wrongdoing themselves, and yet may have information that discloses the

⁵⁰ [1993] 1 IR 335 (HC). As a result of interacting with the defendant in the case, the garda established the requisite degree of suspicion ('reasonable cause' to suspect) required to ground an arrest under section 25 of the Misuse of Drugs Acts 1977 and 1984.

possible commission of white-collar crimes. Indeed, it may often be the case that gardaí or other investigators have more of an interest in making contact with non-offenders who happen to be close to a crime, rather than the perpetrator or perpetrators of the crime itself. To build a prosecution against a suspect through contact with people around that suspect, and without alerting the suspect of such an investigation, may, from the point of view of collecting a sufficiency of evidence for a viable prosecution, often make more tactical sense than premature contact with the perpetrator of a white-collar crime, particularly if such third parties are willing to act as informants. A further issue that bears mention at this point is a situation whereby an investigator makes contact with a wrongdoer who offers to inform and provide evidence against a fellow wrongdoer, or wrongdoers, in return for immunity from prosecution.⁵¹ However, the common law position remains the same regardless of whether contact is made with the perpetrator of a crime or someone who is simply close to a crime: absent an additional statutory power brought into play by the circumstances of an encounter, an investigator is not entitled to compel a person to respond to enquiries made.

It might also be noted that there is one further narrow group of investigative powers of particular relevance to white-collar crime that do not require prior suspicion of criminal misconduct before they are exercisable. They are a range of statutory powers of summary entry and inspection and search and are discussed more fully in part 7 of this chapter. They are of particular relevance to white-collar crime in that they are, in the main, targeted at ensuring that diverse business activities are conducted in accordance with existing legal requirements. Included in the group are powers aimed at uncovering revenue offences⁵² and health and safety offences.⁵³ In a similar vein, EU law has extended far-reaching powers to the Competition and Consumer Protection Commission including, for example, the power to engage in dawn raids.⁵⁴

⁵¹ It is solely at the discretion of the DPP as to whether immunity from prosecution is granted: Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (November 2010) [7.8], [9.11], [14.2], [14.7].

⁵² Section 905 of the Taxes Consolidation Act 1997 gives summary powers of entry and search to authorised officers of the Revenue Commissioners.

⁵³ Section 64 of the Safety, Health and Welfare at Work Act 2005 gives summary powers of search and entry to authorised officers of the Health and Safety Authority.

⁵⁴ The Competition and Consumer Protection Act 2014 establishes the Competition and Consumer Protection Commission, effective from 31 October 2014. The Commission has a mandate to enforce the law found in the Competition Acts 2002-2014, as well as EU law found in Articles 101 and 102 of the Treaty of the Functioning

The question might be posed as to why there are relatively few investigative powers of a coercive nature where there is otherwise no indication of the commission of a crime. Any answer, it seems, must have regard to the tension in liberal democracies, alluded to in part 2 of this chapter, between the personal rights of individuals and the sometimes competing interests of society more generally. As will be seen in the discussion in part 5 of this chapter, the law generally requires that a power of investigation only becomes operable when there is a reasonable suspicion or belief of criminal wrongdoing on the part of the person intended to be the subject of the power, thereby providing some measure of protection for relevant personal rights. The relatively small number of sources of law that provide for the indiscriminate exercise⁵⁵ of coercive powers of investigation have, on their face, strong public interest and public health justifications in the form of, for example, safer roads and businesses.

This part of the chapter has considered the breadth of investigators' powers where they are at a 'standing start' and lack any basis for suspecting the commission of a white-collar crime. However, most investigations might be thought of as reactive rather than proactive: an investigator's approach to a person is more likely to be made only after some suggestion of impropriety has been reported or unearthed.

4 Laws Creating Reporting Obligations and Encouraging Disclosure

The powers enjoyed by investigators increase substantially where they have a suspicion that a white-collar crime has been committed by a particular alleged perpetrator. It should be observed that a certain level of suspicion (generally at or about the level of 'reasonable' suspicion, although the exact test can vary from statutory power to statutory power⁵⁶) must be present before relevant powers accrue to investigators. This situation is consistent with the respect for personal rights in liberal democracies: interference with such rights must be rational rather than arbitrary.

of the European Union and associated EU Regulations. Sections 36 and 37 of the Competition and Consumer Protection Act 2014 describe the extensive powers of investigation available to the Competition and Consumer Protection Commission.

⁵⁵ In the sense of not requiring prior suspicion of wrongdoing referable to the subject of the particular investigative power.

⁵⁶ See the discussion at part 5 of this chapter.

Investigators may, through a variety of ways, acquire reasonable suspicion that a white-collar crime has been committed; such suspicion might be accrued through their own proactive investigations⁵⁷ or through reactive investigations prompted by, for example, unsolicited complaints received from members of the public. However, suspicion that a crime has been committed can also come about through a number of statutory provisions which oblige individuals to report conduct that they believe may be criminal in nature. These provisions amount to statutory exceptions to the general principle that a person is entitled to keep his counsel. Specifically, under a range of statutory provisions and in relation to crimes covered by those provisions, a person who comes across circumstances suggestive of the commission of a criminal offence must volunteer certain information or risk criminal prosecution. The backdrop to these statutory provisions is the common law crime of misprision of felony, which is a crime of failing to report knowledge of a felony to the appropriate authorities.⁵⁸ Further provisions encourage the disclosure, by way of whistleblowing, of information concerning suspected wrongdoing.

4.1 Statutory Obligations to Inform

A general duty to disclose information arises under section 9 of the Offences Against the State (Amendment) Act 1998, which provides that a person will be guilty of an offence if, without reasonable excuse, he fails to disclose information which he knows or believes might be of material assistance in preventing the commission of a serious offence by any other person, or in securing the apprehension, prosecution or conviction of any other person for a serious offence. For the purposes of the section, a 'serious offence' is an offence that carries a maximum penalty of at least five years and is an offence that involves loss of human life, serious personal injury (other than injury that constitutes an offence of a sexual nature), false imprisonment, or a serious loss of or damage to property or a serious

⁵⁷ For example, the exercise of the common law entitlement of investigators to communicate and make enquiries, discussed at part 3 of this chapter, could result in the emergence of a set of circumstances that provide the level of suspicion necessary to invoke another common law or statutory power of investigation.

⁵⁸ In *Sykes v DPP* [1962] AC 582 (HL), after it had been argued that it had never existed as a crime, or had become obsolete if it ever did, misprision of felony was held to be a common law crime of failing to report knowledge of a felony to the appropriate authorities. The crime was classified as a misdemeanour. If the crime ever existed in Ireland, it would seem that it did not survive the enactment of section 3 of the Criminal Law Act 1997, which abolished the distinction between felonies and misdemeanours.

risk of any such loss, injury, imprisonment or damage.⁵⁹ Notwithstanding the title of the governing legislation, section 9 criminalises the withholding of information in relation to serious crime and not just terrorism offences and therefore has the potential to serve as the catalyst for white-collar crime investigations.

Of direct relevance to the area of white-collar crime, section 19 of the Criminal Justice Act 2011 creates an obligation in the same terms as section 9 of the Offences Against the State (Amendment) Act 1998 in relation to a very wide array of 'relevant offences'.⁶⁰ As noted in Chapter 2, a raft of relevant offences is set out in Schedule 1 to the Act, including offences relating to banking, investment of funds and other financial activities, company law offences, money laundering and terrorist offences, theft and fraud offences (including many frequently prosecuted offences detailed in the Criminal Justice (Theft & Fraud Offences) Act 2001), bribery and corruption offences, consumer protection offences and criminal damage to property offences. Section 3(2) of the 2011 Act allows for the list of the relevant offences to be added to for all arrestable offences of the type referred to in Schedule 1, but also competition offences, criminal acts involving the use of electronic communication networks and information systems or against such networks or systems or both, and offences concerning the raising and collection of taxes and duties.

The offence of failing to report information under section 19 of the 2011 Act is punishable by an unlimited fine and imprisonment for up to five years or both. A person who has information which he or she knows or believes might be of material assistance in preventing the commission by another person of a relevant offence or in securing the apprehension, prosecution or conviction of another person for such an offence, and who fails without reasonable excuse to disclose such information as soon as practicable to the Gardaí will be guilty of the offence.

⁵⁹ Section 8 of the Offences Against the State (Amendment) Act 1998. Sections 2 and 3 of the Criminal Justice (Withholding Information on Offences Against Children and Vulnerable Persons) Act 2012 create offences as regards a range of offences against children and vulnerable persons that mirror the language of section 9 of the Offences Against the State (Amendment) Act 1998.

⁶⁰ In Ch 2, the list of 'relevant offences' for the purpose of the Criminal Justice Act 2011 together with the statutory scheme for adding to that list was adopted as a basis for an understanding of the term 'white-collar crime' for the purposes of the instant research.

Section 19 of the 2011 Act amounts to a modern statutory incarnation of the common law offence of misprision of felony, which, as has been noted, has had doubtful applicability in Ireland. Section 19 gives teeth to the 2011 Act and it was accorded centre stage in the press release publicising the passing into law of the Act, in which the then Minister for Justice and Equality was quoted as saying:

I am confident that the Act will provide early assistance to the Gardaí in their current and future investigations. In particular, I want to draw attention to the offence of withholding information provided for in section 19 of the Act.

People who have information relating to current investigations into financial wrongdoing, even if it predates the enactment of this legislation, who have not made that information available to An Garda Síochána, need to be aware that following the commencement of this Act, they will be under a legal obligation to assist the Gardaí in their investigations. Should it emerge, following the commencement of this Act, that they failed to do so, they themselves will be liable to criminal charges. This is just one of the reasons why this Act is so important in the context of current investigations.⁶¹

Nonetheless, questions arise from the wording of section 19. First, the Act does not define what amounts to a 'reasonable excuse' for withholding information. In a Dáil debate of the Bill leading to the 2011 Act, the Minister stated:

[I]nvestigations and prosecutions under this section will be subject to the exercise of discretion in the usual way by the Garda Síochána as to the appropriateness of such investigation and prosecution. In addition, an important safeguard in regard to section 19 is that a direction by the Director of Public Prosecutions will be required before a prosecution under that section can proceed.⁶²

A general aspiration in a Dáil debate that the DPP would exercise her independent

⁶¹ Department of Justice and Equality Press Release (5 August 2011).

⁶² Dáil Deb 20 September 2011, vol 740 col 705.

discretion appropriately falls considerably short of clear legislative guidance as to the circumstances in which a person might legitimately withhold information that might fall within the scope of section 19.

Secondly, section 19 states that a person has an obligation to disclose information that may be of material assistance in connection with the commission of an offence by another person. But, as noted by Costelloe, uncertainty arises in a situation where the information could also be used against the person disclosing it.⁶³ It is not clear, for example, that the usual rules against self-incrimination apply.⁶⁴ This, in turn, leaves open the question as to whether a legitimate concern regarding potential self-incrimination could amount to a 'reasonable excuse' for withholding relevant information.

Thirdly, there is no clear exception provided for section 19 offences where the issue of legal professional privilege arises.⁶⁵ Costelloe surmises that, as the section does not expressly state that legal professional privilege does not apply, the privilege remains and would trump any possible obligation under the section.⁶⁶ However, a lack of legislative guidance has, again, created uncertainty on this point, and we must await judicial determination of the issue in the absence of further legislative clarification.

Fourthly, there is a lack of clarity as to the extent of a person's obligations. Costelloe gives the example of an accountancy firm that obtains information that falls within the scope of section 19.⁶⁷ Such a firm may have a concern that the revelation of information on foot of section 19 may cause it to breach an express or implied contractual term of confidentiality in relation to the information provided to the firm. The English authority of *D v National Society for the Prevention of Cruelty to Children* holds that in such a situation a 'public interest test' is appropriate such that, if this approach was to be followed in this jurisdiction, a defence of legal necessity arising from the operation of section 19 would likely prove a good defence to any possible breach of contract claim made by a person

⁶³ S Costelloe, 'Part III - Criminal Justice Act 2011' (Bar Council Conference, Dublin, 28 January 2012) 7.

⁶⁴ The privilege against self-incrimination is discussed in Ch 5.

⁶⁵ Legal professional privilege is considered in Ch 5.

⁶⁶ S Costelloe, 'Part III - Criminal Justice Act 2011' (Bar Council Conference, Dublin, 28 January 2012) 11.

⁶⁷ S Costelloe, 'Part III - Criminal Justice Act 2011' (Bar Council Conference, Dublin, 28 January 2012) 11.

against the accountancy firm.⁶⁸ However, yet again, in the absence of legislative direction on the point it seems that a judicial determination of the issue must be awaited before there can be certainty. Finally, there is no definition of the phrase 'as soon as reasonably practicable' as used in section 19. It is not clear, for example, whether, if a company notices a possible issue that brings section 19 into play and commences an inquiry, that company might be in breach of the section if it waits until the conclusion of the inquiry before making efforts to comply with section 19 rather than move to comply at the first sign of something amiss.

On their face, the provisions discussed in this section provide an impetus for the reporting of a range of crimes and, particularly through section 19 of the Criminal Justice Act 2011, most, if not all, crimes that might reasonably be labelled white-collar crimes. However, the practical operation of such provisions is another matter and initial indications in relation to the efficacy of section 19 are not particularly promising.⁶⁹ Further uncertainty arises as regards the viability of prosecutions for failure to report serious crime. An apparent difficulty in any such prosecution would be adducing sufficient proof of the requisite degree of knowledge or belief that a relevant crime had been committed, or was in the process of being committed, on the part of a defendant alleged to have withheld information regarding a possible crime.

The efficacy of section 19 also depends on the will to prosecute for breaches of the provision and the deterrent effect of any such prosecutions. The question arises as to the extent to which investigators are under a duty to act where a report of suspected or alleged criminal activity is received, whether the report is made voluntarily or as a result of a statutorily described 'misprision of felony'- type obligation to report. The Garda Síochána Act 2005 states that An Garda Síochána has, as part of its function to provide policing and security services for the State, the objective of bringing criminals to justice, including by

⁶⁸ [1978] AC 193 (HL).

⁶⁹ Annual Reports of the Office of the Director of Corporate Enforcement show that the Office received one report under section 19 in 2012: Office of the Director of Corporate Enforcement, *Annual Report 2012* (Stationery Office 2013) 35; none in 2013: Office of the Director of Corporate Enforcement, *Annual Report 2013* (Stationery Office 2014) 31; and two in 2014: Office of the Director of Corporate Enforcement, *Annual Report 2014* (Stationery Office 2015) 22.

detecting and investigating crime.⁷⁰ The 2005 Act also states that section 7, dealing with the function of An Garda Síochána, is not to be taken to confer on any person a right in law that he would not otherwise have to require the Garda Síochána to perform a function or provide a service referred to in the section or to desist from any action.⁷¹ Thus it would seem that the 2005 Act is careful to empower, rather than require, An Garda Síochána to investigate reported crimes. Given resource implications and other practical restraints, the garda function of detecting and investigating crime is likely to be tempered by a consideration of what is considered reasonable in all of the circumstances. The investigative obligations on other bodies that might receive complaints of alleged white-collar crimes are cast in similar terms to those that apply to An Garda Síochána.⁷²

In addition to provisions such as section 19 of the Criminal Justice Act 2011 that oblige anyone to report suspected criminal conduct of a particular kind, there are a range of measures that place reporting requirements on narrower categories of people in the context of suspected white-collar crimes. The reported material may be the impetus for the commencement of a criminal investigation on the part of the body that receives the material. For example, under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, financial institutions and other designated persons for the purposes of the Act are required to report financial transactions that they suspect are connected to the offence of money laundering (referred to as suspicious transaction reports or 'STRs') to the Garda Bureau of Fraud Investigation and to the Revenue Commissioners.⁷³

Certain categories of professionals, such as auditors,⁷⁴ receivers⁷⁵ and liquidators⁷⁶ are, pursuant to a number of different statutes, obliged to report a range of suspected offences.

⁷⁰ Garda Síochána Act 2005, s 7(1)(f).

⁷¹ Garda Síochána Act 2005, s 7(5)(a).

⁷² For example, under section 949 of the Companies Act 2014, it is a 'function' of the Director of Corporate Enforcement 'to investigate instances of suspected offences under this Act'.

⁷³ Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, s 42.

⁷⁴ A wide range of reporting obligations arise for auditors, including under the following provisions: section 59 of the Criminal Justice (Theft and Fraud Offences) Act 2001, section 1079 of the Taxes Consolidation Act 1997, section 83 of the Pensions Act 1990, section 122 of the Credit Union Act 1997 and section 393 of the Companies Act 2014.

⁷⁵ Receivers have reporting obligations to the DPP and the Director of Corporate Enforcement under section 447 of the Companies Act 2014.

⁷⁶ Liquidators have reporting obligations to the DPP and the Director of Corporate Enforcement under section 723 of the Companies Act 2014.

Depending on the relevant statutory provision, suspected offences are reported either to the ODCE or the DPP; such reports may then become catalysts for criminal investigations by either office. These reporting obligations would seem to be designed to circumvent one of the most common difficulties associated with the investigation of white-collar crime, namely the difficulty in uncovering it in the first place. By obliging relevant professionals to report suspected crimes, or even just suspicious transactions, the law increases the chances that white-collar crime will be revealed and, in turn, investigated.⁷⁷ This approach also has the advantage of encouraging best practice in the professions affected by the reporting obligations.

Finally, it might be noted that the Disclosure of Information for Taxation and Other Purposes Act 1996 allows for the formal disclosure of information between the Revenue Commissioners and the Criminal Assets Bureau. Inevitably, some of this information forms the basis for the commencement of white-collar crime investigations. Although informal disclosure of information occurs as between other bodies with responsibility for the investigation of white-collar crime, it would seem sensible to put such exchanges on a similar statutory footing.⁷⁸

4.2 Whistleblowing

A mandatory duty to disclose information, of the kind encapsulated by section 19 of the Criminal Justice Act 2011 Act, can be distinguished from whistleblowing, which is an informal term that is generally understood to constitute the voluntary disclosure of wrongdoing or suspected wrongdoing.⁷⁹ Both forms of disclosure have in common the capacity to assist investigators and prosecutors in the detection, investigation and

⁷⁷ Within any statutory provision that provides for a reporting obligation, provision is generally made for an offence of failing to comply with the obligation; see, for example, section 393(6) of the Companies Act 2014.

⁷⁸ For example, the ODCE has a Memorandum of Understanding with the Central Bank concerning the exchange of information between the two entities: Office of the Director of Corporate Enforcement, *Annual Report 2014* (Stationery Office 2015) 19. See part 2 of Ch 4 for more detailed consideration of issues concerning bodies tasked with the investigation and prosecution of white-collar crime.

⁷⁹ It has been noted that the generality of the term 'whistleblowing' leads to confusion, with some people contending that it covers mandatory reporting, while others take the view that it only applies to voluntary disclosures: Oireachtas Library and Research Service, *Spotlight: Disclosure of Information: Duty to Inform and Whistleblowing* (December 2011) 3. For present purposes, the term is understood to refer to voluntary disclosures. For discussion of the law on whistleblowing as it applies in the UK, see: J Bowers, M Fodder, J Lewis and J Mitchell, *Whistleblowing: Law and Practice* (2nd edn, OUP 2012).

prosecution of white-collar crime. Statutory protection is crucial if whistleblowing is to be encouraged, as a person is unlikely to volunteer information without some degree of assurance that they will not suffer repercussions for their actions. In a white-collar crime context, a person may be in the vulnerable position of an employee giving information against their employer or a fellow employee and may be wary of the risk of losing their livelihood. The particular value of whistleblowing in the detection of certain forms of white-collar crime has been noted in the context of corruption allegations in the planning process here and so it is of huge societal interest that the activity is encouraged and protected.⁸⁰

General protection for whistleblowers was introduced in this jurisdiction in the form of the Protected Disclosures Act 2014 and marked a move to generic protection of whistleblowers after years of an ad hoc, sectoral approach to the issue that included a number of different provisions of application in a white-collar crime context.⁸¹ At the time that the heads of the Protected Disclosures in the Public Interest Bill 2012 were published by the Minister for Public Expenditure and Reform in early 2012, the Minister stated that ‘best international practice’ would inform the drafting of the legislation.⁸² The Protected Disclosures Bill 2013

⁸⁰ The Mahon Tribunal, *Tribunal of Inquiry Into Certain Planning Matters and Payments* (March 2012) 2531, remarked on the importance of protection for whistleblowers in the context of the detection of corruption offences. In a US context, a study of 230 reported corporate frauds concerning companies with assets of more than \$750 million during the period 1996 - 2004 revealed that detections were prompted by whistleblowing employees in 19% of cases: A Dyck, A Morse, L Zingali, *Who Blows the Whistle on Corporate Fraud?* (National Bureau of Economic Research Working Paper, February 2007).

⁸¹ The Government Reform Unit, Department of Public Expenditure and Reform, *Protected Disclosures Bill 2013 Regulatory Impact Analysis* (July 2013) 4, considered the history to the decision of the government in February 2012 to draft protected disclosures legislation and observed that ‘[t]he Government decided on 7 March 2006 (decision number S180/20/10/0237A) to address the issue of “whistleblowing” on a sectoral basis and to include, where appropriate, “whistleblowing” provisions in all future draft legislation. It also decided to remove the Whistleblowers Protection Bill 1999 from the Dáil Order Paper.’ Therefore, there was a substantial period of time during which protection for whistleblowers operated on a sectoral basis in relation to areas as diverse as child protection (Protections for Persons Reporting Child Abuse 1998, s 4), workplace safety (Safety, Health and Welfare at Work Act 2005, s 27) and charities (Charities Act 2009, s 62). In a white-collar crime context, protective provisions for whistleblowers have been introduced over the years across a range of Acts, including: Pensions Act 1990, s 84 (protection for reports of suspected misappropriation or fraud); Competition Act 2002, s 50 (protection for reports of suspected competition law offences); National Asset Management Agency Act 2009, s 222 (protection for reports of suspected offences); Criminal Justice Act 2011, s 20 (protection for reports of suspected offences covered by the Act).

⁸² Joint Committee on Finance, Public Expenditure and Reform Deb 18 April 2012, 4, where the Minister stated that regard would be had to the UK and New Zealand models of whistleblowing legislation in the drafting of the Irish legislation. The relevant UK legislation is the Public Interest Disclosure Act 1998 and the New Zealand statute is the Protected Disclosures Act 2000.

was published by the Minister for Public Expenditure and Reform in July 2013 and the legislation was finally enacted as the Protected Disclosures Act 2014 in July 2014.

Protection under the 2014 Act is afforded to anyone who qualifies as a 'worker' for the purposes of the legislation. The term 'worker' is defined as including employees, contractors, consultants, agency staff, former employees, temporary employees, interns, trainees, and members of the Permanent Defence Force and the Reserve Defence Force.⁸³ The broad meaning ascribed to the term 'worker' means the veil of protection afforded by the legislation is cast usefully wide, although there has been criticism of the fact that volunteers were not included in the statutory definition.⁸⁴ In a white-collar crime setting, the breadth of the definition is important given that, arguably, it is the more transient individuals who may be most inclined to blow the whistle on wrongdoing.

A 'protected disclosure' is defined as a disclosure of information which in the reasonable belief of the worker tends to show a 'relevant wrongdoing'.⁸⁵ The definition of 'relevant wrongdoing' is drafted broadly and includes: criminal offences; failure to comply with legal obligations; miscarriages of justice; health and safety matters; environmental damage; unlawful or improper use of funds or resources of a public body; and, an act or omission by or on behalf of a public body which is oppressive, discriminatory, grossly negligent or constitutes gross mismanagement.⁸⁶ If information relating to these matters is likely to be concealed or destroyed, such concealment or destruction is also a 'relevant wrongdoing'.⁸⁷ In a provision that has relevance to instances of transnational white-collar crime, the geographical location of a 'relevant wrongdoing' is immaterial for the purposes of the legislation.⁸⁸ The legislation provides that the motivation for making a disclosure is irrelevant.⁸⁹ A disclosure of information in respect of which a claim to legal professional

⁸³ Protected Disclosures Act 2014, s 3(1).

⁸⁴ L Kierans, 'Blowing the Whistle in the Workplace - Challenges and Protections' (Bar Council Seminar, Dublin, October 2014) 6.

⁸⁵ Protected Disclosures Act 2014, s 5(2)(a).

⁸⁶ Protected Disclosures Act 2014, s 5(3)(a)-(g).

⁸⁷ Protected Disclosures Act 2014, s 5(3)(h).

⁸⁸ Protected Disclosures Act 2014, s 5(4).

⁸⁹ Protected Disclosures Act 2014, s 5(7). This may take account of the UK experience on this issue. The Public Interest Disclosure Act 1998 in that jurisdiction originally required that disclosures had to satisfy a 'good faith' test. However, in an amendment to the legislation introduced by section 18 of the Enterprise and Regulatory Reform Act 2013, the requirement that a worker must make a protected disclosure 'in good faith'

privilege could be maintained in legal proceedings is not a protected disclosure if it is made by a person to whom the information was disclosed in the course of obtaining legal advice.⁹⁰

The 2014 Act provides a number of distinct disclosure channels for potential whistleblowers that are not ranked or require a worker to use one channel before another, namely: to an employer or other responsible person;⁹¹ to a prescribed person;⁹² to a Minister;⁹³ or to a legal adviser.⁹⁴ There is also provision for a worker to make a disclosure in unspecified 'other cases', which could include disclosure to outside third parties such as the media.⁹⁵ However, if a worker seeks to avail of this avenue there are a number of additional requirements that must be satisfied in order for the disclosure to be protected. This demonstrates an intention on the part of the legislature to promote whistleblowing on an internal level in the first instance and is, perhaps, a debatable legislative strategy that may have a dissuasive effect given that potential whistleblowers may find it riskier and harder to make a report within their place of work.

In order to gain protection in relation to a disclosure made externally to the work setting, a worker must reasonably believe that the information disclosed, and any allegation contained in it, are substantially true.⁹⁶ Further, the disclosure must not be made for personal gain and in all the circumstances of the case, it must be reasonable for the worker

was removed. This was in line with arguments made by Dame Janet Smith in her 2004 report on the Shipman Inquiry that the requirement of 'good faith' should be omitted in favour of a 'public interest' requirement so as to move the focus of the legislation to 'the message rather than the messenger', on the basis that a disclosure which is in the public interest should not be unprotected solely because it is made in bad faith: Shipman Inquiry, Fifth Report, *Safeguarding Patients: Lessons From the Past – Proposals for the Future*, Chapter 11: 'Raising concerns: the Way Forward' (2004) Col 6394.

⁹⁰ Protected Disclosures Act 2014, s 5(6).

⁹¹ Protected Disclosures Act 2014, s 6. 'Responsible person' refers to the reporting of wrongdoing to a person nominated by the worker's employer to receive such a disclosure.

⁹² Protected Disclosures Act 2014, s 7. The Protected Disclosures Act 2014 (Section 7(2) Order 2014, SI 2014/339, prescribes 72 regulatory bodies for the purposes of this section. Of relevance to white-collar crime, the bodies include the Director of Corporate Enforcement and the Director of Internal Audit in the Office of the Revenue Commissioners. Wrongdoing reported under this provision should fall under the realm of responsibility of the prescribed body.

⁹³ Protected Disclosures Act 2014, s 8. This applies in the case of worker who works for a public body and the matter falls within the remit of the Minister to whom the disclosure is made.

⁹⁴ Protected Disclosures Act 2014, s 9. This provision has application in a situation where a worker makes a disclosure in the course of obtaining legal advice, including advice relating to the operation of the Act.

⁹⁵ Protected Disclosures Act 2014, s 10.

⁹⁶ Protected Disclosures Act 2014, s 10(1)(a).

to have made the disclosure.⁹⁷ In addition, one or more of the following must be satisfied: the worker reasonably believes that he will be subjected to penalisation by his employer if he makes the disclosure to his employer, to a prescribed person, or to a Minister; if there is no prescribed person, that the evidence relating to the relevant wrongdoing will be concealed or destroyed if the worker makes the disclosure to his employer; that the worker previously made a disclosure of substantially the same information to his employer, to a prescribed person or to a Minister in compliance with the Act; or the relevant wrongdoing is of an exceptionally serious nature.⁹⁸ The approach of setting the bar higher for disclosure to outside parties encourages a situation whereby employers are given a reasonable opportunity to deal with an allegation of wrongdoing raised by a worker, while also ensuring that wider dissemination of information concerning wrongdoing, or suspected wrongdoing, is not precluded if a number of relatively stringent criteria are met but, as already alluded to, the obstacles involved in this approach may have a chilling effect on potential whistleblowing.

The Act provides that a more exacting regime applies in order to gain protection for disclosures made in the contexts of law enforcement,⁹⁹ and security, defence, international relations and intelligence.¹⁰⁰ On their face, these more restrictive provisions protect against the release of information that might damage the interests of the State in a narrow range of areas, although the argument could be made that this is merely an attempt to exclude certain public sector contexts from the scope of the Act. Moreover, the use of general categories like 'security' and 'international relations' could be open to abuse if, to take one example, international State sponsored banking interests were to be brought under the aegis of such categories in a manner that is outside the spirit of what the legislation seeks to achieve.

⁹⁷ Protected Disclosures Act 2014, ss 10(1)(b) and (d). Section 10(3) provides that, in determining whether a disclosure is reasonable, regard shall be had to a number of factors including the identity of the person to whom the disclosure is made, the seriousness of the relevant wrongdoing, whether the wrongdoing is continuing or likely to occur in the future and whether disclosure is made in breach of a duty of confidentiality.

⁹⁸ Protected Disclosures Act 2014, s 10(2).

⁹⁹ Protected Disclosures Act 2014, s 17.

¹⁰⁰ Protected Disclosures Act 2014, s 18.

The Act provides a range of protections for workers, including: protection from dismissal for having made a protected disclosure;¹⁰¹ protection from penalisation by the employer;¹⁰² a right of action in tort where a whistleblower or a member of his family experiences coercion, intimidation, harassment or discrimination at the hands of a third party;¹⁰³ civil immunity from action for damages and a qualified privilege under defamation law;¹⁰⁴ and, subject to certain exceptions, protection of a whistleblower's identity.¹⁰⁵ Furthermore, it is expressly stated that it will not be a criminal offence to make a whistleblowing report that is a protected disclosure under the Act.¹⁰⁶ Superficially, there is some strength to the protections on offer but it remains to be seen how effective they will be in practice. For example, one wonders how realistic it is to assume that a person who blows the whistle on corporate wrongdoing within their place of employment can continue to work in the same place given the stakes involved in such disclosure.

On the whole, the Protected Disclosures Act 2014 is a welcome attempt to codify and unify protections for whistleblowers, which, until the promulgation of the Act, were scattered across the statute book and applied to narrow sectors of the working population. The operation of section 24 and Schedule 4 of the 2014 Act provides that existing statutory protections are not repealed but do not apply in the case of a protected disclosure for the purposes of the 2014 Act and so, practically speaking, the 2014 Act will move to the foreground of protection for whistleblowers given the breadth of protection that it affords. A key advantage of the 2014 Act over more piecemeal provisions is that it sends out a clear, coherent message to all workers that there is State encouragement of, and protection for, the reporting of wrongdoing, or suspected wrongdoing, in a workplace setting. It is too early to say whether the legislation will have the desired effect of increasing the incidence of whistleblowing, but the statute has the merits of singularity of purpose,

¹⁰¹ Protected Disclosures Act 2014, s 11.

¹⁰² Protected Disclosures Act 2014, s 12.

¹⁰³ Protected Disclosures Act 2014, s 13.

¹⁰⁴ Protected Disclosures Act 2014, s 14.

¹⁰⁵ Protected Disclosures Act 2014, s 16. Revelation of the identity of a person who makes a disclosure is permissible in a number of situations, including if the person to whom the disclosure is made takes reasonable steps to avoid such a revelation, or if they do not think that the worker who made the disclosure would object to the revelation, or the revelation is necessary for the investigation of the wrongdoing, or it is otherwise in the public interest that the identity of the worker who made the disclosure is revealed.

¹⁰⁶ Protected Disclosures Act 2014, s 15.

comprehensiveness and due regard for comparative legislation in other jurisdictions; time will tell whether the potential points of weakness and uncertainty identified in the preceding analysis will require legislative remedy.

5 Reactive Powers of Investigation

It is clear from the foregoing that investigators enjoy basic rights to stop people and to approach and communicate with people. Investigators may also benefit from provisions that create reporting obligations or encourage the disclosure of wrongdoing by way of whistleblowing. However, the question arises as to the point at which investigators are entitled to avail of the full panoply of what might be referred to as core investigative powers, including powers of surveillance, entry, search, seizure, arrest and pre-charge detention. As alluded to at an earlier point in this chapter, the answer, in broad terms, is that an investigator must have a reasonable suspicion or belief that a white-collar crime has been committed by a particular suspect or suspects. Yet, there is an absence of a common test concerning the state of mind that an investigator must have before a particular power of investigation can be deployed. Identifying the point at which a power becomes available to an investigator requires consideration of the language of the source of law for the individual power that an investigator may seek to exercise; only by analysing the specific power that is sought to be invoked can it be ascertained whether an investigator has satisfied the relevant threshold to trigger the power at hand.¹⁰⁷ While the differences between the various tests may seem relatively small, O'Malley has pointed out that there is a conceptual distinction between powers of investigation requiring reasonable belief as to the existence of a specified state of affairs and those that demand only a reasonable suspicion.¹⁰⁸

¹⁰⁷ The most commonly used formulae are 'reasonable cause to believe' (see, for example, section 13 of the Criminal Damage Act 1991 concerning a power of search in the context of that statute) and 'reasonable cause to suspect' (see, for example, ss 23 and 25 of the Misuse of Drugs Act 1977 concerning powers to search and arrest in connection with drugs offences). The term 'reasonable suspicion' is used in section 30 of the Offences Against the State Act 1939. The power to arrest for 'drink driving' (now an offence under section 4 of the Road Traffic Act 2010) is unusual in that it can be exercised where a garda is of the 'opinion' that a person is committing or has committed a relevant offence. However, the courts have held that such an 'opinion' must be genuine and reasonably held: *DPP v Finnegan* [2008] IEHC 347, [2009] 1 IR 48 (this case analysed the precursor to section 4 of the Road Traffic Act 2010, the similarly worded section 49 of the Road Traffic Act 1961).

¹⁰⁸ T O'Malley, *The Criminal Process* (Thomson Round Hall 2009) [11.20].

The case of *DPP v O'Driscoll* provides a comprehensive review of the law concerning the level of suspicion required to activate many core investigative powers in this jurisdiction and adopts principles to be applied in this jurisdiction.¹⁰⁹ At issue was the question of what amounted to the 'reasonable cause to suspect' that was required to operate a particular power of investigation.¹¹⁰ The Supreme Court adopted the following written submissions of the appellant as an accurate summary of the relevant case law and reflective of the applicable legal principles:

1. The reasonable cause to suspect must be fair and reasonable and honestly held on the basis of information available to a member of An Garda Síochána at the relevant time.
2. The reasonable cause to suspect must be referable to facts or information which would satisfy an objective observer: it is an objective test.
3. The objective test requires that the basis for the reasonable cause to suspect be examined by reference to the time and the circumstances in which the power was exercised.
4. The facts or information grounding the reasonable cause to suspect may be either what the member of the Garda Síochána has observed or information that he has received. The information acted on by the member need not be based on his own observations since he is entitled to have a reasonable cause to suspect based on what he is told.
5. The reasonable cause to suspect may be based on information from any source including an anonymous source. Since it is only the information that is in the mind of the member of An Garda Síochána that is relevant it is unnecessary to investigate what was known to an informant or whether the information is true. If the information grounding the reasonable cause to suspect turns out to be ill-founded the lawfulness of the entry will not be impugned. What is relevant is the information available to the member of the Garda Síochána at the relevant time.

¹⁰⁹ [2010] IEHC 2, [2010] IESC 42.

¹¹⁰ The power of investigation in question was a power to search a premises in connection with suspected offences contrary to the Control of Horses Act 1996.

6. Material grounding a reasonable cause to suspect need not satisfy the same threshold as is required to lay a charge nor is it necessary that it constituted admissible evidence.¹¹¹

The court also adopted a phrase from the case of *R v Da Silva*.¹¹² In that case, the English Court of Appeal was concerned with the meaning of 'suspecting' in section 93A(1)(a) of the Criminal Justice Act 1988, and stated the following in that regard:

It seems to us that the essential element in the word 'suspect' and its affiliates, in this context, is that the defendant must think that there is a possibility which is more than fanciful, that the relevant facts exist.¹¹³

It would appear that that the principles adopted by the Supreme Court in *O'Driscoll* encapsulate the law on the formation of suspicion as it applies, in general terms, in this jurisdiction. However, as already noted, there is no all-embracing standard for the operation of core powers of investigation in this jurisdiction: each individual power has its own source of law and procedures, be that in statute or at common law. From the perspective of investigations involving white-collar crime, notwithstanding that the principles adopted in *O'Driscoll* give general guidance on the standard of suspicion required to be present in order to exercise various powers of investigation, it remains the case that, until such time, if ever, that a uniform standard applies to the invocation of investigatory powers, the primary consideration in each case is the specific wording of the individual power in issue.

Are there any practical implications arising from the current position as to the level of suspicion required to be present in order to activate a range of powers of investigation, particularly in a white-collar crime context? It seems likely that investigators operate as if the state of mind required for the activation of core powers of investigation is a unitary concept, notwithstanding subtle differences in language as between different statutory provisions. However, the differences remain relevant, superficially at least, for the

¹¹¹ [2010] IESC 42.

¹¹² [2006] 4 All ER 900 (CA).

¹¹³ [2006] 4 All ER 900 (CA) 905.

purposes of, for example, a written application for a search warrant. They may be of even greater relevance in the context of a trial where the investigator's state of mind at the point at which a particular power of investigation was exercised comes under scrutiny by the defence.

A common, statutorily described, standard of 'reasonable suspicion' for the invocation of investigative powers, underpinned by the principles adopted in *O'Driscoll*, rather than the collection of analogous phrases to be found in different parts of the statute book, would have the advantages of showing due respect for the personal rights of suspects, as well as clarity for all those concerned with the exercise of such powers, including witnesses, suspects and investigators.

6 Powers of Surveillance and Interception of Communications

The ability to intercept communications and otherwise engage in surveillance of suspects can be very useful tools for investigators in a white-collar crime context given the centrality of various methods of communication, including email and telephone calls, in the commission of such crime.¹¹⁴ If used effectively, such techniques can operate without the knowledge of white-collar crime offenders, thereby increasing the chances that investigators will collect evidence that will result in a viable prosecution. It is proposed to assess the general constraints placed upon investigators in this jurisdiction in the form of a requirement to respect a person's right to privacy as guaranteed by Art. 40.3.1° of the Constitution, and also by Article 8 of the European Convention on Human Rights (ECHR). Consideration will then be given to those statutes that impinge upon the right to privacy in certain circumstances and enable investigators to legitimately engage in interception of communications and surveillance of suspects. The section will conclude with a treatment of those issues of particular relevance to the investigation of white-collar crime.

It has already been suggested that the normative backdrop for the common law's reluctance

¹¹⁴ For expositions of the law concerning powers of surveillance and interception of communications, see: D Walsh, *Criminal Procedure* (Thomson Round Hall 2002) Ch 7; D Walsh *Human Rights and Policing in Ireland: Law Policy and Practice* (Clarus Press 2009) Part 2; G Orange, *Police Powers in Ireland* (Bloomsbury Professional 2013) Ch 12; L Campbell, *Organised Crime and the Law: A Comparative Analysis* (Hart Publishing 2013) Ch 4; R Coen, *Garda Powers: Law and Practice* (Clarus Press 2014) Ch 11.

to countenance the right of investigators to compel responses to general enquiries in the absence of an express legal authority providing for this was the premium liberal democracies place on respect for individual rights and freedoms. Evidence to support this contention comes in the form of the wealth of articles in the Constitution and the ECHR devoted to the guarantee of an assortment of personal rights.¹¹⁵

In the context of surveillance and interception of communications, the personal right of most relevance is the right to privacy. Although the Constitution does not expressly mention privacy, it is recognised as an unenumerated right protected by Article 40.3.1° by virtue of the judgment of Hamilton P in *Kennedy v Ireland*.¹¹⁶ In that case the plaintiffs had sought damages for violation of their rights in circumstances where interceptions of their phone calls were effected on foot of warrants purportedly issued pursuant to section 56 of the Post Office Act 1908. The State conceded that the issue of the warrants and the consequent interceptions, while improper on the particular facts of the case, were not illegal, inasmuch as no right of the plaintiffs, constitutional or otherwise, had been violated.

Hamilton P held that the plaintiffs had a constitutionally derived right to personal privacy, which included 'the right to privacy in respect of telephonic conversations without deliberate, conscious and unjustified references with and intrusion thereon by servants of the State'.¹¹⁷ In keeping with the established approach of the courts in this jurisdiction to determining the limits of constitutional personal rights, Hamilton P observed that the right to privacy is not an 'unqualified right' and considered whether the infringement of the right to privacy in the instant case could be justified by reference to the common good, the requirements of public order and morality, or some other constitutionally recognised interest.¹¹⁸ He found that no such grounds existed in the case before him. The existence of a constitutional right to privacy has been reaffirmed in subsequent case law.¹¹⁹

¹¹⁵ Of immediate relevance in the context of criminal proceedings are Article 38.1 of the Constitution and Article 6 of the ECHR, both of which guarantee trial in due course of law; a range of other provisions afford protection to individuals in the context of pre-trial investigations, including the right to liberty (Art 40.4.1° of the Constitution and Art 5 of the ECHR) and the right to privacy (Art 40.3.1° of the Constitution and Art 8 of the ECHR).

¹¹⁶ [1987] IR 587 (HC).

¹¹⁷ [1987] IR 587 (HC) 594.

¹¹⁸ [1987] IR 587 (HC) 592.

¹¹⁹ *DPP v Dillon* [2002] 4 IR 501 (CCA); *Herrity v Associated Newspapers (Ireland) Ltd* [2008] IEHC 249, [2009]

Notwithstanding the recognition of a constitutional right to privacy, reliance on broadly worded judicially created principles to identify the outer edges of the right has caused the Law Reform Commission (LRC) to argue that the precise limits of that right are not clear.¹²⁰ In a similar vein, Gillespie, writing in the context of surveillance by the State, argues that, as a matter of principle, the citizens of a state should have the right to know the specific circumstances under which their right to privacy can be interfered with by the State.¹²¹

Given the uncertainty regarding the outer limits of the right to privacy as guaranteed by the Irish Constitution, arguably the clearer obligation to regulate surveillance and interception of communications in this jurisdiction arises because of this country's ratification of the ECHR and its incorporation into Irish law. Section 3(1) of the European Convention on Human Rights Act 2003 provides that 'every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.' Thus, it would seem clear that investigatory authorities in this jurisdiction have an obligation to behave in a manner consistent with the ECHR and the jurisprudence of the European Court of Human Rights (ECtHR).

Article 8 of the ECHR outlines what might be described as a qualified right to privacy, with the first paragraph setting out the breadth of the right, and the second paragraph describing the circumstances in which the State may legitimately interfere with the right.¹²² It is beyond the scope of this work to consider in any detail the substantial body of ECtHR jurisprudence that has identified the contours of the right. In very broad terms, the relevant jurisprudence requires that any interference must first be expressly legal and the

1 IR 316; *DPP v Geasley* [2009] IECCA 22.

¹²⁰ Law Reform Commission, *Report on Privacy: Surveillance and the Interception of Communications* (LRC 57 - 1998). At [3.42] of the report, the following observation is made: 'The existing case law of our Superior Courts contains clear statements of a constitutional right of privacy and of freedom from unjustified surveillance. Nonetheless, the content and limits of this right are unclear and do not permit the citizen, the media or others concerned to determine with even reasonable certainty their rights and obligations in this sphere...There is then, in our view, a need to translate constitutional guarantees into prescriptive detail and a need to go beyond the piecemeal evolution of the common law.'

¹²¹ A Gillespie, 'Covert Surveillance, Human Rights and the Law' (2009) 3 ICLJ 71.

¹²² Article 8 is entitled 'Right to respect for private and family rights', and reads: '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

ECtHR must then be satisfied that it is in pursuance of a legitimate aim, that it is necessary and, finally, that it is proportionate.¹²³

In *Kane v Governor of Mountjoy Prison* the Supreme Court considered an instance of intense overt police surveillance involving close physical monitoring of a person.¹²⁴ In that case the person under surveillance was suspected of being a member of an unlawful organisation and was openly followed on foot by gardaí and by two patrol cars. The court held that, in the absence of a specific justification, the overt surveillance of an individual could constitute an infringement of his constitutional right to privacy and could be unlawful. The court further held that, in determining whether such surveillance was unlawful, the court would have regard to the nature of the surveillance, the nature and importance of the police duty being discharged and to all the circumstances of the case.

On the facts of the case before it, the Supreme Court endorsed the police surveillance involved having first considered the importance of the duty being discharged by the police in apprehending a person for whom the delivery of an extradition warrant was imminent.

In a comment on the *Kane* case, the LRC stated:

That this issue could be aired before the superior courts is a good thing. However, it would be preferable, in our view, to provide a basis in positive law for such police action especially where it involves covert surveillance. The need for a positive legal basis for such official action is in fact required under Article 8 of the European Convention.¹²⁵

¹²³ *Klass v Federal Republic of Germany* (1978) 2 EHRR 214; *Malone v United Kingdom* (1984) 7 EHRR 14; *Halford v United Kingdom* (1997) 24 EHRR 523; *Khan v United Kingdom* (2001) 31 EHRR 45; *Hewitson v United Kingdom* (2003) 37 EHRR 31; *Elahi v United Kingdom* (2007) 44 EHRR 3. For a comprehensive treatment and defence of the proportionality principle, see J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Nijhoff 2009); cf S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7(3) *International Journal of Constitutional Law* 468-493.

¹²⁴ [1988] IR 757 (HC and SC). Overt surveillance refers to a situation where those carrying out surveillance make no effort to hide their activity from those under surveillance, whereas covert surveillance refers to a situation where every effort is made to conceal the activity of surveillance from the subject of the surveillance.

¹²⁵ Law Reform Commission, *Report on Privacy: Surveillance and the Interception of Communications* (LRC 57 - 1998) [3.36].

The LRC observation highlights a view that covert surveillance, although not as obviously intrusive as overt surveillance, often amounts to a greater incursion on the right to privacy in circumstances where, by its nature, it is more likely than overt surveillance to occur unnoticed by the subjects of such surveillance.

Since shortly after the invention of the telephone, legal provision has been made to guarantee the secrecy of messages.¹²⁶ However, such measures did not cover the issue of State interception of communications. In the absence of legislative provisions dealing with the point, State interception of private communications has, in the past, been upheld by the English courts in the context of the prerogative power of the Crown and in the absence of a common law right to privacy, only for the ECtHR to rule that this was no justification for a clear breach of Article 8 of the ECHR.¹²⁷

As a matter of administrative practice, rather than legislative provision, Ireland followed the UK example, begun in 1937, of only carrying out State interception of communications on foot of warrants issued by way of ministerial order.¹²⁸ This relatively informal approach to State interception of communications potentially fell foul of the recognition in *Kennedy v Ireland* of an unenumerated constitutional right to privacy that prevented the 'unjustified' State interception of communications.¹²⁹

¹²⁶ Section 45 of the Telegraph Act 1863, section 20 of the Telegraph Act 1868, section 11 of the Post Office (Protection) Act 1884, and section 56 of the Post Office Act 1908, were aimed at officers and employees of telegraph companies and sought to prohibit 'divulging' of messages and the making of 'disclosures contrary to duty'.

¹²⁷ *Malone v United Kingdom* (1984) 7 EHRR 14.

¹²⁸ This practice was confirmed in Dáil debates (referred to in Hogan and Whyte, *Kelly: The Irish Constitution* (4th edn, Butterworths 2003) 579, n 39) that followed the revelation of the Kennedy/Arnold interception of the telephone calls of certain journalists, which led to the case of *Kennedy v Ireland* [1987] IR 587 (HC), discussed above.

¹²⁹ [1987] IR 587 (HC). For reasons of limitations of space and peripherality to the issues at the centre of the instant research, it is to be noted that the discussion and analysis of legislation that follows focuses on powers of surveillance and interception of communications, but not to the extent of considering the law dealing with the interception of postal communications. Portions of the Postal and Telecommunications Services Act 1983 and the Interception of Postal Packets and Telecommunications Messages (Regulations) Act 1993 originally regulated the transmission and interception of postal packets, although the area is now largely governed by the Communications Regulation (Postal Services) Act 2011.

6.1 Postal and Telecommunications Services Act 1983

The Postal and Telecommunications Services Act 1983 ('the 1983 Act') was primarily aimed at putting aspects of the Department of Post and Telegraphs on a corporate footing by setting up Bord Telecom and An Post. At the time of its passing, it was also an opportunity to comprehensively regulate the circumstances in which there may be permissible State interception of communications. However, it was an opportunity that was largely passed up.

Although section 98(1) of the 1983 Act, as originally promulgated,¹³⁰ restated a general prohibition on interception of phone calls by making it an offence to do so (similar older statutory prohibitions having been repealed by the same Act¹³¹), section 98(2) of the Act outlined a number of exceptions to the general prohibition, including garda investigation of an offence arising out of relevant communications, ministerial order made under section 110 of the Act¹³² or 'other lawful authority'.

Thus, the 1983 Act left the State with broad licence to engage in the interception of communications, with no indication as to the basis on which a ministerial order under section 110 of the Act might be made. As a result of the judgment of Hamilton P in *Kennedy*,¹³³ it might be said that telephone tapping constitutes a prima facie infringement of the unenumerated constitutional right to privacy and, as such, must be justified by reference to the common good, the requirements of public order and morality, or some other constitutionally recognised interest. The opacity surrounding the basis on which interceptions might be made under the 1983 Act as initially passed left it vulnerable to challenge.

¹³⁰ The 1983 Act has been amended in some significant respects by primary and secondary legislation, particularly the Interception of Postal Packets and Telecommunications Services Act 1993 and the Communications Regulation (Postal Services) Act 2011; the amendments introduced by those Acts will be discussed in due course.

¹³¹ Schedule 3 of the 1983 Act.

¹³² Section 110 provided that: '(1) The Minister [for Posts and Telegraphs] may issue directions in writing to either company... (2) to do (or refrain from doing) anything which he may specify from time to time as necessary in the national interest... (3) A company shall comply with every direction given to it under this section.'

¹³³ [1987] IR 587 (HC).

6.2 Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993

In the wake of *Kennedy v Ireland*,¹³⁴ the passing of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 saw the legislature address some of the difficulties inherent in the 1983 Act. A comprehensive definition of the term 'interception' is provided.¹³⁵ By laying down precise conditions for the authorisation of interceptions, further sections of the 1993 Act address concerns arising from the framing of the 1983 Act, whereby the failure of the 1983 Act, as initially promulgated, to identify the limit and scope of ministerial discretion to direct the interception of communications could lead to impermissible interference with the right to privacy.¹³⁶ In two further measures that bring the domestic regime for interception of communications more into kilter with the constitutional right to privacy and the demands of Article 8 of the ECHR, the 1993 Act provides for a comprehensive complaints procedure and its operation is reviewed by a High Court judge on an annual basis.¹³⁷

Associated secondary legislation authorises the interception of telecommunications 'sent to or from a particular telecommunications address'.¹³⁸ Orange expresses the view that the legislation was clearly intended to facilitate the tapping of landlines but may still be considered, in a more modern era of telecommunications, to refer to mobile phones if each subscriber's phone number is considered a telecommunications address.¹³⁹

A more uncertain issue is whether 'telecommunications address' is broad enough to capture communications by way of email, text message, and messages sent through instant

¹³⁴ [1987] IR 587 (HC).

¹³⁵ Under section 98(6) of the 1983 Act, as inserted by section 13(3) of the 1993 Act, 'intercept' means 'listen to, or record by any means, in the course of its transmission, a telecommunications message but does not include such listening or recording where either the person on whose behalf the message is transmitted or the person intended to receive the message has consented to the listening or recording, and cognate words shall be construed accordingly.' Section 1 of the 1993 Act made it an offence for an interception to occur otherwise than by way of an appropriately issued ministerial order.

¹³⁶ Interception of Postal Packets and Telecommunications Messages (Regulations) Act 1993, ss 2 - 7 and ss 11 - 12.

¹³⁷ Interception of Postal Packets and Telecommunications Messages (Regulations) Act 1993, ss 8 and 9.

¹³⁸ Interception of Postal Packets and Telecommunications Messages (Regulations) Act 1993, s 4(a)(iii).

¹³⁹ G Orange, *Police Powers in Ireland* (Bloomsbury Professional 2013) Ch 12; G Orange, 'Telephones and Computers Used as Evidence in Court' (Bar Council Seminar, Dublin, April 2013) 4.

messaging programmes or through social media platforms. In a white-collar crime context, a statutory basis for accessing the content of individual emails could yield material of great evidential value to investigators. Although there may not be a clear legal basis for doing so, Irish law enforcement agencies are making applications to internet service providers for such information. For example, a Microsoft Transparency Report for the period July - December 2014 shows that Microsoft, in its capacity as an internet service provider, received twenty-seven requests for customer data in relation to thirty-one accounts and that data was provided in over seventy per cent of cases, including access to the content of customer accounts (as opposed to subscriber or transactional data) in the case of over eleven per cent of the requests made.¹⁴⁰

Writing at the time of a Microsoft Transparency Report that disclosed the making and granting of requests in relation to Irish customer data for a period in 2012, digital rights campaigner and academic, TJ McIntyre, expressed the view that such access was unlikely to be authorised by the 1993 Act, as this was enacted prior to the advent of email, meaning that its drafters would not have envisaged that its provisions would have covered the interception of digital communication, such as email content.¹⁴¹ Further, he pointed out that if there was no appropriate legislative basis for the making and granting of such requests, the situation would put Ireland in breach of its obligations under Article 8 of the ECHR.¹⁴² Other commentators have also expressed the view that it seems unlikely that the provisions of the 1993 Act govern access to email content in circumstances where 'telecommunications message' is defined in the 1993 Act as having the meaning provided in the Postal and Telecommunications Services Act 1983.¹⁴³

While the 1993 Act goes a long way towards satisfying the balance required to vindicate the

¹⁴⁰ <<http://www.microsoft.com/about/corporatecitizenship/en-us/reporting/transparency/>> (accessed 21 September 2015).

¹⁴¹ TJ McIntyre, 'Microsoft Joins the Transparency Movement (With an Important Irish Dimension)' (IT Law in Ireland, 21 March 2013) <<http://www.tjmcintyre.com/2013/03/microsoft-joins-transparency-movement.html>> (accessed 21 September 2015).

¹⁴² TJ McIntyre, 'Microsoft Joins the Transparency Movement (With an Important Irish Dimension)' (IT Law in Ireland, 21 March 2013) <<http://www.tjmcintyre.com/2013/03/microsoft-joins-transparency-movement.html>> (accessed 21 September 2015).

¹⁴³ S More O'Ferrall and Ú Ní Raifeartaigh, 'Electronic Evidence Gathering and Use in Criminal Proceedings' (Irish Rule of Law Conference, Dublin, November 2014) 13.

right to privacy, it might be said that a point of weakness is the failure to set out an express system for notifying individuals whose phones have been tapped of that fact, unless there are security or operational reasons for not doing so. In this regard, the 1993 Act probably passes muster in terms of the requirements found in the jurisprudence concerning the constitutional right to privacy and Article 8 of the ECHR. However, the legislature did the bare minimum to ensure compliance with the constitutional right to privacy and eschewed the opportunity to spell out the circumstances in which notification of interceptions to the subjects of such interceptions might occur, thereby giving a fuller vindication of the individual's right to privacy. The point does not appear to have arisen in relevant Dáil debates.

A somewhat curious feature of the 1983 Act, and indeed the 1993 Act, is the failure to expressly state that the contents of authorised interceptions may be admissible evidence in criminal proceedings. It is as though the legislature saw the contents of such interceptions as material for intelligence, rather than prosecution, purposes. A dearth of case law on the point suggests that, in the absence of express provision for the admissibility of such evidence, investigators and prosecutors may have viewed the legislation in the same way and that the prosecution has not sought to adduce the content of intercepted communications in evidence in relevant trials. *DPP v Dillon*¹⁴⁴ and *DPP v Geasley*¹⁴⁵ are tangentially relevant to this point. In *Dillon*, the Court of Criminal Appeal held that the contents of an intercepted mobile telephone call were inadmissible in evidence as the interception was unlawful in circumstances where it had occurred outside of the relevant statutory scheme; in *Geasley*, the Court of Criminal Appeal held that evidence of the contents of telephone conversations gathered during an entrapment operation by a UK police agency was not the product of an interception within the meaning applicable to the Irish statutory regime and was, therefore, *prima facie* admissible evidence.

6.3 Criminal Justice (Surveillance) Act 2009

An attempt to regulate covert surveillance by the State came in the form of the Criminal

¹⁴⁴ [2002] 4 IR 501 (CCA).

¹⁴⁵ [2009] IECCA 22.

Justice (Surveillance) Act 2009. The 2009 Act might also be seen to regulate certain forms of overt surveillance. An indication of the scope of the legislation is given in the form of how surveillance and related terms are defined for the purposes of the 2009 Act. Surveillance is defined as:

- (a) monitoring, observing, listening to or making a recording of a particular person or group of persons or their movements, activities and communications, or
- (b) monitoring or making a recording of places or things, by or with the assistance of surveillance devices;¹⁴⁶

A 'surveillance device' is then defined as:

- an apparatus designed or adapted for use in surveillance but does not include-
- (a) an apparatus designed to enhance visual acuity or night vision, to the extent to which it is not used to make a recording of any person who, or any place or thing, that is being monitored or observed,
- (b) a CCTV within the meaning of section 38 of the Garda Síochána Act 2005, or
- (c) a camera, to the extent which it is used to take photographs of any person, or any thing that, is in a place to which the public have access;¹⁴⁷

Further, the 2009 Act is held not to apply to CCTV in garda stations or audio recording of garda questioning of people in connection with the investigation of offences or audio recording of any evidence or statement given in connection with court proceedings.¹⁴⁸ In the absence of any indications in relevant Dáil debates or elsewhere, it might be surmised that the policy reasons for these exceptions are to reduce the inconvenience for State authorities of having to comply with the requirements of the Act in situations that might be regarded to entail overt surveillance of a kind that amounts to a minimal and proportionate interference with the right to privacy. Thus, the scope of the 2009 Act is confined to audio recorders or video recorders in surveillance of people or locations where such devices have been planted in places, with particular exclusions arising in relation to garda stations, garda

¹⁴⁶ Criminal Justice (Surveillance) Act 2009, s 1.

¹⁴⁷ Criminal Justice (Surveillance) Act 2009, s 1.

¹⁴⁸ Criminal Justice (Surveillance) Act 2009, s 2(4).

questioning and statements or evidence connected to court proceedings.

Inasmuch as the 2009 Act regulates these forms of surveillance by requiring, *inter alia*, that authorisation for such surveillance be obtained, the question arises as to the position that obtains in relation to forms of surveillance falling outside of the ambit of the 2009 Act. Gillespie takes the simple example of a garda using binoculars to observe the comings and goings from a suspect's house, creating a log as he does so.¹⁴⁹ He notes that this surveillance, falling as it does outside the 2009 Act, would not require prior authorisation. He posits that the absence of legal provision for such 'ordinary' covert surveillance creates the following problem:

Placing only some forms of surveillance onto a statutory footing would appear an invitation for a person to petition the Irish courts or the ECtHR, complaining that other forms of surveillance interfere with their rights under Art. 8(1)... it is difficult to see how such an argument could be resisted.¹⁵⁰

It should be noted that Gillespie's concern only arises in relation to surveillance not covered by the 2009 Act or some other statutory framework. For example, interception of communications is expressly stated to fall outside the remit of the 2009 Act and to remain governed by the provisions of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993.¹⁵¹ Similarly, another exclusion from the 2009 Act, namely electronic recording of questioning by gardaí, is governed by another legislative provision.¹⁵²

The parties to which the provisions of the 2009 Act apply are An Garda Síochána in respect of arrestable offences (defined as an offence carrying a maximum period of imprisonment of five years or more), the Defence Forces in respect of threats to the security of the State and the Revenue Commissioners in respect of certain revenue offences.¹⁵³ Restricting the

¹⁴⁹ A Gillespie, 'Covert Surveillance, Human Rights and the Law' (2009) 3 ICLJ 71, 77.

¹⁵⁰ A Gillespie, 'Covert Surveillance, Human Rights and the Law' (2009) 3 ICLJ 71, 77.

¹⁵¹ Criminal Justice (Surveillance) Act 2009, s 2(3).

¹⁵² Criminal Justice Act 1984, s 27.

¹⁵³ Criminal Justice (Surveillance) Act 2009, s 2(1) and s 4.

applicability of the 2009 Act to surveillance in connection with arrestable offences most likely reflects a concern to keep within ECHR requirements that any infringement of the right to privacy be in pursuit of a legitimate aim: any attempt to extend the 2009 Act to more minor offences may have resulted in a finding that an appropriate balance had not been struck between the potentially drastic incursion on a person's right to privacy resulting from surveillance and the valid need to protect society from criminal actions. The implications for resources may also inform policy on this point.

The inclusion of the Revenue Commissioners as an arm of the State subject to the 2009 Act would seem reasonable given that the body already has certain investigative powers concerning legislative offences. It does, however, lead to the question of why other State bodies with investigative powers, such as the ODCE, were not brought within the 2009 Act, thereby rendering surveillance by such bodies, that would otherwise be lawful under the 2009 Act, open to challenge.

Official permission must be obtained before any surveillance is carried out. Section 3 states:

A member of the Garda Síochána, a member of the Defence Forces or an officer of the Revenue Commissioners shall carry out surveillance only in accordance with a valid authorisation or an approval granted in accordance with section 7 or 8.

Section 4 of the 2009 Act provides that, ordinarily, a District Court judge must authorise any surveillance on foot of an *ex parte* application. In language that has apparent regard for the demands of compatibility with Article 8 of the ECHR, any application for an 'authorisation' must demonstrate that there are reasonable grounds for believing that surveillance is necessary for the investigation of serious offences; that the particular form of surveillance sought to be used is the least intrusive form required; that it is proportionate to its objectives having regard to all of the circumstances; and that it is of a duration reasonably required to achieve its objective.¹⁵⁴ Only once satisfied that these factors are present should a judge issue an authorisation, which should be in written form that details the

¹⁵⁴ Criminal Justice (Surveillance) Act 2009, s 4.

extent of the surveillance permitted.¹⁵⁵

Where cases of urgency arise, as described within the legislation, members of the relevant bodies are not required to apply for an authorisation but can instead seek an 'approval' from a superior officer, who, in deciding whether to grant an approval, is required to apply the same test that applies to a District Court judge to whom an application for an authorisation is made.¹⁵⁶ There is a risk that a broad interpretation of this provision could result in investigators bypassing inappropriately the normal process for obtaining authorisation. An authorisation by a District Court judge can only last up to 3 months¹⁵⁷ and an approval by a superior officer up to 72 hours.¹⁵⁸ However, there is provision for the renewal of an authorisation for up to three months with no finite number of applications for renewal.¹⁵⁹

In addition to the rules regarding authorisation of surveillance, other provisions in the 2009 Act suggest that the legislature, conscious that the new legislation represented an incursion on the right to privacy, saw the need to balance some of the more far-reaching provisions of the Act to meet the demands of the protection afforded to this right by Article 40.3.1° of the Constitution, as well as Article 8 of the ECHR.

Section 9 sets out time limits for the retention of materials associated with applications for authorisation or gathered in the course of surveillance, such that nothing is kept for longer than is necessary. Section 10 places restrictions on the disclosure of the existence of authorisations and related documents. In an advance on the approach taken by the Interception of Postal Packets and Telecommunications (Regulation) Act 1993, sections 10(3) and 10(4) of the 2009 Act make provision for ministerial regulations providing for the disclosure of information concerning an authorisation or approval to the subject of such an authorisation or approval.

¹⁵⁵ Criminal Justice (Surveillance) Act 2009, ss 5(4) and 5(6).

¹⁵⁶ Criminal Justice (Surveillance) Act 2009, s 7.

¹⁵⁷ Criminal Justice (Surveillance) Act 2009, s 5(8).

¹⁵⁸ Criminal Justice (Surveillance) Act 2009, s 7(8).

¹⁵⁹ Criminal Justice (Surveillance) Act 2009, s 6(1).

Section 13 makes confidential, on pain of prosecution for anyone who breaches the provision, any information connected with an operation under the 2009 Act, unless such disclosure is to an authorised person. Under section 15, any other disclosures of such information may only occur by way of court order. Section 11 of the 2009 Act sets out a complaints procedure for anyone who believes they are the subject of a surveillance authorisation, although the *ex parte* basis of applications for surveillance and the generally covert nature of surveillance suggest that section 11 is unlikely to be availed of to any great extent and serve to undermine the initial impression that it is a meaningful safeguard.¹⁶⁰ Section 12 provides that the operation of the 2009 Act will be reviewed by a High Court judge at least once every 12 months, who will then report his or her findings to An Taoiseach.¹⁶¹ These provisions echo the approach taken in the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 and reflect in particular the exigencies of this jurisdiction's ratification of the ECHR.

Before the enactment of the 2009 Act, there was uncertainty as to the admissibility of evidence obtained from surveillance, a point considered more generally at the end of part 6.2 above. Indeed, the paucity of case law on the point suggests a presumption on the part of prosecutors that material gleaned from surveillance was only useful for investigative purposes and that any attempt to admit such material in evidence at trial would come to naught.¹⁶² In one of its most important provisions, the 2009 Act assists An Garda Síochána

¹⁶⁰ The complaints procedure has been described as 'bizarre', in circumstances where, in order to invoke the procedure, a person is expected to act on the basis of a belief that a relevant order has been made in respect of them, a belief that will only be confirmed as accurate if the referee for the complaint determines that the issue of a relevant authorisation or approval was in contravention of the 2009 Act and that it does not offend the public interest to inform the complainant of this: A Whelan, 'Are They Watching You? - The Criminal Justice (Surveillance) Act 2009' (Bar Review February 2010) 3.

¹⁶¹ Mr Justice Kevin Feeney wrote annual reports for the periods 12th July 2009 (the date of commencement of the Act) - 31st July 2010; 1st August 2010 - 31st July 2011; and 1st August 2011 - 31st July 2012. At the conclusion of his last report, Feeney J stated: 'I have now conducted the review of the operation of this Act under s.12 for three years and it is evident that the use of surveillance and monitoring devices is and remains an important asset in the investigation of arrestable offences and the prevention of suspected arrestable offences and the safeguarding of the State against subversive and terrorist threats.' Mr Justice Peart wrote the annual report for 1st August 2012 - 31st July 2013. This report was issued in May 2014 and is the most recently available report.

¹⁶² *DPP v McKevitt* [2009] IESC 29, [2009] 1 IR 25 throws some light on the traditional approach of investigators and prosecutors to material obtained from surveillance. The accused had been charged with offences connected with membership of an unlawful organisation. Oral testimony was given by a witness who claimed to have met the accused on a number of occasions and who connected him to the unlawful organisation in question. As soon as it became apparent that the accused's defence was that he had never met the witness, the prosecution provided very late disclosure to the defence of surveillance notes providing

and the DPP in prosecuting a crime by making evidence obtained by way of surveillance expressly admissible in certain circumstances. Section 14(1) states:

Evidence obtained as a result of surveillance carried out under an authorisation or under an approval granted in accordance with section 7 or 8 may be admitted as evidence in criminal proceedings.

The section sees a move away from regarding such legislation as setting out a framework for the gathering of intelligence and towards a situation that seeks to maximise the amount of information collected in the course of an investigation that may be used in any consequent prosecution.

It is notable also that section 14 makes provision for situations where there is an error on the face of an approval or authorisation and situations where the members acting on an authorisation or approval fail to comply with a condition attached thereto. The evidence may still be admitted in such circumstances, but only after various factors have been considered by the trial judge, including whether the error or omission was serious or merely technical in nature and whether it is in the interests of justice to admit the evidence.¹⁶³ The provision serves as an interesting example of a discretionary balancing test for unlawfully obtained evidence.

Idah v DPP has been helpful in clarifying the operation of aspects of the 2009 Act.¹⁶⁴ The appellant in the case had been convicted by a jury of two counts of soliciting another to commit the offence of unlawful importation of a controlled drug. The prosecution alleged that the appellant had solicited two undercover gardaí to import controlled drugs into the State by seeking to induce them to travel to Brazil and smuggle back cocaine. The solicitation was said to have occurred over a number of days in September 2010, during which the appellant was allegedly in contact with the undercover gardaí over twenty times.

details of relevant encounters. The Supreme Court upheld the conviction of the accused, finding that there was a bona fide justification for the late disclosure of the surveillance notes. The significance of the case for present purposes is that the initial approach of the prosecution was to rely entirely on the oral testimony of the witness to establish the connection of the accused with the unlawful organisation and that no effort was made to adduce the surveillance notes in evidence to corroborate the oral testimony concerning the meetings.

¹⁶³ Criminal Justice (Surveillance) Act 2009, ss 14(3) and 14(4).

¹⁶⁴ [2014] IECCA 3.

During the trial, audio recordings and transcripts of these contacts were put in evidence.

The appellant argued before the Court of Criminal Appeal that the audio recordings and transcripts of the appellant's contacts with the undercover gardaí were inadmissible as evidence because they had been obtained in circumstances where there was non-compliance with the provisions of the Criminal Justice (Surveillance) Act 2009. It was undisputed that the undercover gardaí had been authorised by a judge of the District Court to install a surveillance device within a room in a hotel in Dublin for a period of a number of days in September 2010 (14th - 18th September). In fact, the 'surveillance device' was a combination of a microphone and a recording/transmitting device fixed and concealed on the person of one of the gardaí that enabled the recording of face to face communications and mobile phone communications. None of the contacts with the appellant occurred in the hotel room referred to in the authorisation. On the 19th September 2010, an approval was granted by a senior member of the gardaí to continue using the surveillance device for that day. However, no attempt had been made on the 17th, 18th or 19th September 2010 to obtain further judicial authorisation. It was argued by the appellant that the admission of all of this evidence should have been excluded as having been unconstitutionally obtained in breach of the appellant's right to privacy. The prosecution argued that the trial judge had been entitled to admit the evidence because it had not been gathered as a result of surveillance, and so the 2009 Act had not been breached.

The Court of Criminal Appeal held that whilst the appellant had a general right to privacy, it was not specifically guaranteed by the Constitution and was not absolute. However, it was also noted that the right to privacy was a personal right of every member of the State and that the 2009 Act had been enacted to indicate the circumstances where public authorities were entitled to use covert measures to gather evidence in breach of that right. As regards the evidence of audio recordings and transcripts that had been gathered outside the authorised room at the hotel, the Court concluded that it came within the definition of surveillance for the purposes of the Act and that, further, it had not been gathered in accordance with the authorisation granted by the District Court. However, the Court noted that, pursuant to section 14(4) of the 2009 Act, this evidence was not automatically inadmissible. In circumstances where it was clear that there was no bad faith on the part of

the gardaí in gathering the evidence and that it could be argued that it was in the public interest to admit it given its probative value, the Court concluded that there was no manifest error in the exercise by the trial judge of his discretion to admit the evidence. However, as regards the evidence gathered on 19th September 2010, it had not been demonstrated that the requirements of section 7(2) of the 2009 Act had been met, specifically the need for the authorising garda to be satisfied that there were conditions of urgency present that justified that granting of the authorisation. In circumstances where there was no statutory discretion to admit this evidence, it was held that it should have been deemed inadmissible at trial. In consequence of the latter finding, the conviction was quashed and a retrial ordered.

6.4 Communications (Retention of Data) Act 2011

The Communications (Retention of Data) Act 2011 ('the 2011 Act') regulates the retention and use of information that has been generated by various service providers arising from the use of traditional telephonic communications, including mobile phones and landlines, but also information generated by internet access, internet e-mail and internet telephony. The 2011 Act sought to give effect to Directive 2006/24/EC and replaces and repeals earlier provisions of Part 7 of the Criminal Justice (Terrorist Offences) Act 2005.

The 2011 Act does not apply to the content of the communications.¹⁶⁵ Rather, it applies to 'data' which is electronically and automatically stored information relating to the use of telephones and the internet. Included in such data are records of mobile phone masts registering activity with a particular phone and details of particular activity (such as the making or receiving of a call) and the times at which such activity occurred.

The 2011 Act obliges service providers operating in the State to retain such data for two years in respect of fixed line and mobile phones and one year for internet related traffic.¹⁶⁶ The service provider is directed to take particular measures to ensure the security of the data and also its destruction after the statutory time period has elapsed unless data has

¹⁶⁵ Communications (Retention of Data) Act 2011, s 2.

¹⁶⁶ Communications (Retention of Data) Act 2011, s 2.

been accessed and preserved in accordance with the legislation.¹⁶⁷

The service provider shall not access the retained data unless a request to do so has been received from either the person to whom the data relates, a member of An Garda Síochána, the defence forces or the revenue authorities, the Data Protection Commissioner or on foot of a court order.¹⁶⁸ The 2011 Act directs the service provider to comply with a request to disclose relevant data.¹⁶⁹

Disclosure requests from gardaí, members of the defence forces or revenue officials may only be made on specified grounds related to the investigation of crime, the preservation of life or the security of the State.¹⁷⁰ The person from within one of these entities who is requesting the data must apply in writing unless the circumstances are of exceptional urgency.¹⁷¹ The 2011 Act also provides for the preparation of statistics concerning requests for disclosure of data and for a complaints procedure.¹⁷²

Although at first glance the 2011 Act might appear to provide for widespread surveillance of citizens' communications, a closer inspection reveals this not to be the case. The exclusion of the content of communications from the data that must be retained is significant. It is also noteworthy that data must only be retained for limited periods and must be deleted upon the expiration of those periods unless data has been accessed and preserved in accordance with the legislation. Further, access to the data covered by the legislation is only permissible where expressly stated to be on the basis of limited and narrow grounds that would safely be seen to be 'necessary in a democratic society', and therefore amounting to a legitimate infringement of the right to privacy.

Orange notes that an obvious weakness of information of the type covered by the 2011 Act is that it may not, by itself, prove that a particular 'user' was the person who actually

¹⁶⁷ Communications (Retention of Data) Act 2011, s 4.

¹⁶⁸ Communications (Retention of Data) Act 2011, s 5.

¹⁶⁹ Communications (Retention of Data) Act 2011, s 7.

¹⁷⁰ Communications (Retention of Data) Act 2011, s 6(1).

¹⁷¹ Communications (Retention of Data) Act 2011, s 6(4).

¹⁷² Communications (Retention of Data) Act 2011, ss 9 and 10.

engaged in the relevant communications.¹⁷³ Further evidence may be necessary to prove that the suspect was the relevant user of the internet service. In these circumstances the information gathered under the 2011 Act may be more useful in terms of investigative purposes than for evidential purposes.

The validity of the 2011 Act has been thrown into serious doubt by the decision of the Grand Chamber of the European Court of Justice in the joined cases of *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others*, and *Kärntner Landesregierung and Others*.¹⁷⁴ The ruling declared that the parent Data Retention Directive was invalid on the grounds, inter alia, that the blanket retention of communications data pursuant to Articles 3 and 5 of the Directive, its failure to lay down conditions limiting the ability of law enforcement agencies to access the retained data, and the lack of safeguards to protect against abuse or require the destruction of the data on expiry of the retention period directly affected rights to privacy, protection of personal data and freedom of expression contained in Articles 7, 8 and 11 of the European Charter. It is open to the Irish legislature to amend the 2011 Act to bring it into line with the requirements of the ECJ ruling. However, this has not happened to date, a state of affairs that has been criticised, not least because it appears to have contributed to grounds for challenges to proceedings in two recent high profile criminal cases.¹⁷⁵

6.5 Conclusions on Powers of Surveillance and Interception of Communications

What, then, are the implications of the law on surveillance and interception of communications in the context of white-collar crime? Given its nature, overt surveillance would not seem to be a key tool for investigators where white-collar crime is concerned. However, covert surveillance in the form of interception of communications, as dealt with

¹⁷³ G Orange, *Police Powers in Ireland* (Bloomsbury Professional 2013) Ch 12; G Orange, 'Telephones and Computers Used as Evidence in Court' (Bar Council Seminar, Dublin, April 2013) 6.

¹⁷⁴ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd (C-293/12) v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung (C-594/12) and Others* (Grand Chamber, 8 April 2014).

¹⁷⁵ TJ McIntyre, 'Two Data Retention Cases Pose Questions for Three Ministers for Justice' (IT Law in Ireland, 30 March 2015) <<http://www.tjmcintyre.com/2015/03/two-irish-data-retention-challenges.html>> (accessed 21 September 2015); T Tuite, 'Garda Seeks to Halt Trial for "Misleading GSOC Inquiry"' *The Irish Times* (Dublin, 26 March 2015); F Garland, 'Option of Manslaughter Ruled Out by Dwyer at Close of Evidence' *The Irish Times* (Dublin, 28 March 2015).

in the 1983 and 1993 Acts, and surveillance of the type described in the 2009 Act, are potentially relevant tools in the investigation of a form of crime that often entails exchange and retention of electronic data and communication by a variety of media, including email and phone calls, for its commission.

While An Garda Síochána (and, therefore, the GBFI in the context of white-collar crime) is afforded powers under the 2009 and 2011 Acts, it is notable that the Revenue Commissioners are also granted powers under the relevant legislation. Although this is positive from the point of view of that body's role in combatting certain forms of white-collar crime, a negative point is a failure of those statutes to make relevant powers available to other bodies with powers to investigate white-collar crime such as, for example, the ODCE and the Competition and Consumer Protection Commission. It seems arbitrary to take the step of extending powers to bodies other than An Garda Síochána but then stop at the Revenue Commissioners and the situation can be contrasted, for example, with the extension of informer privilege by the courts to law enforcement broadly speaking.¹⁷⁶

A major omission from the Irish statute book in this era of modern communications is the absence of clear legislative provision for the interception of internet communications. ECtHR jurisprudence demonstrates that it is crucial that any infringement of the right to privacy must, in the first instance, be positively provided for in law, whatever about fulfilment of the remaining criteria described in Article 8 of the ECHR. In these circumstances, the failure to provide for a statutory framework for the legitimate interception of internet communications means Ireland is depriving investigators of a valuable tool of investigation where white-collar crime is concerned. This lacuna could be remedied by way of amendment of existing legislation. While provision for interception of internet communications could be provided for within the framework established by the 2009 Act, it may fit more naturally within the regime established by the 1983 and 1993 Acts, analogous as it is to the interception of telephonic communications. Finally, the validity of the Communications (Retention of Data) Act 2011 is very much in question in light of the ECJ ruling in *Digital Rights Ireland*;¹⁷⁷ unless the Act is amended urgently to take

¹⁷⁶ See L. Heffernan with Ú Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury Professional 2014) Ch 12.

¹⁷⁷ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd (C-293/12) v Minister for Communications*,
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account of the exigencies of that ruling, any reliance upon it could jeopardise relevant white-collar crime investigations and prosecutions.

7 Powers of Entry, Search and Seizure

In the course of a criminal investigation, there may come a point at which an investigator finds it necessary to enter private property to either carry out an arrest, or to search for evidence and then seize anything that might be found on foot of such a search.¹⁷⁸ Generally speaking, an investigator will seek to invoke powers of entry, search and seizure at a point where there is a reasonable suspicion that an offence has been committed. Indeed, as will be seen, many powers of entry, search and seizure, whether common law or statutory, require that there be a reasonable suspicion of criminal activity in the mind of the investigator before such powers become exercisable. However, as mentioned at part 3 of this chapter, it is to be noted that a limited range of powers of entry and search are available to investigators where there is no prior suspicion of criminal misconduct; these powers allow for entry and search of business premises for the purposes of general inspection in the main, a point of some relevance to the realm of white-collar crime. Thus, in limited situations the exercise of certain common law or statutory powers of entry, search and seizure may mark the starting point for a particular criminal investigation as opposed to the midpoint of an investigation.

In common with other methods of investigation, an investigator may enter, search and seize property with the consent of an owner. However, in all other cases it is incumbent on an investigator to locate a specific common law or statutory basis for the power of investigation sought to be exercised and to ensure that the requirements associated with the exercise of the relevant power are fulfilled. The common law has long acknowledged that private property cannot be made the subject of an unjustified forcible entry or

Marine and Natural Resources and Others and Kärntner Landesregierung (C-594/12) and Others (Grand Chamber, 8 April 2014).

¹⁷⁸ For discussion of relevant powers, see: Walsh, *Criminal Procedure* (Thomson Round Hall 2002) Ch 8; T O'Malley, *The Criminal Process* (Thomson Round Hall 2009) Ch 11; G Orange, *Police Powers in Ireland* (Bloomsbury Professional 2013) Ch 1 and Ch 9; R Coen, *Garda Powers: Law and Practice* (Clarus Press 2014) Part IV. Consideration of the law concerning search warrants forms part of the LRC's Third Programme of Law Reform: Law Reform Commission, *Issues Paper on Search Warrants* (LRC IP 4-2014).

interference.¹⁷⁹

In the case of searches of dwellings and business premises, regard must be had to Articles 40.3, 43 and 40.5 of the Constitution, which provide qualified protection for property rights, the right to privacy and the inviolability of the dwelling respectively.¹⁸⁰ Further protection is to be found in the ECHR. Article 8(1) of the ECHR provides that everyone has the right to respect for his private life, his home and his correspondence. Article 8(2) provides that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Of particular relevance to the instant research is the fact that the ECtHR has extended the scope of the word 'home' in Article 8 to businesses.¹⁸¹

It is well established at common law that an investigator has no general entitlement to enter into or remain on private property in order to investigate a criminal offence without the consent of the owner or occupier.¹⁸² Investigators may, however, have an implied licence to enter a premises to make enquiries in the ordinary course of their duties; this licence will remain intact unless revoked, expressly or impliedly, by the owner or occupier of the premises.¹⁸³ There are a limited range of circumstances where the common law allows for entry onto private property without warrant, and without the consent of the occupier or owner.¹⁸⁴ However, these situations are simply noted here in circumstances where they are not of obvious relevance in a white-collar crime context.

¹⁷⁹ *Entick v Carrington* (1765) 19 St Tr 1029; *Dillon v O'Brien* [1887] 20 LR Ir 300; *Simple Imports Ltd v Commissioners of Inland Revenue* [2000] IESC 40, [2000] 2 IR 243; *Creaven v Criminal Assets Bureau* [2004] IESC 92, [2005] 1 ILRM 53.

¹⁸⁰ See G Hogan and G Whyte, *Kelly: The Irish Constitution* (4th edn, Butterworths 2003) Ch 7.

¹⁸¹ *Chappell v UK* (1990) 12 EHRR 1; *Niemitz v Germany* (1993) 16 EHRR 97; *Societe Colas Est v France* (2004) 39 EHRR 17.

¹⁸² *DPP v Gaffney* [1987] IR 173 (SC); *DPP v Delaney* [1997] 3 IR 453 (SC).

¹⁸³ *Minister for Justice v Wang Zhu Jie* [1993] 1 IR 425 (HC and SC); *DPP v Delaney* [1997] 3 IR 453 (SC) suggests that it will be harder to establish an implied licence to enter a dwelling as distinct from some other form of premises.

¹⁸⁴ *R v Walker* (1854) Dears 358 (to terminate an actual affray); *Handcock v Baker* (1800) 2 Bos & Pul 260 (to prevent an occupant from causing serious injury to someone else on the premises) *Smith v Shirley* (1846) 3 CB 142 (to arrest a felon - this particular exception is of academic interest only with the removal by the Criminal Law Act 1997 of the distinction between felonies and misdemeanours).

Statutory powers to enter onto private property without the consent of the owner or occupier and without a warrant are more numerous than is the case at common law. In general terms, the Criminal Law Act 1997 enables a garda to enter any premises without a warrant in order to effect the arrest of a person who is, or who the member with reasonable cause suspects to be, on the premises.¹⁸⁵ Most of the remaining statutory powers of summary entry are aimed at providing for the inspection of the conduct of a business on a premises, a point of relevance to the domain of white-collar crime. In a significant departure from the normal requirement that there is a reasonable suspicion of criminal wrongdoing, some of these powers do not require that investigators have any such suspicion before they are exercisable. Examples include powers of entry, inspection and search of premises used for the following kinds of commercial activity: gaming;¹⁸⁶ rearing and slaughter of animals;¹⁸⁷ manufacturing and retailing of goods;¹⁸⁸ and air travel.¹⁸⁹

Inasmuch as these powers do not require prior suspicion of wrongdoing, they are readily available to investigators and could spark the commencement of a hitherto non-existent criminal investigation. While amounting to a relatively severe impingement on rights to property and privacy, these powers are defensible on the basis that they do not directly contravene Article 40.5 of the Constitution (which only guarantees the inviolability of the dwelling) and, even where it can be established that a particular personal right has been trespassed upon (perhaps, for example, the unenumerated constitutional right to privacy, or the right to respect for private life guaranteed by Article 8 of the ECHR), are necessary and proportionate infringements of any such right on public interest grounds, particularly public health grounds. These powers enable the authorities to check that a particular business is being carried out in accordance with legal requirements.

A further range of powers to enter and search or inspect premises summarily require that an investigator have reasonable grounds to believe that a relevant offence is being

¹⁸⁵ Criminal Law Act 1997, s 6. There are further conditions on the exercise of the power of arrest including, for example, that the garda be in possession of a relevant arrest warrant or committal order or, if not, that the arrest that is sought to be effected is for an arrestable offence, meaning an offence for which the maximum penalty is at least five years' imprisonment.

¹⁸⁶ Gaming and Lotteries Act 1956, s 38.

¹⁸⁷ Abattoirs Act 1988, s 54.

¹⁸⁸ Metrology Act 1996, s 10.

¹⁸⁹ Air Navigation and Transport Act 1988, s 18.

committed; in this regard they might be seen to amount to a slightly less severe infringement of the rights of those made the subject of such powers. Examples of such powers include powers to enter and search premises in connection with offences concerning: the sale of alcohol;¹⁹⁰ cruelty to horses;¹⁹¹ drug trafficking;¹⁹² and moneylending.¹⁹³ The requirement for prior suspicion of wrongdoing would appear to arise from the fact that an investigator should have no automatic reason for supposing that illegal behaviour, of the kind covered by the relevant statutes, is occurring on a particular premises, whereas those powers of entry where no prior suspicion of wrongdoing is required might be thought of as enabling investigators to ascertain whether a particular business is being carried out in accordance with the law.

Much more numerous than summary powers of entry, search and seizure (whether statutory or common law in nature) are statutory powers allowing for powers of entry, search and seizure where a warrant has been obtained from a competent authority, usually a District Court judge or a peace commissioner. Cognisant of the inevitable intrusion upon property rights brought about by the exercise of such warrants, the courts have held that the requirements of such warrants must be strictly met.¹⁹⁴ The fact that most powers of entry, search and seizure are only operable on foot of a validly obtained warrant, particularly where dwellings are concerned, might be seen to reflect a concern on the part of the legislature to have due regard for the personal rights of citizens, particularly property rights.

Walsh has observed that the current statutory powers to issue warrants 'constitute an unwieldy collection of disparate provisions which have developed in a piecemeal fashion over the past two centuries'.¹⁹⁵ This state of affairs means that it is not inevitably the case that there will be a statutory provision authorising the issue of a search warrant in every case where the legitimate interests of law enforcement might be best served by a warrant. Rather, an investigator who wishes to obtain a warrant will have to source a suitable

¹⁹⁰ Intoxicating Liquor Act 1988, s 43.

¹⁹¹ Control of Horses Act 1996 s 34.

¹⁹² Criminal Justice (Drug Trafficking) Act 1996, First Schedule.

¹⁹³ Consumer Credit Act 1995, s 105.

¹⁹⁴ *Simple Imports v Revenue Commissioners* [2000] 2 IR 243 (SC); *DPP v McGoldrick* [2005] 3 IR 123 (CCA).

¹⁹⁵ D Walsh, *Criminal Procedure* (Thomson Round Hall 2002) 402.

statutory power and then take care to satisfy the requirements to be fulfilled to obtain a warrant. The Law Reform Commission has also noted the difficulties caused by the proliferation of statutory powers and has provisionally recommended that a generally applicable legislative framework on search warrants should be enacted.¹⁹⁶

It is beyond the scope of this research to document and analyse every statutory power providing for warrants of entry, search and seizure, particularly where each power is worded differently and sets out different criteria to be fulfilled. However, a number of general observations can be made. First, the myriad of relevant powers provides for warrants to issue in widely differing situations, including: ill-treatment and neglect of children;¹⁹⁷ sexual offences;¹⁹⁸ stolen goods;¹⁹⁹ and customs offences.²⁰⁰ Second, depending on the wording of the individual provision, different authorities may have jurisdiction to issue a warrant. Most powers provide that a District Court judge may issue a warrant.²⁰¹ Fewer powers provide that a peace commissioner has jurisdiction to issue warrants.²⁰² A small number of statutory provisions allow for members of An Garda Síochána to issue warrants, particularly in cases of emergency, but in *Damache v DPP* the Supreme Court held that one such provision, namely section 29(1) of the Offences Against the State Act 1939, was 'repugnant to the Constitution as it permitted a search of the appellant's home contrary to the Constitution, on foot of a warrant which was not issued by an independent person'.²⁰³ In the wake of that case the legislature moved quickly to enact the Criminal Justice (Search Warrants) Act 2012, which amended section 29 of the 1939 Act and other similar provisions to provide that a garda issuing a warrant in accordance with the sections must be independent of the investigation to which the warrant relates.²⁰⁴

¹⁹⁶ Law Reform Commission, *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) [2.02]-[2.23].

¹⁹⁷ Children Act 2001, s 254.

¹⁹⁸ Sexual Offences (Jurisdiction) Act 1996, s 10.

¹⁹⁹ Criminal Justice (Theft and Fraud Offences) Act 2001, s 48.

²⁰⁰ Customs and Excise (Miscellaneous Provisions) Act 1998, s 5.

²⁰¹ See, for example, section 6 of the Petty Sessions (Ireland) Act 1851 and section 106(6) of the Road Traffic Act 1961.

²⁰² The constitutionality of one such power (the now repealed section 42 of the Larceny Act 1916) was upheld in *Ryan v O'Callaghan* (HC 22 July 1987).

²⁰³ [2012] IESC 11, [2012] 2 IR 266 (SC) 285.

²⁰⁴ The Criminal Justice (Search Warrants) Act 2012 amended section 26 of the Misuse of Drugs Act 1977 and section 8 of the Criminal Justice (Drug Trafficking) Act 1996 in a similar fashion to section 29 of the Offences Against the State Act 1939.

Third, statutory powers of entry, search and seizure generally require that a warrant can be issued only on the basis of information sworn before the appropriate authority and, further, that the issuing authority is satisfied that there are reasonable grounds for the suspicion prompting the application for a warrant.²⁰⁵ As discussed at part 5 of this chapter, this latter requirement is consistent with the approach to what might be termed 'core' powers of investigation: the more intrusive the power of investigation, the less likely it is that the legislature will permit indiscriminate use of that power; rather, a minimum level of suspicion, referable to the subject of the power to be used, must be present before the power will become operable.

Fourth, relevant warrants must contain certain basic information. At a minimum, a valid warrant will have to show jurisdiction on its face by stating the statutory power under which it has issued, the statutory preconditions for its issue and also the fact that such requirements have been met.²⁰⁶ Warrants will also generally describe the addressee of the warrant as well as a description of property, where relevant. However, errors with regard to these latter types of information will not deprive a warrant of legality if they do not go to the jurisdiction of the warrant.²⁰⁷

Fifth, insofar as warrants of entry search and seizure provide legal authority to enter and search private property in the absence of the consent of the owner, use of reasonable force will often be required in order to execute the warrant, and this will often be provided for in the wording of a given statutory provision.²⁰⁸

Finally, depending on the individual statutory provision, a warrant will last for a set period of time, most commonly one week or one month, and will be spent once used, unless

²⁰⁵ *Byrne v Grey* [1988] IR 31 establishes the issuing authority must be satisfied that there are reasonable grounds for the relevant suspicion and that the issue of the warrant should not be a 'rubber stamping' exercise. See also *DPP v Tallant* [2003] 4 IR 343 (CCA).

²⁰⁶ The necessity of showing jurisdiction on the face of a warrant has been affirmed in a number of cases, including *Simple Imports Ltd v Commissioners of Inland Revenue* [2000] IESC 40, [2000] 2 IR 243; *DPP v McGoldrick* [2005] 3 IR 123 (CCA) and *Macharia v Governor of Cloverhill Prison* [2009] IEHC 42, [2011] 3 IR 472. *DPP v Mallon* [2011] 2 IR 544 (CCA) (O'Donnell J) includes a comprehensive account of the rich history of this line of authority.

²⁰⁷ *DPP v Balfe* [1998] 4 IR 50 (CCA); *DPP v Mallon* [2011] 2 IR 544 (CCA).

²⁰⁸ See, for example, Section 48(3) of the Criminal Justice (Theft and Fraud Offences) Act 2001.

otherwise provided for.²⁰⁹ The time limits applicable to warrants demonstrate an awareness on the part of the legislature of the need for the inevitable interference with property rights to be limited and proportionate.

Section 48 of the Criminal Justice (Theft & Fraud Offences) Act 2001 is an example of a statutory power of entry, search and seizure that is of particular relevance in a white-collar crime context and could be used, for example, by the GBFI when investigating fraud offences falling within the scope of the statute. The section provides for an application to be made to a District Court judge for a broad search warrant that will last one week.

If an investigator has a right to search a particular premises for particular material, they may seize that material if it is found. Search warrants will generally specify the subject matter of the search and do so in broad terms. An issue arises as to the entitlement to seize material that is discovered in the course of a search and is believed to be evidence of a criminal offence but which is not covered by a warrant. The common law in England and Wales is clear in allowing for such material to be seized.²¹⁰ However, the common law position is relatively unimportant in the context of a broad statutory power in this jurisdiction that gives gardaí the right to seize material in the course of a valid search, regardless of whether the material is specified in the relevant search warrant. Section 9 of the Criminal Law Act 1976 provides that where a garda is carrying out a lawful search under any power, the garda may seize and retain anything which he or she believes (not necessarily on reasonable grounds) to be evidence of any offence or suspected offence.

Writing in 1983, Ryan and Magee suggested that the scope to seize property under section 9 is so wide as to make the provision vulnerable to constitutional challenge.²¹¹ However Walsh has demurred from such a suggestion, arguing that the crime challenge facing society and police today is such that the courts would likely find that section 9 falls within the parameters of what would be deemed to be an acceptable infringement of relevant personal

²⁰⁹ Examples of powers that allow multiple uses of a warrant within a given period include section 106 of the Consumer Credit Act 1995 and section 75 of the Investment Intermediaries Act 1995.

²¹⁰ *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299 (CA); *Chief Constable of Kent v Verdon-Roe* [1983] QB 34 (CA).

²¹¹ E Ryan and P Magee, *The Irish Criminal Process* (Mercier Press 1983) 153.

rights.²¹² The latter view would appear to have more merit, particularly in circumstances where section 9 will only remain operative for the duration of a lawful search. So, for example, if a warrant becomes spent because the property named on it is found, absent some additional power of search (on foot of an arrest, for example), a garda will not be entitled to seize material after the expiration of the warrant.

A small number of statutory powers permit gardaí to seize certain items summarily without reference to any prior stop, entry or search.²¹³ These are exercisable where gardaí have reasonable grounds for believing material (cash, for example) is associated with criminal activity. Such material may be seized for a limited period of time, unless extended by court order, to allow gardaí to make further enquiries.

Once gardaí have lawfully seized material they may retain it for as long is necessary in the context of potential court proceedings. In the English case of *Ghani v Jones*, it was established that this extends to material belonging to an innocent third party.²¹⁴ *Ghani* was approved in Ireland in *McLaughlin v Aviva Insurance plc*, where the Supreme Court held that retention of material belonging to a third party in the context of criminal proceedings, whether in contemplation or in being, was justifiable on public interest and investigative privilege grounds.²¹⁵

Beyond the general powers of entry, search and seizure set out and discussed above, there are certain powers that are of particular relevance to certain white-collar crimes. Some of these powers, including section 48 of the Criminal Justice (Theft and Fraud Offences) Act 2001, have already been mentioned. Under section 787 of the Companies Act 2014, which replaces and expands upon the power established by section 20 of the Companies Act 1990, the Director of Corporate Enforcement may apply to the District Court for a broad search warrant in connection with Companies Acts offences. Such a warrant will last for an initial period of thirty days but with provision for a further application to a District Court judge to

²¹² D Walsh, *Criminal Procedure* (Thomson Roundhall 2002) 425.

²¹³ For example, section 38 of the Criminal Justice Act 1994; section 15 of the Proceeds of Crime Act 1996; section 7 of the National Monuments (Amendment) Act 1994.

²¹⁴ *Ghani v Jones* [1970] 1 QB 693 (CA).

²¹⁵ [2011] IESC 42.

extend the period of the validity of the warrant by whatever period of time the judge thinks appropriate and just, having heard the basis for the request for an extension of time.²¹⁶ Section 787 contains a number of features that are particularly suited to searches of business premises related to suspected financial fraud or other corporate offences; these include an extended power of seizure where it is not possible to immediately identify if material comes within the remit of a search warrant,²¹⁷ and powers to operate a computer found at the site of the search and demand any password that may be required to operate such a computer.²¹⁸

Pursuant to section 37(3) of the Competition and Consumer Protection Act 2014, authorised officers of the Competition and Consumer Protection Commission may apply to the District Court for search warrants to issue under this section. Such warrants last for one month. Speaking of the similarly worded precursor to section 37 of the 2014 Act, namely section 45 of the Competition Act 2002, Horan notes that the use of these warrants in unannounced early morning searches in connection with tax and cartel offences has led to the association of such warrants with the nomenclature 'dawn raids'.²¹⁹

Section 5 of the Prevention of Corruption (Amendment) Act 2001 provides for an application to be made to a District Court judge for a broad search warrant in connection with offences dealt with in the Prevention of Corruption Acts 1889 - 2010. Such warrants last for one month, an unusually long time for search warrants.

Section 908C of the Taxes Consolidation Act 1997 provides for an application to be made to a District Court judge by an authorised officer of the Revenue Commissioners for a broad warrant of entry, search and seizure in connection with relevant offences, including the entitlement to demand and receive passwords necessary to gain access to materials stored on computers. This power is particularly necessary in a time when data is stored in digital format only to an ever increasing extent. It is crucial for investigators to be able to access material that may advance an investigation and form part of the body of evidence in any

²¹⁶ Companies Act 2014, ss 787(9) - (11).

²¹⁷ Companies Act 2014, s 787(3).

²¹⁸ Companies Act 2014, s 787(7).

²¹⁹ S Horan, *Corporate Crime* (Bloomsbury Professional 2011) [6.218].

prosecution. A related power of a summary nature is section 900 of the Taxes Consolidation Act 1997, under which authorised officers of the Revenue Commissioners may demand books and other information from taxpayers without any prior suspicion of wrongdoing.

Summary powers of entry and search in connection with revenue offences are provided for in sections 903 and 905 of the Taxes Consolidation Act 1997. Sweeping powers of entry and search, not predicated on prior suspicion of wrongdoing, are afforded to the Revenue Commissioners in cases of premises other than dwellings. Search warrants are required in the case of dwellings. In a white-collar crime context, this gives revenue officials substantial powers to enter and search an office or business premises to trawl for evidence of criminal wrongdoing, even in the absence of suspicion of such wrongdoing.

Perhaps the most striking aspect of the powers of entry, search and seizure particular to white-collar crimes is that, as with the powers applicable to crime more generally, there is no discernible pattern to be found as regards the parameters and contents of the various powers. Some powers are operable summarily and without prior suspicion of wrongdoing, whereas others require a search warrant grounded on reasonable suspicion of wrongdoing; even within those sections that provide for the issuing of search warrants, there are often differences between the specific powers available and the duration of validity for the warrants.

The one bracket of offences for which the legislature allows for deep, and relatively unencumbered, powers of entry, search and seizure, is revenue offences. In most other situations, the standard requirements of prior suspicion of wrongdoing, combined with a requirement that a search warrant be procured, apply. The conclusion may be drawn that the legislature prioritises protection of public finances over personal rights considerations, whereas a more even balance between personal rights and public interest considerations is drawn in the context of other offences.

It is apparent that the same patchwork and piecemeal approach to powers of entry, search and seizure applies in relation to white-collar crimes as obtains in connection with crimes

more generally. On the one hand, it can be said that this allows for flexibility and suitably tailored approaches to different powers of investigation. On the other hand, the absence of a coherent, uniform approach to the content and organisation of relevant powers of investigation is not in ease of investigators and could be said to be indicative of a lack of a focused approach on the part of the legislature with regard to the issue of combatting white-collar crime.

8 Powers of Arrest

It is not proposed to analyse powers of arrest in as much detail as other powers of investigation considered in this chapter in circumstances where the law in the area is relatively settled. However, the core aspects of powers of arrest and their relevance to white-collar crime will be assessed briefly.²²⁰ At part 2 of this chapter, it was noted that a comprehensive domestic and international framework guaranteeing a range of personal rights forms the context in which investigative powers must operate. Where powers of arrest are in issue, a primary concern of the legislature is to ensure that the inevitable encroachments upon the right to liberty are reasonable and proportionate in order to save them from findings of unconstitutionality or incompatibility with the ECHR. The right to liberty is guaranteed by Article 40.4.1° of the Irish Constitution, which reads 'No citizen shall be deprived of his personal liberty save in accordance with law.' Article 5(1) of the ECHR provides:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:... c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his

²²⁰ It might be noted that only powers of arrest amounting to tools of investigation are discussed here, but they can also arise in other ways, for example to ensure compliance with a court order (for example, pursuant to a bench (judicially issued) warrant to arrest a person for failure to answer bail) or in the context of concerns over a person's mental health eg Mental Health Act 2001, s 12. For discussion of powers of arrest, see: D Walsh, *Criminal Procedure* (Thomson Round Hall 2002) Ch 4; T O'Malley, *The Criminal Process* (Thomson Round Hall 2009) Ch 10; G Orange, *Police Powers in Ireland* (Bloomsbury Professional 2013) Ch 6; R Coen, *Garda Powers: Law and Practice* (Clarus Press 2014) Part II.

committing an offence or fleeing after having done so;

A failure to have adequate regard for the constitutional rights of an arrested person can have devastating consequences for a prosecution, although the recent landmark judgment of the Supreme Court in *DPP v JC* has resulted in a test for admissibility of evidence that is less restrictive than the one that formerly obtained.²²¹

The concept of arrest has been characterised as follows:

The seizure or touching of a person's body with a view to his restraint; words may, however, amount to an arrest if, in the circumstances of the case, they are calculated to bring, and do bring, to a person's notice that he is under compulsion and that he thereafter submits to the compulsion.²²²

Valid restraint of a person requires, at a minimum, that some form of words is used to indicate clearly to a person that they are under arrest as well as the reason for the arrest.²²³ Such words are generally accompanied by physical apprehension of the person. Indeed, physical apprehension will become necessary if a person refuses to submit to words of restraint.²²⁴

At common law a member of An Garda Síochána, and any citizen, can use such force as is reasonably necessary to effect or maintain a lawful arrest or to prevent crime.²²⁵ In addition, section 19(1) of the Non-Fatal Offences Against the Person Act 1997 provides that '[t]he use of force by a person in effecting or assisting in a lawful arrest, if only such as is reasonable in the circumstances as he or she believes them to be, does not constitute an offence.' Neither statute nor common law provide for a definition of what amounts to 'reasonable force'. What is reasonable will depend on the individual circumstances under

²²¹ [2015] IESC 31. See the discussion of this case at part 2 of this chapter.

²²² Lord Mackay of Clashfern (ed), *Halsbury's Laws of England* (4th edn, Lexis Nexis) 11(1) [693]. This characterisation is cited in T O'Malley, *The Criminal Process* (Thomson Round Hall 2009) [10.01].

²²³ *Christie v Leachinsky* [1947] AC 573 (HL); *Re O'Laighleis* [1960] IR 93 (SC); *DPP v McCreesh* [1992] 2 IR 239 (SC); *DPP v McCormack* [1999] 4 IR 158 (HC).

²²⁴ *Bird v Jones* [1845] 7 QB 742.

²²⁵ *Dowman v Ireland* [1986] ILRM 111 (HC).

which the arrest is taking place, including the offence for which the person is being arrested for. There must be a reasonable proportion between the amount of force used and the offence in question²²⁶ and only moderate and proportional force will be compatible with the ECHR.²²⁷

On arrest a person must be conveyed to a garda station with reasonable dispatch, although detention occurring during a temporary delay before the suspect is conveyed to a garda station may be permissible if for a 'reasonable' period of time.²²⁸ Traditionally, arrest was seen as 'simply a process of ensuring the attendance at Court of the person so arrested'²²⁹ but, as will be considered at part 9 of this chapter, the law has developed to allow for the questioning of a suspect in the period of time between arrest and the point at which the suspect is brought before a judicial authority.

Powers of arrest might be regarded as 'core' powers of investigation because they fall into the bracket of powers requiring prior suspicion of wrongdoing in order for them to become operable. The discussion at part 5 of this chapter considered how a state of mind approximating to 'reasonable suspicion' is generally required for the activation of 'core' powers of investigation. This also applies to powers of arrest but, as is the case with other similar powers of investigation, consideration of the exact wording of a given power of arrest is required to ascertain the precise level of suspicion required to be present in order to render that power of arrest operable.

An arrest may be made either with a warrant, or, if there is a common law or statutory power to do so, without a warrant. To effect an arrest under warrant, the arresting officer must have secured prior permission from the appropriate authority, generally a District Court judge. Common law powers of arrest have largely been superseded by statute. However, the common law power of summary arrest for the common law offence of breach of the peace remains.²³⁰ Both a citizen and a member of Garda Síochána enjoy a common

²²⁶ *R v Turner* [1862] VR 30; *Lynch v Fitzgerald* [1938] IR 382 (SC).

²²⁷ *Farrell v United Kingdom* [1983] 5 EHRR 466.

²²⁸ *DPP v Walsh* [1980] IR 294 (SC).

²²⁹ *DPP v Shaw* [1982] IR 1(SC) 29 (Walsh J).

²³⁰ *R v Howell* [1981] 3 AER 383 (CA); *Thorpe v DPP* [2007] 1 IR 502 (HC).

law power of arrest for breach of the peace. Either may arrest a person who has committed or is committing such an offence in their presence or someone who they reasonably believe is going to commit a breach of the peace in the immediate future.

In terms of statutory powers of arrest, section 4 of the Criminal Law Act 1997 creates powers of arrest for a broad range of offences. Numerous other statutes create powers of arrest in relation to narrower categories of offences.²³¹ Section 4 of the Criminal Law Act 1997 confers powers of arrest in relation to arrestable offences. An arrestable offence is defined in section 2(1) of the 1997 Act as 'an offence for which a person of full capacity and not previously convicted may, under or by virtue of any enactment or the common law, be punished by imprisonment for a term of five years or by a more severe penalty and includes an attempt to commit any such offence'.

In circumstances where very many offences in this jurisdiction have a maximum penalty of five years or more, section 4 covers a huge swathe of both common law and statutory offences and, as such, is a very commonly used power of arrest. It may be used in relation to very many white-collar crimes, as well as crimes more generally. Section 4 creates a power of arrest in relation to arrestable offences in the following situations. Section 4(1) provides that any person may arrest anyone without warrant who is or whom he or she, with reasonable cause, suspects to be in the act of committing an arrestable offence. Pursuant to section 4(2), where an arrestable offence has been committed any person may arrest without warrant anyone who is or whom he or she, with reasonable cause, suspects to be guilty of the offence. Finally, under section 4(3), where a member of the Garda Síochána, with reasonable cause, suspects that an arrestable offence has been committed, he or she may arrest without warrant anyone whom the member, with reasonable cause, suspects to be guilty of the offence.

It is important to note that in relation to section 4(1) and section 4(2) of the 1997 Act, an arrest other than by a member of An Garda Síochána may only be effected by a person where he or she, with reasonable cause, suspects that the person to be arrested by him or

²³¹ See, for example: Offences Against the State Act 1939, s 30; Misuse of Drugs Act 1977, s 25; Criminal Justice (Public Order) Act 1994, s 24; Firearms and Offensive Weapons Act 1990, s 14; Criminal Law (Sexual Offences) Act 2006, s 3(8); Criminal Damage Act 1991, s 12.

her would otherwise attempt to avoid, or is avoiding, arrest by a member of the Garda Síochána. Further, a person who is arrested pursuant to Section 4 of the 1997 Act by a person other than a member of the Garda Síochána must be transferred into the custody of the Garda Síochána as soon as practicable.²³²

Section 4 of the Criminal Law Act 1997, which applies to any offence that carries a maximum penalty of five years or more, applies to many white-collar crimes in the same way that it applies to a large number of offences generally. However, there are relatively few powers of arrest that are peculiar to white-collar crimes. One example is Section 906 of the Taxes Consolidation Act 1997, which provides that where an authorised officer enters a premises in connection with section 903 (power of inspection with respect to PAYE), section 904 (power of inspection in relation to tax deductions from payments to subcontractors) or section 905 (power of inspection of documents and records), the officer may be accompanied by a garda, and any such garda may arrest without warrant any person who obstructs or interferes with the officer in the exercise or performance of his powers or duties under any of those sections.

By virtue of the wide ambit of section 4 of the Criminal Law Act 1997, the power to arrest a person is, in practice at least, on a relatively unitary footing, certainly in comparison to other powers of investigation. A patchwork quilt of powers of arrest still remains on the statute book but, where there is an overlap between section 4 and one or more other powers of arrest, an investigator is entitled to rely on any one relevant power of arrest.

9 Powers of Pre-Charge Detention

We have come a long way since the days when a suspect in a crime could not be detained for questioning, in advance of charge, by the relevant investigative arm of the State. Save for the relatively rare situation whereby an individual was happy to voluntarily 'help gardaí with their enquiries', properly collected confession evidence was seldom available to the prosecution under the old common law regime. In any case where there was an argument that an accused had not voluntarily 'assisted gardaí', the onus was on the State to prove

²³² Criminal Law Act 1997, s 4(5).

beyond a reasonable doubt that the person knew of his right to leave at any time until he was told to leave the garda station or until he was arrested.²³³

The traditional position was that evidence ought to be collected before, rather than after the making of an arrest. On arrest, a suspect had to be cautioned and informed of his rights under the Judges' Rules of 1922 and, once charged, he could not be questioned further. The suspect then had to be brought before a District Court judge or peace commissioner as soon as practicable. The effect of the traditional approach was that investigators were very constricted in their ability to obtain admissible confession evidence. In *Dunne v Clinton*, Hanna J confirmed that the sole purpose of arrest was to have the arrested person charged with an offence. He stated that 'there can be no halfway house between the liberty of the subject, unfettered by restraint, and an arrest'.²³⁴

The rationale for this common law position appears to have arisen from a concern to uphold the rights of a suspect, particularly the right to liberty, a right which came to be protected by Article 40.4.1° of the Constitution. As Higgins CJ stated in *People (AG) v Loughlin*:

'Holding for questioning' and 'taking into custody' and 'detaining' are merely different ways of describing the act of depriving a man of his liberty. To do so without lawful authority is an open defiance of Article 40, s.4, sub-s.1 of the Constitution.²³⁵

However, few rights, if any, are protected absolutely, and the strong degree of protection provided by the traditional common law position for an individual suspected of a crime

²³³ This position was confirmed in *DPP v Coffey* [1987] ILRM 727 (HC). For discussion of the current and historical position concerning the detention of suspects without charge, see: D Walsh, *Criminal Procedure* (Thomson Round Hall 2002) Ch 5; T O'Malley, *The Criminal Process* (Thomson Round Hall 2009) Ch 10; G Orange, *Police Powers in Ireland* (Bloomsbury Professional 2013) Ch 6; R Coen, *Garda Powers: Law and Practice* (Clarus Press 2014) Ch 5; D Keane, 'Detention Without Charge and the Criminal Justice (Drug Trafficking) Act 1996' (1997) 7 ICLJ 1; A Ryan, 'Arrest and Detention: A Review of the Law' (2000) 10(1) ICLJ 2; J White, 'The Confessional State - Police Interrogation in the Irish Republic: Part 1' (2000) 10(1) ICLJ 17; J White, 'The Confessional State - Police Interrogation in the Irish Republic: Part 2' (2000) 10(2) ICLJ 2; K Sweeney, 'The Questioning of Criminal Suspects in Ireland' (2015) 2 ICLJ 37.

²³⁴ [1930] IR 366 (HC) 372.

²³⁵ [1979] IR 85 (SC) 91.

came to experience a sure and steady attenuation in this jurisdiction over the years, starting with the Offences Against the State Act 1939. This reshaping of the rights of the individual has gathered pace in the last few decades, the most recent development in this regard being the passing of the Criminal Justice Act 2011. The primary focus of this part of the chapter is the 2011 Act given the statute's particular relevance to the field of white-collar crime.²³⁶

Ní Raifeartaigh has suggested that the pattern of expansion in the area of pre-charge detention in recent years can be traced directly to the murder of the well-known journalist Veronica Guerin, in the first instance, which led to changes in drug trafficking investigations; and the Omagh bombing in 1998, in the second instance, which led to changes in 'Offences Against the State' legislation.²³⁷ She makes the further observation that the phenomenon of 'gangland' crime in the 2000s 'may be responsible for creating the bridge over which these provisions of law travelled from exceptional islands of crime to the mainland of criminal investigation.'²³⁸

The first legislative incursion on the common law position that a suspect was not obliged to potentially assist his own prosecution came in the form of section 30(3) of the Offences Against the State Act 1939. As regards offences scheduled under the 1939 Act, the common law position was altered so as to provide for a right of detention for up to a maximum of seventy-two hours. During that period, the gardaí are entitled to question the suspect. Any admission against interest made during questioning is *prima facie* good evidence against the suspect in any prosecution under the well-established exception to the rule against hearsay allowing for the admissibility of confession evidence. The 1939 Act was challenged in *DPP v Quilligan and O'Reilly (No.3)* but the Supreme Court upheld the constitutionality of the legislation.²³⁹ The court rejected arguments that the Act violated the right to be held equal before the law,²⁴⁰ the right to personal liberty,²⁴¹ and the right to silence.²⁴²

²³⁶ See Ch 2 for discussion of the relevance of the 2011 Act to the field of white-collar crime.

²³⁷ Ú Ní Raifeartaigh, 'Interviewing Suspects in Detention: The Changing Landscape' (Criminal Law Update Conference, School of Law, Trinity College Dublin, 19 November 2011).

²³⁸ Ú Ní Raifeartaigh, 'Interviewing Suspects in Detention: The Changing Landscape' (Criminal Law Update Conference, School of Law, Trinity College Dublin, 19 November 2011).

²³⁹ [1993] 2 IR 305 (SC).

²⁴⁰ Article 40.1 of the Constitution.

²⁴¹ Article 40.4.1° of the Constitution.

²⁴² Protected by Article 38.1 of the Constitution.

Section 4 of the Criminal Justice Act 1984 saw a further extension of the investigative tool of 'detention for questioning', this time allowing for detention for questioning for periods of up to 12 hours where the investigation of serious offences (offences carrying a maximum of 5 years' imprisonment or more) was concerned. This period was extended further to 24 hours by the Criminal Justice Act 2006. Section 2 of the Criminal Justice (Drug Trafficking) Act 1996 introduced detention for questioning for a period of up to one week if felt necessary for the proper investigation of serious offences covered by the Act. Section 42 of the Criminal Justice Act 1999 provides for a situation whereby the Criminal Justice Act 1984 provisions would apply in much the same way to prisoners already in custody on unrelated matters as the 1984 Act applied to suspects at liberty. The effect is that a prisoner can be moved from a prison or remand centre to a police station that had the necessary facilities for questioning suspects.

Section 50 of the Criminal Justice Act 2007 expanded the concept of detention for questioning further by providing for detention for questioning for periods of time of up to one week if considered necessary for the proper investigation of serious offences covered by the Act (predominantly serious offences involving the use of firearms).

In relation to the various provisions set out above, the legislature has always provided for a series of 'checks and balances' within the 'detention for questioning' provisions. Arguably the biggest driver behind these safeguards has been a constant concern on the part of the legislature to avoid a finding by the judiciary that the various provisions are a disproportionate infringement on the personal rights of an individual who is not charged with any offence, let alone convicted, at the time of detention for questioning. Such a finding could, of course, cause such provisions to be struck down on grounds of unconstitutionality.

The safeguards take various forms, including:

- a requirement that extensions of time for detention (up to the maximum provided for by a given provision) are sought at regular intervals and on objectively justifiable

grounds²⁴³

- a requirement that persons of increasingly higher rank (within An Garda Síochána), or higher standing as regards the judiciary, sanction further extensions of time for questioning (up to the maximum provided for by a given provision)²⁴⁴
- a requirement that adequate periods of rest are allowed²⁴⁵
- a requirement that adequate breaks in questioning are provided²⁴⁶
- a requirement that a suspect detained for questioning is informed of his or her right of access to legal advice and given reasonable access to that advice when it is requested²⁴⁷

Further evidence that the legislature has been acutely aware of the need to balance the encroachment on the rights of an innocent citizen generated by the exercise of the 'detention for questioning' provisions comes in the form of comprehensive regulations governing the treatment of persons in this form of custody.²⁴⁸

Section 4 of the Criminal Justice Act 1984 is perhaps the most utilised of the 'detention for questioning' provisions, mainly because of its extremely broad ambit. Whereas, for example, the Criminal Justice (Drug Trafficking) Act 1996 applies in the main, as the name of the Act suggests, to drugs offences, and section 50 of the Criminal Justice Act 2007 applies largely to serious offences involving firearms, the 1984 Act provides for a power of detention for questioning if it is necessary for the proper investigation of any offence that carries a maximum sentence of 5 years or more. There is a multitude of offences, diverse in nature, that fall into this category.

²⁴³ Criminal Justice Act 1984, s 4(3)(b).

²⁴⁴ Criminal Justice Act 1984, s 4(3)(bb); Criminal Justice (Drug Trafficking) Act 1996, s 2(2)(g)(i).

²⁴⁵ Criminal Justice Act 1984 (Treatment of Persons in Custody) Regulations 1987, Reg 12(7).

²⁴⁶ Criminal Justice Act 1984 (Treatment of Persons in Custody) Regulations 1987, Reg 12(4).

²⁴⁷ Criminal Justice Act 1984, s 5.

²⁴⁸ Criminal Justice Act 1984 (Treatment of Persons in Custody) Regulations 1987.

Part 2 of the 2011 Act, specifically section 7 thereof, makes substantial changes to section 4 of the Criminal Justice Act 1984, but only with regard to 'relevant offences' within the meaning of the 2011 Act.²⁴⁹ Section 7(a) of the 2011 Act inserts a substantial addition to section 4 of the 1984 Act in the form of subsections 3A to 3F. It was commenced on 9th August 2011.²⁵⁰ Section 4(3) of the 1984 Act provides for the detention for questioning of a person for up to a maximum of one day, excluding the possibility of a rest period of up to 8 hours between midnight and 8am. However, there is no provision for any break in time in the calculation of the period of detention. Further, section 10 of the 1984 Act prohibits the re-arresting of a person for the purpose of detaining them for questioning afresh, save on application for an arrest warrant to a District Court Judge who must be satisfied that further information has come to the knowledge of the gardaí since the original period of detention that would justify a fresh period of detention. This means that gardaí generally have just one attempt at making the most of what is an extremely powerful investigative tool.

The effect of section 7(a), however, is that, where it is deemed necessary for the further and proper investigation of a 'relevant offence' for the purposes of the 2011 Act, the gardaí may suspend the period of questioning on up to two occasions so long as not more than four months elapse from the date that the detention is first suspended. In other words, in relation to a large number of offences, the gardaí can now stop the clock running on the maximum of 24 hours of questioning available to them and take a generous amount of time to make further enquiries before resuming questioning of the suspect; and they may do so on not one, but two, separate occasions. As the explanatory memorandum to the first draft of the Bill leading to the 2011 Act puts it: 'The purpose of these provisions is to allow the gardaí to follow up on information obtained during questioning'.

At first blush, this development would seem to be very friendly to investigators, in that gardaí are not under pressure to achieve results from a sequence of questioning that must be carried out in one 'unstoppable' period of time. The ability to suspend questioning gives them time to carry out further necessary investigations and check facts, but a by-product of the legislative development is that they also have time to evaluate the approach taken to

²⁴⁹ Criminal Justice Act 2011, s 3. See Ch 2 for discussion of this provision.

²⁵⁰ Criminal Justice Act 2011 (Commencement) Order 2011, SI 411 of 2011.

date during questioning and also introduce other investigators at a later stage if a new or different approach to questioning is felt to be in order.

However, the development in question might also be positive from a suspect's point of view. If the gardaí exercise the new entitlement to suspend questioning, the suspect may feel less pressurised as a result of being detained for less time in one go than would otherwise be the case. Further, even if the suspect has availed of the right to legal advice during the period of questioning, a suspension of questioning would allow for more in-depth and considered legal advice away from the potentially oppressive setting of a garda station. On any resumption of detention for questioning, the suspect has at least the possibility of a strategy or approach to the detention informed by the experience of the initial period of detention as well as any additional legal advice received in the interim.

As regards the practicalities of suspending questioning, section 7(a) states that it is to be done on notice in writing to the suspect, with the notice to provide details of when and where the suspect should return for a resumption of the balance of time allowed for detention for questioning. There are provisions for either the gardaí or the suspect affected by any suspension in questioning to seek to change the time and place of any resumption of the balance of the period of detention allowed for questioning, although the gardaí may only seek to do so on one occasion during each such period of suspension.

Procedures to ensure compliance with the command to return at an appointed time and place for further detention for questioning are provided for by section 8 of the 2011 Act, which inserts sections 4A - 4C after section 4 of the 1984 Act. These provisions give the gardaí the power to arrest without warrant a suspect who has not complied with a notice to return for questioning (and return the suspect directly to the garda station for a resumption of the balance of the period of detention allowed for questioning) and also make it an offence to fail to return to a garda station for a further period of detention for questioning.

The provisions providing for the staggering of questioning in relation to 'relevant offences' under the 2011 Act were utilised in the high-profile investigations that gave rise to the trial of three former employees of Anglo Irish Bank plc after the collapse of the bank in 2008.

Seán FitzPatrick was questioned at different times in 2010 and 2011 (as provided for under the 2011 Act) before being charged with sixteen allegations contrary to section 60 of the Companies Act 1963, as amended.²⁵¹ Mr FitzPatrick's co-accused, Willie McAteer and Pat Whelan, were charged with exactly the same offences. In a resulting Circuit Criminal Court trial that took place over a number of months in early 2014, Sean Fitzpatrick was acquitted of all charges, while Willie McAteer and Patrick Whelan were acquitted of some counts and convicted of others and duly sentenced to periods of community service.²⁵²

A significant provision of the 2011 Act is section 7(c), which has not, as of the time of writing, been commenced yet. It affects the investigation of white-collar crime, but also crime more generally. When commenced, section 7(c) will introduce a new section 6 to the Criminal Justice Act 1984 that will remove some of the uncertainties inherent in the current section 6.

First, questioning will be suspended during the period midnight to 8am unless the suspect objects to such a suspension. Thus the discretion of the member in charge to allow questioning to continue during the period midnight to 8am, if he is not of the opinion that is reasonably necessary to allow the suspect to rest, is removed.

Secondly, the grounds on which An Garda Síochána may continue to question a suspect during the aforementioned period are described. The new section 6(d) provides:

A member of the Garda Síochána in charge of a Garda Síochána station may authorise the questioning of a person detained pursuant to this section between the hours of midnight and 8 a.m. where the member concerned has reasonable grounds for believing that to suspend the questioning would involve a risk of—

- (i) interference with, or injury to other persons,
- (ii) serious loss of, or damage to, property,

²⁵¹ S Carswell, 'More Arrests Expected as FitzPatrick Detained in Anglo Inquiry' *The Irish Times* (Dublin, 19 March 2010); M Fogarty, 'FitzPatrick Held Overnight at Bray Garda Station' *The Irish Independent* (Dublin, 14 December 2011).

²⁵² Office of the Director of Corporate Enforcement, *Annual Report 2014* (Stationery Office 2015) 4.

- (iii) the destruction of, or interference with evidence,
- (iv) accomplices being alerted or the securing of their apprehension being made more difficult,
- or
- (v) hindering the recovery of property obtained as a result of an offence or the recovery of the value of any proceeds of an offence.

A member in charge who provides written authorisation for questioning during the period midnight to 8am will now have to rely on one of the grounds set out above. This provides greater clarity than the situation under the current regime, whereby a member in charge may authorise continued questioning of a suspect during the period midnight to 8am for an unspecified 'serious reason'.

10 Recent Developments in the Right of Reasonable Access to Legal Advice

In a measure that has an impact on the investigation of white-collar crime, but also the investigation of crime more generally, section 9 of the 2011 Act, which at the time of writing has not yet been commenced, inserts new provisions after section 5 of the Criminal Justice Act 1984 that bolster and improve a suspect's right of reasonable access to legal advice during a period of detention for questioning.²⁵³ In line with ECtHR jurisprudence such as *Salduz v Turkey*,²⁵⁴ the new section 5A of the 1984 Act will provide that no questioning of a person detained for questioning shall occur until after the person has consulted with his or her solicitor, where they have requested a solicitor. In ease of the gardaí, the clock will stop running (for a maximum of up to six hours, depending on the circumstances and subject to any future reduction by way of ministerial regulation) on the reckonable period of detention from the time of the request for a solicitor until the conclusion of a consultation with the solicitor. A member in charge may authorise questioning of a suspect before the

²⁵³ For discussion of the constitutional right of reasonable access to legal advice, see: T O'Malley, *The Criminal Process* (Thomson Round Hall 2009) Ch 8; L Heffernan with Ú Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury Professional 2014) Ch 9; D McGrath with E Egan, *Evidence* (2nd edn, Thomson Roundhall 2014) Ch 8; B Storan, 'Right of Access to a Solicitor in Garda Custody' (2011) 2 *The Bar Review* 27; R Farrell, 'Pre-trial detention and access to legal advice - European law developments' (Bar Council Conference, Dublin, 28 January 2012). The matter also forms part of the discussion of the privilege against self-incrimination in Ch 5.

²⁵⁴ (2008) 49 EHRR 421.

suspect has had an opportunity to consult with a solicitor where one or more grounds identical to those set out in the new section 6(d) of the 1984 Act, as outlined above, are present.

It should be noted that the uncommenced section 5A has arguably been rendered moot by the landmark decision of the Supreme Court in *DPP v Gormley and DPP v White*.²⁵⁵ The case involved two defendants who were the subject of unrelated prosecutions. Mr Gormley had been arrested and subsequently interviewed by members of An Garda Síochána after his solicitor had been contacted but before that solicitor had arrived at the station and given legal advice. A number of inculpatory admissions were made in that interview and were deemed admissible by the trial judge. Mr White had been arrested and forensic samples had subsequently been taken from him before his solicitor had arrived at the station and given legal advice. Both accused argued that their right of reasonable access to legal advice had been infringed on the facts of each situation. Dealing with that aspect of the case involving Mr Gormley, the Supreme Court noted that the jurisprudence of the European Court of Human Rights and of various other countries made it clear that a detained person had a right of access to legal advice, which would be breached in circumstances where he or she was interrogated after such access to legal access is requested, but before the access has been obtained:

[I]t is important to note that the ECHR and the US Supreme Court accept that the securing of a conviction of a person, by placing significant reliance on admissions made in the course of questioning which occurred in the absence of advice from a lawyer in breach of the suspects entitlements necessarily leads to the trial being an unfair trial (see *Salduz*, *Miranda* etc). I am persuaded that a like position must be found to exist under *Bunreacht Na hÉireann* (Irish Constitution).²⁵⁶

Clarke J observed:

[T]here would be little point in giving constitutional recognition to a right of access

²⁵⁵ [2014] IESC 17, [2014] 1 ILRM 377.

²⁵⁶ [2014] IESC 17, [2014] 1 ILRM 377 (Clarke J) 405.

to a lawyer while in custody if one of the principal purposes of that custody in many cases, being the questioning of the relevant suspect could continue prior to legal advice being obtained. At a minimum any such right would be significantly diluted if questioning could continue prior to the arrival of the relevant lawyer. In those circumstances, it seems to me that the need for basic fairness, which is inherent in the requirement of trial in due course of law under Article 38.1 of the Constitution, carries with it, at least in general terms and potentially subject to exceptions, an entitlement not to be interrogated after a request for a lawyer has been made and before that lawyer has become available to tender their requested advice.²⁵⁷

By confirming in *Gormley and White* that the constitutional right of reasonable access to legal advice encompasses a right to such advice before questioning begins, the judiciary has, in effect, triggered what the legislature intended in the 2011 Act in circumstances where the executive has thus far failed to exercise its authority to commence the relevant statutory provision.

It is clarified in the still uncommenced section 9 of the 2011 Act, inserting section 5A(8) into the Criminal Justice Act 1984, that a consultation with a solicitor may be in person or by telephone and that a 'consultation in private' is within sight of a member of An Garda Síochána but out of hearing distance. This provision follows the general approach of the High Court in *Ward v Minister for Justice*.²⁵⁸

The 2011 Act makes no changes to the situation that has obtained in Ireland since the case of *Lavery v Member in Charge, Carrickmacross Garda Station*, whereby a suspect who has been detained for the purpose of interview is not entitled to have a solicitor present for the purpose of interview.²⁵⁹ Farrell has made the following observation in relation to that judgment: 'It might (perhaps tritely) be observed that the State is sometimes entitled to be present when an accused meets his lawyers but never the other way around'.²⁶⁰

²⁵⁷ [2014] IESC 17, [2014] 1 ILRM 377, 402.

²⁵⁸ [2007] IEHC 39, [2007] 2 IR 726. In *Brennan v UK* (2002) 34 EHRR 18, the ECtHR held that the act of a police officer sitting in on a solicitor-client interview constituted a breach of Article 6 of the ECHR.

²⁵⁹ [1999] 2 IR 390 (SC).

²⁶⁰ R Farrell, 'Pre-trial Detention and Access to Legal Advice - European Law Developments' (Bar Council Conference, Dublin, 28 January 2012).

A ready-made opportunity for Ireland to subscribe to the concept that the right of reasonable access to legal advice includes the right to have a lawyer present during interview came in the form of the EU Directive on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate Upon Arrest, which had been in gestation since 2009 and was finally adopted into EU law in October 2013.²⁶¹ The directive provides for a right of access to a lawyer in criminal proceedings and the right to communicate upon arrest. The explanatory memorandum to the original proposal for the directive states:

A number of recent rulings of the European Court of Human Rights (ECtHR) have clarified the scope of these provisions. The Court has repeatedly held that Article 6 applies to the pre-trial stage of criminal proceedings and that a suspect must be offered the assistance of a lawyer at the initial stages of police questioning and as soon as he is deprived of his liberty, irrespective of any questioning. The Court also ruled that these guarantees must apply to witnesses whenever they are in reality suspected of a criminal offence, as their formal qualification of the person is immaterial. In the case of *Pankovits*, the ECtHR found a breach of Article 6 where statements made by the suspect in the absence of his lawyer were used to secure a conviction, even though they were not the sole evidence available. The court found that the lack of legal assistance during an applicant's questioning constitutes a restriction of his defence rights, in the absence of compelling reasons that do not prejudice the overall fairness of the proceedings. The number of complaints about the right of access to a lawyer has been growing steadily over the last few years. Without proper implementation of the ECtHR's case-law, Member States are likely to incur substantial costs stemming from liquidated damages awarded by the Court to successful applicants.²⁶²

Articles 4.2 and 4.3 of the Directive, as adopted, set out an explicit right to be present during questioning:

²⁶¹ Directive on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate Upon Arrest (COM/2011/0326 Final - COD/2011/0154).

²⁶² Directive on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate Upon Arrest (COM/2011/0326 Final - COD/2011/0154).

2. The lawyer shall have the right to be present at any questioning and hearing. He shall have the right to ask questions, request clarification and make statements, which shall be recorded in accordance with national law.

3. The lawyer shall have the right to be present at any other investigative or evidence-gathering act at which the suspect or accused person's presence is required or permitted as a right, in accordance with national law, unless this would prejudice the acquisition of evidence.

In January 2013, the Secretary General of the Department of Justice and Equality established a Working Group to advise him on various issues identified as relevant should Ireland choose to opt in to the proposed directive.²⁶³ The Working Group reported back in July 2013, highlighting in particular the cost implications of implementation of the directive in particular and concluding:

Even if Ireland chooses not to opt into the Directive, the trend in case law of the European Court of Human Rights suggests that current policy of not permitting solicitors to be present during Garda interviews with detainees will come under pressure in the medium term.²⁶⁴

These were prescient observations on the part of the working group, for obiter dicta of Clarke J in *Gormley and White* have prompted movement on the issue. In what might be seen as a warning shot across the bows of the State, Clarke J stated the following in the context of the broader right to have a lawyer present during questioning:

[T]he likelihood that the State would be required, as the UK Supreme Court put it in *Cadder*, to organise its systems to take account of such rights has being on the agenda for a sufficient period of time that a finding of a constitutional right to a fair

²⁶³ Under the Lisbon Treaty, Ireland and the UK negotiated an 'opt-in' protocol - Protocol 21 to the Treaty on European Union and to the Treaty on the Functioning of the European Union - in respect of measures proposed under the area of Title V (Freedom, Security and Justice). This Protocol extends to the field of criminal justice cooperation the flexible arrangements that were already applicable in the areas of immigration, asylum and civil law - namely, the discretion to opt into such measures on a case-by-case basis.

²⁶⁴ Department of Justice and Equality, *Report of Working Group to Advise on a System Providing for the Presence of a Legal Representative During Garda Interviews* (July 2013) 22.

trial encompasses the right to access to legal advice before questioning can hardly come as a surprise. If it be the case that the State has not to date, organised itself in a manner sufficient to allow such questioning to take place in conformity not just with the Constitution but also with the well established jurisprudence of the ECHR, then it is those who are in charge of putting such provisions in place who must accept responsibility.²⁶⁵

Soon after the release of the judgment in *Gormley and White*, the DPP issued a direction in March 2014 to the effect that gardaí holding suspects in periods of pre-charge detention should allow the suspect's solicitor to sit in on questioning if this is requested.²⁶⁶ Thus the one remaining area where Ireland was not on all fours with the practice in comparable democracies and the exigencies of being a party to the ECHR would appear to have been addressed, although it is less than desirable that this circular does not have the authority of a judicial ruling or legislative measure. An advance in this regard would be for Ireland to move to opt in to the EU Directive on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate Upon Arrest.²⁶⁷

Without prejudice to the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987, provision is made in the new section 5B of the Criminal Justice Act 1984 (inserted by section 9 of the Criminal Justice Act 2011) for the creation by the Minister for Justice of regulations in relation to access to a solicitor by persons detained in Garda stations concentrating in particular, but not exclusively, on procedures to be applied where difficulties arise with:

- contacting a nominated solicitor
- suspects who fail to nominate a solicitor

²⁶⁵ [2014] IESC 17, [2014] 1 ILRM 377, 404.

²⁶⁶ Directive issued by the Director of Public Prosecutions to An Garda Síochána on 7 May 2014.

²⁶⁷ In commentary on the usefulness of the relevant 'opt-in' procedure, E Regan, 'Dialogue between National and EU Legislators and Authorities in Developing EU Criminal Law' (Irish Centre for European Law Conference, Dublin, March 2014) 14, argues that: 'The Protocol 21 opt-out has provided initial re-assurance to Ireland that its criminal justice system would not be threatened by EU criminal justice legislation and experience has shown that there is no such threat in reality. We should learn from that experience and end the opt-out.'

- suspects who fail to consult with a nominated solicitor upon their arrival
- issues concerning the waiver of the right to consult a solicitor

It is provided for in section 9(b), section 13 and section 14 of the Criminal Justice Act 2011 that the new section 5A of the Criminal Justice Act 1984, when commenced, shall also apply to detention for questioning under section 30 of the Offences Against the State Act 1939, section 2 of the Criminal Justice (Drug Trafficking) Act 1996 and section 50 of the Criminal Justice Act 2007 respectively.

Section 9(c), section 9(d) and section 9(e) of the 2011 Act amend sections 18, 19 and 19A of the 1984 Act (as amended by the Criminal Justice Act 2007) in order to make it clearer that an inference adverse to an accused arising from his or her failure or refusal to account for suspicious circumstances, amongst other matters, on being questioned by a garda cannot be drawn in proceedings unless the accused was informed before such failure or refusal occurred that he or she had the right to consult a solicitor and was afforded an opportunity to do so (other than where he or she waived the right). Sections 10, 11 and 12 provide for similar amendments to the inference-drawing provisions in section 2 of the Offences Against the State (Amendment) Act 1998, section 72A of the Criminal Justice Act 2006 and section 3 of the Criminal Justice (Forensic Evidence) Act 1990.²⁶⁸

11 Conclusion

It is important to bear in mind that the context for any consideration of powers of investigation is the high level of respect for personal rights in this jurisdiction. While it may be helpful from an investigator's point of view to allow for sweeping and indiscriminate powers of investigation, the Constitution and the ECHR will only countenance infringements of relevant personal rights to the extent that is necessary and proportionate. It has been contended that this is the correct approach. However, the question remains as to whether, working within the relevant personal rights architecture, there is an appropriate accommodation of the personal rights of citizens and the interests of society in

²⁶⁸ Provisions allowing for the drawing of inferences from silence are considered more fully at part 2.4.2 of Chapter 5.

having white-collar crime detected, investigated and prosecuted. The answer, it seems, involves a positive response in certain respects but a negative one in others.

Flowing from a culture which dictates that any invasion of personal rights brought about by powers of investigation should be strictly circumscribed, it has been seen that the powers of investigators who endeavour to act proactively in uncovering hidden white-collar crime are narrow and few: while investigators are entitled to make enquiries and communicate with people, there is no obligation on people to respond to such enquiries, and the invocation of stronger powers of investigation generally requires prior suspicion of wrongdoing so as to protect against their operability in an arbitrary fashion that would amount to a disproportionate trenching on relevant personal rights. It is suggested that an appropriate balance has been struck in this regard. There have been promising legislative developments in recent years that seek to oblige and encourage the disclosure of suspected wrongdoing but it remains to be seen how effective these measures will be in practice.

Once an investigator has prior suspicion that a crime has been committed, much stronger powers of investigation (referred to in this chapter as 'core' powers of investigation), namely powers of surveillance, entry, search, seizure, arrest and detention, become available. It has been noted that an investigator must generally have a reasonable suspicion or belief of wrongdoing for a core power of investigation to become operable. However, depending on the power in question, slightly different thresholds apply. The apparently arbitrary differences in the thresholds result in incoherence and confusion. It has been mooted that the adoption of a standardised threshold for the triggering of relevant powers is feasible and would bring certainty and coherence that would be in ease of both suspects and investigators.

Under the rubric of powers of surveillance and interception of communications, the law here has only begun, in recent decades, to catch up with the requirements of Ireland being a party to the ECHR, and gaps and deficiencies remain. It has been observed that an omission from the statute book here is clear provision for the surveillance of internet communications, including emails, a potentially valuable tool for those investigating certain forms of white-collar crime. Powers of entry search and seizure are patchwork in nature

and are ripe for streamlining; recommendations in this regard are under active consideration by the LRC.²⁶⁹ However, those powers of entry, search and seizure that are targeted at white-collar crime, for example section 787 of the Companies Act 2014, are generally well tailored to meet the particular features of investigations of such crime.

The Criminal Justice Act 2011 introduced a useful adaptation of the power of pre-charge detention in relation to a wide range of white-collar offences. However, other important provisions in that statute concerning access to legal advice remain uncommenced and have been effectively overtaken by subsequent legal developments. This chapter gives a mixed response to the question of the adequacy of the existing regime for investigating white-collar crime. Would the creation of a coherent, dedicated statutory approach to white-collar crime elicit a more positive response? The Criminal Justice Act 2011 might be regarded as a step in that direction, and yet it falls well short of amounting to a codified approach to the area. The last decade has seen the passing of a basket of legislative measures on organised crime that included some mechanisms copied and adapted from the 'Offences Against the State' regime.²⁷⁰ In Chapter 6, consideration will be given to the question of whether a codified approach modelled on the same regime might better serve the State's fight against white-collar crime, while still respecting the personal rights of citizens.

²⁶⁹ Law Reform Commission, *Issues Paper on Search Warrants* (LRC IP 4-2014).

²⁷⁰ See: L Campbell, *Organised Crime and the Law: A Comparative Analysis* (Hart Publishing 2013); L Campbell, 'The Criminal Justice Act 2007-A Theoretical Perspective' (2007) 17(3) *Irish Criminal Law Journal* 8.

Chapter 4

Prosecuting White-Collar Crime in Ireland: An Evaluation of Existing Rules and Doctrines

1 Introduction

In the last chapter, challenges that arise in the investigation of white-collar crime in this jurisdiction were considered. The focus of this chapter is on those issues that are of particular relevance to the prosecution of white-collar crime. The chapter seeks to evaluate the design of institutional structures, laws and doctrines associated with the prosecution of white-collar crime in Ireland. The first matter for consideration is the institutional framework for the prosecution of white-collar crime in this jurisdiction. An initial point of interest in this regard is the fact that only the DPP may prosecute white-collar crimes on indictment, while relevant bodies other than the DPP are confined to launching prosecutions that are purely summary in nature. A further relevant matter is the very wide degree of discretion afforded to regulatory bodies as to whether a summary prosecution is launched in an instance of white-collar crime over which they have jurisdiction. Another pertinent issue is the absence in this jurisdiction of clearly defined structures for multi-agency approaches to the prosecution of white-collar crime. A final aspect of the institutional approach to the prosecution of white-collar crime in this jurisdiction that warrants attention is the lack of a body akin to the Serious Fraud Offices that exist in the UK and New Zealand.

The second area of focus in this chapter is a particular challenge presented by the fact that white-collar crime often leads to the prosecution of legal persons as well as natural persons. A specific issue for examination is the uncertain state of the law in this jurisdiction on the question of attributing direct liability to a defendant company and the consequences that flow therefrom.

A third matter for analysis in this chapter is the place of documentary evidence in the prosecution of white-collar crime, given that such evidence is, generally speaking, central to

the prosecution of most white-collar crimes. The definition of documentary evidence, or rather the lack of a uniform approach to such a definition, will be assessed. Specific consideration will be given to the impact of exclusionary rules on the admissibility of documentary evidence and also the array of statutory presumptions operating in relation to documentary evidence. Powers to demand the production of documentary and electronically stored material that may be of evidential value in white-collar crime prosecutions will be examined. Issues relating to pre-trial disclosure of documentary and electronic evidence will be considered. A further point for appraisal is the challenge created by the practicalities of presenting large volumes of documentary evidence at trial and the extent to which relevant statutory provisions address this challenge. It might be noted that the impact of the privilege against self-incrimination and legal professional privilege on the admissibility of documentary evidence is considered in Chapter 5.

The fourth matter for consideration is the extent to which current rules promote efficiency in the conduct of white-collar crime trials in circumstances where a variety of factors, including lengthy indictments and the need to adduce voluminous documentary evidence, tend to greatly lengthen white-collar crime trials in comparison to trials of other forms of crime.

A final matter for assessment in this chapter is the role of the jury in the prosecution of white-collar crime in this jurisdiction. Specifically, arguments that trials of white-collar crimes should be run without juries, or with specialist juries, will be scrutinised. The experiences of some other common law jurisdictions will be assessed as part of this analysis.

2 Bodies Tasked With Prosecuting White-Collar Crime

The significance of the institutional structures associated with the prosecution of white-collar crime lies in the fact that the primary focus of this thesis, namely the powers, procedures and laws of evidence associated with the investigation and prosecution of white-collar crime, must operate within the context of this architecture. The main responsibility for the detection and investigation of white-collar crime in this jurisdiction

falls on the Garda Bureau of Fraud Investigation (GBFI), a specialist subdivision of An Garda Síochána.¹ However, once an investigation has reached a conclusion, it is within the exclusive domain of the DPP to decide whether or not a prosecution should be advanced in any case where prosecution on indictment, rather than summary prosecution, is contemplated.² Even where exclusively summary prosecutions are in issue, the DPP provides guidance to An Garda Síochána in relation to such prosecutions.³ Thus, in relation to the investigation and prosecution of white-collar crime falling outside the purview of regulatory bodies, there is a clear division of jurisdiction: An Garda Síochána retains control over investigations and, under the guidance of the DPP, some summary prosecutions, while in relation to serious crimes, the DPP exclusively makes decisions on the initiation or continuance of prosecutions.

A range of other bodies have authority to investigate and prosecute narrower categories of criminal activity that fall under the umbrella of white-collar crime. Such bodies include the Office of the Director of Corporate Enforcement (ODCE),⁴ the Competition and Consumer Protection Commission,⁵ The Central Bank,⁶ the Health and Safety Authority,⁷ and the

¹ A recommendation that a National Bureau of Fraud of Investigation replace the Garda Fraud Squad that had been in existence since the 1950s was made to the government in 1992: PD Maguire (Chairman), *Report of the Government Advisory Committee on Fraud* (Stationery Office, Dublin, 1992) [4.1]. The GBFI was constituted in 1996. See also: S Horan, *Corporate Crime* (Bloomsbury Professional 2011) [8.168]-[8.173].

² Article 30.3 of the Constitution reads: 'All crimes and offences prosecuted in any court constituted under Article 34 of this Constitution other than a court of summary jurisdiction shall be prosecuted in the name of the People and a the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose.' See also: G Hogan and G Whyte, *Kelly: The Irish Constitution* (4th edn, Butterworths 2003) [5.4.11] - [5.4.31]; G Hogan and E Kinsella, *The Origins of the Irish Constitution 1928-1941* (Royal Irish Academy 2012) 720. Section 3 of the Prosecution of Offences Act 1974 has regard to Article 30.3 of the Constitution by nominating the DPP to replace the Attorney General as the sole office holder responsible for prosecuting virtually all indictable matters. Responsibility for prosecuting a very small range of indictable offences (mainly fisheries offences) remains with the Attorney General.

³ Section 8 of the Garda Síochána Act 2005 provides that a garda may institute and conduct prosecutions in a court of summary jurisdiction, but only in the name of the DPP. However, by virtue of the same section, the exercise of this function is subject to any general and specific directions that might be given by the DPP. The DPP's *General Direction Number 3* (8 November 2011) provides detailed guidance to An Garda Síochána on the categories of cases that may and may not be brought to prosecution without first obtaining a specific direction from the DPP.

⁴ The ODCE was established by the Company Law Enforcement Act 2001. The statutory basis for the body is now provided for in the Companies Act 2014, ss 945-957.

⁵ Competition and Consumer Protection Act 2014, s 9.

⁶ The Central Bank was afforded increased powers of investigation by the Central Bank Reform Act 2010.

⁷ Having been established originally by the Safety, Health and Welfare at Work Act 1989, the Authority was renamed and given additional powers of investigation and prosecution by a 2005 Act of the same name.

Revenue Commissioners.⁸ An issue for consideration at this point is the extent to which such bodies can progress investigations to the prosecution stage.

2.1 Regulatory Bodies: A Limited Power to Prosecute

There are some important distinctions to be drawn between the DPP and the aforementioned regulatory entities. The DPP is the public prosecutor in this jurisdiction and, as such, has a function to prosecute all crimes brought to her attention where there is a sufficiency of evidence and no good reason not to do so.⁹ The DPP has no investigative function and is confined to enforcing pre-existing rules in relation to past behaviour. In contrast to this, the primary function of the bodies mentioned in the last paragraph is to regulate the relatively small spheres of human activity falling within their bailiwick. In order to give effect to this regulatory function, such bodies are given both investigative and prosecutorial powers. As such, these bodies have more in common with the 'cradle to grave' approach to the investigation and prosecution of white-collar crime adopted in some other common law jurisdictions.¹⁰

The difference between the DPP and the aforementioned regulatory bodies that is of most interest for the purposes of the instant discussion is the fact that, while the DPP has the power to initiate both summary and indictable prosecutions, the regulatory bodies are limited to advancing a relatively narrow range of prosecutions of a summary nature only. The question of prosecuting more serious matters coming within the realm of such bodies must be referred to the DPP for her decision and her decision alone. A possible advantage of this approach is that there is a consistency and uniformity to the exercise of the prosecutorial discretion. It could also be said that it prevents competition between

⁸ Having been established in 1923, powers of investigation and prosecution at the disposal of the Revenue Commissioners were consolidated and expanded by the Taxes Consolidation Act 1997.

⁹ G Hogan and G Whyte, *Kelly: The Irish Constitution* (4th edn, Butterworths 2003) [5.4.22]; T O'Malley, *The Criminal Process* (Thomson Roundhall 2009) [12.15]. The DPP retains a broad discretion to prosecute in a given case, with the public interest the dominant consideration in every case. The DPP's *Guidelines For Prosecutors* (November 2010) give extensive direction on how the discretion to prosecute is to be exercised.

¹⁰ This phrase is used by Jessica de Grazia at paragraph 26 of the executive summary of her *Review of the Serious Fraud Office Final Report* (June 2008), which considered the operation of the UK Serious Fraud Office. The contrast between the unified approach to the investigation and prosecution of crime adopted in some other common law jurisdictions, as distinct from the binary approach adopted for the most part in this jurisdiction, is considered in more detail at part 2.3 of this chapter.

agencies and a rush to prosecute. On the other hand, the failure to devolve the prosecutorial function to other competent bodies can lead to inefficiencies and a loss of expertise in the making of key decisions.

For the purposes of the issue under consideration, it is proposed to examine the powers of prosecution available to just one of the aforementioned bodies, namely the Central Bank. This choice is made in order to keep the issue as focused as possible and because the body is broadly representative of other regulatory bodies in this jurisdiction in terms of the powers of prosecution extended to it.

2.1.1 The Central Bank: A Limited Power to Prosecute

The Central Bank Reform Act 2010 created a new single unitary body, namely the Central Bank of Ireland, which is responsible for both central banking and financial regulation. The new structure replaced the previous related entities, the Central Bank and the Financial Services Authority of Ireland and the Financial Regulator. Of the many roles now carried out by the Central Bank, it is the role of financial regulation that is of interest here, as it is this responsibility that gives the Central Bank, through its Enforcement Directorate, the power to detect, investigate and prosecute certain white-collar crime.

Part IIIC of the Central Bank Act 1942 provides the Central Bank with the power to administer sanctions in respect of prescribed contraventions by regulated entities and persons concerned in the management of regulated entities, a system that is referred to as the Administrative Sanctions Procedure.¹¹ Where the Central Bank has a concern that a prescribed contravention may be, or may have been, committed, an investigation into the issue may be commenced to establish whether there are reasonable grounds for the suspicion. When the investigation is concluded a decision will be taken about whether to establish an inquiry. An inquiry shall decide if the prescribed contravention has occurred and will determine the appropriate sanctions.

¹¹ Part IIIC was inserted by section 10 of the Central Bank and Financial Services Authority of Ireland Act 2004 and further amended by secondary legislation and primary legislation, including the Central Bank Reform Act 2010 and the Central Bank (Supervision and Enforcement) Act 2013.

Alternatively, the Central Bank's Administrative Sanctions Procedure provides that, at any time before the conclusion of an inquiry, the matter may be resolved by entering into a settlement agreement. This is a written agreement which binds the Central Bank and the regulated entity. Decisions of an inquiry may be appealed to the Irish Financial Services Appeals Tribunal. Evidently this approach to legislative infringement does not involve recourse to the criminal law. Indeed, the relevant legislation provides that where a monetary penalty is imposed and the prescribed contravention in respect of which the sanction is imposed is an offence under a law of the State, the financial service provider or other person concerned is not liable to be prosecuted or punished for the offence under that law.¹²

However, a considerable number of relevant financial services legislative provisions provide that breaches of the provisions are criminal offences.¹³ The Central Bank has powers to prosecute some of these offences through the courts, namely those that are summary only in nature. The way in which the Central Bank exercises its discretion to prosecute certain summary offences will be considered in the next section but the crucial point of note at this juncture is that the power to prosecute is confined to minor offences. The situation is analogous to that obtaining in relation to An Garda Síochána, who may prosecute cases summarily but must leave to the DPP the decision on prosecution of crimes of a non-minor nature.

As the law stands, only the DPP may prosecute matters on indictment. The role of the DPP as the exclusive prosecutor on indictment comes from Article 30.3 of the Constitution, which previously designated the Attorney General as the only person entitled to prosecute on indictment.¹⁴ The functions of the Attorney General were transferred to the DPP by means of the Prosecution of Offences Act 1974. Farrell has argued that it would be a mistake to assume that the purpose of Article 30.3 was to restrict the role of prosecuting on indictment to the Attorney General on the basis that only one of the chief law officers of the State could discharge so solemn and grave a role and that it is rather more probable that it

¹² Central Bank Act 1942, s 33AT.

¹³ See, for example, sections 33, 36 and 37 of the Central Bank Act 2010.

¹⁴ See n 2.

had more to do with seeking to restrict private prosecutions to courts of summary jurisdiction.¹⁵ In any event, there would not appear to be any barrier to the Oireachtas legislating for bodies other than the DPP to prosecute on indictment.

There are a number of reasons why consideration should be given to the question of expanding the power to prosecute on indictment to regulatory bodies such as the Central Bank. First, the current approach of limiting the power of regulators to prosecute to summary prosecutions arguably has a chilling effect on the use of a prosecution as a regulatory tool. Under the current system, a regulator such as the Central Bank will lose control of a prosecution if decisions on the jurisdiction of a prosecution are made in such a way that a matter is tried on indictment. Notwithstanding that a regulatory authority will often have its own legal staff with expert knowledge of the law relevant to its sphere of influence, such a body will be forced to cede control of a prosecution to the Office of the DPP in the event that the decision is made that a prosecution cannot proceed otherwise than on indictment. This will quite possibly result in delay, replication of work by lawyers from the Office of the DPP and a high risk of dissatisfaction on the part of the regulatory body involved that its lawyers are consigned to the role of assisting lawyers from the Office of the DPP to advance a particular prosecution. Taken together, these factors risk pushing a regulatory authority to exercise its discretion not to prosecute in a given case where the body might otherwise do so if given full powers to advance all viable prosecutions, whether summary or indictable in nature.

Secondly, it is unsatisfactory that there is a paradox whereby a regulatory body's lawyers with a specialised and expert knowledge of the relevant law are entitled to handle minor prosecutions, whereas they are forced to relinquish control of more complex and serious matters to be tried on indictment to lawyers in the Office of the DPP, who although qualified, are far more likely to have legal training and experience of a more general nature. For matters that proceed on indictment, the final say on issues ranging from the

¹⁵ R Farrell, 'Prosecutors, Regulators, Trial by Jury and the Prosecutor's Discretion' (11th Annual National Prosecutors' Conference, Dublin, April 2010) 3. The paper notes that Article 30.3 essentially replicates the terms of section 9 of the Criminal Justice (Administration) Act 1924 in constitutional form. Prior to the 1924 Act private prosecutions were permissible, if not particularly common as a result of the introduction of the Vexatious Indictments Act 1869, which had been introduced to restrict a growing number of private prosecutions.

presentation of complex evidence to the prosecution strategy at trial lies with a lawyer from the Office of the DPP rather than a lawyer from the regulatory body that commenced the investigation. This is far from an ideal state of affairs, particularly when a lawyer of more relevant specialised training and experience could, if appropriate legislation is passed, be given full carriage and control of such a prosecution.

A final argument for bolstering prosecutions as weapons in the armoury of regulators lies in the fact that, unlike the DPP whose function is to respond to crime rather than prevent it, regulators have as part of their function the prevention of crime and the shaping of behaviour in their spheres of influence. Farrell makes the point that the current approach of confining regulators powers to the prosecution of summary matters only does not reflect the breadth of a regulator's function: only by extending the power to prosecute to indictable matters will a situation be achieved whereby regulators have a role commensurate with function ascribed to them.¹⁶ This sensible observation amounts to a further reason for extending full powers of prosecution to regulatory bodies in relation to criminal behaviour falling within their area of oversight.

Of course, particular cases may not always fall neatly within the purview of one or other regulator. Certain issues may transcend the sphere of a particular agency or raise matters of a more general criminal nature, a point of particular significance in the absence of a clear understanding of the term 'white-collar crime'. The question arises as to how contests between agencies over particular prosecutions would be resolved if the power to prosecute on indictment was to be extended to bodies other than the DPP. In the absence of clear lines of responsibility, agencies might rush to seize investigative control of an instance of suspected white-collar crime so as to preserve prosecutorial autonomy. One course of action in situations where more than one body claims jurisdiction over a particular investigation and prosecution would be to leave it to the DPP, as the primary prosecutor in the land, to rule on disputes as to jurisdiction. Another approach would be to provide for more formalised mechanisms of cooperation between entities in relevant situations.¹⁷ The

¹⁶ R Farrell, 'Prosecutors, Regulators, Trial by Jury and the Prosecutor's Discretion' (11th Annual National Prosecutors' Conference, Dublin, April 2010) 6.

¹⁷ One example of informal cooperation between regulatory bodies and the DPP in this jurisdiction arose in the case of the lengthy and complex investigation into the circumstances of the collapse of Anglo Irish Bank

ODCE has complained about the lack of established 'statutory gateways' for the exchange of information between agencies and has called for a 'common legal basis permitting one primary regulatory body to take the lead role in investigation a set of events relevant to different legislative codes in agreement and in cooperation with other relevant regulatory bodies'.¹⁸

It can be argued that the current system whereby the DPP retains sole control over the prosecution of matters on indictment works reasonably well, particularly in a small jurisdiction such as Ireland, and precludes the occurrence of inter-agency conflict with regard to the decision to prosecute on indictment and the conduct of such prosecutions. Indeed, arguments to this effect held sway in the LRC's *Report on a Fiscal Prosecutor and a Revenue Court* that decided not to recommend the establishment of a Director of Fiscal Prosecutions.¹⁹ However, it is contended that, on grounds of efficiency and the maximisation of available expertise, there should be a devolution of powers of prosecution to regulatory bodies in relation to offences within the domain of such bodies, with formal mechanisms to be put in place to deal with instances of a conflict of jurisdiction as between relevant bodies.

2.2 Regulatory Bodies and the Discretion to Prosecute

While the DPP retains a discretion to prosecute in a given case, this is to be exercised in the context of her function as the public prosecutor with reference to the public interest.²⁰ However, regulators are not shackled by such considerations and may exercise the discretion to prosecute as they see fit. It has been observed that the selective nature of the role of a regulator, in contrast to that of a public prosecutor, means that factors such as expedience, convenience and resourcing, as well as their efforts to shape future conduct in their realm of influence, a factor the DPP has no jurisdiction to be concerned with, will

plc in 2008. Detailed summaries of the investigation, and particularly the cooperation between the ODCE and the GBFI, can be found in the annual reports of the ODCE for 2009-2014.

¹⁸ Office of the Director of Corporate Enforcement, *Submission on White Collar Crime* (30 November 2010) 15.

¹⁹ Law Reform Commission, *Report on a Fiscal Prosecutor and a Revenue Court* (LRC 72-2004) [6.17].

²⁰ Article 30.3 of the Constitution.

influence the exercise of a regulator's discretion to prosecute.²¹ While the principle of prosecutorial discretion is sensible and desirable, it also seems reasonable to expect that it would be exercised with reference to established factors. While this is the case with the DPP,²² the same cannot be said of regulatory bodies with powers of summary prosecution. Such bodies would doubtless argue that they at all times act in the public interest but, as things stand, they do not exercise their discretion with reference to clear criteria.

2.2.1 *The Central Bank: A Discretion Not to Prosecute*

The Central Bank's 'Enforcement Strategy 2011 - 2012' document provides guidance as to the policy of the Enforcement Directorate of the Central Bank in relation to powers of investigation available to it where certain white-collar crimes are concerned.²³ Of particular note is the following extract from the report:

3.4.2 Criminal Prosecutions and the Administrative Sanctions Procedure

In certain circumstances a breach of a regulatory requirement by a regulated entity will constitute both a prescribed contravention and a criminal offence for which the Central Bank may commence summary prosecutions. Where this situation exists, no criminal prosecution may be brought if the Administrative Sanctions Procedure has been followed and has led to the imposition of a monetary penalty. If a criminal prosecution has been brought in respect of an offence that also involves a prescribed contravention, and the regulated entity is found either guilty or not guilty then no monetary penalty may be imposed pursuant to the Administrative Sanctions Procedure.

At present, it is our policy to pursue prescribed contraventions pursuant to the Administrative Sanctions Procedure in preference to bringing a summary prosecution. In exceptional circumstances we will pursue a prescribed

²¹ R Farrell, 'Prosecutors, Regulators, Trial by Jury and the Prosecutor's Discretion' (11th Annual National Prosecutors' Conference, Dublin, April 2010) 5. For detailed consideration of relevant issues, see: S Kilcommins and U Kilkelly (eds), *Regulatory Crime in Ireland* (First Law 2010).

²² DPP's *Guidelines For Prosecutors* (November 2010).

²³ Central Bank, *Enforcement Strategy 2011 - 2012* (2010).

contravention via the criminal courts. Where such circumstances arise, we are also committed to pursuing criminal prosecutions through to conviction. We are currently scrutinising this policy to ensure that criminal prosecutions are pursued in all appropriate cases taking into account the seriousness, intent and wilfulness of the contravention involved. We expect to consult publicly on our policy in this area during 2011.²⁴

It is clear from this section of the document that, although the Central Bank has the power to bring summary prosecutions in certain cases, it often has the choice as to whether to proceed by way of criminal prosecution or to approach a matter in a manner that keeps it outside of the criminal justice system. This discretion flows from the lack of detail and specificity in the statutory framework providing the Central Bank with the relevant powers. Clearly there are very different implications for an entity under investigation depending on the way in which the Central Bank exercises its discretion. Under the Administrative Sanctions Procedure, at worst an entity may face a substantial financial penalty and publicity to the effect that it has breached a regulatory provision. However, if a criminal prosecution is opted for, the same entity faces criminal conviction and a sentence imposed with reference to the relevant penalty provision, together with the public opprobrium associated with such an occurrence, which is likely to be a far less favourable outcome.

It is the stated policy of the Central Bank to prefer an approach to contravention of the law that avoids a criminal prosecution, even where this is provided for as a possibility. This is the case, save in 'exceptional circumstances'. There is no clear guidance as to what such 'exceptional circumstances' may be, although it is stated that 'the seriousness, intent and wilfulness of the contravention involved' will be taken into account in deciding on 'appropriate cases' for prosecution.²⁵ It might be speculated that the greater the seriousness, intent and wilfulness of a particular contravention, the more likely it is to lead to a criminal prosecution, but this is by no means clear.

The document in question does not provide a rationale for the policy of preferring a non-

²⁴ Central Bank, *Enforcement Strategy 2011 - 2012* (2010) 20.

²⁵ Central Bank, *Enforcement Strategy 2011 - 2012* (2010) 20.

criminal approach to contraventions. It may be that there are pragmatic reasons for the policy. Is use of the Administrative Sanctions Procedure more cost effective? Has the Central Bank been unsuccessful in initiating criminal prosecutions in the past? Does the fact that the Central Bank may only launch summary proceedings lead to a view that such prosecutions would have little punitive or deterrent effect on alleged offenders, as distinct from proceedings brought on indictment? Whatever the exact reasons for the approach of the Central Bank, a troubling aspect of its policy is that those in potential contravention of rules over which the Enforcement Directorate of the Central Bank has jurisdiction have the comfort of knowing that the preferred approach to dealing with them is outside of the criminal justice system, even if this is not guaranteed.

Notwithstanding that the sanctions imposed under the Administrative Sanctions Procedure may be strong in their impact, it is contended that they could not carry the same deterrent weight as a criminal prosecution, not least because of the greater social stigma attached to a finding in the criminal courts over a finding made pursuant to an Administrative Sanction Procedure. Is it appropriate that unelected State bodies set policy and make decisions in private on sensitive issues such as the threshold between civil and criminal proceedings where wrongdoing has been uncovered? While there may be strong arguments that regulatory bodies should retain the discretion whether or not to prosecute where the DPP has no corresponding discretion in the case of a viable prosecution, there would seem to be no excuse for an absence of legislative guidance as to how this discretion should be exercised. Bodies such as the Central Bank cannot be blamed for filling the vacuum left by a paucity of legislative direction as to how they might exercise their discretion in individual cases but it is argued that more prescriptive legislation is required in order to rectify this deficit. However, it is worth emphasising that the lack of clarity over the exercise of the discretion of relevant regulatory bodies to prosecute matters summarily relates to matters which are, by definition, minor in nature.

2.3 A Unified Approach to the Investigation and Prosecution of White-Collar Crime

It has already been noted that, in the case of summary matters within their remit, regulatory agencies in this jurisdiction have carriage of investigations and prosecutions

‘from cradle to grave’. However, in the case of investigations that disclose the commission of serious white-collar crime, the regulatory agencies must pass the baton to the DPP, who takes charge of any subsequent prosecution on indictment. The same is true in the case of indictable matters investigated by the GBFI; a binary approach applies whereby the GBFI investigates a given matter before handing control of any related prosecution to the DPP. Established in April 1996, the GBFI is a specialist division of An Garda Síochána that investigates serious and complex cases of commercial fraud, cheque and payment card fraud, counterfeit currency, money laundering, computer crime and breaches of the Companies Acts.²⁶ In answering the question as to how the GBFI decides whether to accept a case, the policy of An Garda Síochána indicates that cases are assessed as to the complexity and gravity of the offences based on the following criteria -

- Monetary loss;
- Investigations involving a significant international dimension;
- Investigations involving widespread public concern;
- Investigations requiring specialised knowledge;
- Investigations involving complex issues of law or procedure²⁷

The criteria proffered by the GBFI as to the basis on which cases are accepted are worthy of note. In what would appear to be an instance of sensible prioritisation when tasked with making the best use of finite resources, it is clear that large-scale fraud is the primary concern of the GBFI. It would seem that cases falling outside of the description of major and complex fraud, or not otherwise satisfying the criteria outlined above, fall to be investigated by other members of An Garda Síochána with less specialised training or who are not, at least, members of the GBFI.

The question arises as to whether the investigative and prosecutorial structures in place at present provide the optimum method of prosecuting serious white-collar crime. It has already been contended at part 2.1.1 of this chapter that the power to prosecute on

²⁶ See n 1.

²⁷ Presentation by Detective Inspector Maureen McGrath and Detective Sergeant Clodagh White of the GBFI as part of a lecture delivered on the Advanced Diploma in Corporate, White-Collar and Regulatory Crime course at The Honorable Society of King's Inns, Dublin, 1 March 2012.

indictment should be extended to relevant regulatory bodies in relation to white-collar crimes within their jurisdiction. A related issue is whether the GBFI should be supplanted by a body with powers of both investigation and prosecution. A key difference between this jurisdiction and some other common law jurisdictions is the absence of a body with powers of both investigation and prosecution in relation to serious white-collar crime, such as the Serious Fraud Office (SFO) in the UK²⁸ or the entity of the same name in New Zealand.²⁹ A further example of a unified investigative and prosecutorial approach to serious white-collar crime can be found in the system that operates in New York City.³⁰ In its governing policies and its practice, for example, of employing in-house forensic accountants to assist in its investigations,³¹ the structure of the GBFI largely mimics that of the SFO in the UK or New Zealand, save for one important exception: it does not have the power or expertise to see matters through from investigation to prosecution.

Questions were raised in Dáil Éireann as long ago as 1991 as to whether a Serious Fraud Office would be established in this jurisdiction.³² The Law Reform Commission's 1992 *Report on the Law Relating to Dishonesty* considered whether a Serious Fraud Office should be established in this jurisdiction but cited the relatively low level of fraud offences in the country at the time, together with a dearth of information as to the success or otherwise of the then newly created UK SFO, in deciding not to recommend the establishment of a SFO

²⁸ The 'Roskill Report' (Roskill (Chairman), *Report of the Fraud Trials Committee* (1986)), published in 1986, was the impetus for the promulgation of the Criminal Justice Act 1987 and the associated creation of the UK Serious Fraud Office.

²⁹ The New Zealand SFO was established in 1990 to administer the Serious Fraud Office Act 1990. The 1990 Act gives the Director of the SFO special powers relating to the detection, investigation and prosecution of serious or complex fraud cases.

³⁰ In the course of the instant research, the author attended a lecture delivered by Ms Karen Hennigan on 5th April 2012 at the Faculty of Law, Trinity College Dublin, and interviewed Ms Hennigan afterwards. At the time, Ms Hennigan was a prosecutor in the Department of Justice covering the Eastern District in New York, comprising Brooklyn, Queens and Staten Island. Her specific role since she had started work there in 2005 had been to investigate and prosecute serious financial crimes that violated provisions of the Federal Code. Ms Hennigan emphasised the combined investigative and prosecutorial nature of her role as a key factor in her success as a prosecutor.

³¹ Remarks of Detective Chief Superintendent Martin McLaughlin of the GBFI, speaking at the Department of Justice and Equality *White Paper on Crime, Consultation Seminar on White Collar Crime* (Criminal Courts of Justice, Dublin, 5 November 2010).

³² Dáil Deb 16 October 1991, vol 411, col 12. John Bruton TD questioned Taoiseach Charles Haughey about a radio interview the Taoiseach had given to RTE on 22 September 1991 indicating that consideration was being given to the establishment of a Serious Fraud Office.

here.³³ The 1992 report of the Government Advisory Committee on Fraud also considered the matter.³⁴ The Committee stopped short of recommending that a Serious Fraud Office be established, stating:

There is no case, in our view, for moving to a completely new model, such as the UK Serious Fraud Office, where the investigative and prosecutorial functions are combined. Significant factors in the establishment of that office were the scale of serious fraud in the UK and the perceived need for a unitary investigative authority in place of the diversity of local police forces, factors which do not apply here.³⁵

Instead, the Committee concluded that the Garda Fraud Squad be replaced with a National Bureau of Fraud Investigation,³⁶ a recommendation that led to the creation of the GBFI.

The factors mentioned in the aforementioned 1992 reports that led to the conclusion that a Serious Fraud Office should not be established here do not, arguably, have as much weight now as they may have had then. In the time since those reports were issued, Ireland has experienced exponential economic growth and white-collar crime has increased in volume and sophistication. More than two decades after their respective establishment, the UK SFO and the New Zealand SFO continue to operate and the most recent annual reports of each entity detail largely positive outcomes in the prosecutions undertaken during the periods under review.³⁷ In light of the success of a unified approach to the investigation and prosecution of serious white-collar crime in other common law jurisdictions, particularly New Zealand, which is comparable to Ireland in its size and economic development, it is submitted that fresh consideration should be given to the establishment of a Serious Fraud Office in this jurisdiction. Although this recommendation, and the other proposals made in this part of the chapter, are secondary to the primary focus of this thesis, it is contended

³³ Law Reform Commission, *Report on the Law Relating to Dishonesty* (LRC 43-1992) 332.

³⁴ PD Maguire (Chairman), *Report of the Government Advisory Committee on Fraud* (Stationery Office, Dublin, 1992).

³⁵ PD Maguire (Chairman), *Report of the Government Advisory Committee on Fraud* (Stationery Office, Dublin, 1992) [4.1].

³⁶ PD Maguire (Chairman), *Report of the Government Advisory Committee on Fraud* (Stationery Office, Dublin, 1992) [4.5].

³⁷ Serious Fraud Office (UK), *Annual Report and Accounts 2014-2015* (2015); Serious Fraud Office (New Zealand), *Annual Report to 30 June 2014* (2015).

that the suggested changes to the institutional framework for the investigation and prosecution of white-collar crime would complement the primary findings of the thesis concerning the powers, procedure and laws of evidence associated with the investigation and prosecution of white-collar crime.

3 Ascribing Liability to Legal Persons for White-Collar Crimes

Given its nature, the prosecution of white-collar crime can raise difficulties in identifying and ascribing liability to the correct defendant or defendants; there is also a lack of clarity in relation to the broader principle of who should be liable in a given case of wrongdoing. A particular point of uncertainty arises in this jurisdiction in relation to the attribution of direct liability to defendant companies as legal persons. It is proposed in this section to examine this area of incertitude and to consider how it might be most satisfactorily clarified.³⁸

3.1 The Prosecution of Companies: Ascribing Liability to Legal Persons

Many offences falling under the umbrella of white-collar crime are regulatory in nature. A common feature of such offences is that they entail absolute or strict liability. As such, there is no requirement for the prosecution to prove mens rea on the part of a defendant alleged to have committed such an offence. In one way, this makes the prosecution of companies for such offences relatively straightforward: once the actus reus of the offence can be proved against the defendant company, the offence is made out. However, there remains the question of how the actus reus of a crime is to be attributed to a defendant company. Furthermore, many other white-collar crimes of a non-regulatory nature require the more traditional proof of both actus reus and mens rea. In such cases, prosecutors will have to concern themselves with proving both elements of the offence in question in addition to determining the most appropriate way of fixing a defendant company with liability.

³⁸ This specific difficulty was highlighted by the ODCE in its *Submission on White Collar Crime* that was written as part of a government consultation process concerning the white-collar crime dimension of a new White Paper on crime: Office of the Director of Corporate Enforcement, *Submission on White Collar Crime* (30 November 2010) 10.

Where provided for by statute, the doctrine of vicarious liability provides that a company may be found liable for the acts of its employees or agents. In such situations, a company is automatically liable once the necessary *actus reus* and *mens rea* of an offence can be proved against an employee or agent of the company. At all times those acts remain the acts of the employee or agent and are not attributed to the company. However, there will be occasions where it is necessary to ascribe direct, or personal, liability to a defendant company. The uncertainty in the law here as to the approach to be adopted in such instances is the reason for its inclusion as a point of discussion in this chapter.

As things stand, there are two main approaches in common law jurisdictions to fixing a company with direct liability, namely the identification doctrine and the attribution doctrine. The purpose of considering these doctrines at this juncture is that there is no clear position in this jurisdiction on which of the two approaches, if either, is the most satisfactory way of ascribing direct liability to a defendant company. Horan makes the comment that the question would benefit greatly from comprehensive judicial scrutiny.³⁹ Such judicial consideration would be welcome but it is arguable that legislative intervention could provide a more expeditious and definitive resolution of the uncertainties surrounding the issue. It is proposed to explore the two doctrines in question before advancing an argument as to the approach that ought to be adopted in this jurisdiction.

3.1.1 *The Identification Doctrine*

The identification doctrine has been described by the Law Commission of England and Wales in the following terms:

When companies are charged with criminal offences involving proof of fault, they are normally judged by reference to the so-called identification doctrine. This doctrine requires a controlling officer of the company him or herself to be proved to have had the fault element of the offence.⁴⁰

³⁹ S Horan, *Corporate Crime* (Bloomsbury Professional 2011) [2.05].

⁴⁰ Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts - An Overview* (LC CP195-2010) [1.63].

The identification doctrine is narrow, in that the human agent must be a controlling officer or, put another way, the 'directing mind and will' of the company in order for liability to be ascribed to the defendant company.⁴¹ The identification doctrine strives to draw a line between employees and agents in the upper echelons of a company and those in the lower tiers in terms of responsibility for the running of a company: the doctrine will only apply in the case of actions on the part of the former category. Older English authorities, using the human body to illustrate the distinction between the two categories, suggest that it is only the actions of those employees or agents constituting the 'brain' or 'mind' of the company, as distinct from the 'body' or 'hands' of the company, that may be capable of satisfying the identification doctrine.⁴²

Of the more recent relevant authorities, *Tesco Supermarkets Ltd v Natrass* provides arguably the fullest guidance as to the operation of the identification doctrine in England and Wales.⁴³ In that case the prosecution sought to fix the defendant company with liability for an offence under the Trade Descriptions Act 1968 in circumstances where the alleged criminal conduct came about through the actions of a store manager. The defendant company had argued that liability should not be ascribed to it in circumstances where it had taken all reasonable precautions to protect against the store manager behaving in the manner alleged. Diplock LJ held that the issue of who constitutes the 'directing mind and will' of a company 'is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company'.⁴⁴

In the same case, Reid LJ presented a slightly broader category of natural persons capable of constituting the 'directing mind and will' of the company, suggesting that 'normally' the managing director, board of directors 'and perhaps other superior officers' are capable of

⁴¹ Viscount Haldane LC used the expression 'directing mind and will of the corporation' in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (CA) 713, to name the category of natural persons capable of constituting the company for the purposes of ascribing direct liability.

⁴² *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (CA) 713; *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 (CA).

⁴³ [1972] AC 153 (HL).

⁴⁴ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 (HL) 199.

speaking and acting as a company, whereas their subordinates are not.⁴⁵ In a further judgment in the same case, Viscount Dilhorne framed the category slightly differently again, ruling that defining the 'directing mind and will' of a company 'may vary from company to company depending on its organisation'.⁴⁶ He went on to express the view that 'a person who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders' could not be regarded as falling outside the category of natural persons capable of constituting the 'directing mind and will' of a company.⁴⁷

While the various judgments in *Tesco* disclose small differences in the characterisation of the category of natural persons capable of being identified as the 'directing mind and will' of a company, they have in common the notion that a company can only be fixed with liability if criminal conduct can be ascribed to one of the controlling officers of the company. While an absence of a precise circumscription of the category of natural persons capable of constituting the 'directing mind and will' of a company is one deficiency associated with the identification doctrine, another crucial difficulty with the doctrine is that larger organisations are more likely to stay beyond the reach of the doctrine than smaller companies. Two English cases illustrate this point.

In *R v Alcindor*, a prosecution resulted from the sinking of a ship that had departed the port of Zeebrugge with its bow doors open in 1987.⁴⁸ The defendant company was acquitted in circumstances where it could not be proved that the risk of open-door sailing was evident to the senior managers of the defendant company: ascribing direct liability to the company was contingent on, in the first place, attributing the requisite mens rea to senior managers of the company. The many tiers of management between those employees operating the ship and those in control of the company contributed to a situation where the necessary mens rea could not be made out as against the 'directing mind and will' of the company. In contrast, in the case of *R v Kite*, a small company was convicted of manslaughter arising out

⁴⁵ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 (HL) 171.

⁴⁶ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 (HL) 187.

⁴⁷ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 (HL) 187.

⁴⁸ (Central Criminal Court (England), 19 October 1990).

of a negligently managed canoe expedition.⁴⁹ In circumstances where the directors of the company were closely involved with the day to day operation of the business, there was little room for argument that the necessary mens rea could not be attributed to them and then, in turn, to the defendant company. It would seem entirely inappropriate that an elaborately structured corporate structure is more shielded from criminal liability than a smaller company that is more simply organised.

The status of the identification doctrine in Ireland is unclear. *R (Cottingham) v Justices of County Cork* is an old case dealing with an infringement of a licensing law that seems to endorse the proposition that a natural person must be found to have exercised a substantial amount of control over a company's operations before a company can, in turn, be fixed with direct liability.⁵⁰ Johnson J spoke of the need for an 'agent or manager' to have been put in the 'exclusive occupation and complete control of the premises' before such a natural person could be taken to have acted as the company.⁵¹

In *Taylor v Smyth*,⁵² McCarthy J appeared to note with approval the 'directing mind and will' test laid down in *Lennard's Carrying Co Ltd*,⁵³ but the authority of the case in a criminal context should not, perhaps, be overstated in circumstances where it emerged from civil litigation.⁵⁴ Again, in the context of civil law proceedings, in *Superwood Holdings plc v Sun Alliance and London Insurance plc*,⁵⁵ the Supreme Court, while first noting the limitations of the traditional anthropomorphic characterisation of the structural divisions with companies ('mind' versus 'body'), gave qualified approval to Viscount Haldane's test in *Lennard's Carrying Co Ltd*.⁵⁶ Denham J stated:

I am satisfied that the appropriate test is to apply the essential principle expounded

⁴⁹ (1996) 2 Cr App R (S) 295 (CA).

⁵⁰ [1906] 2 IR 415 (CA).

⁵¹ [1906] 2 IR 415 (CA) 427.

⁵² [1991] 1 IR 142 (SC).

⁵³ [1915] AC 705 (CA).

⁵⁴ However, it is worth noting that in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 (CA), Nourse LJ commented that the identification doctrine 'has been developed with no divergence of approach, in both criminal and civil jurisdictions, the authorities in each being cited indifferently in the other'.

⁵⁵ [1995] 3 IR 303 (SC).

⁵⁶ [1915] AC 705 (CA).

by Lord Haldane to an Irish company in a practical manner and to determine who was in control of the relevant issue.⁵⁷

In a third case arising out of civil proceedings, in *Howard v Irish Life & Permanent plc and Guinness and Mahon (Ireland) Ltd*, O'Sullivan J stated:

[I]t would be unfair if, for example, knowledge in the possession of an employee of a branch of the respondents were to be imputed in the present context to the respondent itself in the absence of any evidence that this knowledge constituted the directing mind and will of the respondent.⁵⁸

This limited comment would appear to be an endorsement of the identification doctrine. However, *Howard*, in common with *Taylor* and *Superwood*, constitutes a relatively cursory analysis of the identification doctrine. Certainly, these cases would not seem to preclude the operation of the attribution doctrine, which is considered in the next section.

3.1.2 *The Attribution Doctrine*

The more recently described attribution doctrine is broader than the identification doctrine and arguably more friendly from a prosecutor's point of view. Under the latter doctrine, it is not necessary to show that the human agent was part of the company's directing mind and will as set out in the articles of association of the defendant company; rather, it will suffice if the human agent's conduct can be ascribed to the defendant company under the particular rule under consideration. What has come to be known as the attribution doctrine has its roots in English case law from the 1990s. In *Tesco Stores Ltd v Brent LBC*, at issue was the prosecution of a company for an offence of selling videos to an underage person, which was an offence under section 11(1) of the Video Recordings Act 1984.⁵⁹

Section 11(2) of the 1984 Act provided that it was a defence if the defendant did not know, nor had reasonable grounds to believe, that the purchaser of a relevant video was under

⁵⁷ [1995] 3 IR 303 (SC)330.

⁵⁸ [2006] IEHC 419.

⁵⁹ [1993] 2 All ER 718 (QB).

eighteen years of age. The issue that arose was whether the defence described in section 11(2) related to knowledge on the part of those who managed the affairs of the defendant company or knowledge on the part of the employee who supplied the film. In circumstances where the Act did not draw a distinction between the company and its employees, at first instance it was held that knowledge on the part of an employee was sufficient to result in the conviction of the company. This approach was affirmed on appeal. Staughton LJ held:

I can find nothing in the authorities to prevent us holding that section 11(2) of the Video Recordings Act 1984 refers to the knowledge and information of the employee through whom the company effects a supply.⁶⁰

El Ajou, a civil case, also saw a broader approach to the assignment of direct liability to a company than would apply under a strict application of the identification doctrine.⁶¹ An investor had sued the defendant company for the recovery of monies that were fraudulently divested by a 'nominee director with non-executive responsibility'. At first instance, the trial judge ruled that the role of the director in question was too minor for him to form part of the 'directing mind and will' of the defendant company. However, the Court of Appeal saw things differently. Nourse LJ held that the general position of a natural person within a company is not determinative of whether that person forms part of the 'directing mind and will' of the company. Rather, a more flexible approach must be adopted that takes into account responsibilities assigned to individuals in relation to specific tasks or projects. Nourse LJ held:

It is important to emphasise that management and control is not something to be considered generally or in the round. It is necessary to identify the natural person or persons having management and control in relation to the act or omission in point.⁶²

Rose LJ saw two circumstances that might give rise to the fixing of a company with direct liability:

⁶⁰ [1993] 2 All ER 718 (QB).

⁶¹ [1994] 2 All ER 685 (CA).

⁶² [1994] 2 All ER 685 (CA) 696.

First, the directors of a company are, *prima facie*, likely to be regarded as its directing mind and will whereas particular circumstances may confer that status on non-directors. Secondly, a company's directing mind and will may be found in different persons for different activities of the company.⁶³

In similar vein, Hoffmann LJ expressed the view that a broader interpretation to the question of the 'directing mind and will' of a company needed to be taken than merely looking to the a company's articles of association and that a 'person held out by the company as having plenary authority or in whose exercise of such authority the company acquiesces, may be treated as its directing mind'.⁶⁴

An even stronger repudiation of the traditionally narrow identification doctrine as the exclusive method for determining direct liability on the part of a company came in *R v British Steel plc*.⁶⁵ In a prosecution for exposing non-employees to risks to their health and safety, contrary to section 3 of the Health and Safety at Work Act 1974, the defendant argued that that as the 'directing mind and will' of the company in the form of senior management had taken all reasonable steps to ensure compliance with the law, direct liability for the strict liability offence could not be attributed to the company through the actions of employees of the company. In a forthright rejection of this argument, Steyn LJ held that it would 'drive a juggernaut' through the legislation and 'emasculate' it were employers able to avoid criminal liability on the basis that the company through its senior management was not involved in the impugned behaviour.⁶⁶

A decisive departure from strict adherence to the restrictive identification doctrine in England and Wales came in two cases from 1995: *Re Supply of Ready Mixed Concrete (No 2)*⁶⁷ and *Meridian Global Funds Management Asia Ltd v Securities Commission*.⁶⁸ In *Re Supply*, the House of Lords held that, in the context of allegations of restrictive practices, companies were liable for agreements made their employees even where senior officers

⁶³ [1994] 2 All ER 685 (CA) 699.

⁶⁴ [1994] 2 All ER 685 (CA) 705.

⁶⁵ [1995] 1 WLR 1356 (CA).

⁶⁶ [1995] 1 WLR 1356 (CA) 1363.

⁶⁷ [1995] 1 AC 456 (HL).

⁶⁸ [1995] 2 AC 500 (PC).

had expressly forbidden such agreements. Templeman LJ held that an 'employee who acts for the company within the scope of his employment is the company'.⁶⁹ This approach takes a flexible approach to the question of who might amount to the 'directing mind and will' of a company in a given situation.

In *Meridian Global Funds*, the Securities Commission brought proceedings against a company for failing to notify it of the purchase of a holding in a public issuer, as required by the law of New Zealand. The purchase had been made by the company's chief investment officer in a manner that was within his authority, but without the knowledge of the board of directors. Rather than apply the traditional identification doctrine, Hoffmann LJ adopted the position that the court should establish a rule of attribution for the particular substantive rule or law at issue. In the case at hand, the rule required the disclosure of large investments to the company and to the stock exchange. Dealing with the facts before him, Hoffmann LJ stated:

In the case of a corporate security holder, what rule should be implied as to the person whose knowledge for this purpose is to count as the knowledge of the company? Surely the person who, with the authority of the company, acquired the relevant interest.⁷⁰

This approach is less rigid than the identification doctrine and links the rule or law in issue to the scope of responsibility of the natural person at the heart of the impugned conduct in assessing whether direct liability can be ascribed to the defendant company. While Hoffmann LJ's approach was a clear rejection of the identification doctrine as the sole method for determining whether direct liability can be attributed to a defendant company, he still found a place for it in appropriate cases:

The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not

⁶⁹ [1995] 1 AC 456 (HL) 456.

⁷⁰ [1995] 2 AC 500 (PC) 511.

provide an answer... In such a case, the court must fashion a special rule of attribution for the particular substantive rule.⁷¹

Thus, Hoffmann LJ appears to advocate a sequential approach. First of all a company's primary rules of attribution, usually found in its constitution, are considered in assessing the question of the attribution of direct liability. If an answer can be found in this way, for example where there can be no dispute that the natural person at the centre of an allegation qualifies as the 'directing mind and will' of the defendant company, there is no need to go further. Otherwise, recourse might be had to general rules of attribution, including agency, estoppel and vicarious liability. These approaches fix a company with indirect liability, as opposed to direct liability, and fall outside the scope of this research. On the approach of Hoffmann LJ, only where the first two methods of assessing attribution of liability do not provide an answer should the court consider whether a 'special rule of attribution' ought to be fashioned for the case before it.

Horan surmises that had Hoffmann LJ's attribution doctrine been applied in *R v P&O Ferries (Dover) Ltd*,⁷² a case that flowed from the sinking of the *Herald of Free Enterprise*, the defendant company in that case, which had been described in the report of the official enquiry as being '[f]rom top to bottom... infected with the disease of sloppiness',⁷³ would not have escaped liability, which it did in consequence of the application of the narrower identification doctrine.⁷⁴

In *Re Odyssey (London) Ltd v OIC Run Off Ltd*,⁷⁵ a majority of the Court of Appeal followed *Meridian*.⁷⁶ The particular issue in the case was whether the act of a director in giving perjured evidence could be ascribed to the defendant company. Having approved Hoffmann LJ's approach in *Meridian* as a principle of general application, Nourse LJ stated:

⁷¹ [1995] 2 AC 500 (PC) 507.

⁷² (1991) 93 Cr App Rep 72 (CA).

⁷³ Mr Justice Sheen, *Report of Investigation of Herald of Free Enterprise* (Report of Court No 8074 HMSO 1987) 14.

⁷⁴ Horan, *Corporate Crime* (Bloomsbury Professional 2011) [2.34].

⁷⁵ [2000] EWCA Civ J0313-1.

⁷⁶ [1995] 2 AC 500 (PC).

Thus in the present case we are concerned with a substantive rule of judge made law which applies to a company, and the question, in Lord Hoffmann's words, is:

'Whose act [i.e., the giving of perjured evidence] was for this purpose intended to count as the act of the company?'

In answering the question we must take into account the policy of the substantive rule, which is that a person who procures a judgment to be given in his favour by fraud ought not to be allowed to profit from the fraud. The question whether perjured evidence should, for the purposes of the fraud of a party rule, be attributed to a company depends on the facts of the case.⁷⁷

Agreeing with Nourse LJ that a broader approach than that provided by the identification doctrine is sometimes required, Brooke LJ stated:

I have considered carefully whether one should cling timorously to the coastline in search of a defining principle before being willing to right such a wrong. For my part, the scale of the wrong that would be done if we are not able to correct it prompts me to be willing to strike out, with Nourse LJ, for the open sea. The result appears to accord with justice as well as with the natural development of the law.⁷⁸

The development of the attribution doctrine in England and Wales has not received significant judicial attention in Ireland. In *Crofter Properties Ltd v Genport Ltd*, McCracken J appeared to speak approvingly of the attribution doctrine where he stated:

The vicarious liability of a company for wrongs committed by a third party clearly exists where those wrongs have been committed by it[s] servants or agents. Indeed it has often been said that a company can only act through individuals who are its servants or agents. The general principles were dealt with in some detail in the

⁷⁷ [2000] EWCA Civ J0313-1 (Nourse LJ) 9.

⁷⁸ [2000] EWCA Civ J0313-1 (Brooke LJ) 96. *Meridian* has also been followed and applied in England and Wales in the more recent cases of *Lebon and Another v Aqua Salt Company Ltd* [2009] UKPC 2; *Orr v Milton Keynes Council* [2011] 4 All ER 1256 (CA); and *Pintorex Ltd v Keyvanfar* [2013] EWPC 36.

Privy Council case of *Meridian*...⁷⁹

The difficulty with the High Court's endorsement of *Meridian* is that it was not applied to the facts of the case before the court. Further, the relevant passage in the *Crofter* case appears to confuse the concepts of vicarious liability and direct liability.

In *Fyffes plc v DCC plc*, in an insider dealing case that came before the High Court, Laffoy J was invited by the plaintiff to attribute certain knowledge to the defendant in accordance with the *Meridian* attribution doctrine.⁸⁰ However, Laffoy J found the attribution doctrine to be of no application to the case before her, further adding:

I did not understand the defendants to question the appropriateness of applying the principles of attribution enunciated by Lord Hoffmann generally in this jurisdiction. Therefore it is not necessary to express any view on that.⁸¹

Thus, as with the more traditional identification doctrine, Irish jurisprudence has merely touched on the attribution doctrine and it is far from clear that it would apply in appropriate cases in this jurisdiction.

3.1.3 Which Method of Attributing Direct Liability to Legal Persons Should be Adopted in Ireland?

In a situation where neither the identification doctrine nor the attribution doctrine has been the subject of rigorous judicial scrutiny in Ireland, there is a debate to be had as to which of the two approaches, if either, ought to be adopted here. The Law Commission of England and Wales has made a number of criticisms of the identification doctrine.⁸² First it notes the conflicting judicial definitions and interpretations of the concept of a 'directing mind and will' of a company, pointing out that in the supposedly authoritative case of *Tesco*

⁷⁹ [2002] 1 EHC 26, [2002] 4 IR 73.

⁸⁰ [2009] 2 IR 417 (HC).

⁸¹ *Fyffes plc v DCC plc* [2009] 2 IR 417 (HC) 466.

⁸² Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts - An Overview* (LC CP195-2010) 111.

Supermarkets Ltd v Natrass,⁸³ 'three of their Lordships described the test in significantly different terms'.⁸⁴ Although the differences of interpretations are generally subtle, the lack of a common approach gives rise to uncertainty and is a problem.

Second, the Commission argues that the doctrine does not reflect business practices in modern times and that, by focusing on attributing the acts and state of minds of a limited range of senior people to the corporation, the doctrine fails to reflect the fact that, in modern corporations, a good deal of important policy or strategic decision-making may be decentralised, or regional rather than national.⁸⁵

Third, the Commission notes that, by making it easier to pursue simple rather than complex business structures, the doctrine produces a perverse incentive for companies to operate with devolved structures that insulate directors (or equivalent persons) to a certain extent from knowledge of what their managers or employees are doing, when that knowledge might involve awareness of offences being committed for the benefit of the company.⁸⁶

Finally, the Commission questions the fairness of the doctrine in circumstances where it is 'faster, cheaper and easier' for prosecutors to prove directorial involvement when small companies are being investigated, thereby incentivising prosecutors to pursue small corporations over larger ones. This, the Commission notes, creates a policy development that may undermine a statutory scheme of liability aimed at small and large companies alike.⁸⁷

Having pointed out the flaws with the identification doctrine, the Commission recommends that legislation should include specific provisions in criminal offences to indicate the basis on which companies may be found liable, but in the absence of such provisions, the courts

⁸³ [1972] AC 153 (HL).

⁸⁴ Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts - An Overview* (LC CP195-2010) 104.

⁸⁵ Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts - An Overview* (LC CP195-2010) 105.

⁸⁶ Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts - An Overview* (LC CP195-2010) 105.

⁸⁷ Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts - An Overview* (LC CP195-2010) 105.

should treat the question of how corporate fault may be established as a matter of statutory interpretation. The Commission further encourages the courts not to presume that the identification doctrine applies when interpreting the scope of criminal offences applicable to companies.⁸⁸

The LRC in Ireland has adopted a more circumspect approach in its consideration of the attribution doctrine. While acknowledging that the approach in *Meridian* 'yields a flexible judicial response to questions of corporate criminal liability', it also observes that the approach 'injects vagueness into the criminal law by leaving the choice of principle of corporate criminal responsibility to the discretion of the court'.⁸⁹ The LRC cites *King v Attorney General*⁹⁰ in raising the argument that, in the Irish context, the approach may offend against the constitutional principles that the ingredients of an offence should be clearly stated and that the courts cannot be given discretion as to what is criminally prohibited.⁹¹ Ultimately the LRC does not recommend the adoption of a flexible approach to the attribution of criminal liability for crimes of homicide to corporations on the grounds that to do so would create uncertainty and could operate unjustly.⁹²

The reservations of the Irish LRC, rooted as they are in a consideration of relevant constitutional principles, are not without foundation. However, the argument can also be made that the attribution doctrine brings some necessary flexibility to corporate criminal liability in a manner that does not fall foul of the constitutional doctrine of vagueness. The position adopted here is that the public interest in ensuring that there is the capacity to ascribe corporate criminal liability appropriately is such that the stance of the Law Commission of England and Wales on the issue is favoured over the position of the Irish LRC and that the attribution doctrine should be endorsed legislatively in this jurisdiction.

⁸⁸ Law Commission of England and Wales, *Consultation Paper on Criminal Liability in Regulatory Contexts - An Overview* (LC CP195-2010) 111.

⁸⁹ Law Reform Commission, *Consultation Paper on Corporate Killing* (LRC CP 26-2003) 37.

⁹⁰ [1981] IR 233.

⁹¹ The Law Reform Commission, *Consultation Paper on Corporate Killing* (LRC CP 26-2003) 37.

⁹² The Law Reform Commission, *Consultation Paper on Corporate Killing* (LRC CP 26-2003) 38.

4 Documentary Evidence and the Prosecution of White-Collar Crime

Given the complex financial transactions that lie at the heart of much white-collar crime and the substantial paper trails associated with such activity, the investigation of white-collar crime generally involves the sorting, collating, processing and analysing of often huge amounts of data. Where such investigations result in viable prosecutions, there is the further challenge of adducing such evidence in an admissible and comprehensible fashion. Until the relatively recent past, such data was primarily recorded in written form only. However, with the technological advances of recent decades, data is now generally recorded electronically, thereby giving even the most apparently inconsequential pieces of information a permanency and retrievability that simply did not apply to records kept before the age of the computer; these technological developments also provide greater opportunities for perpetrators of white-collar crime to alter information or conceal it in a welter of other data.

This part of the chapter will consider a number of the obstacles that arise from the need to rely on documentary evidence in order to advance the vast majority of white-collar crime prosecutions. First, challenges in defining the term 'document' in an era where technology is evolving at an ever increasing pace will be given brief consideration. Secondly, the impact of the fundamental requirement of relevancy as well as two exclusionary rules, namely the best evidence rule and the rule against hearsay, on the admissibility of documentary evidence will be considered. Thirdly, existing statutory presumptions arising in relation to documentary evidence will be assessed. Fourthly, it is proposed to examine statutory provisions that afford investigators and prosecutors the power to demand the production of documents and electronically stored information that may be of evidential value in advancing prosecutions. Fifthly, issues concerning pre-trial disclosure of documentary and electronic evidence will be examined. Finally, consideration will be given to a number of statutory provisions that strive to assist prosecutors in the presentation of complex evidence at trial.

4.1 The Definition of 'Document'

The traditional definition of 'document' at common law encompassed 'any written thing capable of being evidence'.⁹³ While relatively broad, this definition is wedded to the concept of a physical item on which there are inscriptions, and is not so wide as to capture technological advances in modern times. An effort to keep abreast of technological advances that led to the creation of electronic documentary evidence saw the courts in this jurisdiction broaden the meaning of the term to include 'something which teaches or gives information or a lesson or an example for instruction. The main characteristic of a document is that it is something which gives information'.⁹⁴

In tandem with developments in the common law, individual statutory provisions, primarily in the field of criminal law, have sought to define the concept of a document in ways that cover the ever evolving methods of recording data. For example, section 2 of the Criminal Evidence Act 1992 describes a document as including:

- (i) a map, plan, graph, drawing or photograph, or
- (ii) a reproduction in permanent legible form, by a computer or other means (including enlarging), of information in non-legible form.⁹⁵

The same provision describes 'information' as including 'any representation of fact, whether in words or otherwise'.

Originally, section 2 of the Offences Against the State Act 1939 provided that the term 'document' included 'a book and also a newspaper, magazine, or other periodical publication, and also a pamphlet leaflet, circular, or advertisement'. This was in line with the traditional common law definition of the term and at a time when there were few, if any, technological advances in the methods of recording data. However, section 5 of the

⁹³ *R v Daye* [1908] 2 KB 333.

⁹⁴ *McCarthy v O'Flynn* [1979] IR 127 (Kenny J) 131, holding that X-Ray plates and photographs came within this definition. In *Dome Telecom v Eircom* [2007] IESC 59, [2008] 2 IR 726 (SC) 736, a case concerning orders for discovery in civil proceedings, it was held that an order of discovery of information contained in electronic format, which involved the creation of documents which did not exist, could be made; otherwise, potential litigants could operate their business computers in such a way that they would be able to evade any worthwhile discovery.

⁹⁵ Criminal Evidence Act 1992, s 2.

Offences Against the State (Amendment) Act 1972 developed the relevant definition in section 2 to include recordings of sounds and visual images.

Notwithstanding that the amended definition of the term 'document' in section 2 of the 1939 Act did not purport to be exhaustive, the LRC has expressed the view that, while sufficient for its time, the definition ran the risk of becoming quickly outmoded and overtaken by innovation and has stressed the need for any definition of 'document' to be 'future proofed'.⁹⁶

More recently, section 1 of the Criminal Justice (Surveillance) Act 2009 has defined 'document' as 'including':

(a) any book, record or other written or printed material in any form,

and

(b) any recording, including any data or information stored, maintained or preserved electronically or otherwise than in legible form.⁹⁷

More recently still, in a piece of legislation of particular significance to the investigation and prosecution of white-collar crime, section 2 of the Criminal Justice Act 2011 provides that the term document 'includes information recorded in any form and any thing on or in which information is recorded and from which information can be extracted'. The 2011 Act definition has the advantage of being technologically neutral and adaptable to different contexts in terms of offences and proceedings as well as data recorded in the future in ways that are unforeseen at present.

It is notable that there are now various statutory definitions of the term 'document' that have built up in a piecemeal fashion and that are applicable only to the interpretation of the individual statutes where the definitions are to be found. Of course, the purpose and

⁹⁶ Law Reform Commission, *Consultation Paper on Documentary & Electronic Evidence* (LRC CP 57-2009) [1.12].

⁹⁷ Criminal Justice (Surveillance) Act 2009, s 1.

context of an individual statute will inform the definitions given to terms used within the body of the statute. Yet, the various existing definitions of the word ‘document’ across the statute book seek, on their face, to be as inclusive as possible, with some definitions broader than others. In these circumstances, the provisional recommendation of the LRC that its proposed definition of the word ‘document’ be passed into law in such a way that it would apply to all legal proceedings, both civil and criminal, and be understood as combining electronic and automated documents as well as hard copy traditional documents is appropriate and is endorsed here. The relevant definition is ‘anything in which information of any description is recorded’.⁹⁸ This definition has the advantages of a wide breadth, thereby maximising inclusivity, and the capacity to encompass future as well as existing forms of information.

4.2 The Admissibility of Documentary Evidence

It is a fundamental principle that in order to be admissible in a given set of proceedings, evidence must be relevant to those proceedings. Thereafter, various rules of admissibility and exclusionary rules may arise that will cause a piece of evidence to be deemed inadmissible. In this section it is proposed to first consider briefly specific issues that arise in considering the relevance of documentary evidence, as distinct from oral evidence, to a given set of proceedings. Secondly, similarly brief consideration will be given to the best evidence rule. Thirdly, this section will examine in some detail challenges thrown up by an exclusionary rule of particular import where documentary evidence is considered, namely the rule against hearsay.

4.2.1 Documentary Evidence and the Requirement of Relevancy

It is a fundamental rule at common law that, in order to be admissible, evidence which is sought to be adduced must be relevant to the issues in a given set of proceedings. In *People*

⁹⁸ Law Reform Commission, *Consultation Paper on Documentary & Electronic Evidence* (LRC CP 57-2009) [1.33].

(AG) v O'Brien, the court held that evidence is relevant where 'it is logically probative'.⁹⁹ In the context of criminal proceedings, such evidence constitutes evidence that has a potential bearing on the guilt or innocence of the accused or, to put it another way, 'tends to prove or disprove, or... renders it more or less probable, that the accused person did or did not commit the act in question'.¹⁰⁰ Once it is established that evidence satisfies this test, that its probative value outweighs any prejudicial effect attaching to it and that no other exclusionary rule of evidence or rule of admissibility applies, there will be no obvious barrier to it being admitted for consideration by the trier of fact.¹⁰¹ Of course, the trier of fact may ascribe little or no weight to a particular piece of evidence, but the exercise of evaluating evidence can only be embarked upon in relation to evidence duly admitted by the trier of law.

An aspect of relevancy and, therefore, admissibility, is that a court is satisfied that a record is what it purports to be. The authenticity of paper documents can generally be established by testimony from, for example, the creator of the document or from an expert witness, if necessary. Greater challenges can arise when it comes to electronic evidence, in that it may be necessary to call fairly detailed evidence concerning, for example, the operation of a particular machine. Uncertainty as to the degree of proof required to prove the authenticity of such evidence has led to the observation that a party seeking to establish the reliability of electronic evidence faces a 'moving target'.¹⁰² It should be noted that the requirement to authenticate a document is relaxed for certain classes of documents such as public records that bear an official seal or signature,¹⁰³ or business records that are created or maintained in the course of business.¹⁰⁴

⁹⁹ [1965] IR 142 (SC) 151. See also: *DPP v Kilbourne* [1973] AC 729 (HL) 756, *R v Kearley* [1992] 2 AC 228 (HL) 263, *Galway City Council v Samuel Kingston Construction Ltd* [2010] IESC 18, [2010] 3 IR 95 (SC) 115, *Condrón v ACC Bank plc* [2012] IEHC 395, [2013] 1 ILRM 113 (HC) 121.

¹⁰⁰ *DPP v MJ* [2014] IECCA 21, [18].

¹⁰¹ In exercising its discretion to admit evidence, a court must also, of course, be cognisant of the guarantee of a trial in due course of law pursuant to Article 38.1 of the Constitution: see *People (AG) v O'Neill* [1964] Ir Jur Rep 1, *DPP v Meleady* (CCA, 20 March 2001).

¹⁰² T Welch, 'Computer Crime Investigation and Computer Forensics' (1997) 6(2) Information Systems Security 56.

¹⁰³ *Mortimer v M'Callan* (1840) 6 M & W 58 establishes that public documents will generally be taken as prima facie admissible evidence. Once the document reveals a stamp, seal or signature from a relevant government authority, further authenticating testimony will not generally be required.

The LRC has provisionally recommended that, in light of its view that the law should be technologically neutral, the essential rules of admissibility should apply equally to traditional forms of manually created documents and to electronic and automated documents and records.¹⁰⁵ It is contended that this is the correct approach to take and that, in the context of the requirement of relevancy, the existing common law test of relevancy is, in its wide breadth and flexibility, as satisfactory a method as can be found for assessing all categories of evidence that might be sought to be adduced in a given set of proceedings.

4.2.2 *Documentary Evidence and the Best Evidence Rule*

The best evidence rule (also known as the original document rule), is a common law rule that requires that evidence that is sought to be adduced must be 'the best that the nature of the case will admit'.¹⁰⁶ This amounts to an exception to the general rule providing for the admissibility of relevant evidence and requires that a party relying on the words used in a document for any purpose other than that of identifying it must adduce primary and original evidence of its contents. The rationale for the rule includes the need for protection against the possibility of fraud or error during the copying process. The rule arose at a point in time when documentary evidence referred to a physical item bearing inscriptions. Attempting to apply the best evidence rule, created at a time when there was essentially one form of documentary evidence, is problematic and anachronistic in an era when there is a multitude of methods for recording data and when the preponderance of data is stored digitally. For example, what constitutes the 'original' of a document stored on the hard drive of a computer?

A number of exceptions to this rigid rule built up over time but on a somewhat ad hoc basis. In *Martin v Quinn*, a prosecution for drink driving resulted in the transmission of a case stated from the Circuit Court to the Supreme Court. The Supreme Court considered a discussion of the area in the English textbook 'Phipson on Evidence' and observed that the

¹⁰⁴ As will be discussed at part 4.3 of this chapter, a number of statutes, including the Criminal Evidence Act 1992, provide that certain documents, including 'banker's books' and 'business records', are to be received by the courts on the basis that they have been shown to be presumptively accurate.

¹⁰⁵ Law Reform Commission, *Consultation Paper on Documentary & Electronic Evidence* (LRC CP 57-2009) [6.183].

¹⁰⁶ *Omychund v Barker* (1745) 1 Atk 21, 49.

'actual decisions of the courts show that by far the most conspicuous feature of the modern law of evidence has been its persistent rescission from the "best evidence" principle'.¹⁰⁷ The Court went on to hold that a doctor's oral evidence of his qualifications could suffice in place of documentary evidence of same.

A later Irish authority took a somewhat stricter view of the circumstances in which departures from the best evidence rule would be permissible in the context of evidence that was very central to the prosecution case. In *Fitzpatrick v DPP*, also a drink driving prosecution, evidence of the level of alcohol in the defendant's system was given other than by way of a statement produced in accordance with section 17(2) of the Road Traffic Act 1994.¹⁰⁸ The court held that secondary evidence (as distinct from the 'best' or 'original' evidence) of the content of a statement would only be admissible where it had been first shown by evidence that the original statement was lost, destroyed or physically or legally impossible to produce.¹⁰⁹ In circumstances where there had been no explanation for the prosecution's attempt to give the relevant evidence other than by way of a statement produced in accordance with section 17, the Court held that there had been a breach of the best evidence rule.

In *Hussey v Twomey*, Kearns J gave the clearest indication yet that the best evidence rule has no practical application in Ireland.¹¹⁰ In declining to apply the rule in the case before the court, he stated:

Phipson on *Evidence* (16th ed.), pp.177 to 182, makes clear that the maxim that 'the best evidence must be given of which the nature of the case permits' is a maxim which no longer enjoys favour. Phipson also notes that the divisional court as far back as *Kajala v Noble* (1982) 75 Cr. App. R. 149 described it as having 'gone by the

¹⁰⁷ [1980] IR 244 (SC). The Supreme Court cited JH Buzzard (ed), *Phipson on Evidence* (12th edn, Sweet & Maxwell 1976) [128].

¹⁰⁸ [2007] IEHC 383.

¹⁰⁹ This followed the approach taken in relation to the admissibility of secondary evidence in the earlier case of *Primor plc v Stokes* [1996] 2 IR 459.

¹¹⁰ [2009] IESC 1, [2009] 3 IR 293 (SC).

board long ago'.¹¹¹

Any difficulty for prosecutors that might be created by the operation of the best evidence rule where documentary evidence that is electronic in nature is sought to be adduced has been alleviated substantially in the context of criminal proceedings by section 30 of the Criminal Evidence Act 1992. Section 30 provides:

(1) Where information contained in a document is admissible in evidence in criminal proceedings, the information may be given in evidence, whether or not the document is still in existence, by producing a copy of the document, or of the material part of it, authenticated in such manner as the court may approve.

(2) It is immaterial for the purposes of subsection (1) how many removes there are between the copy and the original, or by what means (which may include facsimile transmission) the copy produced or any intermediate copy was made.

(3) In subsection (1) 'document' includes a film, sound recording or video recording.

This is a very powerful provision, which, if used appropriately, circumvents the difficulties for prosecutors that are thrown up by the best evidence rule. However, it must be stressed that section 30 does not transform an otherwise inadmissible document into an admissible document.

Notwithstanding the disinclination on the part of the courts to apply the best evidence rule in this jurisdiction in recent times, it has not been definitively abolished. In these circumstances, the LRC has provisionally recommended that the best evidence rule be abolished and replaced with a statutory framework on documentary evidence in the form of a dedicated evidence statute, which should contain a rule that documentary evidence is, in general, admissible in civil and criminal proceedings where the court is satisfied as to its

¹¹¹ [2009] 3 IR 293 (SC) 306. In *D McGrath with E Egan*, *Evidence* (2nd edn, Roundhall Thomson Reuters 2014) [1-27], the view is expressed that, in light of *Hussey*, the best evidence rule has 'fallen into desuetude and has no continuing vitality in Irish law as an independent rule of admissibility'.

relevance and necessity.¹¹² Notably, such a development would also affect the *status quo* where documentary hearsay is concerned by having the potential to broaden the existing categories of admissible documentary hearsay. However, just one year later, in a contradictory stance that did not make express reference to the proposal in the 2009 consultation paper, the LRC shied away from a broadening of the test for the admissibility of documentary evidence in a consultation paper that considered the rule against hearsay.¹¹³ The approach taken in the latter paper might be seen to be cautious in comparison with the more radical change suggested by the LRC in its 2009 paper.

The view adopted here is that the course of action suggested in the LRC's 2009 paper is preferable to the conclusion reached in the LRC's 2010 paper. It is argued that the conclusion in the LRC's 2010 paper is unnecessarily conservative and does not have adequate regard to the exigencies of modern methods of creating and retaining information, whereas, if implemented, the recommendations in the LRC's 2009 paper would remove definitively a best evidence rule that is ill-suited to current ways of storing data and an unnecessary inconvenience to prosecutors, while also taking account of concerns associated with documentary hearsay from a defence perspective by providing a reasonable threshold for the admissibility of such evidence.

4.2.3 *Documentary Evidence and the Rule Against Hearsay*

In a fundamental and far-reaching exception to the general rule providing for the admissibility of relevant evidence, the rule against hearsay provides that an out of court statement sought to be adduced to prove the truth of its contents is *prima facie* inadmissible evidence.¹¹⁴ There are various theories on the rationale for the rule, which generally focus on the potential unreliability of hearsay evidence, but it is not necessary to

¹¹² Law Reform Commission, *Consultation Paper on Documentary & Electronic Evidence* (LRC CP 57-2009) [2.153].

¹¹³ Law Reform Commission, *Consultation Paper on Hearsay in Civil and Criminal Cases* (LRC CP 60-2010) [5.49].

¹¹⁴ In *Cullen v Clarke* [1963] IR 368 (SC), the Supreme Court considered the rule against hearsay in some depth and confirmed its applicability in this jurisdiction.

consider these theories for the purposes of the instant research.¹¹⁵ While the rule against hearsay is relatively straightforward in its description, the application of it to evidence that is sought to be adduced in a given case is complicated by the myriad of exceptions to the rule that have built up over time, both by way of developments in the common law and the statute book. In order to keep the instant discussion as focused as possible, it is intended to concentrate on those exceptions to the rule against hearsay that have had arguably the biggest impact on the admissibility of documentary evidence and, therefore, on the conduct of many trials of white-collar crimes.

The Criminal Evidence Act 1992

The promulgation of Part II of the Criminal Evidence Act 1992 saw the introduction of a major statutory exception to the rule against hearsay, the operation of that rule having hampered the introduction of documentary evidence in both civil and criminal trials. It is proposed to first consider the position that predated the legislation before considering the key aspects of the statute.

The case of *Myers v DPP* highlights the difficulties created for prosecutors by the operation of the traditional common law position on hearsay and is illustrative of the position that obtained before the passing of the 1992 Act.¹¹⁶ The defendants in that case had been charged with a range of offences concerning stolen cars. The prosecution alleged that a number of cars that the defendants conceded selling were, in fact, stolen cars in disguise. The prosecution sought to adduce evidence of records of cylinder block numbers on the cars that were impossible to remove after manufacture. These records were generated at the time of manufacture. However, the witnesses called to give evidence of the records had simply maintained them. They had not created the records. The defence objected to the evidence on the ground that the records were hearsay.

The trial judge admitted the evidence and the defendants were convicted. On appeal, the

¹¹⁵ For comprehensive discussions of the rationale for the rule see: L Heffernan with Ú Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury Professional 2014) [7-13]-[7-16]; McGrath with Egan, *Evidence* (2nd edn, Thomson Roundhall 2014) [5-04]-[5-18].

¹¹⁶ [1965] AC 1001 (HL).

House of Lords, in a three to two decision, held that the evidence should not have been admitted. However, on an application of the proviso, the convictions were allowed to stand. The House of Lords unanimously held that an exception to the general rule concerning the admissibility of hearsay evidence would have to be found if the evidence was to be admissible. While a minority went on to find that an exception could be found, the majority ruled that to do so would amount to inappropriate and unacceptable legislating on the part of the judiciary.¹¹⁷

In an almost immediate response to the judgment in *Myers*, the UK Parliament passed the Criminal Evidence Act 1965 into law. In broad terms, this statute provided for the admissibility of first hand documentary statements and records created in the course of business.¹¹⁸ Some decades later, Ireland followed suit by passing the Criminal Evidence Act 1992. Some years before the promulgation of the 1992 Act, the LRC surveyed international experience of the point in issue and concluded that legislation should be enacted that recognised the reliability of statements and information recorded in documents where these have been compiled in the ordinary course of business and supplied by persons who had personal knowledge of the matters.¹¹⁹

Part II of the 1992 Act establishes that records which are systematically kept are generally reliable, even where the person who compiles them relies on information supplied by others, and that such records are admissible subject to conditions. The definition of document for the purposes of the 1992 Act is referred to at part 4.1 of this chapter.¹²⁰ Part II provides for the admission of information in documentary form. Material will qualify for the purposes of the Act if it has been compiled in the ordinary course of business or

¹¹⁷ For the majority, Reid LJ stated, '[T]here are limits to what we [as a Court] can or should do... The only satisfactory solution by legislation following on a wide survey of the whole field, and I think that such a survey is overdue.' [1965] AC 1001, 1021-1022. In an Irish context, cases such as *People (AG) v O'Brien* (1969) 1 Frewen 343, *DPP v Marley* [1985] ILRM 17 and *DPP v Prunty* [1986] ILRM 716 confirm the inadmissibility of documentary hearsay evidence, at least as far as the common law is concerned.

¹¹⁸ The provisions of the 1965 Act have since been consolidated into the UK Criminal Justice Act 2003 and Part III of the Criminal Justice (Evidence) (Northern Ireland) Order 2004.

¹¹⁹ Law Reform Commission, *Report on Receiving Stolen Property* (LRC 23-1987) [29] (discussion of the law) and [144] (recommendation for reform).

¹²⁰ Section 2 of the Criminal Evidence Act 1992 describes a document as including:

- (i) a map, plan, graph, drawing or photograph, or
- (ii) a reproduction in permanent legible form, by a computer or other means (including enlarging), of information in non-legible form.

supplied by one person, whether or not that person can be identified or has compiled the information in the document, to another person who may reasonably be supposed to have personal knowledge of the matters in question.¹²¹ The information may be supplied directly or indirectly, but if it is supplied in the latter manner it is only admissible if each person through whom it was supplied, whether or not he is identifiable, received it in the ordinary course of business.¹²²

Section 5 of the 1992 Act provides for the admissibility of information contained in documents which have been compiled in the ordinary course of business.¹²³ Save for very limited exceptions, information must have been compiled independently of any allegation of criminality made against the accused.¹²⁴ The LRC has observed that section 5 gives relevant information 'great probative force precisely because it was created prior to and independently of any allegation of criminality made against the accused'.¹²⁵ Put another way, it is the routine nature of the compilation of the information that bolsters its accuracy and reliability.

There are some additional conditions and qualifications that apply to the admissibility of documentary hearsay. Under section 6, a certificate affirming that the relevant information was compiled in the ordinary course business must be completed and served on the other side if such evidence is sought to be adduced at trial. Further, under section 7 there are notice requirements if such evidence is sought to be adduced. Under section 8, there is a residual discretion given to the court to exclude a particular document 'in the interests of justice'. In exercising this discretion, the court must consider all of the circumstances, including the reliability and authenticity of the information, as well as the possibility of controverting relevant evidence in the absence of oral evidence from the person who

¹²¹ Criminal Evidence Act 1992, s 5(1).

¹²² Criminal Evidence Act 1992, s 5(2).

¹²³ Section 4 provides that business 'includes any trade, profession or other occupation carried on, for reward or otherwise, either within or outside the State and includes also the performance of functions by or on behalf of - (a) any person or body remunerated or financed wholly or partly out of moneys provided by the Oireachtas, (b) any institution of the European Communities, (c) any national or local authority in a jurisdiction outside the State, or (d) any international organisation'.

¹²⁴ Criminal Evidence Act 1992, s 5(3).

¹²⁵ Law Reform Commission, *Consultation Paper on Hearsay in Civil and Criminal Cases* (LRC CP 60-2010) [5.10].

supplied it.¹²⁶ Even where information is admitted in evidence, in deciding on the weight, if any, to be ascribed to the information given in evidence, the tribunal of fact must have regard to all of the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.¹²⁷

In a white-collar crime context, Part II of the Criminal Evidence Act 1992 has been a boon for prosecutors. Shane Murphy SC has opined that white-collar crime was not a phenomenon prosecuted to any great extent in Ireland until the 1990s, when a series of high profile fraud cases came before the courts, and he has emphasised the important role of the Criminal Evidence Act 1992 in advancing such prosecutions.¹²⁸ He has noted that the mechanism whereby prosecutors can introduce qualifying evidence by way of a certificate through a witness has worked very well for 'databank' information such as telephone records, and has pointed to specific trials of white-collar crimes where the 1992 Act has been of invaluable assistance to prosecutors.

One example is the case of *DPP v O'Doherty & O'Dwyer*, which was a Circuit Criminal Court prosecution.¹²⁹ The defendants owned a car hire firm. The prosecution advanced thirty-one charges of obtaining money by false pretences contrary to section 32 of the Larceny Act 1916, six offences under the Companies Acts and three offences of false accounting. In essence, the prosecutor's case was that false business books had been produced by the accused as part of a fraud in the amount of £1.4 million. The numbers on the books were an extremely important aspect of the prosecution case. As part of the investigation of the charges, a liquidator looked into a sister company owned by the defendants and discovered a system for manipulating chassis numbers. A key challenge for the prosecution was the establishment of a method for proving the relevant information at trial. Sections 5 and 6 of the Criminal Evidence Act worked to the prosecutors' benefit in the end. Fulfilling the requirements of the 1992 Act proved to be an onerous process but the relevant evidence was successfully admitted and the defendants changed their pleas mid-trial to pleas of

¹²⁶ Criminal Evidence Act 1992, s 8(2).

¹²⁷ Criminal Evidence Act 1992, s 8(3).

¹²⁸ Remarks made during a lecture delivered on 15th March 2012 as part of the Advanced Diploma in Corporate Crime course at The Honorable Society of King's Inns, Dublin.

¹²⁹ (Circuit Criminal Court, Clonmel, 26 October 1996).

guilty to ten counts on the indictment, namely seven of obtaining money by false pretences, two of criminal fraudulent trading and one of false accounting. Murphy has expressed the view that the operation of the Criminal Evidence Act 1992 in the course of this particular trial was highly likely to have been material to the decision on the part of the defendants to change their not guilty pleas mid-trial.¹³⁰

Murphy has also observed that establishing conspiracy in a white-collar crime context often requires proving the existence of large numbers of documents that show that transactions occurred in a particular sequence and manner.¹³¹ The Criminal Evidence Act 1992 can be of great assistance in this regard so long as its provisions are followed properly. In practice, this means that relevant employees, such as bookkeepers and telephonists, will often have to be called in the course of a white-collar crime trial. Used appropriately, the 1992 Act substantially eliminates for prosecutors many of the challenges posed by documentary hearsay evidence, while at the same time providing adequate safeguards for defendants by requiring prosecutors to satisfy a broad range of conditions before deeming relevant evidence to be admissible under the Act.¹³²

A final point of note is that Part II of the 1992 Act is broad enough to also capture documentary evidence that is of a non-hearsay nature.¹³³ The common law establishes that data that is recorded mechanically, and without human intervention, constitutes real, rather than hearsay evidence.¹³⁴ Submitting such evidence under Part II of the 1992 Act allows for it to be treated as 'evidence of any fact therein of which direct oral evidence would be admissible'.¹³⁵ This can be more advantageous from a prosecutor's point of view than seeking to admit it as real evidence at common law. This is because real evidence can only be used by a tribunal of fact as evidence of the existence of the thing in question rather than

¹³⁰ Remarks made during a lecture delivered on 15 March 2012 as part of the Advanced Diploma in Corporate Crime course at The Honorable Society of King's Inns, Dublin.

¹³¹ Remarks made during a lecture delivered on 15 March 2012 as part of the Advanced Diploma in Corporate Crime course at The Honorable Society of King's Inns, Dublin.

¹³² *Re Bovale Developments: Director of Corporate Enforcement v Bailey* [2007] IEHC 365, [2011] IESC 24, [2011] 3 IR 278 (SC), a civil case with a corporate context, provides a good illustration of the pedantic pitfalls of the rule against hearsay in situations where there is no statutory scheme, such as the Criminal Evidence Act 1992, to circumvent the operation of the common law rule against hearsay.

¹³³ *DPP v Meehan* [2006] 3 IR 468.

¹³⁴ *R v Minors* [1989] 1 WLR 441; *R v Spiby* (1990) 91 Cr App Rep 186; *DPP v Murphy* [2005] 2 IR 125.

¹³⁵ Criminal Evidence Act 1992, s 5.

evidence of the truth of its contents, a finding that is permitted if the evidence is admitted pursuant to the statutory exception to the hearsay rule in Part II of the 1992 Act.

The Bankers' Books Evidence Acts 1879 - 1989

A long standing exception to the rule against hearsay where documentary hearsay is concerned is to be found in the Bankers' Books Evidence Acts 1879 - 1989.¹³⁶ This legislative framework establishes that proof of bank and other business accounting records is presumptively admissible in evidence, whether as original material or copies of original material.¹³⁷ Like the Criminal Evidence Act 1992, the rationale for the exception would seem to be that the repetitive and systematic nature of recording large volumes of material, in the interests of maintaining accurate records, lends such material a reliability that justifies its exception from the strictures of the rule against hearsay.

In addition to the perception that such material is inherently reliable, convenience would also seem to be a factor. In *R v Marlborough Street Stipendiary Magistrate (ex parte Simpson)*, the court had the following to say about the purpose of the legislative scheme:

The purpose of the provision is unquestionable. It is that to save bankers from the inconvenience of having their books and their staff in courts for the purposes of supplying evidence, it shall be possible for the police officers concerned to obtain an order from the court, and by virtue of that order to be at liberty to inspect the accounts and take notes from them in the bank. Then when the trial comes on the bank will be undisturbed in its business. That is the purpose of the section.¹³⁸

The 1879 - 1989 Acts are of particular relevance in a white-collar crime context. In this regard, Horan makes the observation that a 'bank account may provide proof that a company was trading while insolvent for the purposes of preferring a criminal fraudulent trading charge, that a fraudulent preference was made by a company in liquidation, or it

¹³⁶ Section 141 of the Central Bank Act 1989 provides that the original Bankers' Books Evidence Act 1879 and subsequent amending legislation are to be referred to collectively as the Bankers' Books Evidence Acts 1879 - 1989.

¹³⁷ Bankers' Books Evidence Act 1879, ss 3 - 6.

¹³⁸ (1980) 70 Cr App R 291, 292 - 293.

may show the presence of suspicious cash deposits (which may have in turn prompted the bank to file a suspicious transaction report under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010'.¹³⁹

Of course, the impact of the 1879 - 1989 Acts is such as to amount to a derogation from the banker's duty of confidentiality to its customers. In *Walsh v National Irish Bank Ltd*, McKechnie J observed that bankers owed their clients a duty of secrecy but stated that this duty is subject to exceptions, such as where the overriding duty of disclosure in the public interest requires it or where a derogation is required to uncover fraud or detect crime.¹⁴⁰ The provisions of the 1879 - 1989 Acts might be said, then, to come within the range of permissible derogations from the banker's common law duty of confidentiality to his customers.

The 1879 - 1989 Acts are not without omissions and deficiencies. While noting the overall benefits of the legislative scheme and provisionally recommending its retention, the LRC has also observed that the legislation does not cover all credit institutions, a situation it suggests ought to be rectified.¹⁴¹ Further, the case of *JB O'C v PCD* establishes that section 9 of the 1879 Act, which deals with the definition of bankers' books, is to be interpreted narrowly and does not extend to 'documents which are in no sense books', a finding that restricts the range of bank records that might be thought to have been covered by the statutory scheme.¹⁴² Heffernan also notes in relation to section 9 that '[a]lthough the statutory definition does embody a dynamic understanding of documentation relative to the time of enactment, it is clearly in need of updating to comport with contemporary developments in informational technology'.¹⁴³

While noting that some of the deficiencies just mentioned have been filled in part by ad hoc

¹³⁹ S Horan, *Corporate Crime* (Bloomsbury Professional 2011) [5.72].

¹⁴⁰ [2008] 2 ILRM 56 (HC).

¹⁴¹ Law Reform Commission, *Consultation Paper on Documentary and Electronic Evidence* (LRCCP 57 - 2009) [4.162].

¹⁴² [1985] IR 265 (HC) 274.

¹⁴³ L Heffernan with Ú Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury 2014) [7.134].

legislative and ministerial regulation,¹⁴⁴ Heffernan makes the following further observation:

The resulting web of statutory regulation is unnecessarily complicated, technical and cumbersome. Moreover, the piecemeal manner in which legislation has been extended provides no guarantee that the full range of financial institutions and information which should in principle come within the exception is actually included.¹⁴⁵

It is suggested that these are sensible observations and Heffernan's endorsement of an approach that would see the 1879 - 1989 Acts included as part of a general consolidation of existing evidence legislation that might lead to 'the enactment of a simple, coherent and inclusive statutory basis for the admission of financial information' is supported here.¹⁴⁶

While this section has focused on Part II the Criminal Evidence Act 1992 and the Bankers' Books Evidence Acts 1879 - 1989, it should be noted that there are sundry other statutory provisions of relevance in narrower, more specific ways, to the investigation and prosecution of particular white-collar crimes.¹⁴⁷ It is beyond the scope of this research to consider each and every such exception to the rule against hearsay in detail. However, it can be concluded from the large number of exceptions scattered across the statute book that the prevailing policy view is that, with appropriate safeguards in place, there ought to be a presumption in favour of admitting routinely gathered documentary hearsay in evidence.

A final matter that remains is whether the current position in this jurisdiction should be altered in any respect. As noted in the last section, the LRC has recommended in a 2009 paper that all documentary evidence should be admissible once the conditions of necessity

¹⁴⁴ For example, section 13 of the Disclosure of Certain Information for Taxation and Other Purposes Act 1996 has extended the application of the 1879 - 1989 Acts to some additional credit institutions.

¹⁴⁵ L Heffernan with Ú Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury 2014) [7.135].

¹⁴⁶ L Heffernan with Ú Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury 2014) [7.136]. Heffernan notes with approval that the Bankers' Books Evidence Act 1879, as amended, is among the statutes nominated as a candidate for inclusion within a single statute consolidating existing evidence legislation: Law Reform Commission, *Issues Paper Number 3, Consolidation of Evidence Legislation* (LRC IP 3-2013) 2.

¹⁴⁷ For example, see: section 1078B(3) of the Taxes Consolidation Act 1997; section 52(6) of the Criminal Justice (Theft and Fraud Offences) Act 2001; and section 13 of the Competition Act 2002.

and reliability are met.¹⁴⁸ However, in a 2010 paper, the LRC concluded that the existing exceptions to the hearsay rule in criminal proceedings should be retained and expressly disapproved of any move to make the admissibility of documentary evidence dependent on a test of necessity and reliability.¹⁴⁹ The LRC had considered whether Ireland should follow the UK example in the Criminal Justice Act 2003, which retains the general rule against hearsay, subject to the established exceptions, and with a limited inclusionary judicial discretion to admit hearsay not falling within any other exception. The LRC concluded that this latter aspect of the Act 'relaxes the rule in such a manner as to potentially render the rule against hearsay redundant'.¹⁵⁰

The LRC also disagreed that judicial discretion exercised with reference to the concepts of reliability and necessity should constitute the test for the admissibility of hearsay evidence, the very test the same body had approved of in the 2009 paper when recommending the abolition of the best evidence rule.¹⁵¹ The latter approach has been adopted in Canada and has been recommended by the New Zealand Law Commission. The LRC's primary criticisms of the approach related to the absence of clarity around the concepts of necessity and reliability and concerns about undue levels of judicial intervention.¹⁵²

While the LRC's criticisms in the 2010 paper are not without foundation, it is contended that they do not outweigh the benefits of the broader approach to admissibility advocated for in the 2009 consultation paper. The existence of a myriad of exceptions to the rule against hearsay for different classes of documentary evidence is unwieldy. Given the general acceptance of the inherent reliability of documentary evidence, it seems appropriate to move to a statutorily embodied test based on considerations of necessity and reliability that would give trial judges an appropriate level of flexibility in relation to the admissibility of documentary evidence while at the same time safeguarding the

¹⁴⁸ Law Reform Commission, *Consultation Paper on Documentary & Electronic Evidence* (LRCCP 57-2009) [2.153].

¹⁴⁹ Law Reform Commission, *Consultation Paper - Hearsay in Civil and Criminal Cases* (LRCCP 60-2010) [5.45] and [5.49].

¹⁵⁰ Law Reform Commission, *Consultation Paper - Hearsay in Civil and Criminal Cases* (LRCCP 60-2010) [5.32].

¹⁵¹ Law Reform Commission, *Consultation Paper on Documentary & Electronic Evidence* (LRC CP 57-2009) [2.153].

¹⁵² Law Reform Commission, *Consultation Paper - Hearsay in Civil and Criminal Cases* (LRC CP 60-2010) [5.37].

interests of defendants.

4.3 Documentary Evidence and Statutory Presumptions

A statute may provide that a certificate put together in a prescribed fashion is admissible as evidence of the facts stated therein. As such, a certificate is comparable to a presumption, in that its contents are presumed to have the capacity for a particular evidential weight.¹⁵³ In a white-collar crime context, there are a number of statutory presumptions that inure to the benefit of prosecutors when advancing a particular case. In Part II of the Criminal Evidence Act 1992, discussed in some detail above, section 6 provides a mechanism whereby, in relation to any information sought to be adduced under section 5 of the Act, all of the conditions for admissibility under section 5 may be certified as having been satisfied. Only where, pursuant to section 7 of the Act, an objection is raised to the admissibility of evidence sought to be adduced under section 5, will oral evidence be required to be given of matters dealt with in a section 6 certificate.

Section 12 of the Competition Act 2002 provides that, in relation to any proceedings involving the Act in question, a very broad range of documents, in both traditional and electronic formats, presumptions concerning the authorship, ownership and relevance of the documents will apply unless the contrary is shown. Section 13 of the same Act then goes on to provide for the admissibility of documentary hearsay once certain conditions are met.

Section 883 of the Companies Act 2014 provides for proof by certificate, unless the contrary is shown, of a range of activities carried out by designated persons in pursuance of their functions under the Act. Section 884 of the Companies Act 2014 creates presumptions concerning the authorship, ownership and relevance of a range of documents unless the contrary is shown. Similar provisions are scattered across the Taxes Consolidation Act

¹⁵³ For comprehensive discussions of the operation of evidential presumptions in Irish law, see: L Heffernan with Ú Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury 2014) [1.26]-[1.34]; D McGrath with E Egan McGrath, *Evidence* (2nd edn, Roundhall Thomson Reuters 2014) [2-159]-[2-170].

Farrell has noted that a weakness in the organisation of the various statutory presumptions currently in existence is that they apply only in relation to proceedings relevant to the respective statutes. In this regard, he has said the following:

At present the position in relation to different types of regulatory prosecution is hopelessly confused and inconsistent. Under the Companies Acts and the Competition Acts there are a number of useful evidential presumptions in relation to documentary evidence. At their most basic level these presumptions allow a court to presume that the person who appears to have signed a document did in fact sign it. However, these presumptions only apply to prosecutions under each of the respective acts. Such a distinction is illogical and inconsistent. Either the presumptions should apply or they should not. It is quite possible at present (for the DPP at least) to mount one prosecution alleging offences under various different codes which each give rise to wholly separate evidential presumptions.¹⁵⁵

The haphazard manner in which the statutory presumptions discussed in this section have arisen over time has resulted in the kind of difficulties described in the passage just cited. It is suggested that consolidating the various presumptions in a dedicated evidence statute would result in a desirable coherence and uniformity of approach to white-collar crime investigations and prosecutions.

4.4 Powers to Demand the Production of Documentary Evidence

It has already been observed that investigations and trials of white-collar crimes generally entail the gathering and handling of voluminous amounts of data in both hard copy and electronic formats. As part of its government-stated aim of addressing existing difficulties in the investigation and prosecution of white-collar crime, the Criminal Justice Act 2011

¹⁵⁴ See, for example: section 1096B(7) (concerning a certificate of evidence of failure to carry out a particular act); section 987 (concerning a certificate of inspection of Revenue records relation to certain failures); section 1052(4)(a) (concerning a certificate showing that a notice was duly given and not complied with).

¹⁵⁵ R Farrell, 'Prosecutors, Regulators, Trial by Jury and the Prosecutor's Discretion' (11th Annual National Prosecutors' Conference, Dublin, April 2010) 8.

contains, in the form of section 15 of that Act, a key provision that is designed to ease the burden of investigators and prosecutors when it comes to the issue of gathering documentary evidence.¹⁵⁶ While this, and other similar statutory provisions that will be discussed in this part of the chapter, could be categorised as additional powers of investigation, the overlap with the field of documentary evidence sees them discussed here rather than in Chapter 3. It is proposed to first examine section 15 in some detail given its relatively recent enactment and its centrality to the field of white-collar crime. Consideration will then be given to other provisions of a similar nature that have pertinence in a white-collar crime context.

Section 15 is a wide-ranging provision that compels a person, in certain circumstances, to provide documents or information that may assist in the investigation of a 'relevant offence'.¹⁵⁷ As noted at part 4.1 of this chapter, the word 'document' is defined broadly in the interpretation section of the Act and 'includes information recorded in any form and anything on or in which information is recorded and from which information can be extracted'. This definition clearly takes account of the widespread use of computers and other digital equipment to store data and information.

In the words of the then Minister for Justice and Equality, section 15 is 'targeted at witnesses, not suspects'.¹⁵⁸ However, there is nothing to stop the operation of section 15 in respect of someone who is, in fact, a suspect.¹⁵⁹ In recognition of the privilege against self-incrimination, discussed more fully in Chapter 5 of this thesis, section 15(10) provides that a statement or admission made by a person pursuant to an order under section 15

¹⁵⁶ See Ch 2 for discussion of the political background to the promulgation of the Criminal Justice Act 2011.

¹⁵⁷ Section 3 of the 2011 Act provides that 'relevant offences' are arrestable offences (offences carrying a maximum penalty of five years or more) detailed in the substantial Schedule 1 to the Act. A raft of relevant offences is set out in Schedule 1 to the Act, including offences relating to banking, investment of funds and other financial activities, company law offences, money laundering and terrorist offences, theft and fraud offences (including many frequently prosecuted offences detailed in the Criminal Justice (Theft & Fraud Offences) Act 2001), bribery and corruption offences, consumer protection offences and criminal damage to property offences.

¹⁵⁸ Seanad Deb, 26 July 2011, vol 209, col 869.

¹⁵⁹ Law Reform Commission, *Report on Disclosure and Discovery in Criminal Cases* (LRC 112-2014) [1.17] notes the capacity for section 15 to compel disclosure of information by an accused and adopted the view that any wider application of the provision to the criminal law generally would not be a suitable means of reforming the disclosure system. M Mulcahy, 'The Criminal Justice Act 2011, Criminal Discovery, and *Egalité des Armes*' (2012) 1 Bar Review 21, 24, argues that the existence of section 15 undermines the argument against the availability of discovery in criminal cases.

requiring the disclosure of certain information is not admissible as evidence in proceedings against the person for an offence (other than an offence under subsection (15), (16) or (17)). Respectively, these latter subsections make it an offence:

- for a person to fail or refuse to comply with an order under made under section 15;
- for a person to provide false or misleading information or statements;
- for a person to fail to comply with an undertaking given by him or her under section 15(8), namely to keep documents safely and securely and when requested, to further them to gardaí in connection with any criminal proceedings for which they are required.

In *Dunnes Stores Ireland Company v Ryan*, Kearns J in the High Court considered the constitutionality of aspects of section 19 of the Companies Act 1990, a statutory provision analogous in many ways to section 15 of the 2011 Act, save in one key respect.¹⁶⁰ Under section 19(5) of the 1990 Act, potentially incriminating information could be compelled on pain of prosecution, as is the case under section 15 of the 2011 Act. However, under section 19(6) any information disclosed pursuant to section 19(5) could later be used in evidence against the person who provided it, a situation section 15 protects against where a person cooperates with investigators. Kearns J held that section 19(6) involved an unacceptable infringement of the privilege against self-incrimination.¹⁶¹ As regards section 19(5), the clause that provided for the compulsory production of documents and the provision of explanations at the request of inspectors appointed by the Minister, Kearns J upheld its constitutionality, as it satisfied the proportionality tests established in *Heaney v Ireland*¹⁶² and *Re National Irish Bank Ltd (No 1)*,¹⁶³ and was, therefore, a reasonable incursion on the privilege against self-incrimination.¹⁶⁴ It would seem, then, that section 15 passes muster on an application of the approach taken by Kearns J in the *Dunnes Stores* case.

¹⁶⁰ [2002] 2 IR 60 (HC).

¹⁶¹ [2002] 2 IR 60 (HC) 123.

¹⁶² [1996] 1 IR 580 (SC).

¹⁶³ [1998] IEHC 116, [1999] 3 IR 145. See part 2.5.1 of Ch 5 for a discussion of the standards adopted in this case.

¹⁶⁴ [2002] 2 IR 60 (HC) 119.

It should be noted that, as regards admissibility of evidence, the protection against self-incrimination afforded by section 15(10) applies only in respect of a statement or admission made by the person in question. Section 15(9) makes it clear that any documents taken away by a member of the Garda Síochána pursuant to an order under section 15 may be retained by the member for use as evidence in any criminal proceedings.

Although section 15(10) affords protection to a person who provides information in the form of answers to questions or a statement pursuant to a section 15 order, it has been noted that the legislation is silent as regards a situation whereby a person voluntarily cooperates with gardaí. This silence generates an 'inefficiency', inasmuch as cautious legal advice would suggest that a client waits until they are made the subject of a section 15 order to guarantee protection under section 15(10), rather than cooperate voluntarily and risk a finding that anything they may utter may be used against them in evidence.¹⁶⁵

Section 15(1) allows the gardaí to apply to the District Court for an order compelling a person to disclose documents or provide information relevant to the investigation of a relevant offence, or both. On the basis of the Minister's comments that section 15 is targeted at witnesses, it appears that, to take one scenario, a factually innocent employee of a commercial organisation might be made the subject of such an order in an effort to investigate white-collar crime suspected to have been committed within the organisation.

A question arises as to whether a section 15 order can operate after a person has been charged with a relevant offence. The element of doubt arises because it is arguable that an investigation is at an end once a person has been charged. The legislation is silent on the point. Similar legislation in England, namely section 2 of the Criminal Justice Act 1987, has been interpreted to mean that the relevant officer (Director of the Serious Fraud Office) continues to enjoy the power to compel the person to answer questions on pain of commission of a criminal offence.¹⁶⁶ It remains to be seen whether the Irish courts will follow this approach should the issue arise for determination. The point is of particular significance in circumstances where a person's status may fluctuate between that of witness

¹⁶⁵ S Costelloe, 'Part III - Criminal Justice Act 2011' (Bar Council Conference, Dublin, 28 January 2012) 7.

¹⁶⁶ S Costelloe, 'Part III - Criminal Justice Act 2011' (Bar Council Conference, Dublin, 28 January 2012) 4, where reference is made to the case of *R v Director of Serious Fraud Office, ex parte Smith* [1993] 1 AC 1.

and suspect during the course of a white-collar crime investigation.

Once a garda makes an application to the District Court pursuant to section 15(1), section 15(2) allows for orders to be made in relation to the production of documents or allowing access to them. Section 15(3) gives power to the District Court to make an order concerning the provision of information to the gardaí by answering the questions specified in the application or making a statement setting out the answers to those questions, or both, and then making of a declaration of the truth of the answers to such questions.

In the case of an order under section 15(2), it must first be established to the satisfaction of a District Court judge, and on information on oath from the garda concerned, that there are reasonable grounds for suspecting that a person has possession or control of particular documents or documents of a particular description. However, in the case of an order under section 15(3), it must first be established that there are reasonable grounds for suspecting that a person has information which he has failed or refused without reasonable excuse to give to the Garda Síochána having been requested to do so. Thus, a procedural difference in the obtaining of the orders is that a garda does not have to make a request of a person for relevant documents before seeking an order from the District Court, whereas, in the case of information, it must be established that the garda has made a request of a person for such information and there has been a failure or refusal to comply with that request.

The procedural difference between section 15(2) and section 15(3) may have its roots in the distinction that is drawn between evidence that exists independently of the will of a person and evidence that relies on the will of a person for its existence.¹⁶⁷ On this analysis, a person will have difficulty relying on the privilege against self-incrimination to resist a court order made under section 15(2) directing that particular documents be handed over, whereas he may have a 'reasonable excuse' for failing to respond to garda enquires made pursuant to section 15(3) if he invokes the privilege against self-incrimination. The Act is silent as what might amount to a 'reasonable excuse' for failing to comply with a garda

¹⁶⁷ *DPP v Boyce* [2005] IECCA 143, [2009] 2 IR 124; *Boyce v Ireland* (2013) 56 EHRR SE11; *DPP v Gormley and DPP v White* [2014] IESC 17, [2014] 1 ILRM 377. See discussion of this point of law at part 2.5.3 of Ch 5.

request under section 15(3). However, it seems likely that recognised privileges, chiefly the privilege against self-incrimination, would be recognised by the judiciary as falling under the umbrella of the term.¹⁶⁸

In addition to the steps just outlined, in either case the District Court judge must also be satisfied, on information on oath from the garda concerned, that:

- there are reasonable grounds for believing that the document or information is relevant to the investigation of the relevant offence concerned; and
- there are reasonable grounds for suspecting that the document or information may constitute evidence of or relating to the commission of that offence; and
- there are reasonable grounds for believing that the documents or information should be provided, having regard to the benefit likely to accrue to the investigation and any other relevant circumstances.

In common with many of the powers of investigation discussed in Chapter 3, section 15 prevents investigators from engaging in what might be viewed as indiscriminate trawling by requiring that there is a certain minimum level of suspicion to justify the request for a section 15 order. It seems likely that, in swearing the relevant informations, the gardaí will rely, *inter alia*, on information obtained as a result of the operation of section 19 of the 2011 Act (the 'obligation to report' provision considered at part 4.1 of Chapter 3) and sections 20 - 21 of the 2011 Act (the 'whistleblowing' provisions discussed at 4.2 of Chapter 3) in order to establish the required grounds.

Where a judge orders the production of documents, he may order the person to identify and categorise the documents in the particular manner, if any, sought by the gardaí or in such manner as the judge may direct. The requirement to provide documents in a particular manner would seem to be an effort to inhibit 'snowing', a practice whereby investigators are inundated with huge volumes of unsorted material with the consequence that the

¹⁶⁸ The legal privileges of most relevance to the investigation and prosecution of white-collar crime, including the privilege against self-incrimination, are discussed more fully in Ch 5.

investigation is, at a minimum, slowed down, and potentially thwarted altogether.¹⁶⁹ It is a very practical development in the law that appears to sit well with the comments of the then Minister for Justice and Equality, where he stated: 'My intention is to ensure that the new procedures and powers set out in the Bill will speed up future investigations and prosecutions.'¹⁷⁰ However, from the perspective of witnesses, suspects and defendants, it is also clear that this requirement places a heavy onus on the person who must comply with such a direction. The wording of section 15(15) is such that a person who does not comply with a direction to the satisfaction of gardaí might be liable to prosecution for the offence of failing or refusing to comply with a 'Section 15 Order'.

It is stated in section 15(4) that an order to provide information may only be made in respect of information that the person concerned has obtained in the ordinary course of business. This echoes the language of section 5 of the Criminal Evidence Act 1992, discussed at part 4.2.3 of this chapter, but there is no further clarification of what the phrase 'acquired in the ordinary course of business' might mean. At a minimum, it would seem to be an attempt to confine the scope of the Act to workplace offences. It may not be easy, or even possible, to determine how certain material was acquired but the absence of a more precise definition of the phrase may give rise to litigation on the point.

Sections 15(5) - (7) concern garda access to material once an order is made. An order may require that a garda be allowed to enter a particular place to obtain access to the documents covered by the order. Gardaí may be entitled to access to passwords where the documents concerned are in non-legible form, for example where they are stored on a computer. Gardaí may make copies of documents and take the copies away.¹⁷¹ There seems to be an assumption in the wording of section 15 that the desired information will be easily identifiable and separable from material that does not have to be disclosed. However, in the case of electronically stored information it can be difficult to distinguish

¹⁶⁹ The term 'snowing' appears to have been coined by Braithwaite, who used it to describe the interaction between a particular company and the Food and Drug Administration in the USA: J Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (Routledge & Kegan Paul 1984) 361.

¹⁷⁰ Dáil Deb, 18 May 2011, vol 732, col 681.

¹⁷¹ Anecdotally, where An Garda Síochána wish to make copies of electronically stored data, gardaí attached to the Computer Crime Unit generally take a mirror image, thus preserving the integrity of the original: S More O'Ferrall and Ú Ní Raifeartaigh, 'Electronic Evidence Gathering and Use in Criminal Proceedings' (Irish Rule of Law Conference, Dublin, November 2014) 7.

between electronic material that comes within a 'Section 15 Order' and irrelevant material that is found on the same device, or even in the same electronic document.¹⁷² An order does not confer any right to production of, or access to, any document subject to legal professional privilege, an issue discussed more fully in Chapter 5, where section 16 of the Act is considered. An order has effect notwithstanding any other obligation as to secrecy or other restriction on disclosure of information imposed by statute or otherwise.

Under section 15(8), there is provision, in certain circumstances, for the retention by, or return to, a person of documents which may otherwise be taken away by the gardaí where the documents are required for the purposes of a person's business or other legitimate purpose. The person must undertake in writing to keep the documents safely and securely and, when requested, to furnish them to the gardaí in connection with any criminal proceedings for which they are required. This provision also applies to third parties affected by an order under section 15.¹⁷³

Section 15(11) states that an order under this section for the production of, or access to, documents may, on the application of the gardaí and if the judge considers it appropriate, require the person to furnish a certificate affirming the authenticity of the documents, and in the case of a document in non-legible form that is reproduced in legible form, the system and manner of that reproduction. This subsection is very similar to section 6 of the Criminal Evidence Act 1992, discussed at part 4.2.3 above, and section 131 of the Central Bank Act 1989, which amends aspects of the Bankers' Books Evidence Acts 1879 - 1989. The purpose of such subsections is to make the relevant evidence admissible at trial per se.

¹⁷² In *LMcL v JD* [2009] 4 IR 123 (HC), a case concerning the lawfulness of the obtaining of electronically stored material by the Revenue Commissioners pursuant to section 908(2) of the Taxes Consolidation Act 1997 that was subsequently disclosed to the Criminal Assets Bureau, the implication of the judgment of Laffoy J was that law enforcement authorities are not entitled to seize or retain electronic material that does not come within the parameters of the search warrant or other lawful authority being exercised.

¹⁷³ Some of the more prosaic subsections of section 15 include the following. Section 15(12) provides that where a person who produces documents under this section claims a lien on the documents or some of them, the production shall be without prejudice to the lien. Section 15(13) allows the court to vary or discharge the order on application by the person who is the subject of the order or An Garda Síochána. Section 15(14) provides that the court may order the return of documents to third parties affected by an order under this section. Sections 15(18) and (19) provide for the geographical jurisdiction of the District Court under section 15 and state that it shall not affect the operation of any other legislative provision under which a court may order production of documents to the gardaí or any other person in connection with the investigation of an offence.

In the context of acquiring documentary material in the course of white-collar crime investigations and prosecutions, sections 7A and 7 of the Bankers' Books Evidence Acts 1879 - 1989 are also of particular relevance. Section 7A is pertinent at the investigation stage where an instance of white-collar crime is concerned. Under the section, a garda not below the rank of superintendent, or the Director of Corporate Enforcement, may apply to a judge of the District Court, Circuit Court or High Court for an order to inspect and take copies of any entries in a banker's book or to inspect and take copies of any entries in a banker's book or to inspect and take copies of any documentation associated with or relating to an entry in such book for the purposes of investigation of an offence. Before granting such an order, the judge must be satisfied that there are reasonable grounds for believing that an indictable offence has been committed and that there is material in the possession of bank specified in the application that is likely to be of substantial value to the investigation of the offence. This section amounts to a valuable tool for investigators and any material gathered pursuant to the section will be admissible evidence at any later trial.

The significance of section 7A in a white-collar crime context is illustrated by the case of *DPP v Synnott*.¹⁷⁴ The case involved a Circuit Criminal Court prosecution of an insurance and investment broker who was alleged to have defrauded a number of his clients. Murphy has characterised it as 'a classic Ponzi Scheme'.¹⁷⁵ The defendant was alleged to have taken money off clients on the basis that the money would be invested through his company, Mark Synnott (Life & Pensions) Brokers Ltd. However, the defendant moved the money from the company account to his own account and took the money for personal use. In order to advance the prosecution, a large number of documents had to be investigated and proved in circumstances where double accounting was alleged against the accused. As part of the investigation of the offence, High Court orders were obtained under section 7A. Murphy has expressed the view that the ability of investigators to procure, and then admit the relevant documents at trial if necessary, resulted in a very strong case against the accused and was likely central to the defendant's decision to plead guilty to one count of

¹⁷⁴ *DPP v Synnott*, *The Irish Times* (Dublin, 8 May 1996).

¹⁷⁵ Remarks made by Shane Murphy SC during a lecture delivered on 15 March 2012 as part of the Advanced Diploma in Corporate Crime course at The Honorable Society of King's Inns, Dublin. 'Ponzi Schemes' are named for Charles Ponzi, an American fraudster who, in 1920, operated a series of fraudulent investment schemes in Boston, Massachusetts, that involved paying returns to investors from new capital paid into the schemes by new investors, rather than from profits earned by the schemes.

criminal fraudulent trading and two counts of fraudulent conversion.¹⁷⁶

Section 7 of the 1879 - 1989 Acts allows that a party to legal proceedings may apply to court for an order that such party be at liberty to inspect and take copies of an entries in a banker's book for the purpose of such proceedings. Thus, where criminal proceedings are already in being, section 7 gives the prosecution the capacity to seek any further evidence that it might require, such as evidence to rebut a defence that an accused intends to raise.

Another provision of relevance to the field of white-collar crime is section 52 of the Criminal Justice (Theft and Fraud Offences) Act 2001, which provides for the making of orders to produce evidential material in connection with fraud offences. These so called 'Section 52 Orders' enable the GBFI to apply to the District Court for an order against a person to produce evidential material connected to a fraud offence (or, indeed, any offence under the 2001 Act) which may then become admissible evidence in any subsequent proceedings. Also pertinent in a white-collar crime context is section 778 of the Companies Act 2014, which enables the ODCE to summarily demand the production of books and documents in connection with possible offences under the Companies Act 2014. Furthermore, under section 783 of the Companies Act 2014, a court may order a third party to comply with a requirement of the ODCE to produce books or documents.

This part of the chapter has considered powers that assist investigators and prosecutors in the gathering of documentary material and other digitally stored material of evidential value. There has been a particular emphasis on section 15 of the Criminal Justice Act given its centrality to investigations and prosecutions of white-collar crime. While the 2011 Act is still in the early years of its operation and its full impact is hard to gauge at this juncture, section 15 of the Act provides, on its face, important assistance to investigators and prosecutors of white-collar crime who, in a technologically advanced era, face the dual challenge of gaining access to huge quantities of largely electronically stored data and then sifting through it in order to identify material of evidential value. From a defence perspective, there are some safeguards on the operation of section 15, including a legal

¹⁷⁶ Remarks made during a lecture delivered on 15 March 2012 as part of the Advanced Diploma in Corporate Crime course at The Honorable Society of King's Inns, Dublin.

professional privilege exception that will be considered in Chapter 5. However, it remains that section 15 constitutes a departure from the traditional approach to disclosure in criminal proceedings and it is notable that the Law Reform Commission did not find it appropriate to recommend that it should have wider application in the criminal law.¹⁷⁷

4.5 Pre-trial Disclosure of Documentary and Digitally Stored Evidence

In order to comply with the requirements of Article 38.1 of the Constitution, which guarantees trial in due course of law, the prosecution has a well-established duty to disclose all relevant evidence to the defence.¹⁷⁸ This duty extends to a requirement to take reasonable steps to seek out and preserve all relevant evidence.¹⁷⁹ Pre-trial disclosure of material in a white-collar crime context is, arguably, a more difficult issue than in the case of other forms of crime for two main reasons. First, the sheer volume of digitally stored material associated with most white-collar crime prosecutions makes procurement, assessment and organisation of it problematic, particularly in the absence of a legislative or rules-based framework governing disclosure in criminal cases in this jurisdiction.¹⁸⁰ Secondly, the absence of a formal third party discovery or disclosure procedure in the Irish criminal justice system creates uncertainty and unpredictability for both the defence and the prosecution in circumstances where relevant material in white-collar crime prosecutions is often in the hands of third parties.¹⁸¹

¹⁷⁷ See n 159.

¹⁷⁸ *DPP v Special Criminal Court* [1999] 1 IR 60 (HC); *DPP v McKevitt* [2008] IESC 51, [2009] 1 IR 525. In the recent case of *DPP v Hawkins* [2014] IECCA 36 [13], Charleton J emphasised the need for a proper application of the criterion of relevance in order to discourage unnecessary and oppressive requests for disclosure. For detailed analysis of the law in relation to pre-trial disclosure, see: T O'Malley, *The Criminal Process* (Thomson Round Hall 2009) Ch 18; W Abrahamson, JB Dwyer and A Fitzpatrick, *Discovery and Disclosure* (2nd edn, Thomson Round Hall 2013) Chs 20 - 28; L Heffernan with Ú Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury Professional 2014) Ch 11; D McGrath with E Egan, *Evidence* (2nd edn, Thomson Roundhall 2014) Ch 12.

¹⁷⁹ *Braddish v DPP* [2001] 3 IR 127 (SC); *Dunne v DPP* [2001] 2 IR 305 (SC); *Bowes v DPP* [2003] 2 IR 25 (SC); *McFarlane v DPP* [2006] IESC 11, [2007] 1 IR 134; *Savage v DPP* [2010] IESC 213, [2011] 1 IR 34; *Byrne v DPP* [2010] IESC 213, [2011] 1 IR 346; *Kearns v DPP* [2015] IESC 23.

¹⁸⁰ The situation in relation to criminal proceedings can be contrasted with the system applicable to civil proceedings, where there are extensive rules of procedure concerning discovery of relevant material: Order 31 of the Rules of the Superior Courts 1986, as amended; Order 32 of the Circuit Court Rules; Order 46A of the District Court Rules. See also: H Biehler and D McGrath with E Egan, *Civil Procedure in the Superior Courts* (3rd edn, Thomson Roundhall 2012) Ch 10.

¹⁸¹ There is no statutory basis for third party disclosure and the absence of any common law basis for such disclosure has been confirmed in the following case law: *DPP v Sweeney* [2001] 4 IR 102 (SC); *JF v Reilly* [2007] IESC 32, [2008] 1 IR 753; *Health Service Executive v White* [2009] IEHC 242.

The challenges relating to pre-trial disclosure in cases involving large amounts of documentary evidence were adverted to in broad terms by Mr Justice Clarke in remarks he made at a seminar organised by the LRC.¹⁸² Mr Justice Clarke commented that he became particularly interested in difficulties associated with disclosure, discovery and general handling of documentary evidence when hearing a Supreme Court appeal on a question of discovery obligations associated with civil litigation concerning Bernie Madoff that came before the Irish courts.¹⁸³ He observed that the massive costs of complying with discovery obligations (some €7 million for just one party to the litigation) were directly related to the fact that virtually all data is now stored electronically and has the capacity to last for ever. He noted the demands associated with retrieving documents from 'the cloud'¹⁸⁴ and questioned whether the various stakeholders in all kinds of proceedings dealing with vast quantities of electronically stored data had yet to come to grips with the challenges of searching, disclosing, revealing and managing such material.

At the same seminar, Remy Farrell SC spoke of the problems associated with documentary evidence and made remarks apposite to any discussion of its place in the investigation and prosecution of white-collar crime. Speaking of the issue of satisfying the rules of disclosure in criminal proceedings, he opined that the system in operation here compared reasonably well with other comparable jurisdictions such as Scotland or the USA. However, he noted

¹⁸² Law Reform Commission, 'Seminar on Disclosure and Discovery in Criminal Cases' (Dublin, 21 May 2014).

¹⁸³ *Thema International Fund plc v HSBC Institutional Trust Services (Ireland) Ltd* [2013] IESC 5, [2013] 1 IR 274. Clarke J delivered a unanimous decision of the Supreme Court clarifying the scope of third party discovery obligations. The background to the case was that Bernie Madoff had operated a massive 'Ponzi' scheme (see n 175) through his Wall Street firm, Bernard L Madoff Investment Securities LLC, which was established in 1960. The fraudulent activity commenced at least by the 1980s, and possibly earlier than that, and involved misappropriation of funds of about US\$65 billion before it was uncovered in December 2008 after Madoff confessed to his sons that his business activity had been 'one big lie'. In March 2009, Madoff pleaded guilty to eleven federal felonies associated with his fraudulent activities and in June 2009 he was sentenced to 150 years' imprisonment. After a New York court ruled in January 2012 that certain litigation was more appropriate for the Irish courts, Thema International Fund, a firm based in the International Financial Services Centre in Dublin, sued HSBC bank in 2012 for losses of \$1.1 billion associated with the Madoff 'Ponzi' Scheme. The issue ruled on by the Supreme Court arose in the course of the litigation's passage before the High Court. The litigation was settled at the end of May 2013, just before a High Court trial of the matter scheduled to last for 14 weeks was due to commence.

¹⁸⁴ This expression is shorthand for 'cloud computing'. In broad terms, this is the practice of using a network of remote servers hosted on the internet to store, manage, and process data, rather than a local server or a personal computer. US Department of Commerce, National Institute of Standards and Technology (Special Publication 800 - 145, September 2011) 2, provides a comprehensive technical definition of the term as follows: 'Cloud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (eg networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.'

that An Garda Síochána is slow to collate documents or create their own summaries of raw data. In rare instances where the content of documentary material is summarised by gardaí, the curtain of privilege is used to shield such summaries from normal disclosure obligations. He questioned whether 'work product' by gardaí that summarises, rather than analyses, raw data, is appropriately hidden behind the veil of privilege. In other words, he suggested that reports created by gardaí that merely synopsis raw material ought to be disclosed to the defence. Further, he observed that the practice of both An Garda Síochána and the Office of the DPP is to present all material in paper format, with little or nothing provided electronically. Indeed, he noted that the DPP's email policy is such as to preclude the attachment of electronic documents to emails.¹⁸⁵

The difficulties of the kind flagged by Farrell can, arguably, be said to stem largely from the absence of an overarching legislative or procedural framework governing disclosure in criminal cases. Heffernan and Ní Raifeartaigh note that, in consequence of this vacuum, the following matters arise:

- There is no distinction between the listing and furnishing of documents;
- There is no requirement that the defence be provided with a schedule of documents;
- There is no specific time limit for the completion of disclosure;
- There is no designated deponent;
- There is no formal procedure for pre-trial disclosure applications;
- There is no distinction between primary and secondary disclosure;
- There is no formal procedure for the assertion of claims of privilege¹⁸⁶

Furthermore, there is no guidance on how searches of vast quantities of electronic data might be conducted or how the defence and the prosecution might work together to

¹⁸⁵ Farrell also made the observation that the DPP must have a greater oversight role in relation to An Garda Síochána where disclosure is concerned. Rather than the DPP simply relying on An Garda Síochána to satisfy its duty to seek out and preserve all relevant evidence in a given prosecution and forward such material to the DPP in an appropriately expeditious fashion, Farrell suggested that a more formal, accountable process be put in place, with emphasis put on the need for investigators to identify what material they have declined to disclose, together with the reasons for non-disclosure of such material. This, he suggested, might address concerns that relevant material is sometimes not disclosed when it ought to have been or is disclosed at an unacceptably late stage in proceedings.

¹⁸⁶ L Heffernan with Ú Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury Professional 2014) [11.10].

identify material of relevance. Any flexibility associated with the ad hoc approach to disclosure that obtains at present comes at the price of consistency and certainty.

Situations where relevant material is in the hands of third parties are another source of difficulty where pre-trial disclosure in white-collar crime prosecutions is concerned. As More O’Ferrall and Ní Raifeartaigh have noted, prosecutions of companies or persons associated with companies may potentially involve queries about documents in the hands of other bodies with whom that company was interacting, for example auditors, regulators or State agencies.¹⁸⁷ In such situations, prosecutors are faced with the conundrum that they are expected to take reasonable steps to procure and preserve relevant evidence¹⁸⁸ in a system that has no formal third party discovery or disclosure procedure in the case of criminal proceedings.¹⁸⁹ While anecdotal experience suggests that prosecutors are generally able to procure relevant material on an informal basis, the absence of formal mechanisms for determining such issues is unsatisfactory.

The situation in Ireland stands in contrast to the state of affairs in England and Wales, where there is a well-established framework governing procedures in relation to disclosure in criminal proceedings. The Criminal Procedure Investigations Act 1996 grounds the relevant regime and this is supplemented by a range of instruments, including guidelines on disclosure issued by the Attorney General’s Office.¹⁹⁰ The latter guidelines include an annex that deals with particular issues arising in relation to digitally stored material.

In a 2014 report, the LRC considered issues associated with disclosure and discovery in criminal cases.¹⁹¹ The report emphasised the need for reform in relation to the following issues: the precise scope of the duty of disclosure; the absence of a clear procedure for ensuring that disclosure is made and made in a timely fashion; the scope of the duty to

¹⁸⁷ S More O’Ferrall and Ú Ní Raifeartaigh, ‘Electronic Evidence Gathering and Use in Criminal Proceedings’ (Irish Rule of Law Conference, Dublin, November 2014) 39.

¹⁸⁸ *Braddish v DPP* [2001] 3 IR 127 (SC); *Dunne v DPP* [2001] 2 IR 305 (SC); *Bowes v DPP* [2003] 2 IR 25 (SC); *McFarlane v DPP* [2006] IESC 11, [2007] 1 IR 134; *Savage v DPP* [2010] IESC 213, [2011] 1 IR 34; *Byrne v DPP* [2010] IESC 213, [2011] 1 IR 346; *Kearns v DPP* [2015] IESC 23.

¹⁸⁹ *DPP v Sweeney* [2001] 4 IR 102 (SC); *JF v Reilly* [2007] IESC 32, [2008] 1 IR 753; *Health Service Executive v White* [2009] IEHC 242.

¹⁹⁰ Attorney General’s Office, *Attorney General’s Guidelines on Disclosure: For Investigators, Prosecutors and Defence Practitioners* (2013).

¹⁹¹ Law Reform Commission, *Report on Disclosure and Discovery in Criminal Cases* (LRC 112-2014).

disclose in summary proceedings; and the absence of a formal procedure for disclosure of material held by third parties, and the concomitant absence of rules for dealing with claims of privilege or confidentiality.¹⁹² Two recommendations made in the report are of particular relevance and usefulness to the concerns of this thesis. The first is that a statutory framework should be enacted setting out the scope of the prosecution duty of disclosure and its application in trials on indictment and summary prosecutions.¹⁹³ The second key recommendation is that provision should be made for pre-trial preliminary trial hearings in which disputed questions concerning disclosure may be determined by the court on the application of the accused, the prosecution or any third party who may be affected by disclosure, including a potential third party witness.¹⁹⁴ It is contended that implementation of these recommendations, along with associated measures proposed by the LRC,¹⁹⁵ would be a very positive step towards addressing the difficulties highlighted above.

A final point of relevance to the issue of pre-trial disclosure is whether the traditional position that the defence should not be required to show its hand before trial, save for relatively narrow statutory exceptions, should be adapted so as to incorporate an additional dimension into pre-trial hearings whereby both prosecution and defence are required to produce 'statements' in advance of trial. Such 'statements' are required in England and Wales by virtue of section 5 of the Criminal Procedure and Investigations Act 1996, as amended, which provides that there is a requirement on the defence to serve a 'defence statement' as part of the disclosure process in any criminal prosecution. The 2003 Fennelly Commission had the following to say on the matter of such statements:

The Royal Commission on Criminal Justice, the Auld Review and the Working Group of the Australian Attorneys-General all felt it appropriate to recommend or endorse legislation expanding upon defence obligations of disclosure, coupled with the availability of sanctions to a greater or lesser degree, to encourage compliance.

¹⁹² Law Reform Commission, *Report on Disclosure and Discovery in Criminal Cases* (LRC 112-2014) 1.

¹⁹³ Law Reform Commission, *Report on Disclosure and Discovery in Criminal Cases* (LRC 112-2014) [1.49].

¹⁹⁴ Law Reform Commission, *Report on Disclosure and Discovery in Criminal Cases* (LRC 112-2014) [1.57]. See further discussion of pre-trial hearings at part 5 of this chapter.

¹⁹⁵ Law Reform Commission, *Report on Disclosure and Discovery in Criminal Cases* (LRC 112-2014) Ch 3.

Matters such as the substantive rights guaranteed to an accused do not in any event, fall within the ambit of an examination of jurisdiction. Quite apart from this consideration, however, the Working Group did not see a basis for contemplating alteration of the present constitutionally ordained balance between the rights of the accused and the legitimate interests of the prosecution in criminal proceedings. Accordingly, we did not entertain the proposition that any change be made to the current extent of the disclosure obligations of the defence, which are at present effectively limited to alibi defence...¹⁹⁶

The issue was also the subject of consideration by the LRC in its 2014 report concerning disclosure and discovery in criminal cases.¹⁹⁷ In an indication of the LRC's view on the matter, the report cites *Markey v Minister for Justice and Law Reform*, where the High Court held that 'there is nothing to prevent the defence from lying in wait to ambush the prosecution, perhaps on some point of technical proof'.¹⁹⁸ The report goes on to state that 'there was general consensus from consultees that defence disclosure should not be introduced' before declining to make any recommendations concerning the introduction of disclosure by the accused.¹⁹⁹ While following the path adopted in England and Wales may well be advantageous from a prosecution point of view, the position of the 2003 Fennelly Commission and the LRC in its 2014 report is favoured here as being more in keeping with the exigencies of Article 38.1 of the Constitution.

¹⁹⁶ Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Stationery Office, Dublin, 2003) [772].

¹⁹⁷ Law Reform Commission, *Report on Disclosure and Discovery in Criminal Cases* (LRC 112-2014) [1.15] - [1.17].

¹⁹⁸ [2012] IEHC 39, [2012] 1 IR 2, 68 (Kearns P).

¹⁹⁹ Law Reform Commission, *Report on Disclosure and Discovery in Criminal Cases* (LRC 112-2014) [1.15] - [1.17].

4.6 The Presentation of Documentary Evidence at Trial

A further issue for consideration is the challenge of presenting complex documentary evidence in a comprehensible fashion at trial. As things stand in this jurisdiction, serious white-collar crime prosecutions that mandate trial on indictment take place in the Circuit Criminal Court or the Central Criminal Court before a judge and jury.²⁰⁰ As the triers of fact, it is crucial that a jury is presented with the evidence in a manner that is coherent, logical and comprehensible. An issue prosecuting counsel in white-collar crime trials must wrestle with is the difficulty associated with presenting documentary evidence of complex activities and transactions in a manner that does not bamboozle a jury.²⁰¹ It is also appropriate from a defence perspective that evidence is adduced in a clear and comprehensible manner. Following on from the 1992 report of the Government Advisory Committee on Fraud,²⁰² the then Minister for Justice asked the Committee on Court Practice and Procedure to consider whether a trial judge should be enabled to direct that certain documents be provided to a jury to assist them in their deliberations. The Committee recommended that a trial judge should be permitted, by way of statute, to order that various documents, including any documents admitted in evidence, the opening and closing speeches of counsel, the transcripts of evidence and the judge's charge, be provided to a jury.²⁰³

This recommendation would appear to have provided the impetus for a statutory provision that has the potential to ease the burden of prosecutors in many white-collar crime trials,

²⁰⁰ The distribution of criminal business between the Circuit Criminal Court and the Central Criminal Court is primarily governed by section 25(1) and (2) of the Courts (Supplemental Provisions) Act 1961. On the understanding of the term 'white-collar crime' adopted in this thesis, the effect of these provisions is that such crime will generally fall to be tried in the Circuit Criminal Court. However, it should be noted that section 11 of the Competition Act 2002 provides that certain competition offences are within the exclusive jurisdiction of the Central Criminal Court and it is possible that future legislative action will broaden the range of white-collar crime triable at that level. Article 38 of the Constitution guarantees the right to trial by jury for serious offences while also providing for exceptions to that right. The role of juries in trials of white-collar crimes will be considered in part 6 of this chapter.

²⁰¹ Coen and Heffernan draw a parallel between the capacity of jurors to understand complex evidence in the context of serious fraud trial and jurors' understanding of expert evidence in an article that includes consideration of methods that might assist juror comprehension of expert evidence, including judicial guidance to jurors on note-taking, the provision of written materials to jurors, and the use of technological aids: M Coen and L Heffernan, 'Juror Comprehension of Expert Evidence: A Reform Agenda' (2010) 3 Criminal Law Review 195.

²⁰² PD Maguire (Chairman), *Report of the Government Advisory Committee on Fraud* (Stationery Office, Dublin, 1992) [8.16].

²⁰³ Committee on Court Practice and Procedure, *25th Interim Report: The Provision of Documentation to Juries in Serious Fraud Trials* (Stationery Office, Dublin, 1997).

namely section 57 of the Criminal Justice (Theft and Fraud Offences) Act 2001. It is notable that section 57 was only commenced in August 2011, some ten years after its promulgation.²⁰⁴ The timing of its commencement corresponded with the passing of the Criminal Justice Act 2011. Given its applicability to many offences falling under the umbrella of white-collar crime, the commencement of the provision could be said to form part of a package of measures aimed at improving the State's response to this form of crime and is certainly in ease of prosecutors in their efforts to present cases to juries in as straightforward and comprehensible manner as is possible.²⁰⁵

Section 57(1) concerns the provision of information to juries and provides:

In a trial on indictment of an offence under this Act, the trial judge may order that copies of any or all of the following documents shall be given to the jury in any form that the judge considers appropriate:

- (a) any document admitted in evidence at the trial,
- (b) the transcript of the opening speeches of counsel,
- (c) any charts, diagrams, graphics, schedules or agreed summaries of evidence produced at the trial,
- (d) the transcript of the whole or any part of the evidence given at the trial,
- (e) the transcript of the closing speeches of counsel,
- (f) the transcript of the trial judge's charge to the jury,
- (g) any other document that in the opinion of the trial judge would be of assistance to the jury in its deliberations including, where appropriate, an affidavit by an accountant summarising, in a form which is likely to be comprehended by the jury, any transactions by the accused or other persons which are relevant to the offence.²⁰⁶

The first point of note is that the section only covers offences described in the Act. While

²⁰⁴ Criminal Justice (Theft and Fraud Offences) Act 2001 (Commencement) Order 2011, SI 394/2011.

²⁰⁵ The Criminal Justice (Theft and Fraud Offences) Act 2001 details a large number of theft and fraud offences organised under a number of headings, including: 'Part 2 Theft and Related Offences'; 'Part 3 Handling Stolen Property and Other Proceeds of Crime'; 'Part 4 Forgery'; and 'Part 5 Counterfeiting'.

²⁰⁶ Criminal Justice (Theft and Fraud Offences) Act 2001, s 57(1).

many white-collar crime offences are described in the 2001 Act, the definition of white-collar crime argued for in Chapter 2 encompasses offences falling outside of the Act, and so the provision in question will not be of assistance in trials of such offences.²⁰⁷ While all elements of the provision have the potential to be helpful, prosecution counsel grappling with the thorny question of how to present complex documentary evidence effectively are likely to home in on section 57(1)(c) and section 57(1)(g) in particular. Used creatively, section 57(1)(c) presents the possibility of reducing large quantities of documentary evidence that verges on the unintelligible for the average person into manageable, understandable units of evidence. In addition, the provision is worded sufficiently broadly to allow for the electronic presentation of evidence. The burden on prosecution counsel and, indeed, juries, is likely to be eased significantly if appropriate resources and facilities are made available to allow for the presentation and handling of documentary evidence in electronic, rather than paper, format.

Section 57(1)(g) is of obvious relevance to the trial of many white-collar crime offences involving convoluted financial transactions. It has the potential to assist prosecutors greatly by allowing for the enlisting of relevant professional expertise to explain transactions not readily or easily understood by the average person. In what amount to reasonable safeguards for the rights of a defendant, section 57(2) provides, in relation to section 57(1)(g), that if a prosecutor proposes to apply to the trial judge for an order that a document mentioned in subsection (1)(g) shall be given to the jury, the prosecutor shall give a copy of the document to the accused in advance of the trial and, on the hearing of the application, the trial judge shall take into account any representations made by or on behalf of the accused in relation to it. Further, under section 57(3), where the trial judge has made an order that an affidavit mentioned in subsection (1)(g) shall be given to the jury, the accountant concerned shall be summoned by the prosecutor to attend at the trial as an expert witness and may be required by the trial judge, in an appropriate case, to give evidence in regard to any relevant accounting procedures or principles. From a defence perspective, section 57 can be seen to mitigate the risk that, faced with evidence that is not easily comprehensible, jurors simply accept the prosecution interpretation of it rather than

²⁰⁷ The LRC has recommended that section 57 should be extended to all crimes on indictment: Law Reform Commission, *Report on Jury Service* (LRC 107-2013) [12.54].

process it with their own minds, although it could be argued that a prosecution case that is difficult to understand leaves greater scope for defence counsel to contend that there is reasonable doubt as to a defendant's guilt.

Other statutory provisions that are worded almost identically to section 57 include section 1078C of the Taxes Consolidation Act 1997 (inserted by section 161 of the Finance Act 2003), section 110 of the Company Law (Enforcement) Act 2001,²⁰⁸ section 10 of the Competition Act 2002²⁰⁹ and, most recently, section 882 of the Companies Act 2014.²¹⁰ These measures allow for the provision of information to juries in a similar manner to that provided for under section 57 in relation to trials of revenue offences, competition law offences and company law offences. The various provisions are a welcome, if somewhat tardily introduced, addition to the armoury of prosecutors in white-collar crime trials, but there is a lack of coherence to the way they are scattered across the statute book. Also, while they cover perhaps the bulk of offences falling within the definition of white-collar crime argued for in Chapter 2, they do not capture all such offences. These issues are addressed by Head 9 of the Revised General Scheme of a Criminal Procedure Bill, which was approved by the government in June 2015. Head 9 proposes a single measure concerning the provision of information to juries that is worded along the same lines as the provisions discussed above and would have application to all trials on indictment.²¹¹ This proposal is a welcome development and it is to be hoped that it will become law in early course.

A final point of note is that, on a practical level, the move in 2010 of all serious criminal business tried in Dublin from the Four Courts to the purpose-built Criminal Courts of Justice has meant that state of the art technology has been available to lawyers in the presentation of cases at trial for some years now, at least in Dublin. This is a point of particular relevance and importance in trials concerning white-collar crime where it is often necessary to adduce voluminous documentary evidence. For example, in *DPP v FitzPatrick, McAteer, and Whelan*, a prosecution arising from the collapse of Anglo Irish Bank plc in 2008, much of the

²⁰⁸ Commenced on 26 September 2011 by Company Law Enforcement Act 2001 (section 110) (Commencement) Order 2011, SI 487/2011.

²⁰⁹ Commenced on 28 September 2011 by Competition Act 2002 (section 10) (Commencement) Order, SI 491/2011.

²¹⁰ Commenced on 1 June 2015 by Companies Act 2014 (Commencement) Order 2015, SI 169/2015.

²¹¹ Such a measure was also recommended by the LRC in its *Report on Jury Service* (LRC 107-2013) [10.27].

documentary evidence was presented on screens positioned in front of the jurors.²¹² Technology allowed for the enlarging, where necessary, of particular portions of documents on the screens. Furthermore, jurors were provided with access to computerised version of documents when carrying out their deliberations. This harnessing of available technology to aid the presentation of evidence at trial is a welcome development in trials of white-collar crime in Ireland and it is hoped that the Courts Service will continue to expand the availability of such technology in courtrooms throughout the jurisdiction.²¹³

5 The Length of White-Collar Crime Trials

White-collar crime trials are often very lengthy due to a variety factors, including: extensive indictments,²¹⁴ frequent and protracted legal arguments and voir dieres during the course of a trial,²¹⁵ the fact that defendants are generally not required to show their hand before trial,²¹⁶ and the requirement to adduce complex documentary evidence in order to prove the case at trial. Speaking of the impact of extremely lengthy trials, the trial judge in the English case of *R v Cohen* had the following to say:

²¹² Dublin Circuit Criminal Court, 5 February 2014 - 18 April 2014. The case is discussed in some detail at part 6.1 of this chapter.

²¹³ The Courts Service *Annual Report 2013* notes, at page 14, that video viewing facilities are available in fifty-two courtrooms in the country and that they allow for the viewing of a range of evidence 'including scanned documentary evidence'. It is a stated goal of the report that the Courts Service will continue to expand the availability of such facilities.

²¹⁴ *R v Cohen* (1992) 142 NLJ 1267, also known as the 'Blue Arrow Case', was a complex fraud prosecution in the UK in which eight individuals were charged with conspiring to fraudulently induce persons to enter into agreements for acquiring or subscribing for securities for shares contrary to section 13 of the Prevention of Fraud Investment Act 1958. The Court of Appeal overturned convictions arrived at after a 184-day trial (then the second longest in English history) on the basis that an overloaded indictment that was directly related to the complexity of the alleged fraud had led to a trial that was not 'manageable'.

²¹⁵ *DPP v FitzPatrick* (Dublin Circuit Criminal Court, 14 April 2015 - 2 June 2015) is an extreme example of the prolongation of a white-collar crime trial by voir dieres and legal argument. The defendant faced twenty-seven charges relating to offences contrary to the Companies Act 1990, including twenty-one charge of making a misleading, false or deceptive statement to auditors and six charges of furnishing false information in the years 2002 to 2007. The prosecution resulted from the collapse of Anglo Irish Bank plc in 2008. The defendant had been chief executive officer of Anglo Irish Bank from 1986 to 2005 and chairman of the bank from 2005 until 2008. The trial ran for twenty-seven days of voir dieres and legal argument without a single piece of evidence having been heard by the jury before the presiding judge, Her Honour Judge Mary Ellen Ring, discharged the jury and adjourned the trial until October 2015. By the time the jury was discharged, it comprised just eleven members, one of its members having been discharged the week before the trial was adjourned due to issues with his own work: *The Irish Times* (Dublin, 3 June 2015).

²¹⁶ As things stand, the requirements on the defence to disclose any part of their case are mainly confined to the provision of an alibi notice under Section 20 of the Criminal Justice Act 1984 and the advance disclosure of expert reports under Section 34 of the Criminal Procedure Act 2010.

What is beyond all doubt is that all involved in this case have had to endure what no one in our courts should be called upon to cope with. That includes the defendants, their families and the jury and me. I can certainly speak for myself. No jury should be asked to cope with what this jury have had to endure. No defendant or his family should have to suffer through month after month after month all that these defendants have had to suffer. There must be some other way.²¹⁷

Not least because of the paramount constitutional importance of affording fairness to an accused, it is imperative that white-collar crime trials run for no longer than is absolutely necessary. As regards the issue of lengthy indictments, it is a matter for prosecution lawyers to make efforts to be as concise as possible in their drafting of indictments; otherwise they risk defence applications to sever the indictment or outcomes of the kind that occurred in *R v Cohen*.²¹⁸

In relation to the lengthening of trials caused by voir dires and legal argument and voluminous documentary evidence, the concept of a preliminary, or 'pre-trial' hearing, is a key measure in any effort to ensure that any such lengthening is kept to a minimum. Such a measure was recommended as long ago as 2003 by the Working Group on the Jurisdiction of the Courts, often referred to as the Fennelly Commission, which proposed that a preliminary hearing be introduced for all hearings on arraignment.²¹⁹ This recommendation has received endorsement from many quarters in the years since 2003.²²⁰

²¹⁷ (1992) 142 NLJ 1267, in which the comments of the trial judge, McKinnon J, were cited by the Court of Appeal.

²¹⁸ (1992) 142 NLJ 1267.

²¹⁹ Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Stationery Office, Dublin, 2003) [775]. The recommendation suggested that a preliminary hearing would fulfil the following functions: '• to identify and determine whether the prosecution has made full disclosure in conformity with its current obligations; • to identify areas in which evidence should be agreed or admitted under the Criminal Justice Act, 1984, sections 21 (proof by written statement) and 22 (proof by formal admission), including admission of expert reports; • to identify any evidence which might require to be taken by video-link and to make arrangements for the taking of such evidence; • to ascertain any other arrangements, whether for information and communications technology, interpreters, or otherwise, which may require to be made for the trial; • to enable the determination of those types of issue of admissibility of evidence which by their nature are capable of being dealt with prior to trial; • to receive and deal with a plea or fix a hearing for sentencing; • to identify any issue of fitness to plead which may arise; and • to enable the court to establish the likely length of the trial.'

²²⁰ For example, in the context of the investigation and prosecution of sexual offences, the Rape Crisis Network Ireland published a position paper in July 2011 entitled 'Reducing Delays before and during Trial: Case Management and Pre-Trial Hearings' that encouraged the adoption, with any necessary adaptations, of

In a 2006 report, the LRC took a much more circumspect view of the advantages of pre-trial hearings, concluding that a consideration of the experiences of other common law jurisdictions, including England and Wales, Scotland, Canada, New Zealand, and Australia suggested that the evidence in favour of introducing pre-trial hearings was 'inconclusive'.²²¹ The LRC limited itself to a suggestion that the Courts Service introduce pre-trial questionnaires that could then be evaluated with a view to assessing the feasibility of mandatory pre-trial hearings in this jurisdiction.²²² The LRC also made the recommendation that a study be conducted into the effects on jurors' appreciation of the evidence in a criminal trial caused by voir dires conducted in their absence, although given the need for juror secrecy, it is hard to see what such a study could achieve in practice.²²³

The Fennelly Commission's recommendation found favour again in the 2012 *Report of the Working Group on Efficiency Measures in the Criminal Justice System - Circuit and District Courts*²²⁴ and in the 2013 *Report of the Expert Group on Article 13 of the European Convention on Human Rights* (the McDermott Report).²²⁵ Pre-trial hearings have also been endorsed recently by the LRC in its *Report on Disclosure and Discovery in Criminal Cases* in the context of measures that might expedite matters relating to disclosure in criminal proceedings.²²⁶ Head 2 of the *Revised General Scheme for a Criminal Procedure Bill*, which was approved by the government in June 2015, finally sees some legislative movement towards the introduction of pre-trial hearings in this jurisdiction. Head 2 provides for a comprehensive system of pre-trial hearings for all trials on indictment that, in the words of the note accompanying the legislative head 'is intended to provide for the widest range of matters which a court could reasonably address in advance of the empanelling of a jury'.²²⁷

the UK Criminal Procedure Rules 2010 on pre-trial hearings, which flow from changes first introduced by the UK Criminal Evidence Act 1987.

²²¹ Law Reform Commission, *Report on Prosecution Appeals and Pre-Trial Hearings* (LRC 81-2006) [4.68].

²²² Law Reform Commission, *Report on Prosecution Appeals and Pre-Trial Hearings* (LRC 81-2006) [4.68].

²²³ Law Reform Commission, *Report on Prosecution Appeals and Pre-Trial Hearings* (LRC 81-2006) [4.84].

²²⁴ Department of Justice and Equality, *Report of the Working Group on Efficiency Measures in the Criminal Justice System - Circuit and District Courts* (November 2012).

²²⁵ Department of Justice and Equality, *Report of the Expert Group on Article 13 of the European Convention on Human Rights* (March 2013).

²²⁶ Law Reform Commission, *Report on Disclosure and Discovery in Criminal Cases* (LRC 112-2014) [2.34] - [2.39].

²²⁷ Department of Justice and Equality, *Revised General Scheme for a Criminal Procedure Bill* (June 2015) 7.

Although practice directions concerning pre-trial hearings for criminal trials have been issued in respect of three of the eight circuits in Ireland in recent years, the effectiveness of these hearings is questionable and it remains the case that pre-trial hearings have not been introduced here on a more formal basis, whether by statute or under Rules of Court.²²⁸

In England and Wales preparatory or pre-trial hearings have been put on a statutory basis for serious fraud trials in the form of the Criminal Justice Act 1987. Section 7(1) of the 1987 Act, as amended, confers a discretion on the trial judge to order a preparatory hearing if it appears to him that the evidence on the indictment reveals a case of fraud of such seriousness or complexity that substantial benefits are likely to accrue from such a hearing. The provisions of the 1987 Act were substantially expanded by Part 3 of the Criminal Procedure and Investigations Act 1996, which provided for preparatory hearings in any case tried on indictment of such complexity, or seriousness, that substantial benefits are likely to accrue from such a hearing. In 2005, Criminal Procedure Rules were introduced to complement the aforementioned primary legislation.²²⁹

Given the complexities associated with disclosure and the large number of voir dres associated with white-collar crime cases, there is a particularly strong case for the use of pre-trial hearings in such proceedings, quite apart from the merits of any broader proposal for their use across the board in all criminal proceedings. In this regard, the recommendations of the 2003 Fennelly Commission and the LRC's 2014 Report concerning pre-trial hearings are favoured over the more conservative approach advocated in the LRC's 2006 Report. It is proposed that a formal system of pre-trial hearings of the kind outlined

²²⁸ Circuit Court Practice Direction CC12, 'Pre-trial Procedure - Dublin Circuit' (2012), Circuit Court Practice Direction CC13, 'Pre-trial Procedure - Midland Circuit' (2012), and Circuit Court Practice Direction CC14 'Pre-trial Procedure - South Eastern Circuit' (2012), introduced forms of pre-trial hearings for criminal proceedings in three of the eight circuits in Ireland, effective from 1 January 2013. The practice directions borrow from the language of the 2003 Working Group recommendation (n 219). However, it is the experience of this author that, in practice, the pre-trial hearings provided for under CC12, which are scheduled for approximately one month before the trial date, are very short in length and rarely amount to anything more than confirmation that the accused is maintaining their plea of not guilty. In particular, the hearings do not generally deal with the factors that tend to be most time consuming at trial, namely voir dres and legal argument concerning the admissibility of evidence. In the case of CC13 and CC14, the pre-trial procedure takes the form of the submission of a completed pre-trial questionnaire to the Circuit Court Office by both the prosecution and defence no later than one month before the trial. However, there is no guidance provided in the practice notes as to the consequences of failing to submit the questionnaire or submission of an incomplete questionnaire. Anecdotally, another factor dampening more extensive use of these pre-trial procedures is the current failure to make specific provision for them in the criminal legal aid scheme.

²²⁹ The UK Criminal Procedure Rules 2014 are the most recent iteration of these rules.

in Head 2 of the *Revised General Scheme for a Criminal Procedure Bill*, as approved by the government in June 2015, should be introduced by primary legislation without delay in order to set out clearly the parameters of the 'pre-trial hearing'. Such legislation should also specifically provide that decisions made by the trial judge at the preparatory hearing are, save for certain exceptional circumstances or in the interests of justice, binding at the actual trial. In other words, the trial judge, nominated to deal with the case from the outset, should be in a position to swear a jury to hear a serious fraud case in the knowledge that the rulings made by him at the preparatory hearing will be generally binding on the parties. There should also be provision that, upon the application of the prosecution or defence, a ruling made by any judge at a preparatory hearing (if for example he or she cannot conduct the actual trial for good reason), should generally be binding at a future trial by another judge.²³⁰

6 The Role of Juries in White-Collar Crime Trials

A matter for consideration in this chapter is the debate as to whether there should be provision made either for non-jury, or for expert jury, trials of complex white-collar crime cases.²³¹ Article 38.5 of the Constitution provides that no person shall be tried on any criminal charge without a jury unless he is being tried in accordance with other constitutional provisions that provide for summary trial, trial by a special court, or trial by a military tribunal.²³² Thus, on one view of the law as it stands, it is a constitutional

²³⁰ P McGrath, 'White-Collar Crime - The Trial Process, Proposals for Reform' (12th Annual National Prosecutors' Conference, Dublin 2011) 9, notes that such a requirement would seem necessary in light of the Supreme Court decision in *Lynch v Moran* [2007] 3 IR 389, which held that issue estoppel has no part to play in Irish criminal law.

²³¹ For present purposes a 'non-jury' trial refers to a judge-only trial and an 'expert jury' is understood to refer to a jury composed of people with professional qualifications that enable them to better understand the issues in a particular trial. For example, in a trial of a white-collar crime it may mean a jury composed of people with qualifications in finance or accountancy.

²³² These exceptions are governed by Article 38.2, Article 38.3 and Article 38.4 respectively. In practice, summary, or minor, matters are tried by a judge sitting alone in the District Court. By virtue of a proclamation issued by the government in 1972 under section 35 of the Offences Against the State Act 1939 to the effect that the courts were inadequate to secure the effective administration of justice and the preservation of public peace and order, Part V of the 1939 Act was brought into force and the Special Criminal Court was established. This three-judge court hears trials of offences that have been scheduled by the government pursuant to section 36 of the 1939 Act unless the DPP has directed otherwise. An offence may be scheduled by the government where it is satisfied that the ordinary courts are inadequate to ensure the effective administration of justice and public peace and order in respect of that offence. Military tribunals deal with offences contrary to military law alleged to have been committed by those subject to military law.

imperative that anyone accused of a serious white-collar crime be tried by a jury.²³³ However, another view holds that jury trial amounts to a right or privilege that might be waived in certain circumstances.²³⁴ Regardless of whether jury trial is an imperative or form of right for an accused, it is arguable that Article 38.5 also confers a benefit on the community at large in allowing the public to judge serious allegations of criminality. This is a point of particular significance and resonance in instances of high profile white-collar crime that have affected large numbers of people.

It is proposed to examine some of the challenges that juries face in white-collar crime trials and measures that might address such challenges before moving on to consider alternatives to the traditional jury trial model. Finally, a conclusion will be drawn as to whether there is a sufficiently strong basis for disturbing the current application of the constitutionally enshrined principle of trial by jury in the case of serious criminal allegations in a white-collar crime context.

6.1 Challenges for Juries in White-Collar Crime Trials

It has already been alluded to at part 4 of this chapter that a common feature of trials involving white-collar crime offences is that prosecutors are often required to adduce huge amounts of often complex documentary evidence in order to come up to proof at trial; defendants may also seek to counter such evidence with documentary evidence of their own. As the triers of fact in a standard trial on indictment, the jury must be able to understand all of the evidence admitted at trial, but if evidence is of a certain level of complexity or not easily accessible to a lay person, there is a risk that an appropriate level

²³³ Hogan and Whyte adopt the position that: 'Article 38.5 is more properly regarded as a "constitutional imperative" rather than a personal "right", inasmuch as trial by jury for non-minor offences is "not only preferred but made mandatory" (*Holohan v Donohue* [1986] IR 45 (SC) 53 (Henchy J)). This would seem to mean, for example, that it is not open to an accused charged with a non-minor offence to waive this right to jury trial.' G Hogan and G Whyte, *Kelly: The Irish Constitution* (4th edn, Butterworths 2003) [6.5.373].

²³⁴ O'Malley opines that it is an 'open question' as to whether the Irish courts would permit an accused person to waive jury trial in favour of a judge-only trial in an ordinary indictable crime court: T O'Malley, *The Criminal Process* (Thomson Roundhall 2009) [21.05]. While Article 38.5 could be seen to have been drafted in a manner that makes it imperative to have jury trials for serious matters, O'Malley notes that case law such as *DPP v O'Shea* [1982] IR 383 speaks of a jury trial as a privilege or right. On this view of matters, it is arguable that, although demurral to an imperative is not a possibility, a privilege or right may be waived. In New Zealand, by virtue of section 361D of the Crimes Act 1961, an accused in a case that is likely to be long and complex may opt for trial by a judge sitting alone.

of comprehension will not be attained by a jury.²³⁵ Further, there is the possibility that, even where a satisfactory level of comprehension of individual pieces of evidence is reached, the sheer length of time it takes to present such evidence will overburden the jury to the extent that an accused's right to a fair trial is not adequately safeguarded or a prosecutor has not had their case assessed adequately or, or both.²³⁶ In the context of the guarantee of trial in due course of law pursuant to Article 38.1, an accused's right to a trial in due course of law may be imperilled because a jury cannot comprehend the evidence in a case or has not been able to pay adequate attention to it due to the complexity of the evidence or the length of the trial. Aside from the potential danger to such an important constitutional guarantee, it is not in the public interest to have a prosecution come to naught as a result of any of the same factors.

Two UK cases serve to highlight the difficulties associated with trying complex fraud charges before lay juries. In *R v Rayment*, also known as the 'Jubilee Line Case', six accused were charged with attempting to perpetrate a fraud on London Underground Ltd by accessing insider information that concerned the awarding of valuable contracts.²³⁷ After nearly two years at trial, the trial judge directed the acquittal of the accused in March 2005 after hearing an application that the accused could not be fairly tried in circumstances where there had been many problems, including jury sickness, delays due to legal argument and a reduction in the number of available jurors from twelve to ten. Interestingly, an inquiry into the collapse of the prosecution recommended measures focused on shortening the length of complex fraud trials and on supporting jurors, rather than making any recommendation to the effect that the jury trial model should be abandoned in favour of some other method of determining guilt or innocence in such cases.²³⁸

In *R v Cohen*, also known as the 'Blue Arrow Case', eight individuals and three companies were charged with various offences of conspiracy to defraud. After a trial lasting some six

²³⁵ The Juries Act 1976 puts flesh on the bones of the constitutional provision for trial by jury in the case of serious offences, providing, inter alia, that a jury shall, at the outset of any trial, comprise of twelve members of the public. *R v Cohen* (1992) 142 NLJ 1267 is an example of a case where fraud convictions were overturned as a direct result of concerns that the jury had not been presented with a 'manageable' case.

²³⁶ See *R v Cohen* (1992) 142 NLJ 1267.

²³⁷ (English Central Criminal Court, 24 March 2005).

²³⁸ HM Chief Inspector, *Review of the Investigation and Criminal Proceedings Relating to the Jubilee Line Case* (June 2006) 132-136.

months, just one of the defendants was convicted.²³⁹ At the sentencing stage, the trial judge was critical of the length of time the trial had taken, remarking that 'no jury should be asked to cope with what this jury have had to endure... There must be some other way'.²⁴⁰ In overturning the verdict in the case, the Court of Appeal made direct reference to the length of the trial and also its complex nature.²⁴¹

A recent example of a high profile trial in this jurisdiction that illustrates some of the demands associated with jury trials of complex white-collar crime trials is the case of *DPP v FitzPatrick, McAteer, and Whelan*.²⁴² Each of the accused, all former directors of the former Anglo Irish Bank Corporation plc,²⁴³ faced sixteen charges of providing financial assistance to sixteen different individuals during different periods in 2008, contrary to section 60 of the Companies Act 1963, as amended. The investigation into the accused had begun in 2009 and had been spearheaded by the ODCE in association with the GBFI. The investigation involved the evaluation and management of millions of documents.²⁴⁴

The trial of the accused started at the beginning of February 2014. The Dublin Circuit Criminal Court was originally told by counsel in the case that the trial could last for up to four months and could entail the calling of up to one hundred witnesses. In fact, mainly as a result of both sides agreeing on the admissibility of large portions of the documentary evidence in the case, the trial lasted for just over two months, concluding in mid-April 2014, and involved the calling of fifty-four witnesses. One juror was discharged during the course of the trial. From the remaining fourteen jurors, twelve were selected at random at the conclusion of the trial to deliberate on the guilt or innocence of the accused.²⁴⁵ After some

²³⁹ (1992) 142 NLJ 1267.

²⁴⁰ *R v Cohen* (1992) 142 NLJ 1267.

²⁴¹ *R v Cohen* (1992) 142 NLJ 1267.

²⁴² (Dublin Circuit Criminal Court, 5 February 2014 - 18 April 2014). For details of the case, see: Office of the Director of Corporate Enforcement, *Annual Report 2014* (Stationery Office, 2015) 4.

²⁴³ Seán FitzPatrick formerly held the roles of CEO and Chairman; Patrick Whelan had been Managing Director of Lending in Ireland at material times; William McAteer had been Chief Risk Officer at material times.

²⁴⁴ Each of the ODCE Annual Reports for the period 2009 - 2014 devote sections to on-going criminal investigations associated with the collapse of Anglo Irish Bank Corporation plc that highlight the large volumes of complex material that required to be evaluated and managed as part of those investigations.

²⁴⁵ By virtue of the operation of section 15A of the Juries Act 1976, as inserted by section 23 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013, fifteen jurors rather than the standard twelve, were empanelled to hear the case. The statutory provision seeks to protect against the collapse of lengthy trials by providing for three 'reserve' jurors for trials that are envisaged to last for at least two months. If more than

thirteen hours of deliberating, the jury acquitted Seán FitzPatrick of all charges preferred against him. After a further deliberation, the jury acquitted the remaining two defendants of some of the charges and convicted them of others. Judge Martin Nolan ultimately sentenced the convicted accused to periods of community service in lieu of imprisonment.

There were positive aspects to the trial just described from the point of view of facilitating a lay jury. It has already been mentioned that the length of the trial was shorter than expected due to the agreement of the parties to the case as to the admissibility of much of the evidence. Modern technology was used to present documentary evidence in as a clear a format as possible. By way of section 15A of the Juries Act 1976, fifteen jurors rather than the standard twelve, were empanelled to hear the case, which may have eased the pressure on individual jurors who might otherwise have felt responsible for causing the collapse of the trial in the event that they were required to withdraw from the trial before proceedings had finished. In all of these circumstances, there is no reason to doubt, on the face of things, that all of the evidence in the case was evaluated thoroughly and appropriately, and that lawful verdicts were arrived at notwithstanding the demands placed on the jury in terms of their comprehension of, and attention to, often complex and technical evidence elicited from more than fifty witnesses over a period of some nine weeks.

6.2 Alternative Models to Traditional Trial by Jury

If concerns about the ability of a jury to comprehend complex evidence in a white-collar crime trial or cope with the burden associated with complexity and length of such proceedings are sufficient to demand the replacement of such an approach on grounds of fairness, the question arises as to what should take its place. In the wake of the collapse of a number of lengthy fraud trials in England, the 1986 English *Report of the Fraud Trials Committee* (the Roskill Committee) examined the extent to which reform of the substantive and procedural law on fraud could improve the fairness of fraud trials.²⁴⁶ The Roskill Committee concluded that provision should be made for the trial of complex fraud cases other than with a conventional jury of twelve people. It recommended that the following

twelve jurors remain at the point at which jury deliberations are about to begin, a ballot is held in open court to select twelve of the jurors to deliberate on the guilt or innocence of the accused.

²⁴⁶ Lord Roskill (Chairman), *Report of the Fraud Trials Committee* (1986).

options be considered: specialist juries comprising experts such as accountants; a single judge sitting with a jury to assist on key issues; a judge or panel of judges sitting with expert assessors; or a fraud tribunal. In 1998, the English Home Office issued a consultation document which also suggested that these options be considered.²⁴⁷ The 2001 *Review of the Criminal Courts in England and Wales* (the Auld Report) went on to consider these options and concluded that a court should be empowered to direct trial with a judge and jury or with a judge and lay members.²⁴⁸ It further recommended that where an accused is deprived of jury trial against his or her wishes, there should be an option for trial by a tribunal comprised in part of persons with appropriate expertise.²⁴⁹ The Auld Report also recommended that it should be open for the defendant to opt for trial with a judge alone.²⁵⁰

Following on from the Auld Report, there was an attempt, in the form of section 43 of the Criminal Justice Act 2003, to allow the prosecution to apply for judge-only trials in serious fraud cases in England and Wales. However a 2005 commencement order was not passed,²⁵¹ and a further attempt to give effect to the same proposals was defeated in the House of Lords.²⁵²

Many European countries with a civil law inquisitorial tradition use juries composed of a mixture of judges and lay people.²⁵³ In a common law country such as Ireland, it would be a major departure to involve judges, experts or specialists in the jury function. Indeed, it is arguable that the concept of an 'expert jury' is a contradiction in terms and that members of such a jury would be more akin to judges. However, specialist juries are not without precedent in the common law world²⁵⁴ and continued in existence until as late as the early

²⁴⁷ Home Office Consultation Document, *Juries in Serious Fraud Trials* (1998).

²⁴⁸ Auld, *Review of the Criminal Courts in England and Wales* (2001) 207-208.

²⁴⁹ Auld, *Review of the Criminal Courts in England and Wales* (2001) 207-208.

²⁵⁰ Auld, *Review of the Criminal Courts in England and Wales* (2001) 207-208.

²⁵¹ Criminal Justice Act 2003 (Commencement No. 12 and Transitory Provisions) Order 2005.

²⁵² The Fraud (Trials Without a Jury) Bill 2007.

²⁵³ In France, nine lay jurors sit with three professional judges; in Germany, juries of two lay people and one judge hear most criminal cases with juries of three lay people and two judges hearing more serious cases; in Italy juries are comprised of six lay people and two judges; see the following articles for a consideration of the different concepts of the jury in common and civil law traditions: PA McInerney, 'Do We Need a Jury? - Composition and Function of the Jury and the Trend Away from Jury Trials in Serious Criminal Cases' (2009) 1 ICLJ 9; T Daly, 'An Endangered Species? The Future of the Irish Criminal Justice System in Light of *Taxquet v Belgium*' (2010) 2 ICLJ 34.

²⁵⁴ J Oldham, *Trial by Jury: the Seventh Amendment and Anglo-American Special Juries* (NYU Press 2006).

twentieth century in Ireland,²⁵⁵ including in the high profile trials of Daniel O'Connell²⁵⁶ and Charles Stewart Parnell.²⁵⁷ It is this latter form of jury that the then DPP, James Hamilton, may have had in mind when he remarked:

Modern financial transactions and consequently the manner in which people commit fraud, have become much more complex and therefore difficult for the lay person to understand. Yet we still select juries at random – or, indeed, as I have suggested on other occasions, not entirely at random in that we tend to exclude a large proportion of the population who might actually understand such complexity by reason of their educational background or training, and then expect juries to be able to make a sensible finding in relation to such matters.²⁵⁸

Article 38.5 of the Constitution provides for trial by jury for indictable matters, although it provides no guidance on the composition of a jury. However, in *de Búrca & Anderson v The Attorney General*, Henchy J said of the guarantee to trial by jury that 'the jury must be drawn from a pool broadly representative of the community so that its verdict will be stamped with the fairness and acceptability of a genuinely diffused community decision'.²⁵⁹ Howlin cites the *de Búrca* case in opining that any such change to specialist juries would likely require amendment of the Constitution.²⁶⁰ It is also notable that the 1992 *Report of the Government Advisory Committee on Fraud*, which considered the Roskill Committee's approach to reform of the substantive law in this area, concluded that the replacement of the ordinary jury with a special jury would conflict with the requirement set out in *de Búrca* that the jury pool and jury panels be broadly representative of the community.²⁶¹

Apart from representativeness, a further issue could arise in relation to the possibility of bias if expert members of juries are drawn from a small pool of professionals. Cost could

²⁵⁵ Specialist juries were abandoned in Ireland by Juries Act 1927.

²⁵⁶ *R v O'Connell* [1845] 1 Cox CC 411.

²⁵⁷ *R v Parnell* [1881-1882] 8 LR Ir 17.

²⁵⁸ J Hamilton, 'Prosecuting Corruption in Ireland' (Burren Law School, 1 May 2010). The former DPP's remarks refer implicitly to the under-representation of working professionals on juries in this jurisdiction.

²⁵⁹ [1976] IR 38 (SC).

²⁶⁰ N Howlin, 'White-Collar Crimes and Expert Juries: Precedents, Alternatives and Implications' [2012] 2 ICLJ 40.

²⁶¹ *Report of the Government Advisory Committee on Fraud* (1992) [8.8]-[8.9].

also be a problem; the State does not currently pay jurors but it is likely that the remuneration of expert jurors could prove to be expensive. Howlin notes these difficulties but ultimately sides with the suggestion canvassed by the former DPP, James Hamilton, concluding:

It is suggested that small panels of experts may be preferable to both the existing system of using unrepresentative juries, and the UK's proposed judge-only trials for such cases.²⁶²

Aside from the question of expert juries, the question arises as to whether provision could be made for non-jury trials of indictable white-collar crimes in 'special courts', as provided for in Article 38.3.1°, which provides that such courts 'may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order'. It has already been noted that there is existing provision for such trials in the case of offences that are scheduled for the purposes of the Offences Against the State Act 1939.²⁶³ Apart from offences that form part of the schedule to the 1939 Act, the Act also enables the DPP to direct the hearing of a trial before the Special Criminal Court on the basis that she believes the ordinary courts to be inadequate to secure the effective administration of justice, and the preservation of public peace and order.²⁶⁴

The basis for the existence of the Special Criminal Court is of particular significance to the instant debate. Campbell argues that the rationale for the removal of the jury from cases heard by the Special Criminal Court 'was and remains juror intimidation and the potential compromising of the resultant decision'.²⁶⁵ This is consistent with the current range of offences tried by the Special Criminal Court. In a white-collar crime context, the rationale

²⁶² N Howlin, 'White-Collar Crimes and Expert Juries: Precedents, Alternatives and Implications' [2012] 2 ICLJ 40.

²⁶³ The current list of scheduled offences includes offences entailing terrorism and subversion against the State, and, more recently, organised crime offences involving violence: Criminal Justice (Amendment) Act 2009, s 8.

²⁶⁴ Offences Against the State Act 1939, ss 47 and 48.

²⁶⁵ L Campbell, 'The Prosecution of Organised Crime: Removing the Jury' (2014) 18(2) International Journal of Evidence and Proof 83, 91.

for juryless trials relates to concerns that the complexity of such cases makes them unsuitable for ordinary jury trial rather than any concerns about witness intimidation. In other words, the scheduling of white-collar crime offences to the 1939 Act or certification by the DPP of such offences for trial in the Special Criminal Court would amount to a radical departure from the current thinking behind the making of such decisions. While *Kavanagh v Ireland*²⁶⁶ and the related case of *Kavanagh v Governor of Mountjoy Prison*²⁶⁷ confirm the broad discretion of the executive to make decisions with regard to the operation of Article 38.3 of the Constitution, the wording of that constitutional provision, particularly the need to demonstrate exigencies in relation to ‘public peace and order’ in order to have matters tried before a special court, do not provide an obvious basis for trials of white-collar crime in such a manner.

6.3 Should the Status Quo Be Maintained?

Even taking account of the experiences in cases such as *R v Rayment* and *R v Cohen*, and the findings reached by the Roskill Committee and recommendations made by the Auld Report, there is an argument that it is speculative to state that juries do not understand complex evidence or cannot tolerate the burden of lengthy trials.²⁶⁸ *DPP v FitzPatrick, McAteer, and Whelan* has been mentioned in the course of this chapter as an example of a relatively lengthy white-collar crime that ran to a successful conclusion using the traditional jury trial model.

The LRC’s 2013 *Report on Jury Service* included a substantial chapter concerning lengthy trials and juror comprehension.²⁶⁹ Having considered the various approaches that might be taken, the LRC recommended that, before considering the use of non-jury trials or trials by specialist juries in lengthy or complex trials that would involve creating another exception to the general right in Article 38.5 of the Constitution to jury trial based on a pool that is broadly representative of the community, other procedural solutions to assist jury trials in

²⁶⁶ [1996] 1 IR 321 (SC).

²⁶⁷ [2002] 3 IR 97 (SC).

²⁶⁸ Indeed, an established line of authority in this jurisdiction has stressed the need to have regard to the robust common sense of juries; see: *D v DPP* [1994] 2 IR 465 (SC), *Bula Ltd v Tara Mines Ltd* (No.6) [2000] 4 IR 41 (SC), *DPP v Tobin* [2001] 3 IR 469, *DPP v Mulder* [2007] 4 IR 796 (CCA), *DPP v Buck* [2014] IECCA 45.

²⁶⁹ Law Reform Commission, *Report on Jury Service* (LRC 107-2013) Ch 10.

such cases should first be considered.²⁷⁰ The LRC made the further recommendation that in a jury trial in criminal proceedings, the trial judge should be empowered to appoint an assessor to assist the court, including the jury, to address any difficulties associated with juror comprehension of complex evidence.²⁷¹

Given the constitutional mandate of trial by jury in this jurisdiction, the indications that any alterations to the current model would be difficult to the point of possibly requiring constitutional amendment, and the lack of conclusive evidence that a move away from the jury trial model is actually required, it is concluded that, in line with the recommendations contained in the LRC's *Report on Jury Service*, issues concerning the suitability of traditional juries to deal with complex white-collar crime trials are best addressed through measures designed to facilitate and support such juries, rather than through the adoption of alternative models for determining the guilt or innocence of an accused.²⁷²

7 Conclusion

The powers, procedures and laws of evidence that are at the core of this thesis operate within an institutional framework and an assessment of this architecture is an important aspect of contextualising the primary subject matter of the thesis. It has been seen that those regulatory bodies with responsibility for narrow ranges of activity falling under the umbrella of white-collar crime have limited powers to bring investigations forward to prosecution and that there is a lack of clarity around the criteria applied to the decision as to whether a regulatory investigation should lead to a civil sanction or to criminal proceedings. The absence of clear statutory criteria to determine the basis on which the bodies should interact with each other, and with An Garda Síochána in the form of the GBFI,

²⁷⁰ Law Reform Commission, *Report on Jury Service* (LRC 107-2013) [12.52].

²⁷¹ Law Reform Commission, *Report on Jury Service* (LRC 107-2013) [12.55]. A Dickey 'The Province and Function of Assessors in English Courts' (1970) 33 MLR 494 is cited at [10.28] of the LRC's report in support of the proposition that 'the court assessor, or adviser, has been used over the centuries by common law courts to provide specialist or expert experience, skill or knowledge, which the court might not ordinarily possess'.

²⁷² Some measures that assist juries have already been introduced or commenced in recent years. These include section 57 of the Criminal Justice (Theft and Fraud Offences) Act 2001 Act (see discussion at part 4.6 of this chapter) and section 15A of the Juries Act 1976, as inserted by section 23 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013 (see n 244). A new measure would be the introduction of assessors to assist jurors, as recommended by the LRC. Measures that would indirectly help jurors would be those that reduce the length of white-collar crime trials to the minimum necessary (see discussion at part 5 of this chapter).

creates the potential for conflict and confusion. The lack of a Serious Fraud Office leaves the jurisdiction dependent on an informally constituted division of An Garda Síochána to investigate serious white-collar crime and is out of kilter with other common law jurisdictions, particularly the comparable jurisdiction of New Zealand, that have a unified, rather than binary, approach to the investigation and prosecution of such crime. This chapter has identified changes that might be made to improve the institutional approach to the prosecution of white-collar crime in this country.

This chapter has also considered a range of issues that go to the core substance of this thesis. The uncertainty in the law concerning both the principle and practice of fixing companies with criminal liability has been highlighted and a course of action has been suggested as to how this might be addressed. Particular attention has been given to documentary and electronic evidence given, generally speaking, the centrality of such evidence in white-collar crime prosecutions. Weaknesses in the statutory definitions of such evidence have been identified and it has been emphasised that a broad definition is required that provides for future technological advances. It has been shown that anachronistic common law rules have created uncertainties surrounding the admissibility of documentary evidence and that piecemeal statutory provisions have only partially rectified these difficulties. A feature of those statutory provisions that create useful presumptions concerning the admissibility of documentary evidence is that they tend to operate on a sectoral rather than general basis, thereby increasing the risks that individual prosecutions will fail.

A number of statutory measures have been introduced in recent years that give investigators the power to demand information and the production of documentary and digitally stored material. While such measures are of assistance to investigators and prosecutors, there is controversy as to whether they trample on the traditional principle that it is for the prosecution to build its own case. Uncertainties and deficiencies in the law concerning pre-trial disclosure in criminal proceedings are exacerbated in the case of white-collar crime prosecutions by the challenges associated with managing vast quantities of electronic data and, further, the fact that such material is often in the hands of third parties. The law in this regard is in need of urgent reform and the LRC's 2014 *Report on*

Disclosure and Discovery in Criminal Cases provides an excellent foundation for change.²⁷³ There have been positive additions to the statute book that affect the presentation of documentary evidence at white-collar crime trials and it is promising that there appears to be a legislative intention to broaden further the application of such provisions.

Problems associated with lengthy trials are magnified in white-collar crime prosecutions and measures that expedite trials, particularly the use of pre-trial hearings, should be implemented without delay having been repeatedly recommended in official reports in the last few decades. Notwithstanding legitimate concerns about the usefulness of the traditional jury model in white-collar crime cases, it has been contended that a balancing of all relevant factors favours the retention of the traditional model for white-collar crime trials but that there is room for greater support of jurors through practical measures like note-taking and assistance from assessors. This chapter has revealed a mixture of strengths and weaknesses in the powers, procedures and rules of evidence associated with white-collar crime and its findings will form an important part of the synthesis of ideas in Chapter 6, where it is argued that the investigation and prosecution of white-collar crime warrants a dedicated statutory approach.

²⁷³ Law Reform Commission, *Report on Disclosure and Discovery in Criminal Cases* (LRC 112-2014).

Chapter 5

The Impact of Certain Privileges on the Investigation and Prosecution of White-Collar Crime in Ireland

1 Introduction

Chapters 3 and 4 have considered matters that are mainly discrete to investigations and prosecutions, respectively. However, looming in the background to both investigations and prosecutions where white-collar crime is concerned are certain privileges that may be invoked by witnesses, suspects and defendants at any stage during an investigation or trial. For the reason that these privileges span both investigations and prosecutions, they are considered in this chapter rather than in the course of the aforementioned chapters.

Legal privileges can amount to valuable protections for witnesses, suspects and defendants. Investigators and prosecutors are more likely to view such privileges as challenges to their ability to carry out their work. While there are a broad range of privileges described by the common law, in a white-collar crime context it is suggested that the most important privileges are the privilege against self-incrimination and, to a lesser extent, legal professional privilege, and so these two privileges form the focus of this chapter.

The centrality of the level of witness, suspect and defendant cooperation to the success or otherwise of the investigation and prosecution of complex white-collar crimes warrants a close examination of the current boundaries of the privilege against self-incrimination. Legal professional privilege, although of greater relevance in civil proceedings than in criminal proceedings, is also considered in this chapter for two reasons. First, it raises issues relating to disclosure in complex proceedings involving substantial amounts of documentary evidence, a point touched on in Chapter 4. Secondly, it is expressly referred to in the Criminal Justice Act 2011 in the context of a set of measures aimed at strengthening the hand of those investigating and prosecuting white-collar crimes.

2 The Privilege Against Self-incrimination

2.1 Introduction

As noted in Chapter 3, one of the most important powers available to investigators seeking to probe the commission of a white-collar crime is the common law authority to seek information from individuals and entities (ie both natural and legal persons) and, where possible, use any such information as evidence in any subsequent prosecution. This power will often operate alongside, and in conjunction with, other important investigative powers such as powers of arrest and pre-charge detention. However, while there is a general power on the part of investigators to seek information concerning the possible commission of a white-collar crime, a series of circumscriptions on the exercise of a such a power arise depending on the precise way in which information is gathered by investigators, the persons or entities from whom information is sought, and the use to which information is put. These constraints arise because of a bundle of immunities constituting the 'privilege against self-incrimination'.¹ The same collection of immunities might be seen to operate to protect defendants in situations where white-collar crime cases go to trial.

Characterisation of the privilege against self-incrimination is challenging because of its sprawling ambit. A further difficulty is a looseness and lack of uniformity in the use of descriptors. For example, while one judge might mean the 'right to silence' to cover the entirety of the privilege against self-incrimination as it will be characterised in this chapter, another might mean the same expression to refer to only one facet of the privilege. In *R v Director of the Serious Fraud Office, ex p Smith*, Mustill LJ adopted the view that the 'right to silence' (the often interchangeably used descriptor 'privilege against self-incrimination' is preferred for the purposes of the instant chapter) 'does not denote any single right, but rather refers to a disparate group of immunities'.² Mustill LJ then outlined six immunities that he saw as falling under the heading of privilege against self-incrimination:

¹ For detailed consideration of the scope of the privilege against self-incrimination, see: T O'Malley, *The Criminal Process* (Thomson Roundhall 2009) [4.63]-[4.68]; S Horan, *Corporate Crime* (Bloomsbury 2011) [6.62]-[6.80]; L Heffernan with Ú Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury 2014) [12.82]-[12.94]; D McGrath with E Egan McGrath, *Evidence* (2nd edn, Thomson Roundhall 2014) [11-03]-[11-04].
² [1993] 1 AC 1 (HL) 31. A similar view was adopted in the Canadian case of *R v Jones* [1994] 2 SCR 229 (SC) 249 (Lamer CJ), where the privilege was described as a 'general organising principle'.

- (1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.
- (2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.
- (3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.
- (4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.
- (5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.
- (6) A specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.³

It will be noted that the immunities described by Mustill LJ arise at different points in the criminal process. The particular point at which the privilege against self-incrimination is invoked will determine not only the specific immunity that is relied upon but also the strength of that aspect of the privilege. In this regard, the following remarks of Sachs J in the South African case of *Ferreira v Levin* are apposite in an Irish context:

In my view, the breach of the long-standing right not to be compelled to incriminate oneself out of one's own mouth would, in any context, raise a question of constitutional freedom. At the same time, the absence of an explicitly stated generalised right against self-incrimination in the Constitution, indicates that the

³ *R v Director of the Serious Fraud Office, ex p Smith* [1993] 1 AC 1 (HL) 31. In *Heaney v Ireland* [1994] 3 IR 593 (HC) 601, Costello J approved of Mustill LJ's characterisation of the privilege, describing it as a 'helpful analysis'.

operation of the principle outside of a trial situation is weaker than within. The privilege against self-incrimination should therefore neither be reduced to a restricted immunity confined to the trial situation, nor be enlarged so as to become an absolute right to be used on all occasions. Its application depends on time, place and context. The closer to a trial situation, the more powerful the principle, the more remote from a trial, the weaker it will be.⁴

While doubtlessly operating to the favour of individual citizens and an essential aspect of the defendant's rights or entitlements, the constitutionally guaranteed privilege against self-incrimination has, in consequence of its vindication, the potential to have a chilling effect on investigations and prosecutions of white-collar crimes.⁵ A key purpose of this chapter is to consider the impact of the privilege against self-incrimination on the ability of investigators and prosecutors in this jurisdiction to engage with white-collar crime and assess whether, within the parameters imposed by the Constitution and this country's obligations as a State party to the European Convention on Human Rights (ECHR), which are entirely appropriate from a normative perspective, there is room to recast the privilege against self-incrimination to take better account of the societal interest in fighting white-collar crime.

2.2 The Privilege Against Self-Incrimination: Its Origins and Rationale

Although its existence as a right enjoyed in this jurisdiction is not in doubt, the precise point at which the privilege against self-incrimination became incorporated into the common law is the subject of some debate. Furthermore, there is controversy as to the rationale for the privilege. For context, these issues are given brief attention here.

⁴ 1996 (1) BCLR 1, 272. In *Dunnes Stores Ireland Company v Ryan* [2002] IEHC 61, [2002] IESC 7, [2002] 2 IR 60 (HC) 116, Kearns J approved of the principle enunciated by Sachs J in *Ferreira*.

⁵ As will be seen, the exact location of the privilege in the Constitution is debated. Cases confirming that the privilege against self-incrimination enjoys constitutional protection in Ireland include: *Heaney v Ireland* [1994] 3 IR 593 (HC) [1996] 1 IR 580 (SC); *Rock v Ireland* [1997] 3 IR 484 (SC); *DPP v Finnerty* [1999] 4 IR 364 (SC); *DPP v Bullman* [2009] IECCA 84. The case law is in agreement that the privilege against self-incrimination has constitutional protection but that individual immunities comprising the privilege are not absolute and may be encroached upon subject to compliance with a proportionality test. However, there hasn't always been uniformity of approach as regards the location of constitutional protection for individual immunities and also the proportionality test to be applied in instances of encroachment. These are issues that will be revisited in the course of this chapter.

It is generally accepted that the privilege dates to mediaeval times and has its roots in Romano-canonical law.⁶ However, as to the point at which the privilege was adopted by the common law, Wigmore's theory has it that the privilege was formally recognised in the mid-17th century in the trial of John Lilburn as a response to the practice of the Courts of Star Chamber of forcing defendants to testify in circumstances where the charges levelled were unclear and imprecise and it seemed that unfairly extensive and open-ended questioning was embarked upon by prosecutors in the hope that answers given would disclose an as yet undiscovered crime.⁷ Another school of thought propounded by Langbein holds that the privilege only emerged in the common law alongside the advent of defence lawyers and adversarial trials in the late 18th century.⁸ McInerney contends that confusion and error has arisen from the fact that the privilege is, in fact, comprised of a collection of immunities and that commentators have not taken care to distinguish between these immunities and acknowledge that each immunity has a different historical origin.⁹

In *Heaney v Ireland*, Costello J in the High Court appeared to accept Wigmore's theory when he observed:

An accused's immunity was developed from the objections taken by the common law courts to the abuses arising from court procedures involving the judicial interrogation of accused persons. As a result an accused cannot be compelled to adduce evidence on his own behalf and is entitled to remain silent during it, and not

⁶ RH Helmholz, 'Origins of the Privilege Against Self-incrimination: The Role of the European *Ius Commune*' (1990) 65 NYU L Rev 962; MRT Macnair, 'The Early Development of the Privilege against Self-Incrimination' (1990) 10 Oxford J Leg Stud 66; E Moglen, 'Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-incrimination' (1993-1994) 92 Mich L Rev 1086, 1087-8. Compare LW Levy, *Origins of the Fifth Amendment: The Right Against Self-incrimination* (OUP 1968), who adopted the position that the privilege was a purely common law creation.

⁷ JH Wigmore, *Evidence* (3rd edn, Little Brown & Co 1940), Vol VIII, para 2250, which analyses *Lilburn's Trial* 3 How. St. Tr. 1315 (1637). See also JH Wigmore, 'The Privilege Against Self-incrimination: Its History' (1902) 15 Harv L Rev 610 and LW Levy, *Origins of the Fifth Amendment: The Right Against Self-incrimination* (OUP 1968).

⁸ JH Langbein, 'The Historical Origins of the Privilege against Self-Incrimination at Common Law' (1993-1994) 72 Michigan LR 1047. JF Witt, 'Making the Fifth: The Constitutionalization of American Self-incrimination Doctrine, 1791-1903' (1998-1999) 77 Tex L Rev 825, 827.

⁹ P McInerney, 'The Privilege Against Self-incrimination From Early Origins to Judges' Rules: Challenging the "Orthodox View"', *The International Journal of Evidence and Proof* (2014) 18 E&P 101-138. McInerney argues that recognition, at common law, of the various immunities falling under the umbrella of the privilege against self-incrimination was a gradual process that began in the mid-seventeenth century and did not finish until the mid-nineteenth century.

to be questioned either by the prosecution or the presiding judge.¹⁰

In *Re National Bank Ltd (No 1)*, Shanley J in the High Court would also appear to have come down in favour of Wigmore's theory where he stated that 'the common law privilege against self-incrimination has been part of English law since the constitutional struggles which resulted in the abolition of the Courts of Star Chamber and High Commission in the second half of the 17th century'.¹¹

Notwithstanding the controversy over the origins of the privilege against self-incrimination, it is not in dispute that it is very well embedded in the common law and the question of whether all three strands of the privilege were incorporated into the common law at once or in stages over a number of centuries does not require to be resolved for the purpose of advancing the instant discussion.

In the same way that the origins of the privilege against self-incrimination are unclear, there is no uniform view regarding the rationale for the privilege in its most general sense. In a decision of the U.S. Supreme Court in *Murphy v Waterfront Commission of New York Harbour*,¹² Goldberg J offered a multi-faceted theory of the rationale for the privilege, as follows:

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial, rather than an inquisitorial, system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load', 8

¹⁰ [1994] 3 IR 593 (HC) 604.

¹¹ [1998] IEHC 116, [1999] 3 IR 145 (HC and SC), 153. In his Supreme Court judgment, Barrington J did not touch on the precise origins of the privilege, although he linked the rationale for the privilege to concerns about the fairness and reliability of forced confessions: *Re National Irish Bank Ltd (No 1)* [1999] 3 IR 145 (HC and SC) 177.

¹² (1964) 378 US 52.

Wigmore, Evidence (McNaughton rev, 1961) 317; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' US v Grunewald, 233 F 2d 556, 581-582 (Frank J, dissenting), rev'd 353, US 353 US 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty', is often 'a protection to the innocent'. Quinn v US, 349 US 155, 349 US 162.¹³

Of course, the opinion just mentioned emerges from a jurisdiction that gives explicit constitutional protection to the privilege against self-incrimination.¹⁴ Drawing on the United States experience, Barrington J in the Supreme Court decision in *Re National Irish Bank Ltd (No 1)*, suggested the following in relation to the rationale for the privilege:

It grew out of the revulsion of the judges for forced confessions as being both unjust in their origin and unreliable in practice. Some judges also seemed to have felt that it was unfair to place a man in a position where he was condemned no matter what he did.¹⁵

A suggestion that the rationale for the privilege against self-incrimination is bound up with an entitlement to privacy emerges from the judgment of Mustill LJ in *R v Director of Serious Fraud Office, ex p Smith*, where he posits that the the privilege is '...a simple reflection of the common law view that one person should so far as possible be entitled to tell another person to mind his own business'.¹⁶ Other rationales associated with personal rights focus on the personal autonomy of the individual¹⁷ and freedom of expression.¹⁸ A number of

¹³ *Murphy v Waterfront Commission of New York Harbour* (1964) 378 US 55.

¹⁴ The Fifth Amendment of the United States Constitution provides that 'No person... shall be compelled in any criminal case to be a witness against himself'.

¹⁵ [1999] 3 IR 145 (HC and SC) 177. Relatively recent US research suggests that innocent suspects benefit from exercising their right to silence during criminal proceedings: S Leshem, 'The Benefits of a Right to Silence for the Innocent' (2010) 41(2) *RAND Journal of Economics* 398 - 416.

¹⁶ [1993] 1 AC 1 (HL) 31.

¹⁷ In *Re National Irish Bank Ltd (No 1)* [1999] 3 IR 145 (HC and SC) 153, it was held that the right 'is, first and foremost, concerned with respecting the will of an accused person to remain silent'. In the ECtHR case of *Saunders v United Kingdom* (1996) 23 EHRR 313, 344, it was held that: 'The right not to incriminate oneself is primarily concerned... with respecting the will of an accused person to remain silent.'

¹⁸ In *Heaney v Ireland* [1996] 1 IR 580 (SC), the Supreme Court found an aspect of the privilege, namely the pre-trial right to silence of a suspect, to be a corollary of the guarantee of freedom of expression in Article 40.6.1° of the Constitution.

other rationales focus on the practical impact of the admission of compelled statements on the fairness of any trial. In *Heaney v Ireland*, Costello J expressed the view that a pre-trial right to silence of a suspect was 'so widely accepted as basic to the rules under which criminal trials are conducted that it should properly be regarded as one of those which comes within the terms of the guarantee of a fair trial contained in Article 38.1'.¹⁹ It is notable that the Supreme Court in the same case, although dismissing the appeal against the judgment of Costello J, located the same immunity under Article 40.6.1°. ²⁰ O'Malley has opined, correctly it is suggested, that the approach of Costello J is 'more compelling' in circumstances where the Supreme Court 'seemed to ignore a respectable body of opinion to the effect that the fairness of a trial may be determined by steps taken before, as well as during, the trial itself'.²¹ Further rationales concerned with fairness at trial emphasise the presumption of innocence;²² the prevention of miscarriages of justice;²³ and general fairness to an accused.²⁴

Before moving on from any discussion of the possible rationales for the privilege against self-incrimination, it must also be noted that it has its detractors. The general thrust of their objection tends to be that it impedes the search for the truth with no benefit to the innocent. In *Palko v Connecticut*, Cardozo J opined that, while suspects and defendants must always be protected against torture and similar mistreatment, 'justice would not perish if

¹⁹ [1994] 3 IR 593 (HC) 606.

²⁰ *Heaney v Ireland* [1996] 1 IR 580 (SC).

²¹ T O'Malley, *The Criminal Process* (Thomson Roundhall 2009) [19.56].

²² In *Saunders v United Kingdom* (1996) 23 EHRR 313, 337, it was held that: 'The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6(2) of the Convention.'

²³ In *Murray v United Kingdom* (1996) 22 EHRR 29, 60, it was held that by 'providing the accused with protection against improper compulsion... [the right not to give evidence and the suspect's right to silence] ... contribute to avoiding miscarriages of justice and to securing the aim of Article 6 [of the ECHR]'.

²⁴ In *Re National Irish Bank Ltd (No 1)* [1999] 3 IR 145 (HC and SC) 153, Shanley J in the High Court observed that 'the prospect of an accused's guilt being extracted or established solely on his own testimony... was offensive to the common law's latter day sense of "fair play"'. In a critique of any rationale based on fairness to an accused, I Dennis, 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-Incrimination' (1995) 54 CLJ 342, 359, opines: 'An innocent suspect would, at least in theory, have nothing to lose by answering questions truthfully. There is therefore no cruelty involved in requiring the innocent suspect to speak. Once the true nature of the premise is recognised the argument loses much of its claim to moral force. It becomes difficult to accept that the interest of a guilty person in escaping conviction by not disclosing evidence of the crime is worthy of official legal protection.'

an accused were subject to a duty to respond to orderly inquiry'.²⁵

Bentham, the philosopher and proponent of utilitarianism,²⁶ was a strong opponent of the right to silence, taking the view that, 'Innocence claims the right of speaking as guilt invokes the privilege of silence.'²⁷ Approaching matters from a similar viewpoint, Friendly argued that, '...on balance the privilege so much more often shelters the guilty and even harms the innocent that... its occasional effect in protection of the innocent would be an altogether insufficient reason'.²⁸

The position adopted in this thesis is that any arguments against the privilege against self-incrimination are outweighed by the various rationales for its existence. However, this is not to concede that the privilege, particularly in the context of the investigation and prosecution of white-collar crime, operates flawlessly in this jurisdiction. Contemporary debates in relation to the privilege are essentially about its scope and a primary concern of this chapter is to assess whether it should apply differently in some or all respects in a white-collar crime context.

2.3 The Right to Silence of a Defendant

It is proposed to start with an analysis of those aspects of the privilege against self-incrimination that arise at the point of trial before considering the remaining immunities in the order in which they become more remote from the point of trial. The right to silence of a defendant is an aspect of the overarching privilege against self-incrimination that enjoys a very high degree of immunity. The key aspects of this immunity are considered in this section. In the context of white-collar crime, evidently the point at which it arises means it is of more interest and relevance to prosecutors than investigators.

²⁵ (1937) 302 US 319.

²⁶ Bentham's philosophy of utilitarianism held as its 'fundamental axiom, it is the greatest happiness of the greatest number that is the measure of right and wrong': J Bentham, *A Fragment on Government* (London 1776) Preface.

²⁷ J Bentham, 'A Treatise on Judicial Evidence' in M Dumont (ed), *The Works of Jeremy Bentham* (Russell and Russell Inc 1825).

²⁸ HJ Friendly, 'The Fifth Amendment Tomorrow: The Case for Constitutional Change' (1968) 27 University of Cincinnati Law Review, 671-726.

The judgment of Keane J in *DPP v Finnerty* sets out clearly and strongly the high degree of protection in relation to this aspect of the privilege against self-incrimination.²⁹ Keane J characterised the case as being 'solely concerned with the claimed right of a person detained under section 4 of the Act of 1984, to refuse to answer questions put to him by the gardaí during the course of his detention and the corollary of that right ie the need to ensure that no inferences adverse to him are drawn at any subsequent trial from the exercise of that right'.³⁰ In ruling that inappropriate reference had been made to the defendant having been interviewed during a period of pre-charge detention even though no admissions against interest had been made during the course of that detention, Keane J outlined three principles:

(1) Where nothing of probative value has emerged as a result of such a detention, but it is thought desirable that the court should be aware that the defendant was so detained, the court should be simply informed that he was so detained, but that nothing of probative value emerged.

(2) Under no circumstances should any cross-examination by the prosecution as to the refusal of the defendant, during the course of his detention, to answer any questions, be permitted.

(3) In the case of a trial before a jury, the trial judge in his charge should, in general, make no reference to the fact that the defendant refused to answer questions during the course of his detention.³¹

Subsequent case law has established that it should also be made clear to a jury that there is no onus on an accused to explain his conduct, nor should the absence of any such explanation enter into their considerations in deciding whether to convict.³²

In *Heaney v Ireland*, Costello J in the High Court held the right of a defendant not to give evidence at trial was, as a concept, 'such a long-standing one and so widely accepted as

²⁹ [1999] IESC 50, [1999] 4 IR 364.

³⁰ [1999] IESC 50, [1999] 4 IR 364, 376. The 'detention' referred to by Keane J refers to the period of pre-charge detention provided for in section 4 of the Criminal Justice Act 1984.

³¹ [1999] IESC 50, [1999] 4 IR 364, 381.

³² *DPP v Coddington* [2001] 5 JIC 3101 (CCA); *DPP v McCowan* [2003] 4 IR 349 (CCA); *DPP v Cummins* [2003] JIC 1906 (CCA); *DPP v Bullman* [2009] IECCA 84.

basic to the rules under which criminal trials are to be conducted that it should properly be regarded as one of those which comes within the terms of the guarantee of a fair trial contained in Article 38, section 1'.³³ In a similar vein, relevant ECtHR jurisprudence has recognised that the right of an accused not to give evidence, as part of a more general privilege against self-incrimination, is protected by the guarantee of a fair trial described in Article 6 of the ECHR.³⁴

The right is afforded statutory protection in the form of the Criminal Justice (Evidence) Act 1924, which makes an accused competent, but not compellable, as a witness at his own trial.³⁵ There is a question mark as to whether the protections described in the 1924 Act were attenuated by the insertion of section 1A into that Act through section 33 of the Criminal Procedure Act 2010. In essence, section 1A provides that an accused 'may' be called as a witness and be asked questions by the prosecution if the defence is conducted in a way that could be construed as unfair to prosecution witnesses or the deceased, or incapacitated, alleged victim in a case. However, in the absence of any qualification of the still extant section 1(a), Healy is of the view, correctly it is suggested, that an accused is still not compellable at the behest of the prosecution.³⁶

It is a different matter if an accused chooses to take the stand in his defence. In such circumstances, section 1(e) of the 1924 Act provides that 'a person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged'. This is to protect against a situation whereby an accused gives a favourable version of events from

³³ [1994] 3 IR 593 (HC) 606.

³⁴ *Funke v France* (1993) 16 EHRR 297; *Murray v United Kingdom* (1996) 22 EHRR 29; In *Saunders v UK* (1996) 23 EHRR 313, 337 the ECtHR stated: 'The court recalls that, although not specifically mentioned in article 6 of the Convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under article 6.'

³⁵ Section 1 makes an accused a competent witness for the defence. However, section 1(a) provides that 'a person so charged shall not be called as a witness in pursuance of this Act except upon his own application'. Further, section 1(b) states that 'the failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution'. Case law establishes that any breach of section 1(b) is a serious matter, although such a breach is capable of remedy if a trial judge gives an appropriate direction to the jury that is 'clear, certain, and wholly unambiguous in its terms': *DPP v P(P)M* [2010] IECCA 61 [10].

³⁶ J Healy, *Law of Evidence* (2013) 261, course text for the Diploma in Law, 'Law of Evidence', course at the The Honorable Society of King's Inns.

his point of view but then invokes the privilege against self-incrimination when faced with questions from the prosecution; nevertheless, there are limits to the questions that can be put to an accused during cross-examination.³⁷

For the purposes of the instant research, it falls to be considered whether particular issues arise in connection with this aspect of the overarching privilege against self-incrimination in the context of white-collar crime. It would seem the prosecutors in trials involving such crime are affected to no greater or lesser an extent than prosecutors in trials of other forms of crime. In all instances prosecutors doubtless find themselves at least occasionally frustrated by their inability to compel an accused to take the stand, or to comment to a jury on an accused's failure to give evidence. However, where an accused does take the strategic choice of giving evidence, the law treats this as a waiver of the right to silence as regards the allegations before the court and there are then relatively few restrictions on the nature of the cross-examination that may be conducted by the prosecution. It must also be borne in mind that, from a defence perspective, the Criminal Procedure Act 2010 has attenuated the level of protection afforded by this strand of the privilege.³⁸ On balance, it is contended that this particular aspect of the overarching privilege appropriately weighs the competing interests of the relevant personal rights of defendants and the interest of society in having white-collar crime prosecuted and is not one that obviously demands alteration or refinement.

2.4 The Right to Silence of a Suspect

The next aspects of the privilege against self-incrimination for consideration are the

³⁷ *Attorney General v Murray* [1926] IR 266 (CCA) confirms that, pursuant to section 1(e), the prosecution is afforded a wide latitude in the conduct of such cross-examination, subject to the constraints set down in section 1(f) of the 1924 Act. A narrower approach to this issue is taken in England and Wales; in *Jones v DPP* [1962] AC 635 (HL), a majority of the House of Lords held that the English equivalent of section 1(e) permits only such questions as tend directly to incriminate the accused as to the offence charged and does not permit questions which tend to do so indirectly. Section 1(f) of the 1924 Act, as amended by section 33 of the Criminal Procedure Act 2010, confines prosecution questioning of an accused to matters relating to the instant allegation or allegations, save for a narrow range of circumstances that might be seen to protect against situations where an accused makes unfair attacks from a position of safety, including where an accused has given evidence against a co-accused or has adduced evidence casting aspersions on the character of a prosecution witness.

³⁸ Criminal Procedure Act 2010, s 33.

immunities associated with the right of a suspect to remain silent.³⁹ As a result of challenges to numerous legislative provisions that have sought to curb this particular facet of the privilege in various ways, these immunities have received much judicial attention in recent decades, both in this jurisdiction and before the ECtHR. Abrogations of this aspect of the privilege against self-incrimination can be said to fall into two categories. The first category of legislative incursion makes it an offence to fail to answer certain questions or give certain information, while the second category allows for inferences to be drawn at trial from an accused's failure to answer certain questions or provide certain information at the investigation stage of proceedings. It is to be noted that, at common law, inferences adverse to an accused may not be drawn from the exercise by an accused of his or her right to silence at the time at which he or she was simply a suspect.⁴⁰ Thus, all attenuations of this particular right are legislative in nature.

The complexity of many white-collar crimes means that inference-drawing provisions in particular can place a heavy burden on those detained on suspicion of having committed such crimes. This is because such suspects are under pressure to anticipate everything that might need to be said in interview in relation to, for example, convoluted financial transactions, if a defence advanced at any later trial is not to be undermined by an invitation from the prosecution to the trier of fact to draw inferences from the fact that one or more aspects of the defence was not mentioned by the suspect during interview in a period of pre-charge detention. The potential impact of such provisions in a white-collar crime context makes robust support for a right of reasonable access to pre-trial legal advice all the more important.⁴¹

2.4.1 *Provisions Creating Offences of Failing to Answer Questions or Give Information*

The Offences Against the State Acts 1939 - 1998 saw the introduction of provisions that

³⁹ See generally, T O'Malley, *The Criminal Process* (Thomson Round Hall 2009) Ch 19; R Coen, 'The Decline of Due Process and the Right to Silence's Demise' (2008) 1 ICLJ 10; Y Daly, 'Is Silence Golden? The Legislative and Judicial Treatment of Pre-trial Silence in Ireland' (2009) DULJ 35; J Jackson, 'Reconceptualising the Right to Silence as an Effective Fair Trial Standard' (2009) 58(4) ICLQ 835.

⁴⁰ *DPP v Finnerty* [1999] IESC 50, [1999] 4 IR 364, where it was held that the Criminal Justice Act 1984 did not modify the common law right of a suspect to refuse to answer questions or his entitlement under the Judges' Rules to be reminded of that right before any questioning begins.

⁴¹ See the discussion at part 10 of Ch 3.

criminalised the exercise of the right to silence in certain circumstances. Section 52 of the Offences Against the State Act 1939 enables investigators to demand of anyone detained in accordance with the Act that they account for their movements and actions during any specified period and all information in that person's possession in relation to the commission or intended commission by another person of any offence covered by the 1939 Act. A failure or refusal to do so, or the provision of a false and misleading account, will result in the commission of an offence. Pursuant to an amendment brought about by section 13 of the Offences Against the State (Amendment) Act 1998, a suspect must be informed in ordinary language of the consequences of a failure to comply with a demand made under section 52.

Section 52 was considered in the seminal case of *Heaney v Ireland*.⁴² The applicants had been charged with failing to provide an account of their movements, contrary to section 52 of the Offences Against the State Act 1939, a provision considered in some detail in the last section of this chapter. The Special Criminal Court convicted them of the offence in question. It was argued for the applicants that there had been a violation of their right to silence and their right not to incriminate themselves.

Dealing with the right of a suspect to remain silent, Costello J in the High Court noted that the fairness of a trial may be compromised by what has happened prior to it and, having taken account of the ECtHR decision in *Funke v France*,⁴³ which deemed this right to warrant the protection of the analogous Article 6 of the ECHR, he deemed the right to also enjoy the protection of Article 38.1 of the Constitution.⁴⁴ The Court held that section 52 interfered with the rights enjoyed under Article 38.1. However, the constitutionality of the provision was upheld as conforming to a test of proportionality.⁴⁵ The objective of the provision was as a means through which to assist the police in the investigation of subversive activity. The provision was rationally connected to this objective and there was nothing arbitrary or irrational about its composition. Finally, the provision impaired

⁴² [1994] 3 IR 593 (HC), [1996] 1 IR 580 (SC).

⁴³ (1993) 16 EHRR 297, 326.

⁴⁴ [1994] 3 IR 593 (HC) 606.

⁴⁵ [1994] 3 IR 593 (HC) 610. Costello J employed a proportionality test adopted in the Canadian case of *Chaulk v R* [1990] 3 SCR 1303, 1335-1336.

suspects' rights as little as possible. The court held that the provision was, therefore, a proportionate interference with the rights of suspects.⁴⁶

On appeal to the Supreme Court, that court neither agreed nor disagreed with the view of Costello J that the right of suspect to remain silent was located in Article 38.1 but rather held that the right to silence was a corollary of the right to freedom of expression conferred by Art. 40.6.1° of the Constitution.⁴⁷ The Supreme Court held that the essence of the case was the extent to which the State was entitled to encroach on the right not to say anything that would be self-incriminatory.⁴⁸ The Court held that the State was entitled to qualify this right in its pursuit of its entitlement to maintain public peace and order, although the right must be affected as little as possible.⁴⁹ In the case at hand, it was held that there was proper proportionality between any infringement of citizens' rights and the entitlement of the State to protect itself.⁵⁰ Therefore the Supreme Court also differed from the High Court in relation to the nature of the proportionality test to be applied to any encroachment of the right. McGrath has remarked upon the judgment of the Supreme Court for its apparent 'disenchantment' with the right to silence, singling out for particular attention O'Flaherty J's unquestioning observance that statutory interference with the right is almost as old as the right itself:

'Thus, in an apparent reversal of the normal order of constitutional adjudication, legislative encroachment set the parameters of a right rather than the other way around.'⁵¹

Other commentators have been even more pointed in their criticism, Hogan and Whyte remarking:

[T]he basic premise on which the Court proceeded ("...the innocent person has nothing to fear from giving an account of his or her movements...") is clearly

⁴⁶ [1994] 3 IR 593 (HC) 610.

⁴⁷ [1996] 1 IR 580 (SC) 585.

⁴⁸ [1996] 1 IR 580 (SC) 585.

⁴⁹ [1996] 1 IR 580 (SC) 590.

⁵⁰ [1996] 1 IR 580 (SC) 590.

⁵¹ D McGrath with E Egan McGrath, *Evidence* (2nd edn, Thomson Roundhall 2014) [11-39].

unsound. If this premise were correct, one would have to question why the privilege enjoyed constitutional protection. In addition, the application of the proportionality principle is unsophisticated and appears to sanction something close to the end justifying the means.⁵²

In *Heaney v Ireland*, the applicants enjoyed a more sympathetic hearing before the ECtHR than had been the case in proceedings before the Irish courts.⁵³ In holding that there had been infringements of the right to a fair trial, as guaranteed by Article 6 of the ECHR, the ECtHR took a relatively simple approach to the issue at hand in holding that the 'degree of compulsion' imposed on the applicants by the application of section 52 of the 1939 Act with a view to compelling them to provide information relating to charges against them under that Act destroyed, in effect, the very essence of the privilege against self-incrimination.⁵⁴

The Court held that a provision that extinguishes the very essence of the applicants' right to silence and right not to incriminate themselves, guaranteed by Article 6(1) of the ECHR, could not be considered a proportionate response to the subsisting terrorist and security threat given the need to ensure the proper administration of justice and the maintenance of public order and peace. The Court further held that, given the close link between the applicants' right to silence and their right not to incriminate themselves guaranteed by Article 6(1), and the presumption of innocence guaranteed by Article 6(2), there had also been a violation of the latter provision.⁵⁵ So, in a very clear divergence of approach to that taken by the Irish Courts, the ECtHR condemned provisions creating offences of failing to answer questions or give information as incompatible with the principle of proportionality.

Another provision requiring the provision of information on pain of punishment is section 2 of the Offences Against the State (Amendment) Act 1972. Under section 2, a garda may demand that a person disclose his name and address and give an account of his movements if certain conditions are met. Those conditions are that the garda has reasonable grounds for believing that a scheduled offence is being or has been committed at any place, and that

⁵² G Hogan and G Whyte, *Kelly: The Irish Constitution* (4th edn, Butterworths 2003) 1086.

⁵³ (2001) 33 EHRR 1.

⁵⁴ *Heaney v Ireland* (2001) 33 EHRR 55.

⁵⁵ *Heaney v Ireland* (2001) 33 EHRR 58.

there are reasonable grounds for believing that a person found at or near the place at the time of the commission of the offence or soon afterwards knew of its commission. A failure or refusal to provide information, or the provision of false or misleading information will lead to the commission of an offence with a maximum penalty of 12 months' imprisonment.

Although section 2 of the 1972 Act remains on the statute book, Walsh expresses the view that it is doubtful that it would withstand constitutional scrutiny.⁵⁶ The main difficulty with the provision is that it penalises a suspect's failure to give an account of his movements at the time of the commission of the offence under investigation. Further, it is silent as to whether information gathered on foot of a request made under the provision may be admissible evidence in a prosecution against the suspect. Case law that considered analogous provisions has clarified that such information is not admissible evidence, save in a prosecution for the offence created by the provision itself.⁵⁷ Yet another difficulty with section 2 of the 1972 Act is that it does not contain the safeguard found in later analogous legislative provisions, such as sections 18 and 19 of the Criminal Justice Act 1984, whereby a suspect must be informed of the consequences of a failure to comply with a request at the time that the request is made.⁵⁸

A statutory provision of some relevance to the realm of white-collar crime is section 19 of the Criminal Justice (Theft and Fraud Offences) Act 2001, which operates in a situation where a garda apprehends a person with stolen property. This provision filled the vacuum created by the repeal of section 16 of the Criminal Justice Act 1984, a similarly worded provision that used the language of the Larceny Act 1916 (a statute effectively replaced by the 2001 Act) in defining what is now referred to as stolen property. Under section 19, it is a criminal offence for a person to withhold information, or give false and misleading information, concerning the possession of stolen property in certain circumstances. In order for the offence to arise, a garda must find a person in possession of property and the garda must have reasonable grounds for believing that the possession is contrary to the criminal law. The garda must also inform the person of this belief. A garda may then

⁵⁶ D Walsh, *Criminal Procedure* (Thomson Roundhall 2002) 323.

⁵⁷ See: *Re National Irish Bank Ltd (No 1)* [1999] 3 IR 145 (HC and SC); *Quinn v Ireland* (2001) 33 EHRR 264.

⁵⁸ Criminal Justice Act 1984, s 18(4), s 19(3). See the discussion of these provisions at part 2.4.2 of this chapter.

demand that the person reveal information as to how he came by the property.⁵⁹ A person who fails or refuses, without reasonable excuse, to give the information, or gives information which he knows to be false or misleading will be guilty of an offence.⁶⁰

Two crucial distinctions between the operation of this section and the operation of section 2 of the 1972 Act mean that section 19 does not trench as heavily as section 2 on the general entitlement of a suspect to remain silent. First, criminal liability will only accrue if the garda discloses, in ordinary language, the potential consequences of a failure to comply with a request for information at the time the request is made.⁶¹ Second, and significantly in the context of any discussion of the privilege against self-incrimination, any information provided by a person in response to such a request will not be admissible in evidence against the person in criminal proceedings, except for a prosecution of the offence created by the statutory provision.⁶²

A similarly worded and particularly significant provision is section 15 of the Criminal Justice Act 1984, as amended by section 62 of the Criminal Justice Act 2006 and section 48(3) of the Criminal Justice Act 2007, under which it is a criminal offence for a person to withhold information, or give false and misleading information, concerning the possession of firearms in certain circumstances. Section 15 operates in the same manner as section 19 of the Criminal Justice (Theft and Fraud Offences) Act 2001, save that the garda finds a person in possession of firearms or ammunition rather than stolen property.

2.4.2 Provisions That Allow For Inferences to be Drawn From the Exercise of the Right to Silence

A separate breed of legislative provision strikes at the foundations of a suspect's right to remain silent by providing for the possibility that, at any later trial, inferences may be drawn by the trier of fact from a suspect's exercise of the right to silence at the investigation stage. In an Irish setting, the earliest examples of such provisions are sections 18 and 19 of

⁵⁹ Criminal Justice (Theft and Fraud Offences) Act 2001, s 19(1).

⁶⁰ Criminal Justice (Theft and Fraud Offences) Act 2001, s 19(2).

⁶¹ Criminal Justice (Theft and Fraud Offences) Act 2001, s 19(3).

⁶² Criminal Justice (Theft and Fraud Offences) Act 2001, s 19(4).

the Criminal Justice Act 1984, as amended by sections 28 and 29 of the Criminal Justice Act 2007. Sections 18 and 19 provide for inferences to be drawn from the failure or refusal of an accused to account for marks, objects or substances on his person or his presence in a place when asked to do so by an investigator who is questioning, charging or informing that person that he might be prosecuted for an arrestable offence, and who reasonably believes that any of the aforementioned matters may be attributable to the accused's participation in the offence of which they are suspected.⁶³

Inferences may only be drawn if the accused is informed in ordinary language of the consequences of failure or refusal to comply with sections 18 and 19 and, since the 2007 amendments to the operation of those provisions, only if they have first been afforded a reasonable opportunity to consult a solicitor.⁶⁴ A further precondition for the drawing of inferences is that any questioning by investigators is electronically recorded, unless this entitlement has been waived by a suspect.⁶⁵ A court may find any inferences that may be drawn as corroborative of any evidence in relation to which the inference is material but a person shall not be convicted of an offence solely or mainly on an inference drawn from a failure or refusal to account for a matter to which sections 18 and 19 apply.⁶⁶

Rock v Ireland dealt with a challenge to the constitutionality of sections 18 and 19 of the Criminal Justice Act 1984.⁶⁷ The State sought to rely on the *Heaney* case in seeking to rebuff arguments of unconstitutionality. However, delivering the judgment of the Supreme Court, Hamilton CJ took the view that *Heaney* was not analogous with the instant case for two reasons. First, section 52 was intended to deal with situations where there is an extraordinary threat to public order or the security of the State, whereas the 1984 Act was an ordinary piece of legislation. Secondly, although non-compliance with section 52 could result in the commission of a discrete summary offence, no inferences could be drawn at trial from such non-compliance, whereas a failure to comply with sections 18 and 19 could

⁶³ Criminal Justice Act 1984, s 18(1), s 19(1).

⁶⁴ Criminal Justice Act 1984, s 18(3), s 19(3). In *DPP v Fitzpatrick* [2012] IECCA 74 [41], O'Donnell J held that section 18(3) requires that a suspect has an opportunity to consult his or her solicitor either after the section is invoked or at some time after a solicitor is told in advance that the section may or will be invoked.

⁶⁵ Criminal Justice Act 1984, s 18(6), s 19(6).

⁶⁶ Criminal Justice Act 1984, s 18(2), s 19(2).

⁶⁷ [1997] 3 IR 484 (SC).

lead to the drawing of an inference which could result in an accused being convicted of a serious offence in circumstances where there might otherwise have been insufficient evidence. The Supreme Court took the view that non-compliance with sections 18 and 19 was a potentially graver matter for an accused than a failure to comply with section 52.

The Court then applied a form of balancing test in finding that sections 18 and 19 passed constitutional muster, holding that in seeking to balance the individual's right to avoid self-incrimination with the right and duty of the State to defend and protect the life, person and property of all its citizens, the legislature had acted within the range of what was permissible. Hamilton CJ pointed to two factors that limited the impact of the impingement on the right to silence. First, he noted that an inference cannot form the basis for a conviction in the absence of other evidence and, secondly, he observed that an inference adverse to the accused can only be drawn where the court deems it proper to do so.

Somewhat confusingly, the Supreme Court set out the test of proportionality that had been applied by Costello J in the High Court in *Heaney v Ireland* rather than the slightly different proportionality test adopted by the Supreme Court in that case,⁶⁸ but also principles regarding the balancing of rights as described in *Tuohy v Courtney*.⁶⁹ The wording of the judgment suggests the matter was decided on an application of the *Tuohy* approach rather than the proportionality test of Costello J in *Heaney* but this is not expressly stated to be the case. It is also unhelpful that the Supreme Court did not consider the very relevant decision of the ECtHR in *Murray v United Kingdom*.⁷⁰

In *Murray v United Kingdom*, the applicant had been convicted on the basis of inferences drawn by the trial judge under provisions of the Criminal Evidence (Northern Ireland) Order 1988 from the fact that he had elected not to give evidence at his trial and had refused to account for his presence at a particular place when requested to do so.⁷¹ In holding that there had been no breach of the guarantee of a fair trial under Article 6 of the

⁶⁸ [1994] 3 IR 593 (HC), [1996] 1 IR 580 (SC).

⁶⁹ [1994] 3 IR 1 (SC) 47.

⁷⁰ (1996) 22 EHRR 29. The decision in *Murray* issued on 8 February 1996 and the judgment in *Rock* issued on 19 November 1997.

⁷¹ (1996) 22 EHRR 29.

ECHR, the ECtHR held that the right to silence was not absolute and that it should not prevent the accused's silence, in situations which clearly call for an explanation from him, being taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.

The ECtHR was, however, careful to mark the boundaries of any circumscription of a suspect's right to silence. First, the Court observed that it is incompatible with the right to silence to base a conviction solely or mainly on an accused's silence or refusal to answer questions.⁷² Second, in assessing whether there has been a breach of Article 6, any infringement of a suspect's right to silence must be considered individually in light of all of the circumstances of the case, focusing in particular on situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion in the situation.⁷³ Third, the Court stressed the importance of access to legal advice in any situation where inferences may be drawn from the exercise of the right to silence.⁷⁴ *Murray* considered provisions that were analogous to those considered by the Irish courts in *Rock*. While the relevant provisions were upheld in both cases, *Murray* provides a deeper and clearer exposition of the factors and criteria applied by the ECtHR in assessing the legitimacy of inference-drawing provisions than was the case on the part of the Supreme Court in *Rock*.

The next, and most potentially far-reaching, enactment providing for inferences to be

⁷² *Murray v United Kingdom* (1996) 22 EHRR 60.

⁷³ *Murray v United Kingdom* (1996) 22 EHRR 61. In finding there was no breach of Article 6 in the instant case, the Court noted the fact that the trier of fact was a judge sitting alone, that an appropriate warning had to be given to the accused regarding the legal effects of maintaining silence and that the prosecution had to have, at a minimum, a prima facie case before inferences could be drawn that might corroborate other prosecution evidence. The Court accepted that the threat of drawing inferences involved a 'certain level of indirect compulsion', but not enough to destroy the essence of the right to silence, particularly where, as here, the applicant had, in fact, maintained his silence.

⁷⁴ *Murray v United Kingdom* (1996) 22 EHRR 62. In the sole finding in the applicant's favour, the Court ruled the denial to the applicant to access to a solicitor for the first 48 hours of his detention to be a breach of the concept of fairness enshrined in Article 6. Until the landmark case of *DPP v Gormley and DPP v White* [2014] IESC 17, [2014] 1 ILRM 377, the Irish position concerning access to legal advice was very vulnerable to challenge as being incompatible with the ECHR. *Gormley and White* shores up the position in this jurisdiction by ruling out the possibility of questioning a suspect who has sought access to legal advice before access to such advice has been provided. A circular issued by the Irish Director of Public Prosecutions in March 2014 to the effect that solicitors should be allowed to sit in on interviews of suspects if a request to that effect is made marks a further step towards compliance with the exigencies of being a party to the ECHR, although it is less than desirable that this circular does not have the authority of a judicial ruling or legislative measure.

drawn from the exercise by a suspect of their right to silence comes in the form of section 19A of the Criminal Justice Act 1984, as inserted by 30 of the Criminal Justice Act 2007.⁷⁵ It operates in broadly similar terms to sections 18 and 19 of the 1984 Act in providing for very important safeguards in the form of a requirement to caution a suspect in ordinary language of the potential for inferences to be drawn from any exercise of a right to silence and to the extent that any inferences drawn may only corroborate other evidence rather than amount to the sole or main basis for convicting a person. Other parallels with sections 18 and 19 include the requirement that a person undergoing questioning under the Act be afforded reasonable access to legal advice and also that any such questioning be electronically recorded unless this entitlement is waived.

A major difference between section 19A and sections 18 and 19 of the 1984 Act is the fact that inferences may only be drawn under section 19A where an accused 'failed to mention any fact relied on in his or her defence in those proceedings, being a fact which in the circumstances existing at the time he or she could reasonably have been expected to mention when so questioned, charged or informed, as the case may be...'.⁷⁶ Thus, section 19A only becomes operative where an accused conducts their defence in a particular way, whereas sections 18 and 19 of the 1984 Act do not rely on the conduct of the defence at trial for their operation and are, therefore, much broader in their effect.

Further, whereas section 18 and 19 require an investigator to identify the issue in relation to which they would like an explanation from an arrested person, section 19A places an onus on a suspect to identify those facts which ought to be mentioned at the investigation stage if inferences from silence are not to be drawn at any trial in the event that, at that stage, the accused elects to give evidence. While sections 18 and 19 are friendly to the prosecution in the sense that they are not reliant on the defence conduct at trial for their operation, section 19A arguably operates as a deeper encroachment on the suspect's right to silence in the heavy demands it places on suspects to weigh the significance of various

⁷⁵ See T McGillicuddy, 'Restrictions on the Right to Silence under the Criminal Justice Act 2007 - Part 1' (2008) 3 ICLJ 77; T McGillicuddy, 'Restrictions on the Right to Silence under the Criminal Justice Act 2007 - Part 2' (2008) 4 ICLJ 121; Y Daly, 'Is Silence Golden? The Legislative and Judicial Treatment of Pre-trial Silence in Ireland' (2009) Dublin University Law Journal 35.

⁷⁶ Criminal Justice Act 1984, s 19A(1).

facts and to anticipate their relevance to the defence approach to a theoretical and distant trial. Like sections 18 and 19, section 19A encompasses all arrestable offences; its broad ambit is such that it is very significant in a white-collar crime context, with most, if not all, white-collar crimes constituting arrestable offences.⁷⁷

Although 19A of the Criminal Justice Act 1984 has not, as yet, been considered by the Irish Courts, *Averill v United Kingdom* saw the ECtHR consider analogous inference-drawing provisions contained in the Criminal Evidence (Northern Ireland) Order 1988.⁷⁸ In finding that there had been no breach of Article 6, the ECtHR took account of a number of factors. First, a finding of guilt could not be solely or mainly based on the basis of inferences drawn. Second, the presence of incriminating fibres on the accused's hair and clothing in circumstances where he was arrested near the scene of the offence, called, as a matter of common sense, for an explanation. The third factor had regard to by the Court was the question of legal advice and it gave the Court the most cause for concern on the facts of the case. In the instant case the applicant had not had access to legal advice for the first twenty-four hours of his detention, a matter giving rise to 'considerable caution' when measuring the significance of a failure to answer questions during this period.⁷⁹ However, the ECtHR also held that, even where access to legal advice is provided, consideration must be given to the possibility of silence having been maintained on the basis of bona fide legal advice. In the instant case, the applicant had not asserted that he stayed silent on the strength of legal advice. In the particular circumstances of the case, the ECtHR held that there had been no infringement of Article 6.

The difficult question of access to legal advice came to the fore again in the case of *Condrón v United Kingdom*.⁸⁰ The provision of law in question was section 34 of the Criminal Justice and Public Order Act 1994, a section similar to section 19A of the Irish Criminal Justice Act 1984. The applicants' solicitor had advised them to maintain their silence in circumstances where they were heroin addicts and he believed them to be unfit to be interviewed. As a

⁷⁷ In this context an 'arrestable offence' is one which carries a maximum possible sentence of five years or more.

⁷⁸ (2001) 31 EHRR 839.

⁷⁹ (2001) 31 EHRR 839, 853.

⁸⁰ (2001) 21 EHRR 1.

consequence, they failed to mention facts that they later relied on as part of their evidence when giving evidence at the trial. The trial judge pointed out the applicants' explanation to the jury but directed the jury that they could still draw an inference from the applicants' silence even if they found the explanation plausible.

The ECtHR held that the trial judge's direction to the jury did not adequately respect the balance between the right to silence and the circumstances in which an adverse inference may be drawn from silence. As it had done in *Averill*, the Court held that an appropriate degree of caution should surround, on the one hand, a failure to grant access to legal advice to a suspect and, on the other hand, any contention on the part of an accused that their decision to maintain silence was based on legal advice. The Court held that a more appropriate direction in the instant case would have been to direct the jury that if it was satisfied that the applicants' silence at interview could not be attributed to their having no answer or none that would stand up to cross-examination, the jury should not draw an adverse inference.⁸¹

Writing about section 19A of the Criminal Justice Act 1984, McGillicuddy has suggested that one of the most 'controversial' issues in a trial in this jurisdiction where legal advice is pointed to as the reason why an accused remained silent during interview will be the way this is treated by trial judges when charging juries on the matter.⁸² In the absence of Irish authorities on the point, it is suggested that the approach in *Condrón*, as expanded upon by English case law decided in the wake of that decision, describes a coherent way of addressing the issue.⁸³ It would seem more appropriate for the Irish legislature to provide

⁸¹ *Condrón v United Kingdom* (2001) 21 EHRR 22.

⁸² T McGillicuddy, 'Restrictions on the Right to Silence under the Criminal Justice Act 2007 - Part 1' (2008) 3 ICLJ 77, 88.

⁸³ The UK Human Rights Act 1998 requires courts in that jurisdiction to interpret and apply the law there in a manner consistent with the ECHR. English case law that has emerged since *Condrón* also provides useful guidance on an approach that might be adopted in this jurisdiction to the specific point addressed in *Condrón*. Dealing with section 34 of the Criminal Justice and Public Order Act 1994 (a provision described as a 'notorious minefield' in *R v B (KJ)* [2003] EWCA Crim 3080 (CA)), in *R v Hoare and Pierce* [2004] EWCA Crim 784 (CA), the Court of Appeal held that when such an explanation is put forward that a defendant remained silent on foot of advice received from a legal advisor, a jury should consider whether it was reasonable for a defendant to rely on such advice. In *R v Beckles* [2005] 1 All ER 705 (CA), the Court of Appeal developed this principle further by setting out a two stage test for juries to consider before drawing an adverse inference. In the first place it must be asked whether the defendant genuinely relied on the legal advice. In other words, did the defendant accept the advice and believe that he was entitled to follow it? If there is an affirmative answer

specific guidance on the approach to be taken to this aspect of the interpretation of section 19A rather than wait for a judicial ruling on the matter. The matter is of particular relevance to the realm of white-collar crime given the potential for greater use of adverse inference provisions by investigators and prosecutors in the investigation of complex offences and it is undesirable that there is uncertainty on the precise operation of a relatively convoluted provision such as section 19A.

More generally, Ní Raifeartaigh observes that, although provision for inferences from silence to be drawn has been in existence for some time in relation to the investigation and prosecution of a range of criminal offences, anecdotally An Garda Síochána have generally stuck to the more traditional caution in interview, which would not allow for such inferences to be drawn.⁸⁴ Even where an appropriate caution regarding inferences is given by An Garda Síochána, it would seem, again anecdotally, that prosecutors only infrequently seek court sanction to allow inferences from silence to form part of the prosecution case.

It is hard to know why the inference from silence provisions have been so little used since their inception but it seems clear that the legislature wishes to, at a minimum, draw attention to the fact that such provisions are working tools for investigators and prosecutors seeking to advance a particularly prosecution. Ní Raifeartaigh suggests, 'If one can use silence as well as speech as part of the prosecution case, this is also likely to encourage more interviewing. Interviews become useful not merely because they may yield answers, but because they may not.'⁸⁵ The latter comment seems perfectly sensible but experience to date would suggest that the inference from silence provisions are not a favoured tool of investigators and prosecutors in terms of advancing prosecutions. The fact that the right of reasonable access to legal advice now appears to encompass an entitlement

to this question, it must then be considered whether it was reasonable for the defendant to rely on the advice. By way of example, a defendant may be acting unreasonably if he relied on the legal advice to remain silent because he had no explanation to give and the advice suited his own purposes. The court also held that reasonableness does not depend on whether the advice was legally correct or whether it complied with the UK Law Society's guidelines.

⁸⁴ Ú Ní Raifeartaigh, 'Interviewing Suspects in Detention: The Changing Landscape' (2012) 2 Crim L & Proc Rev 22.

⁸⁵ Ú Ní Raifeartaigh, 'Interviewing Suspects in Detention: The Changing Landscape' (2012) 2 Crim L & Proc Rev 23.

to a consultation with a lawyer once such provisions are invoked⁸⁶ may serve as a stimulus for investigators to make greater use of the provisions in question, particularly in investigations of complex white-collar crimes.

In trenchant criticism of section 7 of the Criminal Justice (Drug Trafficking) Act 1996, a provision similar to, and repealed by, section 19A,⁸⁷ Ryan has suggested that section 7 was the culmination of 'the abolition rather than modification of the right to silence', arguing that an accused's right not to testify is 'undermined indirectly by the removal of the immunity to remain silent before trial, since there may be more compulsion upon an accused to give evidence in order to explain his earlier silence'.⁸⁸ Commenting on sections 28 - 30 of the Criminal Justice Act 2007, Campbell has been similarly critical of provisions that curb a suspect's right to silence, arguing that they represent 'a move away from deontological concerns about individual liberties, towards a more utilitarian approach, wherein the interests of crime control are seen as superior to the rights of the accused'.⁸⁹ While there is merit to the arguments of Ryan and Campbell, it is contended that as long as there are safeguards in place, including reasonable access to legal advice and electronic recording of interviews, such attenuations of the right to silence are reasonable and proportionate, particularly in the context of the investigation and prosecution of white-collar crime.

2.5 The Right of Any Person to Invoke the Privilege Against Self-incrimination

This section considers those immunities falling under the umbrella of the privilege against self-incrimination that are available to all persons. An issue for analysis is the current legal uncertainty as to whether the privilege against self-incrimination is limited to utterances and otherwise expressive conduct or whether it extends also to at least some forms of

⁸⁶ *DPP v Fitzpatrick* [2012] IECCA 74 [41], where O'Donnell J held that section 18(3) requires that a suspect has an opportunity to consult his or her solicitor either after the section is invoked or at some time after a solicitor is told in advance that the section may or will be invoked.

⁸⁷ This was in circumstances where section 19A encompassed the 'drug trafficking' offences that had been covered by section 7 of the 1996 Act. For similar reasons, section 5 of the Offences Against the State (Amendment) Act 1998 was also repealed by section 19A of the Criminal Justice Act 2007.

⁸⁸ A Ryan, 'The Criminal Justice (Drug Trafficking) Act 1996: Decline and Fall of the Right to Silence?' (1997) 1 ICLJ 22, 37.

⁸⁹ L Campbell, 'The Criminal Justice Act 2007 - A Theoretical Perspective' (2007) 3 ICLJ 8, 12.

physical evidence. In light of the centrality of documents to the investigation and prosecution of white-collar crime, it is problematic that they are a particular source of uncertainty: can they be legitimately construed as 'utterances' and, if so, should the privilege extend to pre-existing documents? Within the context of white-collar crime, identification of the limits of the right of any person not to say or produce anything that tends to incriminate him or her is of crucial importance. This is because the right in question arises, by its nature, at the nascent stages of any investigation into white-collar crime: a blanket entitlement of the kind in question has the potential to stifle an investigation at an early stage, whereas a more qualified right may aid investigators, while still respecting the core features of this aspect of the privilege against self-incrimination.

Given the importance of documentary evidence and evidence from witnesses such as company employees in the investigation and prosecution of complex white-collar crimes, it is perhaps unsurprising that much of the case law considering the parameters of this facet of the privilege against self-incrimination has a white-collar crime setting. As will be seen, in general terms the Irish courts and the ECtHR have upheld provisions compelling individuals to utter or produce information that might incriminate them; however, on the question of the admissibility of any such information in any proceedings that might be subsequently taken against the providers of the information, a distinction is drawn between utterances and material that has an existence independent of the provider of that material. The jurisprudence of the Irish courts and the ECtHR is against the admissibility of compelled utterances in any subsequent proceedings against the makers of such utterances. With regard to material that exists independently of the person providing it, the jurisprudence of the Irish courts and the ECtHR tends to favour the admission of such material, although, as will be seen, there are some inconsistencies and ambiguities in the case law on this point.

2.5.1 Irish Case Law

Re National Irish Bank Ltd (No 1) saw the Irish courts consider the boundaries of the right of an individual not to say or produce anything that would tend to incriminate him or her and is notable for its illustration of the fact that the privilege against self-incrimination can be

invoked outside of a strict criminal context.⁹⁰ In issue were certain provisions of Part 2 of the Companies Act 1990. It should be noted that Part 2 of the 1990 Act was amended in various respects by the Company Law Enforcement Act 2001. In its original form it provided for the investigation of the affairs of a company in a manner to be specified by the High Court. Section 10 of the 1990 Act provided that it was the duty of all company officers and agents to produce books and documents of or relating to the company and also, if requested, to attend before the inspectors when required and in a general way to assist the inspectors. The power of investigation also extended to parties whom the investigators considered to be in possession of information concerning the company under investigation, as did the duty to comply.

Section 10(4) provided that an inspector could examine on oath the aforementioned parties and could administer an oath for this purpose and reduce to writing the answers given and require the examinee to sign the document. Section 18 then provided that the answers given could be used in evidence against the party giving these answers. Section 10(5) provided that where a party chose not to answer questions or otherwise comply with the inspector's requests, a procedure could be invoked whereby the refusal became the subject of a reference to the court and the court was then empowered to investigate and punish the offender as if they had been guilty of contempt of court. In colourful commentary on the composition of Part 2 of the 1990 Act, Redmond has stated that '[t]he investigation as it were places the party between the Scylla of self-incrimination and the Charybdis of punishment under the hand of the court'.⁹¹

The factual backdrop to *Re National Bank* was that, pursuant to section 8 of the Companies Act 1990, the then Minister for Enterprise and Employment launched an investigation concerned with mishandling of customers' funds and inappropriate charging of fees at National Irish Bank Ltd. The investigation led to challenges to the powers afforded to inspectors by section 10 and section 18 of the Companies Act 1990: first, to the obligation to respond to investigators' requests and, second, to the admissibility of responses to any requests made as evidence in any proceedings that might subsequently be taken against the

⁹⁰ [1998] IEHC 116, [1999] 3 IR 145 (HC and SC).

⁹¹ A Redmond, 'The Privilege Against Self-Incrimination in the Context of the 1990 Companies Act' (1992) 2 ICLJ 118, 120.

provider of the requested information. Both the High Court and the Supreme Court had no hesitation in holding that the contents of section 10 amounted to an abrogation of the aspect of the privilege against self-incrimination under discussion in this section of the chapter, but both courts held that section 10 was a proportional restriction of the privilege in accordance with the principles laid down by the Supreme Court in *Heaney*.⁹²

Barrington J in the Supreme Court located protection against any compulsion to provide self-incriminatory information as falling under Article 40.6.1°,⁹³ as reinforced by Article 40.3.⁹⁴ However, affirming the proportionality of the interference of section 10 with this right, he expressed the view that ‘if there are grounds for believing that there is malpractice or illegality in the operation of the banking system, it is essential, in the public interest, that the public authorities should have power to find out what is going on’.⁹⁵ These prescient comments have a particular resonance in light of the major crisis that gripped the Irish banking sector in 2008.⁹⁶ Barrington J’s remarks also serve as a reminder that, while it is one issue for relevant authorities to have statutory powers of investigation at their disposal, it is another matter altogether as to whether those authorities actually avail of the powers in question.⁹⁷

⁹² *Heaney v Ireland* [1994] 3 IR 593 (HC) [1996] 1 IR 580 (SC).

⁹³ A qualified right of freedom of speech is guaranteed by this article of the Constitution, subject to considerations of public order and morality.

⁹⁴ This article guarantees the personal rights of Irish citizens, including the life, person, good name, and property rights of every citizen.

⁹⁵ [1999] 3 IR 145 (HC and SC) 180.

⁹⁶ In September 2008, by way of the Credit Institutions (Financial Support) Act 2008, the then Irish government initiated a hugely costly process of guaranteeing the liabilities of, and then recapitalising, the six main Irish banks at the time, namely Anglo Irish Bank, Bank of Ireland, Allied Irish Bank, Permanent TSB, Irish Nationwide and Irish Life and Permanent. While the wisdom of the government’s intervention has been hotly debated ever since, it is not in dispute that the banks in question would have become insolvent without government assistance. Successful prosecutions against some former executives of the now defunct Anglo Irish Bank in 2014 provide a basis for suggesting that at least some, if not all, of the parlous state of the banks at the time was down to malpractice and illegal behaviour.

⁹⁷ The Central Bank and Financial Services Authority of Ireland Act 2003 established the Irish Financial Services Regulatory Authority, which was in existence from 2003 to 2010. It had responsibility for regulating the institutions that required emergency government assistance in 2008. Major question marks remain as to the extent to which the body exercised its function and utilised the powers of investigation available to it. Answers to some of these questions may, perhaps, emerge from the Committee of Inquiry into the Banking Crisis, colloquially known as the Banking Inquiry, which was formally established in November 2014 under the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013. The inquiry is due to conclude oral hearings in September 2015 and it will then move to produce its written report:

<<https://inquiries.oireachtas.ie/banking/banking-inquiry-to-conclude-public-hearings-and-start-final-phase-of-work-leading-to-inquiry-report/>> (accessed 7 September 2015).

The Court then considered the second issue in the case, namely the admissibility at trial of responses to requests from inspectors. Barrington J adopted the view that section 18 collided with Article 38.1 rather than Article 40.6.1°. Having observed the common law rule that a confession is not admissible unless it is voluntary⁹⁸ and having reviewed case law dealing with the admissibility of statements obtained by statutory compulsion,⁹⁹ he expressed the view that the admission of a compelled statement would constitute a breach of the guarantee of a trial in due course of law provided for in Article 38.1 of the Constitution. The choice of Article 38.1 is significant given the arguably greater level of protection afforded to the right than would have been the case if it had been located in Article 40.6.1°; the language of Article 38.1 provides a very clear guarantee, whereas the wording of Article 40.6.1° leaves room for proportionate restrictions on the right that it protects.

The judgment of Barrington J is also significant for its constitutionalisation of the common law rule prohibiting the admissibility of involuntary confessions. Having adopted this position, the Court applied the presumption of constitutionality to section 18 and expressed the view that it should not be interpreted as authorising the admission of forced or involuntary confessions against an accused person in a criminal trial. However, the Court went on to point out that the question of whether a confession was voluntary was a matter of fact for the trial judge in a given case:

[I] would uphold the decision of the learned trial judge but would add the statement that a confession of a bank official obtained by the inspectors as a result of the exercise by them of their powers under s. 10 of the Companies Act, 1990, would not, in general, be admissible at a subsequent criminal trial of such official unless, in any particular case, the trial judge was satisfied that the confession was voluntary.¹⁰⁰

Shane Murphy SC has described the use of the words 'in general' in the passage just cited as 'dangerous words', in the sense that they appear to give a trial judge a residual discretion to

⁹⁸ *People (AG) v Cummins* [1972] IR 312 (SC).

⁹⁹ *People (AG) v Gilbert* [1973] IR 383 (CCA) and *DPP v Madden* [1977] IR 336 (CCA) were some of the cases considered.

¹⁰⁰ [1999] 3 IR 145 (HC and SC) 189.

admit a compelled admission into evidence in some as yet unknown sets of circumstances.¹⁰¹ However, it might also be argued that the words ‘in general’ are superfluous and not intended to convey the meaning argued for by Murphy. Even if nothing is intended to turn on the use of the words in question to the extent suggested by Murphy, they create some uncertainty. This point of law would benefit from legislative clarification to the effect that only a voluntary confession shall be admissible in evidence against the maker of such a confession.

In *Dunnes Stores Ireland Company v Ryan*, the High Court considered section 19 of the Companies Act 1990.¹⁰² The section empowered the executive, in the form of the Minister for Enterprise, Trade and Employment, or a duly appointed authorised officer, to give directions and to require the production of books and documents by companies and other persons and to require explanations in relation to them in certain circumstances. Section 19(5) made it an offence not to produce books or documents or provide an explanation. Under section 19(6), any statement provided by a person in accordance with the requirements of section could be used in evidence against that person.

In relation to section 19(5), Kearns J took a very similar approach to that taken by the Supreme Court in *Re National Irish Bank Ltd (No 1)* in relation to the analogous section 10(4) of the 1990 Act. The Court found that any infringement of personal rights protected by Article 40 was proportional ‘when weighed in the balance with the countervailing public interest in good corporate governance’, a clear reference to the public interest in counteracting white-collar crime.¹⁰³ However, turning to section 19(6), Kearns J drew a distinction between this provision and section 18 of the 1990 Act, which was central to the Court’s considerations in *Re National Bank*, on the basis that, under section 10(5), a person who was unwilling or refused to answer had the opportunity of having the reasonableness of that refusal tested as an issue by the court, whereas a person interviewed under section 19(5) automatically committed an offence if they behaved similarly. On this basis, Kearns J

¹⁰¹ Remarks made during a lecture delivered on 15th March 2012 as part of the Advanced Diploma in Corporate Crime course offered by The Honorable Society of King’s Inns,

¹⁰² [2002] IEHC 61, [2002] IESC 7, [2002] 2 IR 60. The Companies Act 1990 has been repealed by the Companies Act 2014. The essence of the power originally provided for in section 19 of the 1990 Act is now located in sections 778 - 786 of the 2014 Act.

¹⁰³ [2002] IEHC 61, [2002] IESC 7, [2002] 2 IR 60, 119.

distinguished *Re National Irish Bank*, finding that there was no room in the wording of section 19(5) for the possibility of a voluntarily obtained statement. He therefore concluded that section 19(6) infringed the minimum invasion aspect of the proportionality test in *Heaney* by not precluding the use of answers given pursuant to the operation of section 19(5) in later criminal proceedings. Kearns J was also critical of the approach of Barrington J in *Re National Irish Bank* of deciding on the voluntariness of a statement on a case by case basis, stating:

This approach inevitably means that the use or admissibility of incriminatory material is not determined by any objective standard, but remain an essentially subjective test going to whether the will of the witness was overborne in the particular circumstances. It would appear to displace the objective test of self-incrimination at common law.¹⁰⁴

McGrath has criticised the reasoning in *Dunnes Stores* as ‘difficult to square’ with *Re National Irish Bank Ltd (No 1)*, noting that the core of the ruling in *Re National Irish Bank Ltd (No 1)* was that an involuntary confession is inadmissible and section 18 was interpreted in that case as not authorising the admission of involuntary statements.¹⁰⁵ He questions why the same reasoning was not applied in *Dunnes Stores* and the conclusion reached, applying the presumption of constitutionality, that section 19(6) was constitutional even if, as a practical matter, the circumstances in which a statement obtained pursuant to section 19 would be found to be voluntary would be very rare.¹⁰⁶ In other words, the argument goes that it was unnecessary to strike down section 19(6) as unconstitutional: there was room to interpret it in a way that would preserve the constitutionality of the provision. It is contended that there is strength to this argument.

Notwithstanding the criticisms in the judgment of Kearns J in *Dunnes Stores*, it is suggested that Barrington J’s approach in *Re National Irish Bank Ltd (No 1)* of assessing the voluntariness of a statement on a case by case basis draws an appropriate balance between the right to a trial in due course of law and the societal interest in successfully investigating

¹⁰⁴ [2002] IEHC 61, [2002] IESC 7, [2002] 2 IR 60, 121.

¹⁰⁵ D McGrath with E Egan McGrath, *Evidence* (2nd edn, Thomson Roundhall 2014) [11-68].

¹⁰⁶ D McGrath with E Egan McGrath, *Evidence* (2nd edn, Thomson Roundhall 2014) [11-68].

and prosecuting white-collar crime. It is notable that the response of the legislature in the wake of *Re National Irish Bank* and *Dunnes Stores* has been to amend existing legislation and shape new legislation so as to provide that statements provided in response to the invocation of certain statutory powers of investigation may not, with limited exceptions, be used in evidence in proceedings against the provider of the statements.¹⁰⁷ It is suggested that this is an unnecessarily restrictive approach on the part of the legislature and that Barrington J's judgment in *Re National Irish Bank* to the effect that the voluntariness of admissions should be made on a case-by-case basis is appropriate, although it is acknowledged that this would introduce less certainty to the law than the current legislative approach.

2.5.2 European Court of Human Rights Case Law

A seminal decision in the approach of the ECtHR to the general area of the privilege against self-incrimination and, more particularly, the right of a person not to say or produce anything that tends to incriminate him, was *Saunders v United Kingdom*, a case of particular interest given the white-collar crime context for the instant discussion.¹⁰⁸ At the heart of that case was the validity of section 434(5) of the UK Companies Act 1985, which stated that an answer given by a person to a question put to him in the exercise of powers conferred on relevant inspectors could be used in evidence against him. The provision was analogous to the provisions at the centre of the domestic Irish cases of *Re National Irish Bank* and *Dunnes Stores*. In a six-month trial for various fraud offences relating to the takeover of a group of companies, a substantial amount of the prosecution evidence against the four defendants in the case comprised of statements given by the various accused to inspectors working for the UK Department of Trade and Industry. All four accused were convicted.

The ECtHR reinforced a contention advanced in earlier jurisprudence of the Court to the effect that Article 6 of the Convention guaranteed the privilege against self-incrimination,

¹⁰⁷ Sections 28 and 29 Company Law Enforcement Act 2001 substantially amended sections 18 and 19 of the Companies Act 1990 so as to achieve this effect and this approach was replicated in section 785 of the Companies Act 2014. Section 15(10) of the Criminal Justice Act 2011 is another relatively recent example of this approach.

¹⁰⁸ (1997) 23 EHRR 313.

observing that 'although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6'.¹⁰⁹

The Court did not take issue with functions performed by investigators the purpose of which was 'to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities - prosecuting, regulatory, disciplinary or even legislative'.¹¹⁰ In this regard, the approach of the ECtHR was consistent with the approach of the Irish courts in the later cases of *Re National Bank* and *Dunnes Stores* in holding that there can be very valid public policy justifications for provisions that compel individuals to provide potentially self-incriminatory information where that information might advance investigations and prosecutions against persons other than the providers of such information. However, the Court drew the line at the use of transcripts obtained in a non-judicial investigation to incriminate the applicant in the instant case. Admitting the transcripts as evidence in the case against the applicant was held to be a violation of his privilege against self-incrimination, which deprived him of a fair hearing in violation of Article 6(1) of the ECHR. In a crucial passage, that has implications for any argument that the investigation of white-collar crime requires greater leeway when it comes to drawing the boundaries around the privilege against self-incrimination, the Court stated:

[The Court] does not accept the Government's argument that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure. Like the Commission, it considers that the general requirements of fairness contained in Article 6, including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction, from the most simple to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to

¹⁰⁹ (1997) 23 EHRR 313, 337. In *Funke v France* (1993) 16 EHRR 297, the ECtHR had held that the right to silence was enshrined in Article 6 of the ECHR.

¹¹⁰ (1997) 23 EHRR 313, 337.

incriminate the accused during the trial proceedings. It is noteworthy in this respect that under the relevant legislation statements obtained under compulsory powers by the Serious Fraud Office cannot, as a general rule, be adduced in evidence at the subsequent trial of the person concerned. Moreover the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right.¹¹¹

Notwithstanding the position adopted by the ECtHR in *Saunders*, ECHR standards evolve to reflect changes in societal views. If the economic and financial crises of the last decade result in changes in laws across the membership of the Council of Europe, it is always possible that there may be a change of approach in Strasbourg. As against that, there is strength to the ECtHR argument that to have adopted the UK's position would have been to render nugatory the guarantee of a trial in due course of law provided for in Article 6 of the ECHR; it would, in effect, have been to strip out the privilege against self-incrimination as an aspect of the guarantee of a trial in due course of law and it is hard to envisage any situation in which the ECtHR would reform its approach to Article 6 of the ECHR to that extent.

It is argued that, with regard to this aspect of the privilege against self-incrimination, the most appropriate balance between the individual's right to a trial in due course of law and society's interest in having white-collar crime investigated and prosecuted is to be found in the somewhat nuanced line taken by Barrington J in *Re National Bank Ltd (No 1)*.¹¹² The general thrust of this approach is that involuntary statements made by a person in the course of an investigation may never be admissible in any subsequent proceedings brought against that person. However, it would leave open the possibility that a statement made in response to the exercise of a power of investigation may be admissible in any trial against the maker of the statement if the trial judge is satisfied that it amounts to a voluntary admission.

¹¹¹ (1997) 23 EHRR 313, 340.

¹¹² [1999] 3 IR 145 (HC and SC) 189.

2.5.3 *The Distinction Between Utterances and Other Forms of Evidence*

In considering the exact scope of the aspect of the privilege against self-incrimination under discussion, an important distinction arises as between speech or utterance and other material that has an existence independent of anything the holder of such material might say or articulate. In *Saunders*, the ECtHR had been careful to observe the following in relation to the right in question:

As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.¹¹³

Two other decisions of the ECtHR have adopted a different tack in relation to documentary evidence in certain situations, a crucial point given that documentary evidence is so central to white-collar crime proceedings. In *Funke v France*, the ECtHR held that the privilege prevented the production of documents relating to tax during an inspection by tax officials where a failure to co-operate could result in a criminal sanction.¹¹⁴ This decision does not sit easily alongside *Saunders* and it could be argued that *Saunders* supersedes *Funke* in circumstances where it postdates *Funke*. But the later case of *JB v Switzerland* took a similar approach to that adopted in *Funke*.¹¹⁵ In *JB* the applicant had been investigated for tax evasion and a demand for documents had been made of the applicant by Swiss tax authorities. His failure to comply with the demand resulted in him being fined and he argued before the ECtHR that this was unfair and in breach of Article 6 of the ECHR. The ECtHR accepted his argument.

¹¹³ (1997) 23 EHRR 313, 337. This approach was affirmed by the ECtHR in *PG v United Kingdom* (2008) 46 EHRR 51, [80] and in *Boyce v Ireland* (2013) 56 EHRR SE 11, [50]. This principle was also acknowledged by the Grand Chamber in *Jalloh v Germany* (2007) 44 EHRR 677, [110]; however, it was held in that case that Article 6(1) was engaged, and breached, in circumstances where the administration of an emetic to force regurgitation of a suspected drugs package involved defiance of the applicant's will and a degree of physical force not normally required to obtain the types of material referred to in *Saunders*.

¹¹⁴ (1993) 16 EHRR 297.

¹¹⁵ (2000) 30 EHRR CD 328.

The approach in US courts has been similar to that of the ECtHR in *Saunders*. In *Schmerber v California*, a case concerning the taking of a blood sample without the consent of the accused, the Supreme Court held:

We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.¹¹⁶

In a similar vein, in *Fisher v United States*, the US Supreme Court held that the privilege may not bar the state from compelling the production of incriminating material from the accused as long as the process involved does not oblige an accused, by way of complying with the state's order, to create an incriminating testimonial response.¹¹⁷

In *Re National Irish Bank Ltd (No 1)*, the High Court took the view that the aspect of the privilege in question 'encapsulated a right in the individual to refuse to answer a question or produce a document when to do so would in the opinion of a court tend to expose such an individual to a real risk of criminal prosecution or penalty' [emphasis added].¹¹⁸ This approach saw a broader view of the application of the right in this jurisdiction, a position consistent with the traditional English approach to this issue.¹¹⁹

¹¹⁶ (1966) 384 US 757, 761.

¹¹⁷ (1976) 425 US 391.

¹¹⁸ [1999] 3 IR 145 (HC and SC) 153 (Shanley J). Cases such as *DPP v McGarrigle* [1996] 1 ILRM 271 (HC) and *DPP v Elliott* [1997] 2 ILRM 156 (HC) contain *dicta* that regard provisions compelling the provision of blood and urine samples as curtailments, albeit legitimate ones, of the privilege. In *DPP v McDonagh* [2008] IESC 57, 2009] 1 IR 767, 779, Denham J referred to the right of an accused not to incriminate himself. On the other hand, cases such as *People (AG) v McGrath* (1964) 99 ILTR 59 (HC), *DPP v Walsh* [1980] IR 294 (SC) and *DPP v Costigan* [2006] IECCA 51, [2007] 4 IR 511, 521, draw a line between non-testimonial evidence and confession evidence when considering the privilege.

¹¹⁹ *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 (HL); *Tate Access Floor Inc v Boswell* [1991] Ch 512 (Chan Div); *Bishopsgate Investment Management Ltd v Maxwell and Others* [1993] 1 Ch 1 (Chan Div). This approach was not followed in *Attorney General's Reference (No 7 of 2000)* [2001] 1 WLR 1879 (CA) 1890, where the Court of Appeal referred to the Human Rights Act 1998 and *Saunders* in holding that the use in the prosecution of a bankrupt of documentary material obtained by the official receiver under compulsion pursuant to a statutory provision, but independently of the making of any statement by him, did not violate his rights under Article 6 of the ECHR and that the judge's ruling was therefore wrong. However, in *obiter* comments in *C Plc v P* [2007] EWCA Civ 493 (CA) [72], it was noted that *Attorney General's Reference (No 7 of 2000)* is not binding authority for a limitation of the privilege against self-incrimination at common law.

Curtin v Dáil Éireann saw the Irish courts change direction, albeit in *obiter dicta*, from the position espoused in *Re National Bank Ltd (No 1)*, and adopt an approach on all fours with the traditional attitude of the ECtHR and the US Supreme Court.¹²⁰ The case saw a challenge by a Circuit Court judge, by way of judicial review, to a direction of an Oireachtas committee to produce his personal computer to the committee. The committee had been established following the proposal of a resolution to remove the judge from office pursuant to Article 35.4.1° of the Constitution. The computer in question allegedly had child pornography on its hard drive. A separate criminal case in respect of the matter had resulted in the applicant being acquitted by direction of the trial judge on the basis that the evidence had been obtained on foot of a defective search warrant and consequently fell within the exclusionary rule. The Supreme Court affirmed the High Court's rejection of the applicant's case for judicial review, holding that, in accordance with the principles of constitutional justice, the parliamentary procedures and standing orders followed in respect of the resolutions to remove the applicant from office must be presumed, by the courts, to be constitutional.¹²¹

Although the applicant did not pursue before the Supreme Court the argument that the impugned direction of the Oireachtas unconstitutionally required him to incriminate himself, Murray CJ, in *obiter dicta*, took the opportunity to expressly approve of the approach taken in *Saunders* and *Schmerber*, holding that the use of the power, conferred on a committee of the Oireachtas, to direct any person to send to the committee any documents in his possession did not give rise to considerations of self-incrimination and that there was a distinction between a requirement that a person give a statement or give evidence which might tend to incriminate him and a requirement that a person produce for inspection whether by An Garda Síochána or other organ of the State, a physical article, including a document.¹²²

The distinction between utterances and other material surfaced again in *DPP v Boyce*.¹²³ In that case, an appeal against conviction on a number of sexual offences turned on the

¹²⁰ [2006] IESC 27, [2006] 2 IR 556.

¹²¹ [2006] IESC 27, [2006] 2 IR 556, 621.

¹²² [2006] IESC 27, [2006] 2 IR 556, 635.

¹²³ [2005] IECCA 143, [2008] IESC 62, [2009] 2 IR 124.

circumstances of the taking of a blood sample. In the Court of Criminal Appeal, Murray CJ held that forensic samples, like blood, hair or nail or fingerprint samples fall into the category of objective evidence and are not subject to the rules relating to confession evidence:

Such matters as forensic samples and indeed documents and other property of an accused which may be obtained in the course of the gathering of evidence for the purposes of a criminal prosecution exist independently of the will of the accused and their objective evidential value is not dependent on a self-incriminating statement or communication by the accused. The Court considers that counsel for the DPP were correct in submitting that they fall into a different category than inculpatory statements by an accused.¹²⁴

On appeal, the Supreme Court did not deal with the point pronounced upon by Murray CJ in the Court of Criminal Appeal. It limited its judgment to a finding that the Criminal Justice (Forensic Evidence) Act 1990, which conferred powers to take, or cause to be taken, certain bodily samples within a new legislative scheme, did not oust the common law power to take samples for forensic testing on the basis of a free and voluntary consent of a person detained.¹²⁵

In his High Court judgment in *DPP (Walsh) v Cash*, Charleton J endorsed the approach taken by Murray CJ in *Boyce*, in that case drawing a distinction between fingerprint evidence and confession evidence.¹²⁶ However, as had been the case with the appeal to the Supreme Court in *Boyce*, the Supreme Court judgment in *DPP (Walsh) v Cash* did not pronounce upon this aspect of the judgment of Charleton J, deciding the case on other grounds.¹²⁷

In *Boyce v Ireland*, a case that flowed from *DPP v Boyce*, the applicant complained under Article 6 of the ECHR that the domestic legal position in Ireland, which provided two legal bases from which the police could choose to request the blood sample, rendered his trial

¹²⁴ [2005] IECCA 143.

¹²⁵ [2005] IECCA 143, [2008] IESC 62, [2009] 2 IR 124.

¹²⁶ [2007] IEHC 108.

¹²⁷ [2010] IESC 1, [2010] 1 IR 609.

unfair.¹²⁸ His primary argument was that the dual approach was so inaccessible, opaque and unforeseeable as to be unfair. However, of relevance to the instant discussion, he also complained under Article 6(2) that the police had used a ruse to extract a sample from him in order to circumvent the 1990 Act and that this was in contravention of his right against self-incrimination. In an admissibility decision, the ECtHR held that, whether or not taking, retaining and using the blood sample would amount to a violation of the 'in accordance with the law' aspect of Article 8 of the ECHR, the reliance on the sample and the DNA drawn therefrom during the applicant's trial did not conflict with the requirements of fairness guaranteed by Article 6(1) of the ECHR. Further, and crucially from the point of view of the instant discussion, the ECtHR observed in relation to the 'ruse' argument that it had previously found that privilege against self-incrimination does not apply to blood or other physical or objective specimens used in forensic analysis and it affirmed its approach in this regard.¹²⁹

In *DPP v Gormley and DPP v White*, two separate cases decided upon in the one landmark judgment, the Supreme Court finally addressed the distinction between utterances and what might be termed 'objective' evidence.¹³⁰ In each case, the central issue was the procuring of material evidence on which an accused might be convicted at a time when the accused was under arrest, had sought the attendance of a solicitor, but before the solicitor concerned had arrived. In *Gormley*, the material evidence was confession evidence, whereas in *White*, the material evidence included swabs and hair samples.

It was argued on behalf of each accused that the entitlement to have access to a lawyer before being interrogated or having forensic samples taken, respectively, forms part of the right to a trial in due course of law. Following the ECtHR decision of *Salduz v Turkey*¹³¹ and the US decision of *Miranda v State of Arizona*,¹³² the Court held that the entitlement not to self-incriminate incorporates an entitlement to legal advice in advance of mandatory questioning of a suspect in custody and that it follows that the right to a trial in due course

¹²⁸ (2013) 56 EHRR SE 11.

¹²⁹ (2013) 56 EHRR SE 11 [50], citing: *Saunders v United Kingdom* (1997) 23 EHRR 313, [69]; *JB v Switzerland* (2000) 30 EHRR CD 328, [68]; *PG v United Kingdom* (2008) 46 EHRR 51, [80].

¹³⁰ [2014] IESC 17, [2014] 1 ILRM 377.

¹³¹ (2009) 49 EHRR 19.

¹³² (1966) 384 US 436.

of law encompasses a right to early access to a lawyer after arrest and the right not to be interrogated without having had an opportunity to obtain such advice.¹³³ Thus, the appeal in *Gormley* succeeded. However, turning to the facts in *White*, the Court observed:

First, it must be acknowledged that the results of forensic testing are objective.

Such results do not depend on the will of a suspect or comments made by a suspect in circumstances where the right to self-incrimination could have been invoked or where it is possible that the circumstances in which the interrogation took place led to the suspect, in the absence of advice, being unfairly prejudiced by the way in which the relevant questioning was conducted or responded to.¹³⁴

The Court concluded that, in the context of the guarantee of a fair trial, there is no constitutional prohibition on the taking, without prior legal advice, of a sample in a minimally intrusive way which is justified in law. The situation might be different if a suspect had a genuine choice in the matter that might be informed by legal advice. However, such a choice does not include a decision to commit an offence by declining to provide a sample. The facts of *White* disclosed a mandatory requirement to provide a sample and so the Court did not find in favour of the appellant.

Gormley and White brings greater, but not total, clarity to the law in this area. In particular, it does not establish a position on the status of documents, a point of specific interest for the purposes of the instant research. A document, such as a printed version of an email, may be communicative or testimonial in nature. Should a distinction be drawn between such documents and documents that merely amount to automatically produced records of, say, financial transactions? The common law rule against hearsay draws such a distinction¹³⁵ but the position is uncertain in the context of the privilege against self-incrimination. Leaving aside the nature of a particular document, is the very act of handing over the document communicative or testimonial in nature? The crucial point here is that if the

¹³³ [2014] IESC 17, [2014] 1 ILRM 377, 405.

¹³⁴ [2014] IESC 17, [2014] 1 ILRM 377, 406.

¹³⁵ See *R v Minors* [1989] 2 All ER 208 (CA) and *R v Spiby* (1990) 91 Cr App R 186 (CA). These cases hold that information created by mechanical means and without the intervention of a human mind, for example details of telephone calls made by hotel guests, constitute real evidence as distinct from hearsay.

privilege against self-incrimination cannot be claimed over a particular document, there is a very good chance that, pursuant to Part II of the Criminal Evidence Act 1992, the contents of such a document will be admissible in evidence in any subsequent proceedings as an exception to the rule against hearsay.

McDougall, writing in an Australian context, posits that there is a conceptual distinction to be drawn between compulsion to produce documents and compulsion to answer questions, and that the rationale for the privilege in the latter case does not necessarily apply with equal force to the former:

It has been suggested that the common law recognises a distinction, on the one hand, between information communicated by an individual in the context of an investigation or inquiry and on the other, 'real' evidence provided by the individual, which exists independently of any act of communication. On this analysis, it is arguable that only the individual's 'testimonial' act of communication should be protected by privilege.¹³⁶

In support of his suggestion, McDougall cites from the judgment of *EPA v Caltex Refining Co Pty Ltd*, where the court held:

[I]t is one thing to protect a person from testifying as to guilt; it is quite another thing to protect a person from the production of documents already in existence which constitute evidence of guilt... [Documents] are in the nature of real evidence which speak for themselves as distinct from testimonial oral evidence which is brought into existence in response to an exercise of investigatory power or in the course of legal proceedings.¹³⁷

It is suggested that this conceptual distinction should be adopted and that the privilege should be limited to situations where a person is compelled to make utterances that would

¹³⁶ R McDougall, 'The Privilege Against Self-incrimination: A Time for Reassessment' (2008), Paper presented to New South Wales Bar Association, 18 October 2008, available electronically at <<http://www.austlii.edu.au/au/journals/NSWJSchol/2008/24.pdf>> (accessed 2 September 2015) 7.

¹³⁷ (1993) 178 CLR 477 (Mason CJ) and 502 (Toohey J).

tend to incriminate him or her, and should not extend to pre-existing material, however it came into existence and whatever its nature. Nor should the handing over of any pre-existing document ever be capable of being construed as an utterance covered by the privilege against self-incrimination. This may well exceed at least some of the ECtHR jurisprudence on the matter, which would appear to include pre-existing documentary material within the ambit of the privilege.¹³⁸ It may also run counter to the current Irish position: it does not fit snugly with *Re National Irish Bank*, and recent case law such as *Gormley and White*, while relevant, does not deal directly with the point. However, it is suggested that such an approach to the matter is consistent with the *Saunders* case and would greatly assist in the investigation and prosecution of white-collar crime while still respecting this aspect of the privilege against self-incrimination. It would be a matter for the Irish legislature to clarify the law in this regard.

2.5.4 *Persons on Whose Behalf the Privilege Can Be Claimed*

It is well established that the privilege against self-incrimination may only be claimed by a person at risk of prosecution and not by any other person on his behalf.¹³⁹ It follows, then, that a person cannot rely on the privilege to refuse to answer questions or produce documents on the basis that to do so would tend to incriminate another person.¹⁴⁰

However, importantly in the context of any consideration of white-collar crime, while the position with regard to natural persons is clear, it is less certain with regard to legal persons. Questions arise in this jurisdiction as to whether the privilege applies to legal persons or whether a director or agent of a company can invoke the privilege against self-incrimination to refuse to answer questions on the basis that it would tend to incriminate the company for which they work. The law on this point is not settled here and there are

¹³⁸ *Funke v France* (1993) 16 EHRR 297, *JB v Switzerland* (2000) 30 EHRR CD 328.

¹³⁹ In *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547 (HL) 637, Diplock LJ commented: 'At common law, as declared in section 14(1) of the Civil Evidence Act 1968, the privilege against self-incrimination was restricted to the incrimination of the person claiming it and not anyone else. There is no trace in the decided cases that it is of wider application; no textbook old or modern suggests the contrary. It is not for your Lordships to manufacture for the purposes of this instant case a new privilege hitherto unknown to the law.'

¹⁴⁰ *Ex p Reynolds* (1882) 20 ChD 294 (CA); *Sociedade Nacional de Combustiveis de Angola UEE and Others v Lundqvist and Others* [1991] 2 QB 310 (CA).

divergent approaches in other jurisdictions. In England and Wales, the privilege has been held to extend to a legal person or a person acting on its behalf.¹⁴¹ However, in the US,¹⁴² Australia¹⁴³ and Canada ¹⁴⁴ the courts have held that the privilege cannot be invoked by an artificial person or by a person on its behalf.

It has been observed that a corporation 'has not body to be kicked or soul to be damned'.¹⁴⁵ It is hard to argue that rationales for the privilege against self-incrimination based on human rights considerations have any application in these circumstances. It is strongly recommended that Ireland should follow the approach to this issue that has been adopted in the US, Australia and Canada. The advantage of such an approach in a white-collar crime context is highlighted in a passage from the judgment of McHugh J in *EPA v Caltex Refining Co Pty Ltd*, where he stated:

Corporate conduct is often complex. Assessment of a corporation's conduct may only be possible through an examination of its documents. A true understanding of a corporation's procedures is likely to be gained only through evidence from the corporation itself, particularly from its records.¹⁴⁶

In a similar vein, the US Supreme Court in *United States v White* observed that 'the greater portion of evidence of wrongdoing by an organisation or its representatives is usually to be found in the official records and documents of that organisation'.¹⁴⁷ Legislative action would be required in the absence of a stated position on the point in this jurisdiction.

¹⁴¹ *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass Ltd* [1939] 2 KB 395 (CA); *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 54 (HL); *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 (HL).

¹⁴² *Baltimore & Ohio Railroad Co v Interstate Commerce Commission* (1911) 221 US 612, 622; *United States v White* (1944) 322 US 694, 701; *George Campbell Painting Corp v Reid* (1968) 392 US 286; *Braswell v United States* (1988) 487 US 99.

¹⁴³ *EPA v Caltex Refining Co Pty Ltd* (1993) CLR 47; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

¹⁴⁴ *R v Amway Corp* [1989] 1 SCR 1.

¹⁴⁵ *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 (HL) 1127 (Denning MR).

¹⁴⁶ *EPA v Caltex Refining Co Pty Ltd* (1993) CLR 47, 554.

¹⁴⁷ *United States v White* (1944) 322 US 694, 700 (Murphy J).

2.6 Conclusions in Relation to the Privilege Against Self-Incrimination

It has been seen that the bundle of immunities that constitutes the privilege against self-incrimination is afforded constitutional protection in this jurisdiction,¹⁴⁸ with the added reinforcement of ECtHR jurisprudence, which deems it to be an aspect of the right to a fair trial protected by Article 6 of the ECHR.¹⁴⁹ However, as shown in the course of this chapter, the relevant jurisprudence also demonstrates that there have been disagreements and tensions in various lines of judicial authority regarding the outer limits of various facets of the privilege. The position argued for in this thesis is that the appropriate balance between the personal rights of individuals and society's interest in the proper administration of justice where white-collar crime is concerned is best achieved by retaining the privilege against self-incrimination but recasting certain aspects of it.

In relation to the right to silence of a defendant, it is suggested that this feature of the over-arching privilege against self-incrimination operates appropriately and does not call for any particular adaptation in the context of white-collar crime prosecutions.

As regards the right of a suspect to remain silent, the view is advanced that the two forms of legislative incursion into this facet of the privilege, namely provisions that make it an offence to fail to answer certain questions or give certain information, or which allow for inferences to be drawn at trial from an accused's failure to answer certain questions or provide certain information at the investigation stage of proceedings, are proportionate interferences with this aspect of the privilege, provided they are accompanied by statutory safeguards in the form of reasonable access to legal advice and electronic recording of interviews.

In particular, section 19A of the Criminal Justice Act 1984, inserted by section 30 of the Criminal Justice Act 2007, should, if used appropriately by investigators, serve as a relatively useful tool in the investigation and prosecution of many white-collar crimes. Two recommendations are made in this regard. The first suggested measure is the passing of

¹⁴⁸ *Re National Irish Bank Ltd (No 1)* [1999] 3 IR 145 (HC and SC); *Dunnes Stores Ireland Company v Ryan* [2002] IEHC 61, [2002] IESC 7, [2002] 2 IR 60.

¹⁴⁹ *Saunders v UK* (1997) 23 EHRR 313; *Weh v Austria* (2005) 40 EHRR 891.

long overdue secondary legislation that would outline appropriately worded cautions that must necessarily be administered as part of the proper invocation of such provisions.¹⁵⁰ This would address the possibility that An Garda Síochána are reluctant to create their own cautions for fear that they will not withstand judicial scrutiny. The second proposed measure is firmer direction within An Garda Síochána, in the form of circulars or otherwise, as to the circumstances in which investigators ought to strongly consider invoking such provisions.¹⁵¹ This would address the possibility that a deficiency in guidance and management has resulted in the under-implementation of useful investigatory tools.

In relation to those aspects of the privilege against self-incrimination that are available to everyone, three main recommendations are made. The first is that involuntary admissions should never be admissible in evidence in proceedings against the person who made the admission but that the question of the voluntariness of an admission should be assessed on a case by case basis rather than have a blanket ban on the admissibility of evidence gathered as a result of the invocation of statutory powers. This would require the legislature to rethink its approach in recent years so as to accommodate the position adopted by Barrington J in *Re National Bank Ltd (No 1)*.¹⁵² It is contended that adopting this recommendation would serve to make probative evidence potentially available in complex white-collar crime prosecutions while still respecting the constitutional rights of defendants.

The second recommendation is that it should be clarified by way of legislation that the privilege against self-incrimination should not extend to material, particularly documents, already in existence at the time of an investigation, howsoever that material came into existence and regardless of its nature; nor should the privilege extend to the act of handing over such material. This approach would maximise the amount of probative evidence

¹⁵⁰ Section 32 of the Criminal Justice Act 2007 enables the relevant minister to make regulations providing for the administration of cautions by members of the Garda Síochána to persons in relation to offences. The provision was commenced on 1 July 2007 by virtue of Criminal Justice Act 2007 (Commencement) Order 2007, SI 236/2007, but no such regulations have been made to date.

¹⁵¹ Anecdotal evidence suggests that inference drawing provisions are underused by investigators. Section 7 of the Garda Síochána Act 2005 includes within the functions of An Garda Síochána 'bringing criminals to justice, including by detecting and investigating crime'. An aspect of fulfilling this function would seem to be the promotion of all available tools at the disposal of investigators.

¹⁵² [1999] 3 IR 145 (HC and SC).

available in a given prosecution while still respecting the rights of defendants. The third recommendation is that this aspect of the privilege should not extend to legal persons. This would yield probative evidence in complex prosecutions without upsetting the kinds of personal rights the privilege was designed to protect.

3 Legal Professional Privilege

3.1 Introduction

A detailed review of the law on legal professional privilege is beyond the scope of this research but this part of the chapter will endeavour to identify those principles likely to be of most relevance in a white-collar crime context.¹⁵³ Heffernan has noted that, in Ireland, the issue of legal professional privilege has not hitherto attracted much attention in criminal cases, positing that ‘this is because most criminal cases do not involve situations where exculpatory material is likely to be contained in documents or to have been generated in the context of a legal professional relationship’.¹⁵⁴ Another factor that may account for the general lack of applicability of legal professional privilege in criminal proceedings is the difference in disclosure obligations as between civil and criminal proceedings. Discovery in civil proceedings is a process whereby a party to the proceedings may apply to court for an order requiring the other side to disclose to the opposition material of relevance to the proceedings. The procedure enables parties to civil proceedings to gain access to relevant material in the possession of the other side so that each side may prepare its case having had access to all relevant material.¹⁵⁵ In some situations, a duty to disclose otherwise relevant information may be trumped by a superior right or interest in the form of a legally recognised privilege. Thus, the invocation of a range of privileges, including legal professional privilege, is a common feature of civil proceedings.

¹⁵³ For comprehensive treatment of the law concerning legal professional privilege, see L Heffernan, *Legal Professional Privilege* (Bloomsbury Professional 2011). See also, J Healy, *Irish Laws of Evidence* (Thomson Round Hall 2004) Ch 13; D McGrath with E Egan McGrath, *Evidence* (2nd edn, Thomson Roundhall 2014) [10-04]-[10-252]; L Heffernan with Ú Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury Professional 2014) [12.14]-[12.71]; J Auburn, *Legal Professional Privilege* (Hart Publishing 2000); C Passmore, *Privilege* (XPL Publishing 2006) Chs 2-5; B Thanki (ed), *The Law of Privilege* (2nd edn, OUP 2006) Chs 2-3.

¹⁵⁴ L Heffernan with Ú Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury 2014) [12.14].

¹⁵⁵ For detailed consideration of the principles and procedures in relation to discovery in civil proceedings, see W Abrahamson, JB Dwyer and A Fitzpatrick, *Discovery and Disclosure* (2nd edn, Round Hall 2013).

In criminal proceedings the mutuality applicable to the discovery procedure in civil proceedings is largely absent. The extent of the obligation to disclose material depends on the nature of a party's involvement in the criminal proceedings at hand. As part of the guarantee of trial in due course of law provided for in Article 38.1 of the Constitution, the prosecution is under an obligation to take reasonable steps to seek out and preserve all relevant evidence and then make any such material available to the defence.¹⁵⁶ On the other hand, the defence in criminal proceedings has, traditionally, been under little obligation to furnish material to the prosecution that may assist in any defence to a criminal prosecution.¹⁵⁷ The rationale for the difference of approach as between civil and criminal proceedings is centred on the concept of 'equality of arms'. This principle, associated with the right to a fair trial under Article 6 of the ECHR, holds that in a system where an individual defendant with limited resources faces the prosecutorial might of the State, a fair trial requires that the prosecution has a general obligation to furnish all relevant material to the defence, whereas, with limited exceptions, the burden of assisting the State in discharging its burden of proof is not to fall on a defendant.¹⁵⁸

In light of the aforementioned features of criminal proceedings, it might be expected that a person the subject of a white-collar crime investigation or prosecution would not often have cause to seek to invoke legal professional privilege. However, a number of statutory

¹⁵⁶ See discussion at part 4.5 of Ch 4. For comprehensive discussions of this well established common law principle, see: T O'Malley, *The Criminal Process* (Thomson Roundhall 2009), Ch 18; L Heffernan with Ú Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury 2014), Ch 11; D McGrath with E Egan, *Evidence* (2nd edn, Thomson Roundhall 2014) Ch 12.

¹⁵⁷ Section 20 of the Criminal Justice Act 1984 is an established exception to this general approach in requiring defendants to provide notice of intention to call alibi evidence at trial so as to give the prosecution a reasonable opportunity to disprove the alibi. A number of more recent statutory provisions have increased the number of disclosure obligations that fall on the defence in criminal law proceedings generally. Section 3(1) of the Offences Against the State (Amendment) Act 1998 requires the defence to obtain leave to call any other person to give evidence on behalf of an accused in a prosecution for membership of an unlawful organisation. Section 19 of the Criminal Law (Insanity) Act 2006 requires that the defence put the prosecution on notice of any intention to call evidence in relation to the defendant's mental condition. Section 33 of the Criminal Procedure Act 2010 amends the Criminal Justice (Evidence) Act 1924 and requires the defence to notify the prosecution of an intention to call certain character evidence. Section 34 of the Criminal Procedure Act 2010 requires that an accused must notify the prosecution of the name of any expert witness that he proposes to call at trial.

¹⁵⁸ The principle is endorsed in ECtHR jurisprudence such as *Rowe and Davis v UK* (2000) 30 EHRR 1 and *Fitt v UK* (2000) 30 EHRR 480 and is referred to with approval in the judgment of Hardiman J in *DPP v DO'S* [2006] IESC 12, [2006] 3 IR 57, 66. See also M Wasek-Wiaderek, *The Principle of Equality of Arms in Criminal Procedure Under Article 6 of the European Convention on Human Rights and its Functions in Criminal Procedure of Selected European Countries* (Leuven University Press 2000).

provisions that give powers to investigators and prosecutors to demand information and the production of documents and other material mean that third parties, witnesses, suspects and defendants in a white-collar crime context increasingly have occasion to seek to invoke legal professional privilege. For example, section 15 of the Criminal Justice Act 2011 creates disclosure obligations for both suspects and potential witnesses in the specific context of white-collar crime proceedings.¹⁵⁹ The 2011 Act also makes provision for the determination of claims of legal professional privilege made in relation to material that has been made the subject of disclosure orders under the Act.¹⁶⁰ Section 15 of the 2011 Act constitutes a significant inroad into the general principle that it is for the prosecution to assemble its own case and Mulcahy argues that the introduction of a fresh discovery obligation by the 2011 Act may 'undermine the argument which underpins the rationale against the availability of discovery in criminal cases'.¹⁶¹

Legal professional privilege also arises in a white-collar crime context as an aspect of the operation of powers of investigation afforded to the ODCE as part of its function as an enforcer of company law provisions in this jurisdiction. The Companies Act 2014 grants powers to the ODCE to demand the production of material or seek court orders in this regard;¹⁶² the 2014 Act also makes provision for the resolution of disputes over claims of legal professional privilege that are made in relation to such material.¹⁶³

It is proposed to begin this part of the chapter with a consideration of the two recognised sub-divisions of legal professional privilege, namely legal advice privilege and litigation privilege. This will be followed by appraisal of two issues that arise in the context of criminal proceedings that may preclude the operation of legal professional privilege, specifically waiver and the exception to the privilege that arises in cases of crime and fraud. Finally, statutory provisions that govern the operation of legal professional privilege in a white-collar crime setting will be assessed.

¹⁵⁹ Criminal Justice Act 2011, s 15. Section 15 is considered in detail in part 4.4 of Ch 4.

¹⁶⁰ Criminal Justice Act 2011, s 16.

¹⁶¹ M Mulcahy, 'The Criminal Justice Act 2011, "Criminal Discovery and *Égalité des Armes*" (2012) (1) Bar Review 21, 24.

¹⁶² Companies Act 2014, ss 778-794. These provisions constitute the most recent iteration of powers that were originally embodied in ss 19 - 21 of the Companies Act 1990, and which have been available to the ODCE since its establishment in 2001.

¹⁶³ Companies Act 2014, s 795.

3.2 Legal Advice Privilege

Legal professional privilege dates back to the sixteenth century but its parameters only became established in the nineteenth century when the relationship between the privilege and principles of discovery were settled and relevant common law and chancery judgments were reconciled.¹⁶⁴ By virtue of a gradual expansion of legal professional privilege over the years, the privilege is now generally thought to be comprised of two separate strands, namely 'legal advice privilege' and 'litigation privilege'.¹⁶⁵ While the exact division of the two sub-divisions is blurred in places, the approximate distinction between the two strands of the privilege is brought out in the following passage from the judgment of Mellish LJ in *Anderson v Bank of British Columbia*:

First, the privilege which protects a man from producing confidential communications made between him and his solicitor [*legal advice privilege*]... [and], secondly, the privilege which entitles him to refuse to communicate evidence which he has obtained for the purpose of litigation [*litigation privilege*].¹⁶⁶ [emphasis added]

The first form of legal professional privilege that falls to be considered is legal advice privilege.¹⁶⁷ This sub-category of the privilege protects confidential communications passing between a client and their lawyer in the context of a professional legal relationship where the communications concern the giving of legal advice. In *Three Rivers District Council v Governor and Company of the Bank of England (No 6)*, the House of Lords considered this form of the privilege at some length and held that a person seeking to invoke the privilege must show that in issue is a communication that was sent in confidence

¹⁶⁴ For discussion of the history and development of the privilege, see the judgment of Lord Neuberger in *R (Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1, [2013] 2 AC 185. For consideration of the rationale and policy behind legal professional privilege, see D McGrath with E Egan McGrath, *Evidence* (2nd edn, Thomson Roundhall 2014) [10-13]-[10-27], [10-55]-[10-62].

¹⁶⁵ See L Heffernan, *Legal Professional Privilege* (Bloomsbury Professional 2011), Ch 1; D McGrath with E Egan McGrath, *Evidence* (2nd edn, Thomson Roundhall 2014) [10-04]-[10-11].

¹⁶⁶ (1876) 2 ChD 644 (CA) 649. These two sub-divisions of the privilege have been recognised in this jurisdiction: *Ahern v Mahon* [2008] IEHC 119, [2008] 4 IR 704, 719; *Markey v Minister for Justice and Law Reform* [2011] IEHC 39, [2012] 1 IR 62, 77; *University College Cork, National University of Ireland v Electricity Supply Board* [2014] IEHC 135 [26].

¹⁶⁷ See L Heffernan, *Legal Professional Privilege* (Bloomsbury Professional 2011), Ch 2; D McGrath with E Egan McGrath, *Evidence* (2nd edn, Thomson Roundhall 2014) [10-12]-[10-53].

between a lawyer and their client in the course of a professional legal relationship and that the purpose of the communication was the giving of legal advice.¹⁶⁸

In order to succeed with an assertion of privilege, the first matter that must be established is that there was a communication. The concept of a communication includes all information which passes between the lawyer and client for the purpose of giving, receiving or formulating legal advice.¹⁶⁹ It follows that the notion of a communication does not extend to communications between either the lawyer or client and third parties, even where such communications concern matters in relation to which the client has sought legal advice.¹⁷⁰ In a similar vein, pre-existing documents created for a purpose other than to receive legal advice can never be cloaked by the privilege, even where they are then given to a lawyer for the later purpose of obtaining legal advice.¹⁷¹ In *Tromso Sparebank v Beirne*, Costello J stated the following in excluding from the definition of 'communication' any document, including copies of documents, created for some other purpose prior to the client seeking legal advice:

It is well established that this privilege extends to documents which come into existence after litigation is commenced, either for the purpose of obtaining or giving legal advice... But I cannot see that the protection of the interests of a litigant requires the privilege to be extended to copies of documents which came into existence prior to the contemplation of litigation, documents which are themselves not privileged and which the other side could probably inspect as a result of a third party discovery order and which they could have produced at the trial pursuant to a *subpoena duces tecum*.¹⁷²

The same approach was adopted in *Woori Bank & Hanvit LSP Finance Ltd v KDB Ireland Ltd*

¹⁶⁸ [2005] 1 AC 610 (HL) 646-647. This approach was followed by the UK Supreme Court in *R (Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1, [2013] 2 AC 185, 215.

¹⁶⁹ *Ochre Ridge Ltd v Cork Bonded Warehouses Ltd* [2004] IEHC 293; *Prendergast v McLoughlin* [2008] IEHC 296, [2010] 3 IR 445.

¹⁷⁰ *Wheeler v Le Marchant* (1881) 17 ChD 675 (CA); *Kerry County Council v Liverpool Salvage Association* [1905] 2 IR 38 (King's Bench Division, Ireland).

¹⁷¹ *Pearce Foster* (1885) 15 QBD 114, 118; *Graham v Bogle* [1924] 1 IR 68 (Ch Div NI) 70.

¹⁷² [1989] ILRM 257 (HC) 261. This case was followed in *Ochre Ridge Ltd v Cork Bonded Warehouses Ltd* [2004] IEHC 293 and in *Prendergast v McLoughlin* [2008] IEHC 296, [2010] 3 IR 445.

in the context of records of communications, albeit in the context of litigation privilege rather than legal advice privilege.¹⁷³ Finlay Geoghegan J held in that case that the privilege did not apply to transcripts of non-confidential telephone conversations between employees or agents of the plaintiff and third parties: a transcript does not amount to an independent communication for the purposes of privilege and is protected only in so far as the communication it records is itself privileged.¹⁷⁴

A second condition that must be satisfied in order to invoke legal advice privilege is that the communication passed was intended to pass in confidence.¹⁷⁵ In assessing this matter, the circumstances in which the communication was made will be considered, including any measures taken to maintain the confidentiality of the communication.¹⁷⁶ The presence of a third party may deprive the communication of the necessary confidentiality, although this is not necessarily the case if a third party's presence is required to protect the client's interests.¹⁷⁷

A further criterion that must be satisfied in order to invoke legal advice privilege is that the communication owes its creation to the professional legal relationship. In other words, to qualify as a communication a document must have been prepared by a client or lawyer in the context of giving or receiving legal advice. Case law establishes that practising solicitors and barristers come within the definition of 'lawyer', as do in-house legal advisers and foreign lawyers.¹⁷⁸ The UK Supreme Court has recently confirmed the principle that legal advice privilege only applies to communications between a client and a member of the legal profession. In *R (Prudential plc) v Special Commissioner of Income Tax*, it was held that legal advice privilege could not extend to legal advice given by accountants in relation to a tax avoidance scheme, even though they were suitably qualified to give such advice.¹⁷⁹ This ruling has resonance in a white-collar crime context and could have a bearing, for example, on the capacity of a person who is the subject of a regulatory investigation by the ODCE to

¹⁷³ [2005] IEHC 451.

¹⁷⁴ [2005] IEHC 451.

¹⁷⁵ *Smurfit Paribas Bank Ltd v AAB Export Finance Ltd* [1990] 1 IR 469 (HC) 473; *Woori Bank & Hanvit LSP Finance Ltd v KDB Ireland Ltd* [2005] IEHC 451 [24].

¹⁷⁶ *Hansfield Developments v Irish Asphalt Ltd* [2009] IEHC 420.

¹⁷⁷ *Hansfield Developments v Irish Asphalt Ltd* [2009] IEHC 420.

¹⁷⁸ *R (Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1, [2013] 2 AC 185.

¹⁷⁹ [2013] UKSC 1, [2013] 2 AC 185 (Neuberger LJ) [52].

resist a demand for disclosure of material pursuant to the Companies Act 2014 on grounds of legal advice privilege.

The final part of the test in relation to legal advice privilege requires that a particular communication is for the purpose of giving or receiving legal advice. In *Smurfit Paribas Bank Ltd v AAB Export finance Ltd*, the Supreme Court drew a distinction between communications seeking legal advice and those seeking legal assistance. The former class of communications was found to be protected by privilege, while the latter was not.¹⁸⁰ Finlay CJ touched on the rationale for legal professional privilege in ruling on the issue:

The existence of a privilege or exemption from disclosure for communications made between a person and his lawyer clearly constitutes a potential restriction and diminution of the full disclosure both prior to and during the course of legal proceedings which in the interest of the common good is desirable for the purpose of ascertaining the truth and rendering justice. Such privilege should, therefore, in my view only be granted in instances which have been identified as securing an objective which in the public interest in the proper conduct of the administration of justice can be said to outweigh the disadvantage arising from the restriction of disclosure of all the facts.¹⁸¹

The court found that legal advice met the test in question but that legal assistance, which includes tasks that could not be said to contain any real relationship with the area of potential litigation, did not.¹⁸² The judgment in *Three Rivers District Council v Bank of England (No 5)* introduced a test whereby it should be considered whether the dominant purpose of the communication was the seeking or giving of legal advice.¹⁸³ This approach was adopted in this jurisdiction in *Ochre Ridge Ltd v Cork Bonded Warehouses Ltd*.¹⁸⁴ In *Prendergast v McLoughlin*, Clarke J followed the approach in *Ochre Ridge*, ruling in the context of documents provided to a solicitor to make a will that a document would have as

¹⁸⁰ [1990] 1 IR 469 (HC and SC).
¹⁸¹ [1990] 1 IR 469 (HC and SC) 477.
¹⁸² [1990] 1 IR 469 (HC and SC) 478.
¹⁸³ [2003] EWCA Civ 474, [2003] QB 1556.
¹⁸⁴ [2004] IEHC 293.

its dominant purpose the seeking of legal advice where the client expressly sought legal advice in this regard, or where it was implicit in the nature of the instructions tendered that the solicitor was under a duty to give legal advice, arising out of the circumstances concerned, rather than simply perform the task of converting the client's instructions into a properly drafted will.¹⁸⁵ Given the frequent interactions between lawyers and clients in a corporate setting, and the nuanced approach of Clarke J in *Prendergast* to the distinction between legal advice and legal assistance, there is plenty of potential for disputes in a white-collar crime context in relation to this aspect of the test for legal advice privilege.

3.3 Litigation Privilege

The other strand of legal professional privilege is litigation privilege.¹⁸⁶ This sub-category of legal professional privilege holds that communications between either a client or his lawyer and third parties are privileged where, at the time of communication, they are made in preparation for litigation which is pending, or which is reasonably apprehended.¹⁸⁷ Originally the privilege was understood to provide protection in relation to communications with third parties only but it has grown to encompass a lawyer's 'work product', meaning any material generated by a lawyer in relation to actual or apprehended litigation.¹⁸⁸

In common with legal advice privilege, it is necessary to demonstrate the confidentiality of communications if litigation privilege is to be invoked successfully.¹⁸⁹ In light of its potentially broad application, the common law imposes two restrictions on the operation of

¹⁸⁵ [2008] IEHC 296, [2010] 3 IR 445, 450.

¹⁸⁶ See L. Heffernan, *Legal Professional Privilege* (Bloomsbury Professional 2011), Ch 3; D. McGrath with E. Egan McGrath, *Evidence* (2nd edn, Thomson Roundhall 2014) [10-54]-[10-105].

¹⁸⁷ *Silver Hill Duckling Ltd v Minister for Agriculture* [1987] IR 289 (HC); *PJ Carrigan Ltd v Norwich Union Fire Society Ltd* [1987] IR 618 (HC); *Gallagher v Stanley* [1998] 2 IR 267 (SC); *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474, [2003] QB 1556; *Ahern v Mahon* [2008] IEHC 119, [2008] 4 IR 704, 722; *Hansfield Developments v Irish Asphalt Ltd* [2009] IEHC 420, [29]; *Markey v Minister for Justice and Law Reform* [2011] IEHC 39, [2012] 1 IR 62, 77.

¹⁸⁸ The term 'work product' was used in the US Supreme Court case of *Hickman v Taylor* (1947) 329 US 495, 516, where Justice Jackson stated, 'Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary'. The principle that litigation privilege extends to 'work product' was confirmed in this jurisdiction in *Hansfield Developments v Irish Asphalt Ltd* [2009] IEHC 420, [89].

¹⁸⁹ *Woori Bank & Hanvit LSP Finance Ltd v KDB Ireland Ltd* [2005] IEHC 451, [24]; *Shell E & P Ireland Ltd v McGrath (No 2)* [2006] IEHC 409, [2007] 2 IR 574, 585.

the privilege, both of which relate to the connection between the litigation and the item of evidence over which privilege is asserted. The first restriction concerns the proximity of litigation. It must be shown that legal proceedings were reasonably apprehended at the time the evidence was created or procured.¹⁹⁰ Different constructions have been used to describe this part of the test: in *Markey v Minister for Justice*, Kearns P held that it would suffice if proceedings are 'contemplated' or 'pending',¹⁹¹ while in *University College Cork, National University of Ireland v The Electricity Supply Board*, Finlay Geoghegan J held that litigation must be 'apprehended or threatened'.¹⁹²

The second restriction on the operation of litigation privilege concerns the motivation behind the decision to create or procure the material over which privilege is sought. In this regard, a 'dominant purpose' test was adopted by the House of Lords in *Waugh v British Railway Board*.¹⁹³ The husband of the plaintiff in that case had been killed in an accident at work. The defendant drew up an accident report two days after the accident and the plaintiff sought discovery of the report. Lord Wilberforce stated the following in relation to the report:

It appears to me that unless the purpose of the submission to the legal adviser in view of litigation is at least the dominant purpose for which the relevant document was prepared, the reasons which require privilege to be extended to it cannot apply. On the other hand to hold that the purpose... must be the sole purpose would, apart from difficulties of proof... be too strict a requirement, and would confine the privilege too narrowly.¹⁹⁴

The House of Lords concluded that, in relation to the case before it, litigation was not the dominant purpose behind the creation of the report. Another purpose of the report that was at least as important was to inform the defendant of the cause of the accident so that measures could be taken to avoid a recurrence. Thus, the report was held not to be covered

¹⁹⁰ *Silver Hill Duckling Ltd v Minister for Agriculture* [1987] IR 289 (HC); *Rhatigan v Eagle Star Life Assurance Company of Ireland Ltd* [2013] IEHC 139.

¹⁹¹ *Markey v Minister for Justice and Law Reform* [2011] IEHC 39, [2012] 1 IR 62, 77.

¹⁹² [2014] IEHC 135, [4].

¹⁹³ [1980] AC 521 (HL).

¹⁹⁴ *Waugh v British Railway Board* [1980] AC 521 (HL) 81.

by litigation privilege.

In *Gallagher v Stanley*, the Supreme Court had to decide whether statements taken from nurses in the aftermath of a difficult birth were taken so that the hospital could account for the sequence of events or in contemplation of litigation.¹⁹⁵ O'Flaherty J applied the *Waugh* 'dominant purpose' test, which had been adopted in this jurisdiction in *Silver Hill Duckling Ltd v Minister for Agriculture*,¹⁹⁶ in finding that litigation privilege did not apply in the case before the Court. In *Hansfield Developments v Irish Asphalt Ltd*, McGovern J affirmed the existence of the 'dominant purpose' test in this jurisdiction.¹⁹⁷ In *University College Cork, National University of Ireland v The Electricity Supply Board*, Finlay Geoghegan J held that the onus of establishing, as a matter of probability, that the dominant purpose for the creation of the document was apprehended or threatened litigation is borne by the party asserting the privilege.¹⁹⁸ It was affirmed in the same case that the dominant purpose test is an objective test to be applied by the court on a consideration of the entirety of the evidence and, as such, does not depend solely on the motivation of the person who caused the document to be created.¹⁹⁹

3.4 Waiver of Legal Professional Privilege

An issue of potential significance in a white-collar crime context is waiver of legal professional privilege.²⁰⁰ A person who is entitled to assert legal professional privilege may decide to waive the privilege or a court may determine that waiver has occurred if an opposing party can demonstrate that this is the case. In *Guinness Peat Properties Ltd v Fitzroy Robinson* it was noted that waiver may be deliberate or inadvertent, express or implied and may occur in whole or in part.²⁰¹ In that case, the plaintiff building directors sued the

¹⁹⁵ [1998] 2 IR 267 (SC).

¹⁹⁶ [1987] IR 289 (HC).

¹⁹⁷ [2009] IEHC 420 [8].

¹⁹⁸ [2014] IEHC 135.

¹⁹⁹ *University College Cork, National University of Ireland v The Electricity Supply Board* [2014] IEHC 135 [4]. This position had earlier been adopted by Finlay Geoghegan J in *Woori Bank & Hanvit LSP Finance Ltd v KDB Ireland Ltd* [2005] IEHC 451, [6].

²⁰⁰ See generally L Heffernan, *Legal Professional Privilege* (Bloomsbury Professional 2011) Ch 6; D McGrath with E Egan McGrath, *Evidence* (2nd edn, Thomson Roundhall 2014) [10-177]-[10-214]; L Heffernan with Ú Ní Raifeartaigh, *Evidence in Criminal Trials* (Bloomsbury Professional 2014) [12.32]-[12.53].

²⁰¹ [1987] 1 WLR 1027 (CA).

defendant architects for breach of contract and negligence. In the course of the discovery procedure, the defendants inadvertently disclosed a letter that had been sent to their insurers before the proceedings had commenced. They had intended to claim privilege over the letter. The Court of Appeal held that inadvertent disclosure of a letter will not lead to a finding of waiver if the list of discoverable documents is amended before they are inspected by the other side. However, it will be generally too late to deny waiver once inspection of the inadvertent disclosure has occurred, unless the other party has procured inspection of the item by fraud or, on inspection, realises that this has only been possible because of an obvious mistake.²⁰² Further case law establishes that the privilege holder has the burden of establishing on the balance of probabilities that the mistake would have been obvious to a reasonable solicitor.²⁰³

Inadvertent disclosure arose as an issue in *Shell E & P Ireland Ltd v McGrath (No 2)*.²⁰⁴ The plaintiff's solicitor had inadvertently included an attendance docket in an exhibit to an affidavit grounding an application for the attachment and committal of the five defendants in the case. *The Irish Times* newspaper sought comment from the plaintiff in relation to the contents of the docket and it was at that point that the disclosure came to light. Some of the contents of the docket were reproduced in the *The Irish Times*. Furthermore, the defendants sought to rely on the docket in order to argue moral turpitude on the part of the plaintiff in relation to the proceedings. Taking note of the decision in *Guinness Peat Properties Ltd*, the High Court took the view that it must have been apparent to the defendants' solicitor that the attendance docket was privileged and had been disclosed by reason of mistake.²⁰⁵ On the question of the suitability of an injunction restraining a party from making use of a privileged document where the document has been circulated and confidentiality lost, the Court held that the publication of excerpts of the docket in the newspaper did not mean the entire document was in the public domain. Furthermore, it was noted that the plaintiff had sought to assert privilege as soon as the inadvertent disclosure came to light. In all the circumstances of the case, the Court saw fit to adopt a protective approach to legal professional privilege where there had been inadvertent

²⁰² *Guinness Peat Properties Ltd v Fitzroy Robinson* [1987] 1 WLR 1027 (Slade LJ) 1046.

²⁰³ *IBM Corporation v Phoenix International* [1995] 1 All ER 413 (CA).

²⁰⁴ [2006] IEHC 409, [2007] 2 IR 574.

²⁰⁵ [2006] IEHC 409, [2007] 2 IR 574 (Smyth J) 585.

disclosure and no abuse of process on the part of the plaintiff.²⁰⁶

The question of whether waiver of privilege may occur if material is disclosed to a third party arose for consideration in *Fyffes plc v DCC plc*.²⁰⁷ The case involved an action for damages against a number of respondents for alleged insider trading in relation to the appellant's shares. Separately, the Irish Stock Exchange launched an investigation into the allegations of insider dealing and the matter was referred to the DPP. Two of the respondents in the civil proceedings furnished expert reports to the Stock Exchange in an effort to demonstrate that the information that was alleged to have been at the heart of the insider dealing was not price sensitive and that, as such, a criminal prosecution was not warranted. It was argued on behalf of the appellant that the disclosure of the expert reports to a third party meant that any privilege over the reports had been waived and that the only circumstances in which this would not occur would be if disclosure is made to a public body and in pursuit of a public duty. Relying on the Australian case of *Goldberg v Ng and Others*,²⁰⁸ the appellant also argued that the question of whether privilege had been waived should be determined by a principle of fairness, whereby a claim of privilege should be disallowed if a party has made voluntary disclosure of privileged material in circumstances where it would be unfair to deprive the opposing party in the litigation of equal access to it.

Declining to adopt the principle in *Goldberg*, Fennelly J expressed the view that the established law went 'no further than the proposition that a party who seeks to deploy his privileged documents by partially disclosing them or summarising their effect so as to gain an advantage over his opponent in the action in which they are privileged, runs a serious risk of losing privilege'.²⁰⁹ As regards the case before the Court, Fennelly J held that there was 'no relevant nexus' between the disclosures to the Stock Exchange and the civil proceedings.²¹⁰ While the disclosure of the expert reports might have been designed to gain an advantage for the respondents, 'it was not an advantage which placed or would

²⁰⁶ [2006] IEHC 409, [2007] 2 IR 574 (Smyth J) 589.

²⁰⁷ *Fyffes plc v DCC plc* [2005] IESC 3, [2005] 1 IR 59.

²⁰⁸ [1993] 33 NSWLR 301.

²⁰⁹ *Fyffes plc v DCC plc* [2005] IESC 3, [2005] 1 IR 59, 72.

²¹⁰ *Fyffes plc v DCC plc* [2005] IESC 3, [2005] 1 IR 59, 72.

have placed the appellant at any corresponding or related disadvantage in the civil trial'.²¹¹ For these reasons, the Supreme Court held that privilege had not been waived in relation to the expert reports.

The question of waiver of privilege resonates with some of the themes of this thesis. It has been noted, for example, that white-collar crime often involves multi-agency and multi-pronged investigations, such as in the case of the investigations into the aftermath of the collapse of Anglo Irish Bank plc. It is not hard to imagine a situation where, for example, a corporation discloses information to the ODCE in one context and another state agency, such as the GBFI, argues that legal professional privilege over such material is waived because of disclosure to a third party. Relevant Irish case law affords a high degree of protection for legal professional privilege in cases of inadvertent disclosure and disclosure to a third party. Nevertheless, it is notable that existing precedent has emerged in the context of civil proceedings and it is not clear whether the same approach to legal professional privilege would obtain in the context of criminal proceedings.

3.5 The Crime and Fraud Exception to Legal Professional Privilege

Legal professional privilege has the value of protecting the confidentiality of the relationship between lawyer and client such that a client feels assured that they can make a 'clean breast'²¹² of matters in any dealings with a lawyer. However, it has also been acknowledged that the upholding of the privilege 'constitutes a potential restriction and diminution of the full disclosure both prior to and during the course of legal proceedings which in the interests of the common good is desirable for the purpose of ascertaining the truth and rendering justice'.²¹³ Therefore, the common law has made provision for exceptions to the privilege in appropriate circumstances.

An exception to legal professional privilege that has relevance to the instant research applies in relation to communications that are in furtherance of conduct which is criminal

²¹¹ *Fyffes plc v DCC plc* [2005] IESC 3, [2005] 1 IR 59, 73.

²¹² This phrase was used by Jessel MR in *Anderson v Bank of British Columbia* (1876) 2 ChD 644 (CA) 38 in the course of offering a rationale for the privilege based on the desirability of preserving the inviolability of the relationship between client and lawyer.

²¹³ *Smurfit Paribas Bank Ltd v AAB Export Finance Ltd* [1990] 1 IR 469 (HC and SC) (Finlay CJ) 477.

or fraudulent.²¹⁴ A rationale for the exception was offered in *R v Cox and Railton*, where Stephen LJ stated:

The reason on which the rule is said to rest cannot include the case of communications criminal in themselves or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice and to those of the administration of justice.²¹⁵

In that case, there was a prosecution for conspiracy to defraud a judgment creditor. The defendants had consulted a solicitor with a view to obtaining advice as to how they might carry out the fraud in question. However, the nature of the query raised by the defendants was not such as to alert the solicitor to the fact that any advice imparted by the solicitor might be used to perpetrate a fraud. In other words, the solicitor made an unwitting contribution to the defendants' efforts to carry out the fraud. The Court for Crown Cases Reserved upheld the right of the prosecution to call the solicitor to testify at the defendants' trial about his communications with the defendant. The Court held that it was of no consequence that the solicitor was ignorant of the defendants' plans; it was the defendants' intention to perpetrate a fraud that caused the application of an exception to legal professional privilege.²¹⁶

In *Williams v Quebrada Railway, Land and Copper Co*, it was held that the exception extended to fraudulent conduct falling short of criminal conduct.²¹⁷ In that case an allegation was made that a charge had been entered into by a company with the intention of defeating the holders of floating debentures. Kekewich J held that 'where there is anything of an underhand nature or approaching to fraud, especially in commercial matters where there should be the veriest good faith, the whole transaction should be ripped up and

²¹⁴ *Annesley v Earl of Anglesea* (1743) 17 How St Tr 1139 is one of the earliest cases to recognise the exception. Its existence has been affirmed in this jurisdiction in cases including *Murphy v Kirwan* [1993] 3 IR 501 (SC) and *Fyffes plc v DCC plc* [2005] IESC 3, [2005] 1 IR 59. For commentary on the exception, see AL Newbold, 'The Crime-Fraud Exception to Legal Professional Privilege' (1990) 53 MLR 472.

²¹⁵ (1884) 14 QBD 153.

²¹⁶ *R v Cox and Railton* (1884) 14 QBD 153. See also *Kuwait Airways Corporation v Iraqi Airways Company* (No 6) [2005] 1 WLR 2734 (CA) 2739.

²¹⁷ [1895] 2 Ch 751.

disclosed in all its nakedness to the light of the Court'.²¹⁸

The pertinence of the crime and fraud exception to legal professional privilege in a white-collar crime context is obvious. It is possible to envisage situations where clients seek advice from lawyers with a view to giving effect to criminal intentions. In other situations lawyers may become so entangled in transactions that become the subject of investigation that the conduct of the lawyers themselves also comes under scrutiny. In either situation, the common law holds that legal professional privilege may not be invoked.

3.6 Legal Professional Privilege in a White-Collar Crime Context

Section 15 of the Criminal Justice Act 2011 was considered in some detail at part 4.4 of Chapter 4. It was noted that the section has the effect of creating a form of additional power of investigation for investigators by requiring persons to provide documents or information that may assist in the investigation of relevant offences.²¹⁹ In creating an obligation of disclosure for persons who may or may not be suspects in the investigation of a white-collar crime, section 15 brings into play the concept of legal professional privilege and the extent to which a person against whom an order is made under section 15 may invoke the privilege.

Section 16 of the 2011 Act covers the issue of legal professional privilege and makes provision for determining legal professional privilege issues which arise in relation to District Court orders under section 15 requiring disclosure of documents to the gardaí.²²⁰

²¹⁸ [1895] 2 Ch 751, 755.

²¹⁹ Section 3 of the Criminal Justice 2011 provides that 'relevant offences' are arrestable offences (offences carrying a maximum penalty of five years or more) detailed in the substantial Schedule 1 to the Act. A wide range of relevant offences is set out in Schedule 1 to the Act, including offences relating to banking, investment of funds and other financial activities, company law offences, money laundering and terrorist offences, theft and fraud offences (including many frequently prosecuted offences detailed in the Criminal Justice (Theft & Fraud Offences) Act 2001), bribery and corruption offences, consumer protection offences and criminal damage to property offences. As discussed in Ch 2, the 'relevant offences' in the Criminal Justice Act 2011, together with the statutory basis for adding to the list of relevant offences, forms the basis for the understanding of the term 'white-collar crime' for the purposes of this thesis.

²²⁰ Section 795 of the Companies Act 2014 sets out an analogous scheme for the treatment of legal professional privilege issues arising in the course of investigations by the ODCE. This scheme replaces a statutory framework for dealing with legal professional privilege issues that was introduced by sections 5 and 6 of the Companies (Amendment) Act in 2009 in relation to powers formerly exercised by the ODCE pursuant to section 20 and 23 of the Companies Act 1990.

Insight into the thinking behind section 16 is found in the then Minister for Justice and Equality's contribution to the Second Stage Dáil debate on the Bill leading to the 2011 Act, where he stated:

Access to documents by the Garda Síochána can be severely delayed by claims of legal privilege which give rise to applications to the High Court. Section 16 contains provisions aimed at reducing such delays by making provision for determining legal professional privilege issues which arise in District Court orders under section 15 requiring the disclosure of documents to the Garda.²²¹

Section 16(1) defines 'privileged legal material' as a document which, in the opinion of the court concerned, a person is entitled to refuse to produce or to give access to it on the grounds of legal professional privilege. It is an open question as to whether the express provision for legal professional privilege impliedly rules out assertions of privilege over information on other grounds of privilege, at least at the investigatory stage if not the trial stage. Inasmuch as section 16(1) leaves it to the court to decide whether legal professional privilege applies in a given case, it is arguable that the legislature did not wish to alter in any way the common law position on legal professional privilege. Thus, District Court judges would be expected to apply existing common law principles in resolving disputes where legal professional privilege is claimed over documentation demanded pursuant to section 15 of the 2011 Act.

Under sections 16(2) and section 16(3), if a person refuses to disclose a document or give access to it pursuant to an order under section 15 on the grounds that it is privileged legal material, a garda, or the person concerned may apply to a District Court judge for a determination as to whether the document is privileged legal material. Section 16(4) imposes an obligation on a person who refuses to produce a document or give access to it on the grounds that the document is privileged legal material to preserve the document and keep it in a safe and secure place pending the final determination of an application under subsection (2) or (3). Section 16(5) allows a District Court judge, pending the final determination of an application under subsection (2) or (3), to give interim or interlocutory

²²¹ Dáil Deb 18 May 2011, vol 732 col 685.

directions, including, where a case involves a substantial volume of documents, the appointment of an experienced, independent person with legal qualifications to examine the documents and prepare a report for the judge with a view to assisting or facilitating the judge's determination as to whether the documents are privileged legal material.

Section 16(6) allows the District Court judge to direct that an application under subsection (2), (3) or (5) be heard otherwise than in public and section 16(7) sets out the notice requirements for applications under this section. The next two subsections of section 16 provide further evidence of a desire on the part of the legislature to introduce processes that expedite the investigation of white-collar crime. Section 16(8) provides that an appeal against the determination of a District Court judge under this section shall lie to the Circuit Court. No further appeal shall lie from an order of the Circuit Court made on such an appeal. Section 16(9) provides that rules of court may make provision for the expeditious hearing of applications to a District Court judge, and any appeals against the determinations of such a judge, under this section. These provisions reveal an eagerness to reduce the amount of time that investigations remain delayed by court applications. Section 16(10) enables the Minister to make regulations for the purposes of this section relating to the awarding, and payment, of costs to or by any party pursuant to an application or an appeal under this section.

In a 2010 response to the Department of Justice and Equality's discussion document on organised and white-collar crime,²²² the ODCE referred to the then on-going investigation into the collapse of Anglo Irish Bank plc in observing that legal professional privilege 'has the potential to greatly complicate and prolong the investigation of a crime'.²²³ Having acknowledged the advances made by sections 5 and 6 of the Companies (Amendment) Act 2009 in creating a statutory framework for dealing with legal professional privilege issues, the ODCE pointed out that a further difficulty remained in relation to claims of legal professional privilege over digitally stored material:

[T]he way in which electronic data is stored digitally appears to militate against the

²²² Department of Justice and Law Reform, *White Paper on Crime, Discussion Document No. 3, October 2010, Organised and White Collar Crime* (October 2010).
²²³ Office of the Director of Corporate Enforcement, *Submission on White Collar Crime* (30 November 2010) 18.

possibility that agreed LPP material can be removed from a seized electronic disc in a manner which does not compromise the evidential integrity of the remaining data – in the same way that it would be possible to remove individual paper files from a filing cabinet. Hence the management of electronic evidence, some of which is LPP and most of which is not, continues to pose challenges – and the possible need for further changes in the law.²²⁴

O'More Ferrall and Ní Raifeartaigh have also noted that, although there have been some statutory developments concerning frameworks for the determination of legal professional privilege issues, further guidance is required for authorities as regards how to deal with electronic data seized, which contains, or may contain, privileged material.²²⁵ They have suggested that, in planning further statutory intervention, court rules and judicial guidelines for this area, useful assistance could be drawn from law and practice in England and Wales, where the Attorney General has developed specific guidelines on digitally stored material including guidelines that address situations where an investigator has reasonable grounds for believing that digital material may contain material subject to legal professional privilege.²²⁶

A final point of relevance is that the existing statutory frameworks for dealing with legal professional privilege operate on a sectoral rather than a general basis. For example, section 16 of the Criminal Justice Act 2011 applies only in the context of investigations by An Garda Síochána pursuant to that Act. Similarly, section 795 of the Companies Act 2014 only has application to investigations brought by the ODCE under that legislation. The ODCE has pointed out that other State agencies operating in the white-collar crime sphere work under statutory codes that do not have frameworks for dealing with legal professional privilege that are as developed as the framework created, for example, by sections 5 and 6 of the Companies (Amendment) Act 2009 and have submitted that statutory frameworks of

²²⁴ Office of the Director of Corporate Enforcement, *Submission on White Collar Crime* (30 November 2010) 18.

²²⁵ S More O'Ferrall and Ú Ní Raifeartaigh, 'Electronic Evidence Gathering and Use in Criminal Proceedings' (Irish Rule of Law Conference, Dublin, November 2014) 11.

²²⁶ S More O'Ferrall and Ú Ní Raifeartaigh, 'Electronic Evidence Gathering and Use in Criminal Proceedings' (Irish Rule of Law Conference, Dublin, November 2014) 12, referring to Attorney General's Office, *Attorney General's Guidelines on Disclosure: Supplementary Guidelines on Digitally Stored Material* (2011) [23]-[34].

general application should be introduced.²²⁷

3.7 Conclusions in Relation to Legal Professional Privilege

Legal professional privilege remains in an embryonic state in terms of its applicability to criminal proceedings in this jurisdiction. In the context of civil proceedings, the courts have shown necessary ingenuity to develop principles and doctrines concerning the application of the privilege. As invocations of legal professional privilege are likely to arise more frequently in a white-collar crime context with the advent of provisions such as section 15 of the Criminal Justice Act 2011 and analogous powers in the Companies Act 2014, it remains to be seen how the common law develops further in the resolution of claims of legal professional privilege made in accordance with the mechanisms described in section 15 of the 2011 Act and section 795 of the 2014 Act.

The aforementioned statutory frameworks for the determination of legal professional privilege claims constitute developments in the law that are positive for both the defence and the prosecution. However a weakness with the schemes is the fact that they do not deal comprehensively with the difficulties that arise where non-privileged digitally stored material is intermingled with material that is covered by legal professional privilege. A further deficiency with the legislative frameworks is that they operate on a sectoral, rather than general basis. It will be argued in the final chapter of this thesis that the current regime for dealing with legal professional privilege in a white-collar crime context operates positively in some respects but that the approach should be adjusted in certain respects as part of the argument for a dedicated approach to the investigation and prosecution of white-collar crime.

²²⁷ Office of the Director of Corporate Enforcement, *Submission on White Collar Crime* (30 November 2010) 19.

Chapter 6

Investigating and Prosecuting White-Collar Crime in Ireland: Findings and Recommendations

1 Introduction

The preceding chapters in this thesis have, by way of doctrinal analysis focusing on the governing primary sources of law, examined those areas that, in the author's view, bear most heavily on the investigation and prosecution of white-collar crime in this jurisdiction. Specific shortcomings have been identified and recommendations made that seek to address these inadequacies. The purpose of this chapter is to synthesise the findings and recommendations made in the previous chapters with a view to producing a coherent theoretical framework for future engagement with issues concerning the investigation and prosecution of white-collar crime in Ireland.

Broadly speaking, three approaches might be taken to the area under discussion. The first denies that white-collar crime should be designated any differently from other types of crime and holds that existing laws and rules concerning the investigation and prosecution of crime generally can deal adequately with white-collar crime. It is contended that such a viewpoint ignores clear distinctions between white-collar crime and other forms of crime. The second perspective acknowledges that white-collar crime gives rise to specific challenges but seeks to deal with these issues in an ad hoc and piecemeal manner that lacks an overarching purpose or sense of direction. As things stand, it would seem that this approach is the one that currently obtains in Ireland, the Criminal Justice Act 2011 being a good example of a legislative initiative that deals to some extent with issues associated with the investigation and prosecution of white-collar crime, yet falls short of amounting to a comprehensive treatment of the matters in question. This approach is preferable to an absence of any effort to make special provision for the investigation and prosecution of white-collar crime but its primary failings are two-fold: a failure to deal with some key issues touching on the investigation and prosecution of white-collar crime and a lack of a clear, coherent policy approach to the area. For these reasons, the stance adopted in this

thesis is that this approach falls short of an appropriate treatment of the matters under consideration.

The third angle gives white-collar crime a separate, albeit broad, designation to other forms of crime and houses powers associated with the investigation and prosecution of white-collar crime in a dedicated piece of primary legislation. For reasons that will be expanded upon in this chapter, it is this focused approach that is favoured in this thesis as best acknowledging the distinctions between white-collar crime and other forms of crime and providing the optimum basis for the operation of relevant powers.

As part of the process of synthesising the ideas produced in the course of this research, this chapter is divided into two parts. The first part is organised into four sections that lay out the arguments for a dedicated scheme concerning the investigation and prosecution of white-collar crime. The first section addresses the factors that have fed into the historical absence of a framework devoted to the particular issues associated with the investigation and prosecution of white-collar crime. The second section considers justifications and imperatives for a dedicated approach to the investigation and prosecution of white-collar crime in this jurisdiction. The third section makes the case that a specially tailored statute is the appropriate instrument for the housing of measures concerning the investigation and prosecution of white-collar crime. A fourth section submits that the scheme argued for in this thesis strikes an appropriate balance in terms of Packer's due process and crime control models of criminal theory.

In the second part of the chapter, the details of the statute contended for in the first part of the chapter are considered under five broad headings. The first section concerns issues relating to legal concepts and liability. The second section assesses findings associated with the investigation of white-collar crime. The third section concerns matters arising at the trial stage of white-collar crime prosecutions. The fourth section considers measures that address the impact of privileges on the investigation and prosecution of white-collar crime. A final section considers safeguards that should apply to suspects and defendants in a white-collar crime context in order to counterbalance some of the proposals that address the challenges faced by investigators and prosecutors of white-collar crime.

2 The Case for a Dedicated Approach

2.1 The Historical Lack of a Dedicated Approach to White-Collar Crime

The question arises as to why there has not, to date, been a more concerted and coherent effort to address issues concerning the investigation and prosecution of white-collar crime in this jurisdiction. A number of factors bear consideration in endeavouring to address this matter. A first point of relevance is Ireland's relatively new status as a country of wealth. It was only in the latter part of the twentieth century that we moved from a predominantly agrarian economic model to an economy more reliant on the industrial and tertiary sectors and, in circumstances where the instance of white-collar crime has a link to the economic development of a country, it did not register as a notable phenomenon in this jurisdiction until recent decades.¹ A second pertinent factor has been the traditional misconception that white-collar wrongdoing does not constitute crime as that word is commonly understood due to the generally non-violent manner of its commission and the frequent absence of observable victims.² The historical lack of notoriety around such crime resulted in a dearth of public disquiet with regard to the issue, which meant there was little agitation for legislators and law enforcement agencies to make it a priority. A related practical fact is that relatively few white-collar crime prosecutions have been launched here over the years.

Even leaving aside that there may, in the past, have been a lack of a societal and political pressure for a more concerted approach to tackling white-collar crime, the legislative approach to the creation of criminal law in this jurisdiction in the last few decades has also, arguably, been a factor in the lack of a dedicated approach to the investigation and prosecution of white-collar crime. Statutes that endeavour to collate measures concerning loose classifications of crime, such as the Offences Against the State Act 1939, were a feature of lawmaking here in the past. The Criminal Justice Act 1984 is another example of

¹ J McGrath, *Corporate and White-Collar Crime in Ireland: A New Architecture of Regulatory Enforcement* (Manchester University Press 2015) Ch 2. In remarks made at a lecture delivered as part of the Advanced Diploma in Corporate, Regulatory and White-Collar Crime course at The Honorable Society of King's Inns on 16 February 2012, Patrick Gageby SC, a barrister in criminal practice in Dublin since the mid-1970s noted, anecdotally, that it wasn't until the 1990s that white-collar crime drifted into the 'grubby halls' of more traditional prosecutions in Ireland to any appreciable degree.

² J Gobert and M Punch, *Rethinking Corporate Crime* (Butterworths 2003) 36.

a groundbreaking comprehensive statute that obviated the need for other legislation for a number of years. However, the typical approach of the legislature in recent decades has been marked by an omnibus approach to criminal legislation, whereby some measures of relevance to a particular class of crime are housed with unrelated criminal law provisions in statutes that lack coherence or any expressive message. Examples of such statutes include the Criminal Justice Act 2006 and the Criminal Justice Act 2007, which contain some measures that address so-called organised crime.³ In a white-collar crime context, the Criminal Justice Act 2011 is a similar statute, in that it contains some measures of relevance in a white-collar crime context but also clauses that are of application to the criminal justice process generally. There are indications of a return to a more focused and dedicated approach to legislating. For example, the Companies Act 2014 comprises a welcome effort to streamline statutory provisions in the area of company law, including company law offences that fall under the umbrella of white-collar crime. However, as things stand, we are without legislation that addresses the issues raised in this thesis in a comprehensive and focused fashion.

In considering the relatively limited activity on the part of the legislature in relation to the investigation and prosecution of white-collar crime, it must also be noted that there is often complexity and controversy associated with the laws, doctrines and rules of evidence that touch on the subject matter of the thesis. For example, the rule against hearsay is notoriously labyrinthine; there is longstanding confusion and uncertainty in relation to aspects of the law concerning the privilege against self-incrimination; and it is far from certain that any changes to the traditional model of jury trial in a white-collar crime context would pass constitutional muster. It is quite possible that the complexity and controversy associated with many pertinent issues has contributed to a more piecemeal approach on the part of the legislature that favours occasional implementation of more straightforward measures over a comprehensive treatment of the area that also incorporates provisions that address some of the more intricate and controversial issues.

³ L Campbell, *Organised Crime and the Law: A Comparative Analysis* (Hart Publishing 2013); L Campbell, 'The Criminal Justice Act 2007 - A Theoretical Perspective' (2007) 17(3) *Irish Criminal Law Journal* 8.

Some of the factors that have played into the historical failure to engage in a comprehensive treatment of the issues concerning the investigation and white-collar crime have been considered. However, modern day public and political attitudes to the issue of white-collar crime are quite different to those that existed in the past and there is, arguably, a greater impetus than ever before for the kind of approach advocated in this thesis. Arguably, the catalysts for the change in attitudes were the financial and economic crises of 2008, which led to much greater social awareness and disquiet about white-collar crime and the role it is perceived to have played in the crises that came to a head in that year. The greater interest amongst politicians in formulating criminal law responses to white-collar crime has, arguably, a clear link to the rise of the issue as a matter of public concern.⁴

There is a legitimate concern that topical criminal justice issues can lead to hasty political responses that have aversion of risk and the desire to protect the public at the core of their rationale, resulting in suboptimal law-making that neglects the significance of due process, the underuse of existing laws and the limitations of the law as primary means of dealing with crime.⁵ However, as long as there is awareness of these potential pitfalls, and it is contended that there is such cognisance in the formulation of the instant thesis, legislative efforts to address deficiencies in the law as currently constituted should be encouraged rather than decried.

A final point worth noting before concluding this consideration of the reasons behind the historical absence of a dedicated approach to the matters at the heart of this thesis is that there have been indications in recent times of streamlining and codifying trends in approaches to legislating in this jurisdiction. The Companies Act 2014 has already been mentioned. Another recent statute that adopts the kind of focused approach argued for in this thesis is the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014. Thus, the model proposed in this thesis is in step with the more organised and coherent approach to lawmaking that has been in evidence in recent times.

⁴ A White Paper on Crime process was commenced by the Department of Justice and Equality in 2009 and included white-collar crime in the subject matter of the third of four discussion documents. The Criminal Justice Act 2011 contains measures that address some of the issues arising in connection with the investigation and prosecution of white-collar crime.

⁵ L Campbell, *Organised Crime and the Law: A Comparative Analysis* (Hart Publishing 2013) 248. Campbell expressed such concerns in examining legislative responses to organised crime in the UK and Ireland.

2.2 Justifications for a Dedicated Approach to White-Collar Crime

The first feature of white-collar crime that, it is argued, justifies treating it differently to other classes of crime is its relative complexity. This intricacy stems from the furtive, clandestine manner in which white-collar crime is generally perpetrated compared to other forms of crime, and also the often convoluted and sophisticated methods employed in its commission. If and when such crime is detected, its investigation and prosecution tends to become infused with a commensurate level of complexity. In its submission to the White Paper on Crime Consultation Process conducted by the Department of Justice and Equality, the Office of the Director of Corporate Enforcement (ODCE) made reference to this feature of white-collar crime in an individual proposal concerning existing limitation periods for the investigation and prosecution of white-collar crime, which noted the following:

The ODCE submits that it is desirable that limitation periods for the investigation and prosecution of white-collar crimes should be flexible and lengthy, having regard both to the complexity of the investigations that will usually be necessary before proceedings can be instituted, and the fact that - by their very nature - many white-collar crimes are capable of being concealed and remaining hidden for many years.⁶

By the time white-collar crime is uncovered, if at all, investigators are often faced with tangled webs of transactions and enormous amounts of data that must be explored and sifted through if a viable prosecution is to be assembled. This gives rise to established difficulties in the investigation and prosecution of this form of crime. Reports from relevant statutory bodies in this jurisdiction reveal that the investigation of white-collar crime generally takes far longer than for other forms of crime.⁷ It has been argued that such delays arise because of the complexity of the matters involved and the associated difficulty

⁶ ODCE, *Submission on White-Collar Crime* (30 November 2010) 8.

⁷ The annual reports of the ODCE for 2009-2014, discussed more fully in Ch 4, highlight the comparatively lengthy nature of such investigations. M Carolan, 'Judge Not Happy with Delays in Anglo Case' *The Irish Times* (Dublin, 5 May 2011) details the trenchant criticisms of Kelly J regarding the delay in the investigation of Anglo Irish Bank plc by the Office of the Director of Corporate Enforcement; at the time of his criticisms, the Director of Corporate Enforcement had been investigating Anglo-Irish Bank for some two and a half years and had indicated to the court that the investigation could last at least until the end of 2011.

for prosecutors in building a successful case against corporations and their officers.⁸ An additional factor that adds to the complexity of many white-collar crime investigations is the financial capacity of many suspects and defendants in such a context to defend their own interests. Corporations in particular often have the financial resources to recruit professionals such as consultants, lawyers, accountants and investment bankers with a view to minimising their exposure to criminal liability; the advice and involvement of such professionals will often slow down the progress of investigations, particularly, for example, where advice is provided that certain documents may be legally privileged.

The complexity associated with white-collar crime also has an effect at the trial stage of the criminal process. Experience of trials falling under the rubric of white-collar crime shows that such trials tend to last longer than trials of other classes of crime, which leads, as a by-product, to a conviction rate that is lower than for prosecutions of other forms of crime in circumstances where lengthy trials are at greater risk of collapse or failure to reach a verdict.⁹ Analysis of prosecutions shows that the number of prosecutions of white-collar crime is apparently disproportionately small when compared with the number of prosecutions of other forms of crime.¹⁰

⁸ S Horan, *Corporate Crime* (Bloomsbury 2011) 17.

⁹ In England, Lord Roskill (Chairman), *Report of the Fraud Trials Committee* (1986) and HM Chief Inspector, *Review of the Investigation and Criminal Proceedings Relating to the Jubilee Line Case* (June 2006) were both prompted by the collapse of lengthy fraud trials and sought to explore ways in which trials of such matters might be shortened. In an Irish context, the 'Aer Lingus Holidays' fraud trial ran for 35 weeks in 1998 before the Dublin Circuit Criminal Court before ending in the directed acquittal of the two accused, Desmond Flynn and Peter Kealy: T Mac Ruairi, 'Judge Orders Acquittal in ALH Fraud Trial', *The Irish Times* (Dublin, 1 December 1998). *DPP v. Fitzpatrick, McAteer, and Whelan* (Dublin Circuit Criminal Court, February - April 2014), a prosecution that arose from the collapse of Anglo Irish Bank in 2008, lasted some two and a half months. In a further prosecution arising from the same events, namely *DPP v. Fitzpatrick* (Dublin Circuit Criminal Court, April - June 2015), the jury was discharged and the trial was adjourned after some six weeks of legal argument and without a single piece of evidence having been heard. The factors contributing to the general tendency of trials of white-collar crime to run for longer than trials of other forms of crime are discussed in parts 3 and 4 of Ch 4.

¹⁰ The DPP's *Annual Report 2013* (Dublin, July 2014) contains statistics on convictions on indictment for 'offences against property' for the period 2010-2012. It shows that, in 2010, of 1112 recorded convictions, just 10 such convictions were for fraud offences. Corresponding figures for 2011 and 2012 were 24 out of 928 and 9 out of 784, respectively. In contrast, conviction figures for other sub-categories of 'offences against property', such as theft, robbery and burglary were in the hundreds. A number of caveats must be noted in this regard. The first is that the DPP does not use the nomenclature 'white-collar crime' in order to categorise offences for statistical purposes and so it is not possible to draw an exact comparison between how the term has been understood for the purposes of the instant research and available statistics on the disposal of criminal prosecutions in this jurisdiction. The second proviso is that there is a difficulty in identifying whether rates of conviction for offences falling under the umbrella 'white-collar crime' are relatively low because the incidence of such crime is comparatively low or because of deficiencies in the detection,

A second justification for a specialised approach to the investigation and prosecution of white-collar crime is the lack of visibility of the often substantial harm it causes, both in financial terms and in terms of the number of victims, when compared to other forms of crime.¹¹ The harm caused by white-collar crime is often less obvious than in the case of other forms of crime. However, economic crimes cause complex secondary harm that is often not realised by the public at large. Although more than one factor led to the collapse of Anglo Irish Bank plc in 2008, the successful conviction of officers of that bank for offences contrary to the Companies Acts shows that white-collar crime played a part, if not in the demise of the bank, in a failure to limit the liabilities of the bank to no more than was necessary in the circumstances. The financial consequences of these crimes, mixed in as they are with the consequences of injudicious economic policy and regulatory failings, have been enormous for Irish society.¹²

A third justification for a stand-alone approach to the investigation and prosecution of white-collar crime is the argument that the expressive power of a dedicated approach to this form of crime would redress the corrosive misconception that financial impropriety is not criminal because it lacks the classic characteristics of violent crime.¹³ It has been argued that, historically, the relative dearth of prosecutions of white-collar crime arises at least in part from the public's lack of concern over corporate crime because the public does not fear corporate crime in the way it does street crime, which is more visible, more immediate and more threatening; consequently, there is not the same public outcry to 'do something' about 'crime in the suites' as there is about 'crime in the streets'.¹⁴ In the same vein, it has been observed that the victims of corporate crime are often not readily apparent, for example in bribery and corruption cases, competition law offences and

investigation and prosecution of such crime.

¹¹ There is a dearth of recent Irish data on the financial cost of white-collar crime but research carried out by consultants RSM Robson Rhodes and Dublin Chamber of Commerce in 2005 concluded that Irish companies were losing €2.5 billion a year through fraud, embezzlement, and cheque and credit card fraud: *The Irish Times* (Dublin, 17 June 2005). The Serious Fraud Office in the UK has estimated the annual cost of fraud to the economy there to be at least £38 billion: <www.sfo.gov.uk/about-us/common-misconceptions.aspx> (last accessed 24 July 2015). Certain forms of fraud, particularly 'Ponzi schemes' that were at the root of a number of the cases discussed in Ch 3, rely on many participants, and therefore victims, for the success of their operation.

¹² See Ch 2, n 22.

¹³ Indeed, this misconception arguably drove the coining of the term 'white-collar crime' by Sutherland, an issue explored in Ch 2.

¹⁴ J Gobert and M Punch, *Rethinking Corporate Crime* (Butterworths 2003) 36.

breaches of the Revenue Code.¹⁵ Indeed, the moral ambivalence that results from a perception that white-collar crime is a 'victimless crime' can result in the collusion of the public with wrongdoers, particularly for offences such as revenue offences.¹⁶

If the public attitude towards white-collar crime in Ireland may have been equivocal at times in the past, the financial and economic crises of 2008 have hardened attitudes in this regard.¹⁷ Furthermore, Irish jurisprudence has noted the societal importance of effective mechanisms for the investigation of white-collar crime; in *Re National Irish Bank* Barrington J specifically noted that 'if there are grounds for believing that there is malpractice or illegality in the operation of the banking system, it is essential, in the public interest, that the public authorities should have power to find out what is going on'.¹⁸ Thus, over and above the practical utility of the core of this thesis, it might be said that there is a moral argument in favour of the proposed specialised approach to white-collar crime; a dedicated approach has a societal value over and above the promise of greater investigative and prosecutorial efficiency.

2.3 A Dedicated Statute

Having laid out the justifications and imperatives that support the argument that white-collar crime deserves to be approached differently to other forms of crime, it falls to be considered whether existing methods of investigating and prosecuting white-collar crime should simply be adapted on an ad hoc and piecemeal basis by the legislature, as has been the case to date, or whether a more coordinated, focused and free-standing legislative approach to white-collar crime is warranted. It is contended that a more tailored approach should apply. In this regard, it is notable that there is already precedent in this jurisdiction for taking distinct approaches to different classes of crime. For example, the Offences Against the State Acts 1939-1998 provide, in relation to a range of designated offences, greater powers to investigators than those that arise in the case of other forms of crime, and

¹⁵ S Horan, *Corporate Crime* (Bloomsbury 2011) 18, where the 'teacake litigation' case (*Marks & Spencer plc v Customs and Excise Commissioners (No 5)* [2009] UKHL 8) is cited to illustrate this point.

¹⁶ J Gobert and M Punch, *Rethinking Corporate Crime* (Butterworths 2003) 37.

¹⁷ See discussion at part 1 of Ch 1.

¹⁸ [1999] 3 IR 145 (HC and SC) 180.

also provide for different methods of prosecuting such crimes, for example in the form of non-jury trials. More recently, the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014, has seen the legislature place powers associated with forensic evidence under a single legislative umbrella.¹⁹

The Criminal Justice Act 2011 has played a role in establishing a distinct legislative agenda for white-collar crime and can be seen as a stepping stone to the approach contended for in this thesis. However, notwithstanding that the 2011 Act made some positive alterations to the ways in which white-collar crime is investigated and prosecuted, it also contains provisions concerning the investigation and prosecution of crime more generally, for example the, as yet, uncommenced provisions clarifying the exact operation of provisions of the Criminal Justice Act 1984 concerning the right of reasonable access to legal advice.²⁰ As such, the Criminal Justice Act 2011 amounts to yet another example of omnibus criminal legislation, other relatively recent examples of which are the Criminal Justice Act 2006 and the Criminal Justice Act 2007. While the 2011 Act contains helpful innovations relevant to the investigation and prosecution of white-collar crime, the inclusion of provisions of a more general nature means that it cannot be said to amount to a dedicated, stand-alone statute on white-collar crime. Furthermore, with the relatively small number of, albeit useful, measures relevant to white-collar crime, the Oireachtas missed an opportunity to introduce a comprehensive, meaningful system of governance for the investigation and prosecution of white-collar crime.

The legislature should continue the approach started in the Criminal Justice Act 2011 of creating specially adapted powers of investigation and prosecution in relation to white-collar crime offences but should create a stand-alone piece of legislation that is, in both its nomenclature and content, clearly and exclusively dedicated to the issues concerning powers relating to the investigation and prosecution of white-collar crime. The parts of the Criminal Justice Act 2011 that are relevant to the investigation and prosecution of white-collar crime should be repealed and replaced with a new statute that would improve on the

¹⁹ For practical critical analysis of this statute, see: C O'Briain, 'Criminal Justice (Forensic Evidence and DNA Database System) Act 2014: An Overview From a Criminal Practitioner's Perspective' (October 2014, Office of the Director of Public Prosecutions).

²⁰ Criminal Justice Act 2011, s 9.

existing relevant provisions in the 2011 Act and add new ones. Such a statute would be analogous to the Offences Against the State Acts 1939 - 1998, or the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014, in that it would house dedicated powers of investigation and prosecution aimed at a particular class of crime.

While this thesis holds to the argument that a statute dedicated to issues concerning the investigation and prosecution of white-collar crime is warranted, it is acknowledged that complete codification and consolidation of all of the proposed measures is not practical or feasible in circumstances where some of them transcend white-collar crime in their relevance to crime more generally. Indeed, a reminder that white-collar crime is not divorced from rules of general application in the criminal process comes in the form of judicial review proceedings taken in recent times in an effort to halt high profile white-collar crime trials on grounds that prejudicial media coverage will prevent a fair trial.²¹ Some of the measures argued for as part of this thesis are of more general application; for example, the proposal on a common standard of suspicion with regard to reactive powers of investigation or the recommended clarifications on the law concerning the privilege against self-incrimination, would fit more comfortably in a dedicated evidence statute.²² However, many of the proposed reforms are particular to the investigation and prosecution of white-collar crime and provide a basis for the creation of a discrete statutory framework.

2.4 The Crime Control and Due Process Value Systems

The contours of the thesis that emerges from the research detailed in preceding chapters have been sketched in the previous sections of this part of the chapter. A final matter that warrants consideration at this juncture is the possible location of the approach argued for in this thesis on the spectrum of criminal policy that has crime control considerations to the fore at one end and the primacy of due process at the other. Such an assessment is apposite given the debate in recent years in this jurisdiction as to whether there has been a rush to let crime control considerations drive criminal policy at the expense of due process for

²¹ *O'Brien v DPP* [2014] IESC 39; E Edwards, 'High Court Dismisses FitzPatrick Application to Halt Trial' *The Irish Times* (Dublin, 29 August 2015).

²² Consolidation of laws on evidence is on the agenda of the Law Reform Commission: Law Reform Commission, *Issues Paper Number 3: Consolidation of Evidence Legislation* (LRC IP 3-2013).

suspects and defendants.²³

The 'crime control' and 'due process' theories of criminal law were first articulated by Packer as rival value systems that compete for the upper hand in the criminal process.²⁴ The 'crime control' model holds that crime prevention is paramount and that efficiency is at the heart of a system that operates as 'an assembly-line conveyor belt down which moves an endless stream of cases'.²⁵ The dominance of this model leads to the limiting of procedural rights of suspects and defendants in favour of expedition in the criminal process. The 'due process' model, on the other hand, holds that protection of the innocent is as important a feature of the criminal process as apprehension of the guilty.²⁶ The model acknowledges the need to suppress crime but places greater emphasis on the reliability of findings of guilt and therefore emphasises the importance of procedural rights and formality in the investigation and prosecution aspects of the criminal process. Under this approach, a failure to adhere to rules designed to protect the rights of a defendant and the integrity of the criminal process may result in a defendant's acquittal even where the facts point towards a finding of guilt; protection of due process values is more important than the attainment of justice in an individual case.²⁷

It might be noted that Packer's models have been the subject of scholarly criticism and that variations or alternatives to his model have been proposed.²⁸ However, it is contended that Packer's identification of two paradigms in the criminal justice system is useful for the

²³ L Campbell, *Organised Crime and the Law: A Comparative Analysis* (Hart Publishing 2013) 42; L Campbell, 'The Criminal Justice Act 2007 - A Theoretical Perspective' (2007) 17(3) ICLJ 8; V Conway and M Mulqueen, 'The 2009 Anti-Gangland Package: Ireland's New Security Blanket?' (2009) 4 ICLJ 106; DS Kennedy, 'Has Packer's "Crime Control" Model Become the Dominant Force in Irish Criminal Justice?' (2013) 23(3) ICLJ 76.

²⁴ HL Packer, *The Limits of the Criminal Sanction* (Stanford University Press 1968); HL Packer, 'Two Models of the Criminal Process' (1964) 113(1) University of Pennsylvania Law Review 1.

²⁵ HL Packer, *The Limits of the Criminal Sanction* (Stanford University Press 1968) 159.

²⁶ HL Packer, *The Limits of the Criminal Sanction* (Stanford University Press 1968) 164.

²⁷ AS Goldstein, 'Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure' (1974) 26 Stanford Law Review 1009, 1049. It is apt to note at this point that *DPP v JC* [2015] IESC 31 saw an attenuation of the rule concerning the admissibility of unconstitutionally obtained evidence in this jurisdiction, a point discussed in Ch 3. Applying the models under discussion to that case, *JC* arguably saw a shift away from due process in the direction of crime control.

²⁸ For example, A Ashworth and M Redmayne, *The Criminal Process* (4th edn, OUP 2010) 40, advocate a reconstitution of Packer's models so that the purpose of the criminal justice system is stated to be crime control but that the pursuit of this is tempered by respect for due process. D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (OUP 2001) expands upon Packer's original theory in emphasising the role of populism in the expansion of a 'culture of control' in the criminal justice system.

present purpose of seeking to identify whether the instant thesis is more deontological or utilitarian in its ideology.²⁹ The core of this thesis emerges from doctrinal analysis of the law under consideration and the aim here is limited to considering where, approximately, the thesis might be located in relation to the models in question.

Political considerations have played a particularly important role in the development of the criminal process in this jurisdiction in recent times. An example of this arose in November 2006, when the then government constituted a Review Group on Balance in the Criminal Law, which the subsequent report of the Review Group characterised as arising in the context of the 'need to keep under review, in a changing society, legal rules that have developed over a long period of time'.³⁰ The terms of reference set by the government required the Review Group to focus on doctrines and rules that have traditionally operated to the favour of suspects and defendants and so it is arguable that the government intention was to identify ways in which such doctrines and rules could be attenuated.³¹ In the course of setting the scene for its work, the Review Group noted the following:

O'Higgins CJ in *Re Criminal Law (Jurisdiction) Bill 1975* [1977] 129, 152, speaking of the constitutional guarantee in Article 38.1 that no-one shall be tried save in due course of law, commented that the concept of due course of law requires 'a fair and just balance between the exercise of individual freedoms and the requirements of an ordered society'. In considering this proposition it must be recalled that individual freedoms are not the monopoly of the defendant and that the State also has a primary responsibility to vindicate the rights of the victim. The criminal law is a significant mechanism for vindicating those rights.³²

²⁹ L Campbell, *Organised Crime and the Law: A Comparative Analysis* (Hart Publishing 2013) 43, argues that deontologism, which she articulates as concerned with duties and rights and the primacy of the individual, maps on to Packer's due process model, whereas utilitarianism, which she characterises as advocating the promotion of the greatest good for the largest number of people, corresponds to the crime control model.

³⁰ G Hogan (Chairman), *Final Report of the Balance in the Criminal Law Review Group* (Dublin, March 2007) 8.

³¹ The terms of reference of the review group were to consider and examine, inter alia, the following issues: the right to silence; allowing character evidence of an accused; the exclusionary rule of evidence; requiring the accused to outline the nature of his defence before or at the commencement of a trial; re-opening new evidence; nullifying an acquittal where there is evidence of jury or witness tampering; 'with prejudice' appeals in the case of wrongful acquittal; extending alibi evidence rules to other analogous situations; allowing submissions by the prosecution before sentencing; modifying the rule in relation to hearsay evidence; the issue of admissibility of video evidence in circumstances where the accused person remains silent.

³² G Hogan (Chairman), *Final Report of the Balance in the Criminal Law Review Group* (Dublin, March 2007) 8.

The Review Group made a number of recommendations in relation to the issues raised in its terms of reference, taking the view that 'some element of re-balancing of the existing rules is required to enable the courts to arrive at a just and fair result in criminal cases'.³³ Inasmuch as the recommendations tended to weaken existing standards, at least from the perspective of a suspect or defendant, the general thrust of the report could be regarded as a step away from due process and towards crime control.

The Criminal Justice Act 2007 was promulgated months after the issue of the report of the Balance in the Criminal Law Review Group. As part of an analysis of the Criminal Justice 2007, specifically those features of the statute that target organised crime, Campbell has highlighted features of that legislation, including the extension of detention periods, the erosion of the right to silence, the expansion of State capabilities in bail applications and the strengthening of the presumptive sentencing scheme as embodying 'a shift away from due process in certain respects and a flourishing of a culture of control'.³⁴ In a similar vein, Kennedy has referred to a broad swathe of legislative provisions, including section 8 of the Criminal Justice (Amendment) Act 2009,³⁵ section 2 of the Criminal Justice (Drug Trafficking) Act 1996,³⁶ and section 7 of the Criminal Justice (Surveillance) Act 2009³⁷ as evidence that 'the crime control model is being ushered in without a semblance of proportionality'.³⁸

Concerns of the kind raised by Campbell and Kennedy are acknowledged but is contended that a recalibration of the rules concerning the investigation and prosecution of white-collar crime can occur in this jurisdiction while still having regard to relevant personal rights, and that the measures and approach argued for in this thesis give appropriate weight to the variety of competing interests. Both the Irish Constitution and the ECHR allow for

³³ G Hogan (Chairman), *Final Report of the Balance in the Criminal Law Review Group* (Dublin, March 2007) 11.

³⁴ L Campbell, 'The Criminal Justice Act 2007 - A Theoretical Perspective' (2007) 17(3) ICLJ 15.

³⁵ This provision increases substantially the range of offences that might be tried by the non-jury Special Criminal Court.

³⁶ This provision allows for a period of pre-charge detention of up to a week for suspects coming within the scope of the Act.

³⁷ Section 7 permits a member of An Garda Síochána to authorise surveillance of a private citizen in an 'emergency' situation.

³⁸ DS Kennedy, 'Has Packer's "Crime Control" Model Become the Dominant Force in Irish Criminal Justice?' (2013) 23(3) ICLJ 76.

proportionate infringements of personal rights insofar as is necessary to secure valid competing interests. The jurisprudence of the ECtHR establishes that, when considering the proportionality of a particular approach, State parties are afforded a margin of appreciation. While it is accepted that the charge may be levelled that the theoretical framework argued for in this thesis might lean more towards a 'crime control' rather than a 'due process' perspective, it is argued that this would be a somewhat superficial analysis. The following observations have been made in relation to Packer's models:

Accepting that the fundamental goal of criminal justice is crime control does not necessitate the acceptance of the crime control model. In the pursuit of crime control, a criminal justice system may reflect crime control values, due process values or a mixture of both.³⁹

To adopt and apply the latter observations, it is suggested that the instant thesis incorporates a mixture of both crime control and due process values. In the next part of this chapter, dedicated measures that aim to improve the efficiency of investigations and prosecutions of white-collar crime are proposed that take account of the peculiar features of white-collar crime, but these are counterbalanced, it is contended, by adequate safeguards for the defence. While the ambitions of this part of the chapter are modest, it is argued that reference to Packer's models suggests that the instant thesis is situated approximately in the centre of the spectrum that runs from a 'crime control' model at one end to a 'due process' model at the other.

3 The Contents of a Dedicated Approach

3.1 Issues Concerning Legal Concepts and Liability

3.1.1 *A Definition of White Collar Crime*

The term 'white-collar crime' defies easy definition.⁴⁰ Different understandings can be

³⁹ M McConville, A Sanders and R Leng, 'Descriptive or Critical Sociology: The Choice is Yours' (1997) 37 British Journal of Criminology 347, 356.

⁴⁰ The question of a definition of the term 'white-collar crime' is explored in Ch 2.

ascribed to the term depending on the academic prism, whether that be sociological, criminological, legal, or philosophical, through which the term is viewed. The term 'white-collar crime' was not introduced into academic discourse until 1939. In that year, Edwin Sutherland made an address to the American Sociological Association in which he proposed 'a comparison of crime in the upper or white-collar class, composed of respectable or at least respected business and professional men, and crime in the lower class, composed of persons of low socioeconomic status'.⁴¹ In the time since Sutherland first coined the term, there has been an ongoing discourse amongst sociologists and criminologists as to the precise parameters of the classification 'white-collar crime'. For present purposes, a significant weakness in the approach of the disciplines of criminology and sociology is the widely held view amongst scholars in those fields that the term can extend to non-criminal conduct. A further problem is the lack of anything approaching a consensus amongst academics in those disciplines as to the nature of the classification in question.⁴² While the influence of those fields of academia in the shaping of the term 'white-collar' crime is significant and deserving of recognition, ultimately it is necessary to look elsewhere for an understanding of the term for present purposes.

A legal perspective on an understanding of the label 'white-collar crime' confines use of the term to acts that contravene the criminal law and focuses on the act rather than the characteristics of the perpetrator of the act.⁴³ This approach has advantages for present purposes given the focus of the instant research on existing procedural law concerning the investigation and prosecution of white-collar crime. If a legal perspective is adopted as a method of arriving at an understanding of the term white-collar crime, the remaining challenge is enumeration of the crimes to be encapsulated by the term. A legal-philosophical angle brings its own approach to this issue but its reliance on concepts of morality as a method of classification is not entirely suitable given the aims of the instant research.⁴⁴

The unique challenges posed by white-collar crime in terms of investigation and

⁴¹ EH Sutherland, 'White-Collar Criminality' (1940) 5 *American Sociological Review* 1-12.

⁴² See discussion at part 3.1 of Ch 2.

⁴³ See discussion at part 3.2 of Ch 2.

⁴⁴ See discussion at part 3.3 of Ch 2.

prosecution mean that ring-fencing of this class of crime is both necessary and desirable. The value of flexibility in deciding on the specific crimes to which specially tailored powers of investigation and prosecution might apply is such that a system of classification that is not unduly rigid suits best for present purposes. A purposive, or functional, approach of loose classification can be achieved in at least two ways. One method is to create a non-exhaustive list in the form, for example, of a schedule of offences to which a particular piece of legislation applies. Another method is to create a flexible definition in the form of 'relevant' offences that share certain characteristics but are not precisely delineated.

A combination of these approaches was adopted by the legislature in the drafting of the Criminal Justice Act 2011, which had as part of its aim the introduction of new measures to aid in the investigation and prosecution white-collar crime. The 2011 Act includes a schedule of a broad range of offences that are deemed to be 'relevant' offences for the purposes of the Act.⁴⁵ However, the 2011 Act also provides a rational basis for adding to the schedule that marries flexibility with coherence of classification.⁴⁶ The approach taken by the legislature in the 2011 Act in creating a non-exhaustive schedule of offences covered by the provisions of that Act, together with a coherent, rational basis for adding to the schedule, is supported here as maximising flexibility with regard to the range of offences to be covered by special measures aimed at assisting with the investigation and prosecution of white-collar crime while also marking out the broad parameters of a meaningful class of crime.

In conclusion, given its peculiar features and the specific challenges it raises when compared to other forms of crime, this thesis contends that it is appropriate for present purposes to view the term 'white-collar crime' from a legal perspective and to deem it a discrete class of crime. The boundaries of this classification are to be drawn loosely and with reference to the approach adopted by the legislature in section 3 of the Criminal Justice Act 2011. The accepted weaknesses of this method of classification are a want of certainty and predictability as regards the precise boundaries of the class of crime in question but it is contended that these negative features are outweighed by the flexibility

⁴⁵ Criminal Justice Act 2011, s 3(1).

⁴⁶ Criminal Justice Act 2011, s 3(2).

and general coherence of the proposed approach. The approach should form the basis of a definition of white-collar crime for the purposes of the dedicated statute proposed as part of the instant thesis.

3.1.2 *Ascribing Liability to Legal Persons*

In the same way there is no settled definition of the term 'white-collar crime', there is uncertainty in this jurisdiction with regard to the question of ascribing direct liability to legal persons where white-collar crimes are concerned.⁴⁷ The significance of this issue lies in the fact that any doubt about the capacity to fix the appropriate perpetrator of a white-collar crime with criminal liability is not in the public interest. The traditional 'identification doctrine' provides that the human agent of the alleged wrongdoing must be the 'directing mind and will' of the company in order for liability to be ascribed to the defendant company.⁴⁸ The more recent 'attribution doctrine' is more flexible and does not require that a human agent be shown to have been part of the 'directing mind and will of the company'. Rather, it is sufficient if the human agent's conduct can be ascribed to the defendant company under the particular statutory rule under construction.⁴⁹ The Irish case law that touches on the area does not provide clarity or certainty as to which of the two doctrines finds favour in this jurisdiction.⁵⁰

The Law Commission of England and Wales has made a number of criticisms of the identification doctrine in relation to the following issues: conflicting judicial definitions and interpretations of the concept of a 'directing mind and will' of a company; the failure of the doctrine to reflect business practices in modern times that entail decentralised, rather than centralised, decision making; the perverse tendency of the doctrine to incentivise companies to operate with devolved structures that insulate directors (or equivalent

⁴⁷ See part 6 of Ch 6 for discussion of this issue.

⁴⁸ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (CA); *Tesco Supermarkets Ltd v Natrass* [1957] 1 QB 159 (CA).

⁴⁹ *Tesco Stores Ltd v Brent LBC* [1993] 2 All ER 718 (QB); *Re Supply of Ready Mixed Concrete (No 2)* [1995] 1 AC 456 (HL); *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC).

⁵⁰ *R (Cottingham) v Justices of County Cork* [1906] 2 IR 415 (CA); *Taylor v. Smyth* [1991] 1 IR 142 (SC); *Superwood Holdings plc v. Sun Alliance and London Insurance plc* [1995] 3 IR 303 (SC); *Howard v Irish Life & Permanent plc and Guinness and Mahon (Ireland) Ltd* [2006] IEHC 419; *Crofter Properties Ltd v Genport Ltd* [2002] IEHC 26, [2002] 4 IR 73; *Fyffes plc v DCC plc* [2009] 2 IR 417 (HC).

persons) to a certain extent from knowledge of what their managers or employees are doing; and the arguable unfairness of the doctrine in circumstances where it is faster, cheaper and easier for prosecutors to prove directorial involvement when small companies are being investigated, thereby incentivising prosecutors to pursue small corporations over larger ones.⁵¹ Having pointed out the flaws with the identification doctrine, the Commission recommends that legislation should include specific provisions in criminal offences to indicate the basis on which companies may be found liable, but in the absence of such provisions, the courts should treat the question of how corporate fault may be established as a matter of statutory interpretation. The Law Reform Commission in Ireland has adopted a more circumspect approach in its consideration of the attribution doctrine, acknowledging that the approach in *Meridian* 'yields a flexible judicial response to questions of corporate criminal liability', but also observing that the approach 'injects vagueness into the criminal law by leaving the choice of principle of corporate criminal responsibility to the discretion of the court' in a manner that may offend against the constitutional doctrine of vagueness.⁵²

In the interests of the effective implementation of the goals of the criminal justice system, it is important that natural persons who commit white-collar crime are prosecuted in appropriate cases and are not allowed to hide behind a corporate mask in order to escape criminal liability. Equally, it is crucial that there is the flexibility to charge and prosecute legal persons in pertinent situations so that white-collar crime is punished regardless of the author of the crime or how it is committed. Notwithstanding the reservations of the Irish Law Reform Commission and the risk that it will be proved right in relation to its concerns about possible infringement of the constitutional doctrine of vagueness, it is argued that Ireland should follow developments in the case law of England and Wales in recent decades and apply the more flexible 'attribution doctrine' in deciding whether a defendant company can be fixed with liability in a given prosecution. Such an approach has the advantage of encouraging greater vigilance on the part of companies as regard the activities of all those working for a company, no matter the status of individual workers within a company.

⁵¹ Law Commission of England and Wales, Consultation Paper on Criminal Liability in Regulatory Contexts (LC CP195-2010).

⁵² The Law Reform Commission, *Consultation Paper on Corporate Killing* (LRC CP 26-2003) 37.

Although the matter could be clarified by the courts in due course, this is a matter that could be dealt with appropriately by way of legislative intervention in a dedicated white-collar crime statute and it is this course of action that is advocated in the instant thesis.

3.2 Issues Concerning the Investigation of White-Collar Crime

3.2.1 Bodies Tasked with the Investigation and Prosecution of White-Collar Crime

There is a wide range of bodies tasked with the investigation and prosecution of white-collar crime in Ireland.⁵³ These entities include the Garda Bureau of Fraud Investigation (GBFI), the Office of the Director of Public Prosecutions (DPP), the Office of the Director of Corporate Enforcement (ODCE), the Competition and Consumer Protection Commission, the Central Bank, the Health and Safety Authority, the National Consumer Agency and the Revenue Commissioners. Arguably amongst the most important of these bodies is the GBFI, given its central role in the detection and investigation of fraud offences, and the DPP, given that body's exclusive discretion with regard to the prosecution of white-collar crimes on indictment.

At present, the GBFI is an informally constituted subdivision of An Garda Síochána. While the relative informality of its constitution and composition may give it the advantage of flexibility and manoeuvrability in its handling of investigations into white-collar crime, the absence of a more robust structure and the fact that it is not underpinned by statute are points of weakness. Furthermore, the GBFI must, at a certain point, pass control of an investigation to the DPP for that body to make a decision on prosecution.

While each of the remaining bodies with an interest in the investigation and prosecution of white-collar crime has a clearly defined jurisdiction, that jurisdiction is confined to investigation of relevant offences and summary prosecution of such offences. In the case of a serious relevant offence, the matter must be passed to the DPP for a decision of the DPP alone as to whether to prosecute such a matter on indictment. Furthermore, there is an absence of statutorily defined divisions of responsibility as between these bodies in the

⁵³ The role of these bodies receives consideration in Ch 4.

event that there is an overlap in the jurisdiction of such bodies. Annual reports of certain of these entities suggest that cooperation between these bodies occurs on an informal basis. To take one example, consideration of the annual reports of the ODCE for 2009 - 2014 reveals that the wide-ranging investigation into the collapse of Anglo Irish Bank in 2008 was divided between three different agencies, namely the ODCE, the DPP and the GBFI, with no formal framework governing the division of labour between the various agencies or the nature and degree of cooperation between the various agencies. The absence of established structures for cooperation makes it hard to gauge how cooperation between the various agencies occurred in that investigation and makes it equally difficult to identify benchmarks by which success, or otherwise, can be measured.

Greater independence amongst those bodies tasked with the investigation and prosecution of white-collar crime is favoured over maintenance of the status quo or any consolidation of existing powers. It is submitted that the current system of having serious fraud and associated white-collar crime matters investigated by the GBFI, with decisions on prosecution made by the DPP, should be replaced. Given the complexity of white-collar crime as compared with ordinary crime, effective investigation and prosecution of such crime demands that a variety of professionals, including lawyers and forensic accountants, are directly involved at the earliest stage possible in the investigative stage. In this regard, the GBFI should be disbanded and, in its place, an Irish Serious Fraud Office should be established along the lines of the Serious Fraud Office in the UK or the entity of the same name in New Zealand, a jurisdiction of similar size to Ireland and with a similar legal system to that operating here. The success of those bodies, as revealed in their annual reports from recent years, shows that the creation of a multi-disciplinary body with dedicated resources and responsibilities, up to and including the power to prosecute matters on indictment, results in high levels of success as regards the investigation and prosecution of white-collar crime.⁵⁴

As regards all those bodies that have a role in the investigation and prosecution of white-collar crime in this jurisdiction, legislative effect should be given to formalising the

⁵⁴ UK SFO *Annual Report and Account 2013-14* (June 2014); UK SFO *Annual Report and Account 2014-15* (July 2015); NZ SFO *Annual Report 2013* (Annual report to 30 June 2013); NZ SFO *Annual Report 2014* (Annual report to 30 June 2014).

hierarchy of responsibility and cooperation in the event of overlaps of jurisdiction between the various bodies.⁵⁵ Furthermore, a change should be made to the current situation whereby only the DPP is entitled to prosecute crimes on indictment. Appropriate legislation should be introduced so that such a power is extended to the existing range of regulatory bodies, as well as any new Irish Serious Fraud Office, in relation to matters over which those entities have jurisdiction.

The counter argument to a move to spread increased responsibility for the investigation and prosecution of white-collar crime across a greater range of bodies is that this could lead to a loss of coherence and uniformity of approach, and that these interests demand that the current position whereby the DPP plays the leading role in relation to prosecutions on indictment should be maintained, or even consolidated further to encompass all prosecutions, whether summary or indictable in nature. This argument is not without value but the view is adopted here that, with the support of clear legislation demarcating the lines of jurisdiction as between the various bodies, the expertise and professionalism of the relevant entities should be trusted to effectively and responsibly investigate and prosecute white-collar crimes within their respective domains. All of the changes referred to in this section are suitable for inclusion in the dedicated statute argued for in this thesis.

3.2.2 *Powers of Investigation*

Where white-collar crime is concerned, a distinction can be drawn between powers of investigation that are the same as those that apply to other classes of crime and those that have been tailored to meet the particular features of white-collar crime.⁵⁶ Examples of the latter breed of powers are to be found in the Criminal Justice Act 2011, which includes a

⁵⁵ Support for this proposition can be found in the ODCE, *Submission on White-Collar Crime* (30 November 2010) 15, where it is noted that 'while the State very frequently operates in a sectoral manner... criminals (whatever the colour of their collar) operate in nothing like so compartmentalised a manner. White collar criminals do not commence their activities by deciding to engage in behaviour which will contravene the Companies Acts, and the Companies Acts alone.' The submission further contends that 'there should be a common legal basis permitting one primary regulatory body to take the lead role in investigating a set of events relevant to different legislative codes in agreement and in cooperation with other relevant regulatory bodies'.

⁵⁶ Relevant powers of investigation are considered in Ch 3.

power to demand that a person hand over documents to investigators⁵⁷ and also a modified power of pre-charge detention in relation to white-collar crime investigations.⁵⁸ However, the preponderance of powers of relevance to the investigation of white-collar crime are common to crimes falling outside the categorisation adopted in this thesis and are scattered far and wide across the statute book. Apart from a recommendation concerning the threshold to be met for the activation of certain reactive powers of investigation and suggested modifications to legislation governing powers of surveillance, this thesis does not argue that there is a need to reorganise or redraw such general powers of investigation. However, it is argued that those powers that are fashioned to meet the features of white-collar crime are best housed in a statute dedicated to issues concerning the investigation and prosecution of white-collar crime.

A point that has been noted in the course of this research is that, in relation to the many powers of investigation that apply equally to white-collar crime and other forms of crime, there is a lack of uniformity as regards the threshold to be met in relation to those reactive investigative powers that require a certain minimum level of suspicion on the part of investigators before they can be activated. The question of the threshold for the exercise of such powers is significant. Whereas it may seem like a small step in the history of any investigation, for example where it takes the form of an application for a search warrant, the threshold may have a transcending importance in relation to how the investigation is characterised and how it ultimately proceeds. A single, statutorily described, threshold that is in line with the approach adopted by the Supreme Court in *DPP v O'Driscoll* should apply to powers of investigation requiring a degree of suspicion on the part of investigators for their activation.⁵⁹ Although such a development in the law would have general application to powers of investigation in a criminal law context, and may therefore be most appropriately housed in a more general statute,⁶⁰ the concept of a common threshold for the activation of an investigatory power is of relevance to the desirability of a common approach to the investigation and prosecution of white-collar crime: in light of the

⁵⁷ Criminal Justice Act 2011, s 15.

⁵⁸ Criminal Justice Act 2011, s 7(a).

⁵⁹ [2010] IEHC 2, [2010] IESC 42. See discussion at part 5 of Ch 3.

⁶⁰ The proposed measure would be appropriate for inclusion alongside those measures contained in the Revised General Scheme of a Criminal Procedure Bill, approved by the government on 9 June 2015.

proposition already made as part of this thesis that it is feasible, and desirable, to allow different bodies to play a hand in the investigation and prosecution of white-collar crime, it is all the more important that these disparate actors apply a standard approach when exercising the same or similar powers.

Powers of interception and covert surveillance have a potential role to play in the investigation of certain forms of white-collar crime.⁶¹ While An Garda Síochána (and, therefore, the GBFI in the context of white-collar crime) is afforded powers under the Criminal Justice (Surveillance) Act 2009 and Communications (Retention of Data) Act 2011, it is notable that the Revenue Commissioners are also granted powers under the relevant legislation. While this is positive from the point of view of that body's role in combating certain forms of white-collar crime, a negative matter is the failure of those statutes to make relevant powers available to other bodies with powers to investigate white-collar crime such as, for example, the Office of the Director of Corporate Enforcement and the Competition and Consumer Protection Commission. This situation should be remedied by amendment of existing relevant legislation so that the relevant powers are extended to other entities concerned with the investigation and prosecution of white-collar crime.

A major omission from the Irish statute book in this era of modern communications is the absence of express legislative provision for the interception of internet communications. ECtHR jurisprudence demonstrates that it is crucial that any infringement of the right to privacy must, in the first instance, be positively provided for in law, whatever about fulfilment of the remaining criteria described in Article 8 of the ECHR. In these circumstances, the failure to provide for a statutory framework for the legitimate interception of internet communications means Ireland is depriving investigators of a valuable tool of investigation where white-collar crime is concerned. This gap in the law should be remedied by way of amendment of relevant existing legislation. While provision for interception of internet communications could be provided for within the framework established by the Criminal Justice (Surveillance) Act 2009, it may fit more naturally within the regime established by the Postal and Telecommunications Services Act 1983 and the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993,

⁶¹ See discussion at part 6 of Ch 3.

analogous as it is to the interception of telephonic communications.

As regards specialised powers of investigation, section 7 of the Criminal Justice Act 2011, which provides for the suspension of periods of pre-charge detention, is an example of a legislative initiative that takes account of specific features of many white-collar crimes, namely the complexity associated with both their commission and investigation, and the consequent need for greater time to carry out investigations that might apply to other forms of crime.⁶² Although it is still relatively soon to gauge the success or otherwise of the initiative in its aim of facilitating investigators, it is supported here as a proportionate and sensible measure that takes reasonable account of the realities and exigencies of white-collar crime investigations. It is one of the measures from the Criminal Justice Act 2011 that should be rehoused in a statute dedicated to issues concerning the investigation and prosecution of white-collar crime.

Challenges arise in relation to the gathering of documentary evidence connected with white-collar crime. Provisions such as section 52 of the Criminal Justice (Theft and Fraud Offences) Act 2001 and section 15 of the Criminal Justice Act 2011 have made it easier for investigators to gather material associated with suspected white-collar crimes by placing an onus on those of whom a request is made to disclose such material in a designated manner.⁶³ However, while these provisions are positive and the thrust of them should be retained, it is contended that they should be supplanted by one comprehensive provision housed in a single statute dedicated to the investigation and prosecution of white-collar crime. Powers such as these have increased the pertinence of legal professional privilege in a white-collar crime context, a point addressed at part 3.4.2 below.

3.2.3 Mandatory and Voluntary Disclosure of Wrongdoing

There are few proactive powers of investigation of any consequence in this jurisdiction. This thesis does not take issue with this state of affairs in light of the appropriateness of the human rights architecture in existence in this jurisdiction and the fact that indiscriminate

⁶² See part 9 of Ch 3 for a discussion of this measure.

⁶³ See the discussion at part 4.4 of Ch 4.

powers of investigation do not fit comfortably into such a framework.⁶⁴ However, the consequent dependence of investigators on reports of actual or suspected wrongdoing to instigate investigations means that statutory provisions that either require or encourage disclosure of wrongdoing are very important for their potential to act as catalysts for white-collar crime investigations. Developments in this regard that are positive on their face have come in recent years in the form of section 19 of the Criminal Justice Act 2011 and the provisions of the Protected Disclosures Act 2014. However, the early indications are that section 19 of the 2011 Act has not prompted the level of reporting that might have been hoped for and there are question marks over certain aspects of the 2014 Act.⁶⁵ The core of these legislative initiatives is supported in this thesis, and section 19 should be rehoused in the dedicated statute argued for in this thesis, but the legislature should remain alive to the potential need to adjust certain aspects of those measures in order to improve their efficacy.

3.3 Trial-Related Issues

3.3.1 *The Role of Juries in White-Collar Crime Trials*

The role of jurors in trials of serious white-collar crime raises particular challenges given the often lengthy and complex nature of such trials.⁶⁶ Concerns have been voiced that jurors may not understand the sometimes arcane, specialised and complex nature of the evidence in such trials, with potential consequences for the fairness of such trials. It has also been suggested that jurors may be overburdened by the sheer length of trials of such matters.⁶⁷ However, the inclusive and participatory nature of the traditional jury system has societal value in the way that it gives the public a stake in the criminal process and the view is adopted here that it is not a model that should be departed from lightly.

Arguably the most radical alternative to the approach that obtains at present would be a move to non-jury trials of serious white-collar crime. In the UK, an effort to allow for non-

⁶⁴ See the discussion at part 2 of Ch 3.

⁶⁵ See the discussion at part 4 of Ch 3.

⁶⁶ See discussion at part 4 of Ch 4.

⁶⁷ The English case of *R v Cohen* (1992) 142 NLJ 1267 is an example of a case where fraud convictions were overturned as a direct result of concerns that the jury had not been presented with a 'manageable' case.

jury trials at the option of the prosecution was defeated by the House of Lords in 2005. In an Irish context, short of a constitutional amendment, such an approach would have to come within the parameters laid down by Article 38.3.1° of the Constitution, which provides that special courts 'may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order'. By virtue of a proclamation issued by the government in 1972 under section 35 of the Offences Against the State Act 1939 to the effect that the courts were inadequate to secure the effective administration of justice and the preservation of public peace and order, Part V of the 1939 Act was brought into force and the Special Criminal Court was established. A schedule of offences to the 1939 Act includes offences entailing terrorism and subversion against the State, and, more recently, organised crime offences involving violence; all of these offences may be tried in the Special Criminal Court with the consent of the DPP. The DPP may also direct that non-scheduled offences be tried in the Special Criminal Court if, in accordance with the language of Article 38.3.1°, she determines that ordinary trial by jury is inadequate to secure the effective administration of justice and the preservation of public peace and order.

While the executive and the DPP enjoy a wide degree of latitude in relation to the kinds of offences that are deemed appropriate for trial before the Special Criminal Court, the rationale for such designations to date has been rooted in concerns over juror intimidation rather than the capacity of jurors to understand evidence adduced at trial.⁶⁸ When this is taken together with the requirement of Article 38.3.1° that the non-jury alternative to jury trial is required for the preservation of public peace and order, there is no obvious constitutional basis for non-jury trials of white-collar crime cases.

An alternative to non-jury trials is the introduction of expert juries for trials of white-collar crime. The argument in favour of such an approach is that it would respect the jury trial approach but populate juries with jurors who are well qualified to comprehend and evaluate the evidence presented at trial. However, a significant drawback of such a model

⁶⁸ L Campbell, 'The Prosecution of Organised Crime: Removing the Jury' (2014) 18(2) *International Journal of Evidence and Proof* 83, 91.

comes in the form of doubts as to the representativeness of such juries, which could possibly result in a finding that such an approach is unconstitutional.⁶⁹

The imperative of a jury trial in relation to serious criminal matters is enshrined in Article 38.5 of the Constitution. Given the indications that any alterations to the current model would be difficult to the point of possibly requiring constitutional amendment, the fact that the traditional jury trial system is so well embedded in this jurisdiction, the societal value of the approach, and the lack of conclusive evidence that a move away from the jury trial model is actually required, it is the position of this thesis that measures that buttress the existing system of trial by jury are preferable to more drastic approaches that strike at the foundations of the model that exists at present.

Provisions providing for the simplifying of material so that it is more easily comprehended by a jury have been introduced in recent times and have allayed some concerns about the extent to which jurors understand complex evidence. Examples include section 57 of the Criminal Justice (Theft and Fraud Offences) Act 2001 and section 882 of the Companies Act 2014. The revised general scheme of the Criminal Procedure Bill, approved by the government in June 2015, proposes to replace various existing enactments allowing for materials to be given to juries in trials for certain fraud, competition, and revenue offences and replace them with a single provision covering trials for all types of offences.⁷⁰ This is a welcome proposal to streamline such provisions. Another measure that would assist jurors comes in the form of judicial guidance on note-taking.⁷¹ Another helpful step would be implementation of the Law Reform Commission recommendation in its 2013 *Report on Jury Service* to the effect that assessors should be introduced to assist jurors in their comprehension of evidence in complex trials.⁷² This thesis argues that the latter two measures should be included in the aforementioned Criminal Procedure Bill given their usefulness and application to criminal prosecutions generally. Alternatively, they should be

⁶⁹ N Howlin, 'White-Collar Crimes and Expert Juries: Precedents, Alternatives and Implications' [2012] 2 ICLJ 40.

⁷⁰ Department of Justice and Equality, 'Revised General Scheme of a Criminal Procedure Bill 2015' (9 June 2015) Head 9.

⁷¹ M Coen and L Heffernan, 'Juror Comprehension of Expert Evidence: A Reform Agenda' (2010) 3 Criminal Law Review 195, 204.

⁷² Law Reform Commission, *Report on Jury Service* (LRC 107-2013) [12.55].

included in the legislative scheme proposed as part of the instant thesis so that they are certain to apply in a white-collar crime context.

A relatively recent legislative enactment in the form of section 15A of the Juries Act 1976, as inserted by section 23 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013, which allows for the empanelling of reserve jurors, is a useful initiative that assuages concerns that trials will collapse due to the non-availability of jurors in the event that the trials run for long length of time. Although the measure does not ease the burden on individual jurors, it provides general support for the integrity of the jury system and it is endorsed in this thesis.

As a secondary point, consideration should be given to following the New Zealand approach of allowing for a non-jury trial at the option of an accused, with the caveat that it is uncertain that such a change can be implemented by legislation as opposed to amendment of the Constitution.⁷³

In conclusion, it is the contention of this thesis that the right to jury trial as it is currently understood in Ireland should be preserved in relation to trials of white-collar crime but that existing supports should be supplemented with additional measures that bolster the operation of this system.

3.3.2 Measures Aimed At Shortening Trials

White-collar crime trials are often very lengthy. This is a phenomenon that is injurious to the administration of justice on a number of levels and it arises due to a variety of factors, including lengthy indictments; frequent and protracted legal arguments and voir dieres during the course of a trial; the fact that defendants are generally not required to show their hand before trial; and the requirement to adduce complex documentary evidence in order to prove the case at trial.⁷⁴ Pre-trial hearings have particular utility in a white-collar crime

⁷³ See discussion at part 6 of Ch 4. In New Zealand, by virtue of section 361D of the Crimes Act 1961, an accused in a case that is likely to be long and complex may opt for trial by a judge sitting alone.

⁷⁴ Measures that might address some of the factors giving rise to unduly lengthy trials are considered at part 3 of Ch 4.

context and have the capacity to improve matters at the point of trial in two key respects. First, if they operate effectively, they have the potential to reduce the length of trials, which is in ease of all concerned and mitigates the risk that trials will collapse. Secondly, and perhaps most importantly given the paramount importance of trial in due course of law, they cut down on the demands made of jurors by reducing the number of occasions when jurors are sent away while legal argument takes place.

Pre-trial hearings have been recommended on many occasions over the past number of decades, perhaps most prominently in this jurisdiction by the Fennelly Commission in 2003.⁷⁵ The Fennelly Commission's recommendation was endorsed again in the 2012 *Report of the Working Group on Efficiency Measures in the Criminal Justice System - Circuit and District Courts*⁷⁶, the 2013 *Report of the Expert Group on Article 13 of the European Convention on Human Rights* (the McDermott Report)⁷⁷ and by the LRC in its 2014 *Report on Disclosure and Discovery in Criminal Cases*.⁷⁸ However, it is also notable that the LRC adopted a more circumspect view in its 2006 *Report on Prosecution Appeals and Pre-Trial Hearings*, concluding that the evidence as to the merits of such hearings was inconclusive.⁷⁹ Although some steps have been taken in this jurisdiction to introduce forms of pre-trial hearings, these have been limited in nature and do not operate to anything like the same extent as other common law jurisdictions, such as the England and Wales.⁸⁰

Legislative movement towards the introduction of a formalised system of pre-trial hearings has finally come about in the form of the revised general scheme for a Criminal Procedure Bill, which was approved by the government in June 2015.⁸¹ It is arguable that this is the result of recent endorsements of the original proposals of the 2003 Fennelly Commission

⁷⁵ Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Stationery Office, Dublin, 2003) [775].

⁷⁶ Department of Justice and Equality, *Report of the Working Group on Efficiency Measures in the Criminal Justice System - Circuit and District Courts* (Dublin, November 2012).

⁷⁷ Department of Justice and Equality, *Report of the Expert Group on Article 13 of the European Convention on Human Rights* (Dublin, March 2013).

⁷⁸ Law Reform Commission, *Report on Disclosure and Discovery in Criminal Cases* (LRC 112-2014) [2.34] - [2.39].

⁷⁹ Law Reform Commission, *Report on Prosecution Appeals and Pre-Trial Hearings* (LRC 81-2006).

⁸⁰ See the discussion at part 3 of Ch 4.

⁸¹ Department of Justice and Equality, 'Revised General Scheme of a Criminal Procedure Bill 2015' (9 June 2015) Head 2.

combined with heightened political interest in addressing factors that impinge upon the effective prosecution of white-collar crime. Should this comprehensive scheme be enacted in due course, as is strongly advocated as part of the instant thesis, Ireland will finally move in line with the approach taken in other jurisdiction such as England and Wales⁸² and the USA.⁸³

3.3.3 *Issues Concerning Documentary and Electronically Stored Evidence*

The nature of white-collar crime is such that huge quantities of documentary material and electronically stored data are often central to its commission and, therefore, to its investigation and prosecution. A number of issues are to the fore in any consideration of documentary evidence in a white-collar crime context. First, traditional definitions of the term ‘document’ have not kept pace with technological developments. The common law and the statute book have a variety of obsolete definitions of the term in question. Secondly, a number of statutory presumptions exist in relation to certain categories of documentary evidence. They assist prosecutors, while also respecting the rights of defendants by affording them the opportunity to rebut such presumptions. However, such provisions have been added to the statute book in a piecemeal manner and in relation to very narrow categories of documents. The deficiencies in the law as it stands mean that there is a great deal of unnecessary confusion, uncertainty and inconsistency in practice. Thirdly, long-standing exclusionary rules of evidence, such as the best evidence rule and the rule against hearsay, are ill-suited to dealing with contemporary methods of storing information and, it is argued, amount to inappropriate barriers to the admissibility of probative evidence at trial.

In the same spirit of consolidation and codification that informs many of the recommendations made as part of this thesis, it is contended that definitions of the term

⁸² In England and Wales preparatory or pre-trial hearings have existed for serious fraud trials since the enactment of the Criminal Justice Act 1987. The provisions of the 1987 Act were substantially expanded by Part 3 of the Criminal Procedure and Investigations Act 1996, which provided for preparatory hearings in any case tried on indictment of such complexity, or seriousness, that substantial benefits are likely to accrue from such a hearing.

⁸³ Pre-trial hearings in the form of motions and hearings *in limine* are long established in the federal courts in the USA and are governed by extensive Federal Rules of Evidence.

'document' should be repealed and replaced with a single definition of universal applicability that is broad enough to capture existing understandings of the term and also future technological advances, in so far as is possible. Definitions that achieve these aims include the definition used in the Criminal Justice Act 2011 and the definition proposed by the LRC in its 2009 *Consultation Paper on Documentary & Electronic Evidence*;⁸⁴ either definition could usefully form the basis for a new statutory definition. It is further proposed that the existing statutory presumptions concerning various categories of documents should be replaced with a single statutory presumption extending to all documents meeting the statutory criteria. Such a universal approach would protect against the current deficiency in the law whereby an individual document may not enjoy a statutory presumption because it does not come within one of the existing piecemeal legislative schemes.

As regards the rule against hearsay, while the Bankers' Books Evidence Acts 1897 - 1989 and the Criminal Evidence Act 1992 amount to statutory examples of reasonable relaxations of the rule against hearsay as regards certain categories of documentary evidence, the rule remains in existence for material not captured by those statutes. It is contended that the rule against hearsay should be modified so that all documentary evidence should be admissible once the conditions of necessity and reliability are met. It might be noted that there is, arguably, a far greater chance that the protagonists in a white-collar crime context will be available for the purposes of cross-examination at trial than in relation to other classes of crime, which reduces the relevance of the rule against hearsay to a certain extent. Nevertheless, the proposed change is likely to be of some utility to prosecutors in a white-collar crime context given the centrality of documentary evidence in trials of such matters.

Uncertainties and deficiencies in the law concerning pre-trial disclosure in criminal proceedings are magnified in the case of white-collar crime prosecutions by the challenges associated with managing vast quantities of electronic data and, further, the fact that such material is often in the hands of third parties. The law in this regard is in need of urgent reform and the LRC's 2014 *Report on Disclosure and Discovery in Criminal Cases* provides an

⁸⁴ Law Reform Commission, *Consultation Paper on Documentary & Electronic Evidence* (LRCCP 57-2009)

excellent foundation for change in its recommendation that a statutory framework should be introduced to govern issues in relation to pre-trial disclosure, a proposition that is fully endorsed here.⁸⁵

This thesis argues that, given their usefulness and application to criminal prosecutions generally, the measures argued for in this section should be included in a broadly based evidence statute of the kind under consideration by the Law Reform Commission.⁸⁶ Alternatively, they should be included in the legislative scheme proposed as part of the instant thesis so that they are certain to apply in a white-collar crime context.

3.4 Issues Arising From Privileges

3.4.1 *The Privilege Against Self-Incrimination*

The privilege against self-incrimination is central to any consideration of the investigation and prosecution of white-collar crime in circumstances where, to a greater extent than with other forms of crime, probative material is often within the possession and control of suspects and witnesses to a relevant crime.⁸⁷ The privilege has constitutional protection with the added reinforcement of protection under Article 6 of the ECHR. A challenge in any consideration of the privilege is the ambiguity that surrounds it in theory, doctrine and practice. Notwithstanding the Supreme Court judgments in *Gormley and White*,⁸⁸ there has been relatively little contemporary discussion of the privilege in this jurisdiction. Perhaps general uncertainty about the privilege has contributed to a lack of appetite on the part of lawyers, judges and policymakers to debate the issue more fully. In the relatively little consideration the privilege has been given in recent times, there has been a notable imbalance in the emphasis on speech and silence as opposed to other forms of communication that might be captured by the privilege.

It is submitted that the appropriate balance between the personal rights of individuals and

⁸⁵ Law Reform Commission, *Report on Disclosure and Discovery in Criminal Cases* (LRC 112-2014).

⁸⁶ Law Reform Commission, *Issues Paper Number 3: Consolidation of Evidence Legislation* (LRCIP 3-2013).

⁸⁷ See the discussion in Ch 5.

⁸⁸ *DPP v Gormley and White* [2014] IESC 17, [2014] 1 ILRM 377.

society's interest in the proper administration of justice where white-collar crime is concerned is best achieved by retaining the privilege and providing statutory clarification of certain aspects of the privilege. In relation to the right of a person not to say or produce anything that tends to incriminate him or her, the law should be clarified in three respects. First, involuntary admissions should never be admissible in evidence in proceedings against the person who made the admission; however, case by case assessment of the voluntariness of an admission is preferable to a blanket ban on the admissibility of evidence gathered as a result of the invocation of statutory powers. Secondly, this aspect of the privilege should not extend to material, particularly documents, already in existence at the time of an investigation, howsoever that material came into existence and regardless of its nature; nor should the privilege extend to the handing over of such material. Thirdly, this facet of the privilege should not extend to legal persons. The last clarification is particularly important from a policy perspective, as it would prevent corporate entities facing allegations in a white-collar crime context from availing of a privilege that, notwithstanding the blurriness of its exact parameters, is rooted in the protection of natural persons. Given their usefulness and application to criminal prosecutions generally, these clarifications should be included in a broadly based evidence statute of the kind under consideration by the Law Reform Commission.⁸⁹ Alternatively, they should be included in the legislative scheme proposed as part of the instant thesis so that they are certain to apply in a white-collar crime context.

As regards that aspect of the privilege concerning the right of a suspect to remain silent, existing statutory provisions that make it an offence to fail to answer certain questions or give certain information, or which allow for inferences to be drawn at trial from an accused's failure to answer certain question or provide certain information at the investigation stage of proceedings are proportionate interferences with this aspect of the privilege. The efficacy of these relatively underused provisions would be improved by the passing of secondary legislation detailing appropriately worded cautions that must be administered as part of the proper invocation of such provisions and also by giving stronger encouragement to investigators, whether through better training or management, to invoke such powers in appropriate circumstances. Finally, that aspect of the privilege concerning

⁸⁹ Law Reform Commission, *Issues Paper Number 3: Consolidation of Evidence Legislation* (LRCIP 3-2013).

the right of a defendant not to give evidence operates appropriately and does not call for any particular adaptation in the context of white-collar crime prosecutions.

3.4.2 *Legal Professional Privilege*

In criminal proceedings the mutuality applicable to the discovery procedure in civil proceedings is largely absent. Generally speaking, the prosecution is under an obligation to seek out and preserve all relevant evidence and then make any such material available to the defence. On the other hand, the defence in criminal proceedings has, traditionally, been under little obligation to furnish material to the prosecution. As such, in the ordinary course of events, a person or entity the subject of a white-collar crime investigation or prosecution might not be expected to have cause to seek to invoke legal professional privilege. However, provisions such as section 15 of the Criminal Justice Act 2011 and sections 778-796 of the Companies Act 2014 make legal professional privilege a very relevant issue for present purposes given the potential for those measures to create substantial disclosure obligations for witnesses, suspects and defendants in a white-collar crime setting.

Section 16 of the Criminal Justice Act 2011 makes provision for the determination of legal professional privilege issues that arise in relation to District Court orders under section 15 of the 2011 Act that require disclosure of documents to investigators. Section 16(1) defines 'privileged legal material' as a document which, in the opinion of the court concerned, a person is entitled to refuse to produce or to give access to it on the grounds of legal professional privilege. Inasmuch as section 16(1) leaves the definition of legal professional privilege to the opinion of the court, it would seem that the legislature did not wish to alter in any way the common law position on legal professional privilege. However, the law on this point could be clearer.

If the existing common law is applied, the two strands of legal professional privilege that will arise in the context of the operation of sections 15 and 16 of the Criminal Justice Act 2011 are legal advice privilege and litigation privilege. Legal professional privilege remains relatively undeveloped in terms of its applicability to criminal proceedings in this

jurisdiction. Because lawyers are involved in financial transactions at various stages and in various ways, inevitably there will be issues around the advice that individuals receive in relation to material events. Similarly there may be issues relating to the purposes for which documents were procured when litigation first surfaced on the horizon. If the role of lawyers or the lawyer-client relationship is somehow deployed in proceedings, the possibility of waiver arises. The multi-agency approach to large scale white-collar crime investigations in recent times, as seen, for example, in the investigation into the collapse of Anglo Irish Bank plc also raises waiver as an issue in circumstances where documents and digitally stored material pass through multiple pairs of hands. The crime and fraud exception to legal professional privilege also has pertinence in the context of white-collar crime proceedings but again, it is not a matter that has received much judicial attention.

The courts have developed measured principles and doctrines concerning the application of legal professional privilege in civil proceedings. As claims of legal professional privilege are likely to arise more frequently in a white-collar crime setting with the advent of provisions such as section 15 of the Criminal Justice Act 2011 and analogous powers in the Companies Act 2014, it remains to be seen how the common law develops these principles in the context of criminal proceedings in the resolution of claims of legal professional privilege made in accordance with the mechanisms described in section 15 of the 2011 Act and section 795 of the 2014 Act.

Aside from the need for the further development of common law principles concerning the relationship between legal professional privilege and criminal proceedings, two further issues arise. The first is the absence of detailed statutory guidance in relation to the practicalities for investigators in the management of digitally stored material that may be the subject of legal professional privilege, particularly where such material is stored alongside material that is not covered by privilege. The second issue relates to the fact that the existing statutory frameworks for dealing with legal professional privilege operate on a sectoral rather than a general basis. It is submitted that both issues require statutory remedy. Ideally, this would be achieved by way of legislation of general application in the criminal law. In the absence of a more general legislative approach to the issue in the near future, provision should be made for these issues in the dedicated statute argued for in this

thesis.

3.5 Defence Safeguards

This thesis argues that there is a justification and need to establish dedicated powers for the investigation and prosecution of white-collar crime and that, where practical and feasible, these should be housed in a single piece of legislation. The measures endorsed and proposed in this thesis are often tailored to the particular issues that arise in the context of the investigation and prosecution of white-collar crime. For example, section 7(a) of the Criminal Justice Act 2011 allows for the suspension of periods of pre-charge detention to take account of the general complexity of investigations of offences coming within the rubric of that Act. In recognition of the fact that some of the measures proposed in this thesis entail deeper incursions on the personal rights of suspects and defendants than arise in relation to other forms of crime, it is also an aspect of the thesis that an enhanced checklist of defence safeguards should apply to investigations and prosecutions of white-collar crime as a counterbalance to the proposals that serve to assist investigators and prosecutors. This is all the more important given the recent landmark case of *DPP v JC*, which attenuated the protection available to defendants in relation to unconstitutionally obtained evidence.⁹⁰

Safeguards were the touchstone of the Supreme Court's decision to uphold inference-drawing provisions in *Rock v Ireland*.⁹¹ Similarly, the ECtHR applies a concept of counterbalancing measures when discussing incursions on certain defence rights under Article 6(3).⁹² Thus, checks and balances that fortify matters from a defence perspective are consistent with relevant national and international jurisprudence and in keeping with the goal of creating a model that is squarely within the relevant national and international human rights architecture.

It is to be noted that many of the measures endorsed in this thesis already contain safeguards. To return to the example of section 7(a) of the Criminal Justice Act 2011, the

⁹⁰ [2015] IESC 31.

⁹¹ [1997] 3 IR 484 (SC).

⁹² *Murray v United Kingdom* (1996) 22 EHRR 29; *Ibrahim v United Kingdom* (2015) 61 EHRR 9.

number of times that pre-charge detention can be suspended under that provision is limited and the section also requires that authorisation for the operation of the provision is obtained from a garda of a certain minimum rank. However, there are deficiencies in existing safeguards for suspects and defendants, particularly in the area of legal advice and representation. A specific measure for inclusion in the scheme proposed as part of this thesis is a statutorily underpinned right to the presence of a lawyer during questioning at the investigative stage of relevant matters.⁹³ Furthermore, at the point at which relevant investigations move to the prosecution phase, there should be enhanced provision for legal aid and access to expert evidence such as forensic accountants to take account of the complexity associated with the investigation and prosecution of white-collar crime. Such measures would address the need for the defence to be provided with sufficient means to challenge the prosecution evidence and also introduce their own independent exculpatory evidence.

4 Conclusion

The first part of this chapter sought to lay a justificatory foundation for a dedicated investigatory and prosecutorial approach where white-collar crime is concerned. It is submitted that the features of white-collar crime outlined in that part of the chapter support the contention that the public interest in protecting against white-collar crime justifies and, indeed, demands a specialised approach to the investigation and prosecution of white-collar crime that also affords due recognition for the personal rights of witnesses, suspects and defendants.

The second part of the chapter then endeavoured to build on the justificatory foundation established in the first part of the chapter by synthesising the ideas that have emerged in the course of this research concerning the constituent features of such a dedicated approach. A range of measures were proposed that should be introduced by the legislature to address deficiencies and lacunae in the adjectival laws and doctrines associated with the

⁹³ On the question of access to a lawyer during questioning, obiter remarks in *DPP v Gormley* and *DPP v White* [2014] IESC 17, [2014] 1 ILRM 377 prompted a change of policy on the part of the DPP that allowed lawyers to sit in on interviews with clients during period of pre-charge detention but primary legislation is still awaited in order to statutorily underpin this change of approach.

investigation and prosecution of white-collar crime in Ireland, while also ensuring that the interests of suspects and defendants are safeguarded.

This thesis demands that measures relating to the investigation and prosecution of white-collar crime are housed, for the most part, in a unifying piece of primary legislation, although it is acknowledged that some of the proposed measures transcend a white-collar crime context in their usefulness and applicability and are more suitable for enactment by way of broader based criminal evidence and criminal procedure statutes. While some of the measures amount, in certain respects, to a difference in treatment of suspects and defendants in the case of white-collar crime, the measures do not necessarily apply to the detriment of such suspects and witnesses. The suggested approach respects and balances the competing interests of the personal rights of suspects and defendants with the societal interest in combating white-collar crime and falls squarely within the existing constitutional and international law architecture guaranteeing a range of personal rights.

While there may have been disinterest and apathy in relation to white-collar crime on a societal and political level in the past, the financial and economic crises that came to a head in 2008 have made this form of crime a priority for consideration and reform. In its examination of relevant laws, rules and doctrines associated with the investigation and prosecution of white-collar crime, this thesis has contributed to that debate; it has identified key areas for reform and marked out how such change should be achieved. The time is ripe for the promulgation of a statute dedicated to the investigation and prosecution of white-collar crime, along with the enactment of other pertinent measures in statutes that are of application to the criminal law generally. It is to be hoped that the topicality of white-collar crime as an issue in contemporary Irish society will prompt the legislature to introduce a balanced and proportionate approach, of the kind contended for in this thesis, to issues concerning the investigation and prosecution of white-collar crime.

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Appendix

SCHEDULE 1 OF THE CRIMINAL JUSTICE ACT 2011

"RELEVANT OFFENCES" FOR THE PURPOSES OF THE ACT

Offences relating to banking, investment of funds and other financial activities

1. An offence under section 58 of the Central Bank Act 1971 insofar as it relates to a contravention of section 17, 18, 23, 24 or 25 of that Act.
2. An offence under section 37(6) or 41(1) of the Insurance Act 1989.
3. An offence under section 20(4) or 24(4) of the Trustee Savings Banks Act 1989.
4. An offence under section 11(3) or 13(5) of the Unit Trusts Act 1990.
5. An offence under section 25(5) or 27(4), or subsection (7) or (8) of section 35, of the Investment Limited Partnerships Act 1994.
6. An offence under section 10(16), 19(1)(b), 30, 34, 35(4), 46(2), 54(6), 56(9), subsection (3), (5), (6) or (9) of section 52 or subsection (7) or (8) of section 79, of the Investment Intermediaries Act 1995.
7. An offence under section 12(2) of the Consumer Credit Act 1995 insofar as it relates to a contravention of subsection (1) or (3) of section 97, or section 101, 102 or 127, of that Act.
8. An offence under section 29(3), or subsection (7) or (8) of section 43, of the Investor Compensation Act 1998.
9. An offence under section 14(3) or 15(2) of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

10. An offence under section 5(2) of the Markets in Financial Instruments and Miscellaneous Provisions Act 2007 insofar as it relates to—

(a) a failure to discharge a duty to which a person is subject under Regulation 40(1) or 112(1) of the European Communities (Markets in Financial Instruments) Regulations 2007 (S.I. No. 60 of 2007), or

(b) a contravention of Regulation 19, 52, 159 or 187B of those Regulations.

11. An offence under Regulation 20(2), 22(4), 58(9), 59(8), 60(6), 62(4) or 76(1) of the European Communities (Reinsurance) Regulations 2006 (S.I. No. 380 of 2006).

12. An offence under section 7 of the National Asset Management Agency Act 2009 insofar as it relates to a person other than a credit institution (within the meaning of that Act).

13. An offence under section 48 of the Central Bank Reform Act 2010.

Company law offences

14. An offence under section 60(15), 295 or 297, or under paragraph (a), (d), (e), (f), (g), (i), (j), (k), (l), (m), (n), (o) or (p) of section 293(1), of the Companies Act 1963.

15. An offence under any of the following provisions of the Companies (Amendment) Act 1986:

(a) section 22(1)(a) (insofar as it relates to a failure to comply with section 5 or 16 of that Act),

(b) section 22(2) (insofar as it relates to a failure to take all reasonable steps to secure compliance with the requirements of section 3 of that Act or a failure to comply with section 13 of that Act), or

(c) section 22(3).

16. An offence under section 197, 202(10), 242 or 243(1) of the Companies Act 1990.

17. An offence under section 37(1) of the Companies (Amendment) (No. 2) Act 1999.

18. An offence under section 48 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

19. An offence under Regulation 5 or 6 of the Market Abuse (Directive 2003/6/EC) Regulations 2005 (S.I. No. 342 of 2005).

20. An offence under Regulation 76(4) of the Transparency (Directive 2004/109/EC) Regulations 2007 (S.I. No. 277 of 2007).

Money laundering and terrorist offences

21. An offence under section 7, 8, 9, 10, 35, 37, 38, 42 or 49 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.

22. An offence under section 13 of the Criminal Justice (Terrorist Offences) Act 2005.

Theft and fraud offences, etc.

23. An offence under section 4, 6, 7, 9, 10, 11, 15, 17, 18, 25, 26, 27, 28, 29, 33, 34, 35, 36, 37, 38, 42, 43, 44, 45 or 51 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

24. Conspiracy to defraud at common law.

25. An offence under section 119 of the Registration of Title Act 1964.

26. An offence under section 17 of the Criminal Justice Act 2011.

Bribery and corruption offences

27. An offence under section 1 of the Prevention of Corruption Act 1906.

28. An offence under section 7 or 8 of the Prevention of Corruption (Amendment) Act 2001.

Consumer protection offence

29. An offence under section 65 of the Consumer Protection Act 2007.

Criminal damage to property offences

30. An offence under section 2, 3 or 4 of the Criminal Damage Act 1991 insofar as the offence relates to data (within the meaning of section 1 of that Act) or a storage medium in which such data are kept.

