

## Coming forward

# Supreme Court upholds the constitutionality of the offence of withholding information

### Background

In *Sweeney v Ireland* [2017] IEHC 702, the High Court held that section 9(1)(b) of the Offences Against the State (Amendment) Act 1998 (the “**1998 Act**”) was repugnant to the Constitution, as it offended against the constitutional right to silence and was impermissibly vague and uncertain. The State appealed the ruling to the Supreme Court, bypassing the Court of Appeal because the issue to be decided was one of legal argument and of considerable public importance.

The Supreme Court delivered its judgment on 28 May 2019 reversing the finding of the High Court. In this briefing we look at the history of the challenge and the broader practical implications of the Supreme Court judgment.

### The relevant facts

Sweeney (the “**Applicant**”) was charged with withholding information under section 9(1)(b) of the 1998 Act (the “**charge**”) after exercising his right to silence during an interview with Gardai, after he was arrested on suspicion of murder. In 2014, the Applicant was sent forward for trial at Sligo Circuit Criminal Court on foot of the charge. He initiated a constitutional challenge in respect of section 9(1)(b), and his trial was stayed pending determination of that challenge.

### Section 9(1)(b)

Section 9(1)(b) of the 1998 Act makes it an offence for a person who has information which he or she knows or believes (might be of assistance in (i) stopping the commission of a serious offence, or (ii) securing the apprehension, prosecution or conviction of a person for a serious offence to fail to disclose that information to the Gardai without a reasonable excuse (the “**Disclosure Obligation**”).

### The High Court

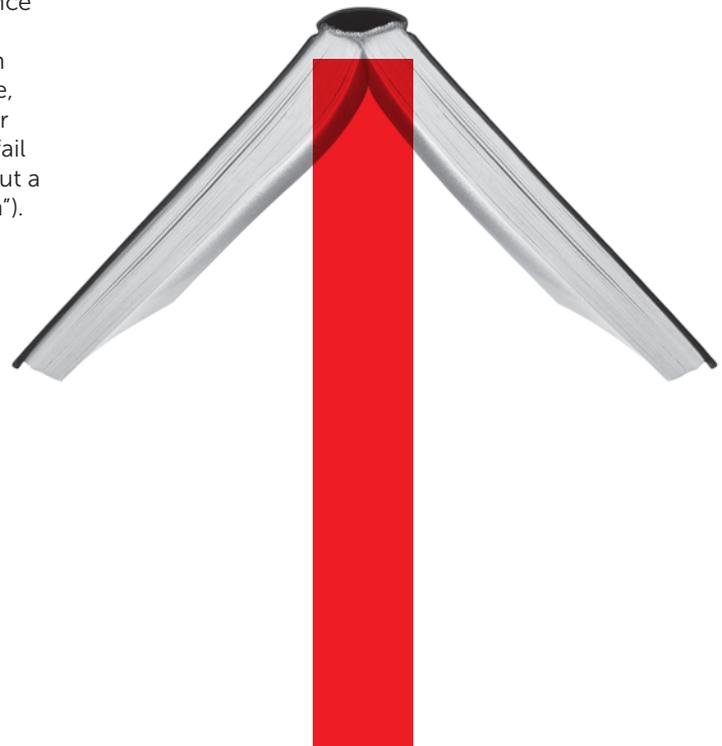
Baker J found that section 9(1)(b) created a compulsion such that the person under questioning is compelled to answer questions, as the failure to do so, exposes the person to the risk of conviction of the separate offence for failing to comply with the Disclosure Obligation.

Under section 9(1)(b), the silence itself constitutes the crime. Baker J found that the offence was vague and uncertain as it could result in a person being unable to understand the relationship between the right to remain silent and the consequence of doing so (and breaching the Disclosure Obligation). Accordingly, Baker J made a Declaration that the offence of withholding information did offend the constitution (the “**Declaration**”).

### The Supreme Court

The Supreme Court held that the Disclosure Obligation only applies to those who have information about the commission of a serious offence; and who know or believe that disclosing this information will assist in apprehending or prosecuting or convicting someone.

Charleton J, delivering the unanimous judgment, found that the offence actually protects the right to silence of a person who does not wish to speak about their own involvement in a crime, as it does not apply where a person has a “reasonable excuse” for not disclosing relevant information (eg the protection against self-incrimination). Charleton J concluded that the elements of the offence are clear and it does not compel a person to self-incriminate themselves.



## Section 19 Criminal Justice Act 2011: the broader reach of the judgment

A similar offence exists under Section 19(1) of the Criminal Justice Act 2011 (the "**2011 Act**"). Section 19(1) applies to a "relevant offence" which is broad in scope and includes certain offences under the Companies Act, Anti-Money Laundering legislation, Bribery and Corruption legislation and certain theft and fraud offences.

Of note is the obligation under section 19(1) on any "person" to disclose information which he or she knows or believes may be of material assistance in preventing the relevant offence or securing the apprehension, prosecution or conviction of a person for the offence. That obligation is to disclose such information to the Gardaí "as soon as it is practicable to do so".

## The Supreme Court ruling and its implications

The reversal by the Supreme Court of the Declaration suggests that any similar challenge to the constitutionality of Section 19 of the 2011 Act would fail.

Companies, employers, and directors are therefore reminded of the importance of having clear policies in place to deal with the reporting of relevant offences such as corruption, fraud or theft, such that they will not fall foul of the obligation to report relevant information to the Gardaí as soon as practicable.

To discuss the impact of this judgment or for assistance in developing appropriate internal policies and controls please contact:



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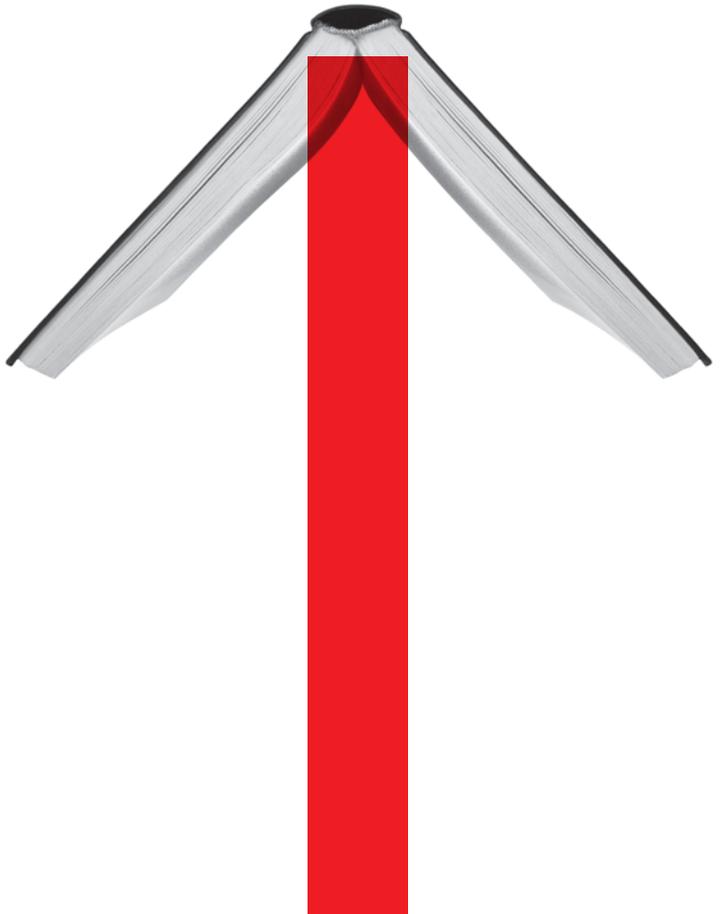
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