Submission to the Independent Review Group on the Offences Against the State Acts

Irish Human Rights and Equality Commission

November 2021

Coimisiún na hÉireann um Chearta an Duine agus Comhionannas
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1. Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014 (the '2014 Act').* The Commission has a statutory mandate to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality, and to make recommendations to the Government on measures to be taken to strengthen, protect and uphold human rights and equality in the State.[1]

The Commission welcomes the opportunity to make a submission to the Independent Review Group on the *Offences Against the State Acts*, which it hopes will assist the Group in its review of the legislation. The Commission and its predecessor body, the Irish Human Rights Commission ('the IHRC'), have previously raised number of significant concerns about the human rights and equality issues arising in connection with the *Offences Against the State Acts* ('the OASA') and the Special Criminal Court.[2]

In this submission, the Commission recommends the repeal of the *Offences Against the State Acts* and the abolition of the Special Criminal Court.

The submission sets out the human rights and equality concerns that arise in connection with the operation of the OASA and the functioning of the Special Criminal Court. The Commission considers that the use of this legislation and the resort to a non-jury court are no longer necessary nor justified in Ireland's current political security environment.

In Section 6 of this submission, the Commission also makes recommendations for strengthening of safeguards in the use of the *Offences Against the State Acts*, in the event that the State does not repeal the Acts.

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1 Section 10(2) (b) and (d) of the Irish Human Rights and Equality Commission Act 2014.

2 These concerns have most recently been raised in the Commission's submission to the United Nations Human Rights Committee in August 2020. IHREC, Submission to the United Nations Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland (August 2020) pp. 14-15. See also IHRC, Comments on the Criminal Justice (Terrorist Offences) Bill 2002; IHRC, Submission to the UN Human Rights Committee on the Examination of Ireland's Third Periodic Report on the ICCPR (March 2008) pp. 13-16; IHRC, Observations on the Criminal Justice (Amendment) Bill 2009 (June 2009); IHRC, Submission of the Irish Human Rights Commission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Report under the International Covenant on Civil and Political Rights (June 2014) pp. 64-70.

2. A needed review of the Offences Against the State Acts

The appointment of the Independent Review Group to examine the *Offences Against the States Acts* is welcome. It has been nearly two decades since the publication of the last comprehensive review of the legislation, the report of the Hederman Committee.[3] In that time, there have been a number of significant developments including the extension of the remit of the Special Criminal Court to certain organised crime offences,[4] and the coming into operation of a second Special Criminal Court in 2016 to clear a backlog of cases.[5] There have also been several informative judgments from domestic courts and the European Court of Human Rights (the 'ECtHR') on the elements of the right to a fair trial, including a number of cases in which the Commission and the former IHRC exercised an *amicus curiae* function.[6]

The changing realities in the Irish criminal justice system and the national security situation call into question the continued reliance on the view of the majority of the Hederman Committee, that the threats posed by paramilitaries and organised crime in Ireland were sufficient to support the continued operation of the OASA and the retention of the Special Criminal Court. [7]

Longstanding concerns and recommendations of the Hederman Committee and the United Nations Human Rights Committee[8] continue to not be fully addressed or implemented by the State. There is a scarcity of publically available data to evaluate the operation of the OASA and the necessity of the Special Criminal Court, particularly as a measure to address jury intimidation. While there are yearly resolutions before the Houses of the Oireachtas renewing certain provisions of the OASA[9] and the *Criminal*

3 Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002).
4 Pursuant to section 9 of the *Criminal Justice (Amendment) Act 2009*.
5 Department of Justice and Equality, Minister Fitzgerald signs rules of court for the second Special Criminal Court (22 April 2016).
6 See Submissions of the *amicus curiae* in *Donohoe v Ireland* (09 May 2012); Submissions on behalf of the *amicus curiae* in *Sweeney v Ireland, the Attorney General and the Director of Public Prosecutions* (12 March 2019); Submissions of the *amicus curiae* in *DPP v RK and LM* (05 July 2021).
7 Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) para. 9.38.
8 In its findings in *Kavanagh v Ireland* and Concluding Observations on Ireland since 1993. It is expected that Ireland will be reviewed by the United Nations Human Rights Committee in 2022.
9 Section 18 of the *Offences Against the State (Amendment) Act 1998* provides that certain sections in the 1998 Act will cease to be in operation unless a resolution is passed by both Houses of the Oireachtas continuing the operation of the provisions. The relevant sections are: section 2 (Membership of an

Justice Act 2009,[10] these motions are often routine and do not involve any substantive discussion of any evidence and data underlying the rationale for retaining the specific provisions or the Special Criminal Court.

The review therefore offers an opportunity to assess whether the legislation is necessary, proportionate and compatible with Ireland's constitutional and international human rights law obligations.

unlawful organisation: inferences that may be drawn); section 3 (Notification of witnesses); section 4 (Amendment of section 3 of Offences against the State (Amendment) Act, 1972) ; section 6 (Directing an unlawful organisation); section 7 (Possession of articles for purposes connected with certain offences); section 8 (Unlawful collection of information); section 9 (Withholding information); section 10 (Extension of period of detention under section 30 of Act of 1939); section 11 (Rearrest under section 30 of Act of 1939); section 12 (Training persons in the making or use of firearms, etc); section 14 (Offences under Act to be scheduled offences); section 17 (Forfeiture of property).

10 Section 8 of the *Criminal Justice (Amendment) Act 2009* provides that certain sections under Part 7 of the *Criminal Justice Act 2006* are deemed to be scheduled for the purposes of Part V of the OASA. The relevant sections under Part 7 are: section 71A – directing the activities of a criminal organisation; section 72 – participating in or contributing to certain activities of a criminal organisation; section 73 – committing an offence for a criminal organisation; section 76 liability for offences by corporate bodies.

3. Relevant human rights and equality standards

The provisions of the OASA, in particular the provisions providing for the establishment of the Special Criminal Court, engage a number of fundamental rights protected under the Constitution, the *European Convention on Human Rights Act 2003*, European Union law and international human rights law.

Core rights engaged include:

- the right to a trial by jury[11]
- the right to a fair trial[12]
- the right to equality before the courts[13]
- the right to equality before the law[14]
- the right to liberty[15]
- the right to disclosure[16]
- the right to cross examine[17]
- the right to silence and the privilege against self-incrimination[18]

The fundamental rights of an individual need to be carefully balanced against the rights of victims, national security concerns and the public interest in having an effective criminal justice system. Any restrictions or limitations of the rights of an individual must comply with the principles of legality, necessity and proportionality.

The right to a jury trial

The right to a jury trial is a fundamental right guaranteed under the Constitution,[19] and an important safeguard for the rights of individuals. The right to a jury trial is not absolute, the Constitution sets out a number of exemptions to the right to a jury trial. One such exemption is Article 38.3.1°, which provides for the establishment of special

11 Article 38.5 of the Constitution.
12 Articles 38.1 and 40.3 of the Constitution; Article 47 of the Charter of Fundamental Rights of the European Union; Article 6 of the European Convention on Human Rights; Article 14 of the International Covenant on Civil and Political Rights.
13 Article 14 of the International Covenant on Civil and Political Rights.
14 Article 40.1 of the Constitution; Article 20 of the Charter of Fundamental Rights of the European Union; Protocol No. 12 to the European Convention on Human Rights; Article 26 of the International Covenant on Civil and Political Rights.
15 Article 40.4.1° of the Constitution; Article 6 of the Charter of Fundamental Rights of the European Union; Article 5 of the European Convention on Human Rights; Article 9 of the International Covenant on Civil and Political Rights.
16 Article 38.1 and Article 6 of the European Convention on Human Rights.
17 Article 38.1 of the Constitution and Article 6.3(d) of the European Convention on Human Rights.
18 Articles 38.1 and 40.6.1° of the Constitution; Article 6 of the European Convention on Human Rights; Article 14(3)(g) of the International Covenant on Civil and Political Rights.
19 Article 38.5 provides that "no person shall be tried on any criminal charge without a jury."

courts for the trial of offences in cases where the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order. This provision is given effect in Part V of the *Offences Against the State Act 1939*,[20] which provides for the establishment of the non-jury Special Criminal Court.[21] The right to a jury trial is not given similar recognition under international law due to divergent legal systems in other jurisdictions. The ECtHR have held that Article 6 of the European Convention on Human Rights (the 'ECHR') does not specify trial by jury as an element of a fair hearing.[22] In *Kavanagh v Ireland*, the UN Human Rights Committee observed that the absence of a jury trial does not, in and of itself, render a trial unfair.[23] While the use of non-jury trials alone may not violate constitutional or international law, the functioning of non-jury trials and the operation of special courts impinge on other fundamental rights, including in particular the right to a fair trial.

The right to a fair trial

The right to a fair trial, guaranteed under the Constitution and international law, includes that everyone, in the determination of any criminal charge against them, shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[24] In regards to the status of special courts and the right to a fair trial, the UN Human Rights Committee has said that the trial of civilians before specialised courts is not prohibited under the International Covenant on Civil and Political Rights (the 'ICCPR').[25] The Human Rights Committee determined in *Kavanagh v Ireland* that a trial before the Special Criminal Court is not, in and of itself, a violation of the entitlement to a fair hearing under Article 14 of the ICCPR.[26] Moreover, in *X and Y v Ireland*, the ECtHR held that the Special Criminal Court was not, in and of itself, in

20 Article 38.3.2° of the Constitution sets out that the constitution, powers, jurisdiction and procedure of special courts shall be prescribed by law.
21 Section 35(2) of the OASA provides that the Government may issue a proclamation declaring that it is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order.
22 *X and Y v Ireland*, Application No 8299/78, Admissibility, 10 October 1980, DR 22, 51–75.
23 *Kavanagh v Ireland*, Communication No. 819/1998, CCPR/C/71/D/819/1998 (26 April 2001) para. 10.1.
24 Articles 38.1 and 40.3 of the Constitution; Article 47 of the Charter of Fundamental Rights of the European Union; Article 6 of the European Convention on Human Rights; Article 14 of the International Covenant on Civil and Political Rights.
25 United Nations Human Rights Committee, General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007) para. 22.
26 *Kavanagh v Ireland*, Communication No. 819/1998, CCPR/C/71/D/819/1998 (26 April 2001) para. 10.1.

contravention of the right to a fair trial under Article 6 of the ECHR as it was a tribunal established by law, and was independent and impartial.[27]

While the trial of individuals before special courts, including the Special Criminal Court, is not prohibited under international law, the Human Rights Committee, in its *General Comment No. 32*, has observed that the use of these courts:

> "may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned."[28]

The Committee states clearly that trials before specialised courts should be the exception not the norm; only in cases:

> "where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials."

In order to protect the rights of individuals, the Committee states that such trials should be in full conformity with the requirements of Article 14, and there should be no limitations or modifications to the guarantees of a fair trial due to the specialised character of the court.

The right to equality before the courts

Article 14 of the ICCPR guarantees equal access and equality of arms, and ensures that parties to the proceedings are treated without any discrimination.[29] Equality of arms ensures that the same procedural rights are provided to all parties to the proceedings, unless any distinction in treatment between the parties is based on law and is justified on objective and reasonable grounds, and does not result in disadvantage or other unfairness to the defendant.[30] The UN Human Rights Committee has stated that equality before courts also:

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27 *X and Y v Ireland*, Application No 8299/78, Admissibility, 10 October 1980, DR 22, 51–75. See also *Eccles v Ireland*, Application No 12839/87, 9 December 1988.

28 United Nations Human Rights Committee, General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007) para. 22.

29 United Nations Human Rights Committee, General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007) para. 8.

30 United Nations Human Rights Committee, General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007) para. 13.

> "requires that similar cases are dealt with in similar proceedings."[31]

With regard to the use of exceptional criminal procedures or specially constituted courts in the determination of certain categories of cases, for example if jury trials are excluded for certain categories of offences or offenders, the Human Rights Committee states that:

> "objective and reasonable grounds must be provided to justify the distinction."[32]

The right to equality before the law

Article 26 of the ICCPR guarantees that:

> "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law."

This right was at issue in the case of Kavanagh v Ireland, where the Human Rights Committee found the right to equality before the law and to the equal protection of the law had been violated. The Committee found that the decision of the Director of Public Prosecutions (the 'DPP') to try Mr. Kavanagh before the Special Criminal Court resulted in him facing an:

> "extra-ordinary trial procedure before an extra-ordinarily constituted court",

where he was deprived of certain procedures under domestic law, which distinguished him from others charged with similar offences in ordinary courts.[33] The Committee was principally concerned with section 47 of the Offences Against the States Act 1939, which allows the DPP to refer cases for trial to the non-jury Special Criminal Court without giving any reason for doing so. The Committee expressed concern that judicial review of the DPP's decisions is:

> "effectively restricted to the most exceptional and virtually undemonstrable circumstances".[34]

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31 United Nations Human Rights Committee, General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007) para. 14.
32 United Nations Human Rights Committee, General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007) para. 14.
33 *Kavanagh v Ireland*, Communication No. 819/1998, CCPR/C/71/D/819/1998 (26 April 2001) para. 10.2.
34 *Kavanagh v Ireland*, Communication No. 819/1998, CCPR/C/71/D/819/1998 (26 April 2001) para. 10.2.

The Committee, observing that trial by jury in Ireland is an important protection for the rights of accused persons, held that Article 26 requires that the State should ensure that persons should not be tried before the Special Criminal Court unless reasonable and objective grounds for the decision of the DPP to refer a case are provided.[35]
The Supreme Court in the case of *Murphy v Ireland* held that trial in the Special Criminal Court did not offend the right to equality before the law, under Article 40.1, as Article 38.1 of the Constitution:

> "contemplates a differentiation being made between those who will receive trial by jury, and those in respect of whom it has been determined in accordance with law that the ordinary courts are inadequate to secure the administration of justice."[36]

The Supreme Court held that fair procedures requires that when the DPP is making the sole decision that a case be tried before the Special Criminal Court, and where the DPP's decision is not subject to appeal or review, the accused should be provided with the DPP's reasons for considering that the ordinary courts are not sufficient to secure the administration of justice in the particular case.[37] However, the Court stated that:

> "it may be sufficient to state that no reason can be given without impairing national security."[38]

The Court also stated that the entitlement to obtain reasons does not carry any:

> "entitlement to obtain the gist of the information upon which the Director's conclusion is arrived at, and no requirement to have an oral hearing, cross-examination of witnesses or to provide for submissions."[39]

The Court also stated that a review of a decision of the DPP that the ordinary courts were inadequate to secure the administration of justice in a particular case, should be the exception and never routine; such a review should only occur when an accused

35 *Kavanagh v Ireland*, Communication No. 819/1998, CCPR/C/71/D/819/1998 (26 April 2001) paras. 10.2-10.3, 11, 12.
36 *Murphy v Ireland* [2014] IESC 19, para. 35.
37 *Murphy v Ireland* [2014] IESC 19, para. 44.
38 *Murphy v Ireland* [2014] IESC 19, para. 43.
39 *Murphy v Ireland* [2014] IESC 19, para. 44.

person can put forward a substantial case that the decision making process has miscarried.[40]

The right to disclosure and the right to cross examine

The rules around the withholding of evidence from an accused engage the right to a fair hearing. The Irish courts have recognised that cross examination is one of the fundamental guarantees of fair procedure.[41] The right to examine witnesses is also guaranteed under Article 6.3(d) of the ECHR. The ECtHR has held that a defendant in a criminal trial should have an effective opportunity to challenge the evidence against them.[42] The ECtHR has held that Article 6.1 requires that prosecution authorities disclose to the defence all material evidence in their possession for or against the accused.[43]

However, this entitlement to the disclosure of relevant evidence is not an absolute right. The Irish courts have held that restrictions on rights must be proportionate; the measure adopted should only impair rights to the minimum extent necessary to achieve the legitimate public interest.[44] The ECtHR has recognised that in any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused.[45] The ECtHR has held that any measures restricting the rights of the defence should be strictly necessary; if a less restrictive measure can suffice then that measure should be applied.[46] In cases where evidence is withheld from the defence, the ECtHR examines whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.[47]

In *Donohoe v Ireland*, which examined the admissibility of belief evidence under section 3(2) of the *Offences Against the State (Amendment) Act 1972*, the ECtHR held that

40 *Murphy v Ireland* [2014] IESC 19, para. 43.
41 *Re Haughey* [1971] IR 217.
42 *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, ECHR 2011, § 127.
43 *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, ECHR 2000-II, § 60.
44 *Heaney v Ireland* [1996] 1 IR 180; *DPP v Kelly* [2006] 3 IR 122.
45 *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, ECHR 2000-II, § 61.
46 *Van Mechelen and Others v. the Netherlands*, 23 April 1997, Reports of Judgments and Decisions 1997-III, §58.
47 *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, ECHR 2000-II, § 62.

cases where due to a claim of privilege there is an impossibility for the defence to have access to sources on which a witness based his or her knowledge or belief, do not automatically breach Article 6.1 of the ECHR.[48] In determining whether the admission of untested evidence violates Article 6, the ECtHR will consider:

> "whether it was necessary to admit the witness statements and whether the untested evidence was the sole or decisive basis for the conviction and, if it was, were there sufficient counterbalancing factors, including strong procedural safeguards, in place to ensure that the trial, judged as a whole, was fair".[49]

The right to silence and privilege against self-incrimination

The right to silence and the privilege against self-incrimination have been recognised under Articles 38.1 and 40.6.1° of the Constitution. The right to silence is also explicitly recognised under the ICCPR, Article 14(3)(g) provides that everyone is entitled not to be compelled to testify against themselves or to confess guilt. The ECtHR has recognised that:

> "[a]lthough not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6."[50]

The Irish courts have recognised that the right to silence is not absolute and may be subject to legislative restrictions that are proportional to the State's entitlement to

48 *Donohoe v Ireland*, Application no. 19165/08, judgement 12 December 2013, § 76. The case involved an Applicant who was convicted in the Special Criminal Court of membership of an illegal organisation in 2004 and sentenced to four years imprisonment. This conviction was upheld on appeal. There were four categories of evidence presented against the Applicant at trial, three of which were considered in the IHRC's *amicus curiae* submission: that is, the belief evidence; inferences drawn from the conduct of the accused and finally; inferences that may be drawn from the silence of the accused under questioning, as is permitted by statute. The Applicant claimed that his trial before the SCC breached Article 6 ECHR. He alleged that the judges who determined his guilt also reviewed material submitted by the prosecution which would tend to establish that guilt as it supported the belief evidence presented by the prosecution. However, the material was not available to the defence as informer privilege was invoked. In essence, the Applicant alleged that the SCC was exposed to material prejudicial to his defence and, as it sat without a jury, the trial was tainted by inadmissible evidence.

49 *Donohoe v Ireland*, Application no. 19165/08, judgement 12 December 2013, § 76.

50 *John Murray v. the United Kingdom* [GC], 8 February 1996, Reports of Judgments and Decisions 1996-I, § 45.

protect itself.[51] However, the Supreme Court has held that the use at trial of a statement that was the result of a provision that compelled them to speak may breach the constitutional right to a fair trial.[52] While recognising the right to silence is not absolute, the ECtHR in *Heaney and McGuinness v Ireland* held that an individual should not be sanctioned for failing to provide information.[53] The ECtHR stated that:

> "the security and public order concerns relied on by the Government cannot justify a provision which extinguishes the very essence of the applicant's right to silence and against self-incrimination guaranteed by Article 6(1) of the Convention."[54]

While finding that a conviction must not be solely or mainly based on the accused's silence or on a refusal to answer questions or to give evidence himself, the ECtHR has held that the right to remain silent cannot prevent the accused's silence – in situations which clearly call for an explanation – from being taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.[55] In determining whether the drawing of adverse inferences from an accused's silence violates Article 6, the ECtHR has regard to:

> "all the circumstances of the case, having particular regard to the 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 inherent in the situation."[56]

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51 *Heaney v Ireland* [1996] 1 IR 580.
52 *Re National Irish Bank (under investigation) (No.1)* [1999] 3 IR 45.
53 *Heaney and McGuinness v Ireland*, Application No 34720/97, 21 December 2000. This case involved section 52(2) of the OASA which made it a criminal offence, carrying a maximum penalty of six months imprisonment, if a person fails or refuses to provide a full account of their movements and actions during a specified period or to provide false or misleading account or information. The ECtHR found 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 in effect destroyed the very essence of their privilege against self-incrimination and their right to remain silent." See also *Quinn v Ireland*, Application No 36887/97, 21 December 2000.
54 *Heaney and McGuinness v Ireland*, Application No 34720/97, 21 December 2000, § 58.
55 *John Murray v. the United Kingdom* [GC], 8 February 1996, Reports of Judgments and Decisions 1996-I, § 47.
56 *John Murray v. the United Kingdom* [GC], 8 February 1996, Reports of Judgments and Decisions 1996-I, § 47.

The ECtHR has stated that adequate safeguards must be in place to ensure that any adverse inferences do not go beyond what is permitted under Article 6.[57] The ECtHR has emphasised that early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination.[58]

Concluding Observations of the United Nations Human Rights Committee

While a specialised non-jury court may not be prohibited under the ICCPR, the Human Rights Committee has continually expressed concern with the operation and functioning of the Special Criminal Court, as well as aspects of the OASA. In the Concluding Observations following the examination of Ireland's First Periodic Report to the Human Rights Committee in 1993, the Committee remarked that:

> "[i]t does not consider that the continued existence of that Court is justified in the present circumstances"

and recommended the State review the need for the Special Criminal Court.[59]
In 2000, the Human Rights Committee expressed particular concern that the law establishing the Special Criminal Court does not specify clearly the cases that are to be assigned to that Court but leaves it to the broadly defined discretion of the Director of Public Prosecutions.[60] The Committee also expressed concern, in regard to compatibility with articles 9 and 14 of the ICCPR, with the continuing operation of the OASA, that the periods of detention without charge under the OASA have been increased, that persons may be arrested on suspicion of being about to commit an offence, that the majority of persons arrested are never charged with an offence, and that, in circumstances covered by the OASA, failure to respond to questions may constitute evidence supporting the offence of belonging to a prohibited organisation. The Committee recommended that:

57 *O'Donnell v. the United Kingdom*, no. 16667/10, 7 April 2015, § 51.
58 *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008, § 54.
59 Human Rights Committee, Concluding Observations of the Human Rights Committee on Ireland's First Periodic Report, CCPR/C/79/Add.21 (3 August 1993) paras. 11, 19.
60 Human Rights Committee, Concluding Observations of the Human Rights Committee on Ireland's Second Periodic Report, A/55/40 (2000) para. 436.

> "[s]teps should be taken to end the jurisdiction of the Special Criminal Court and to ensure that all criminal procedures are brought into compliance with articles 9 and 14 of the Covenant."[61]

In 2008, the Committee reiterated its concerns around the continuing operation of the Special Criminal Court and the establishment of additional special courts; and recommended that the State:

> "should carefully monitor, on an ongoing basis, whether the exigencies of the situation in Ireland continue to justify the continuation of a Special Criminal Court with a view to abolishing it."[62]

The Committee also recommended that the State should:

> "ensure that, for each case that is certified by the Director of Public Prosecutions for Ireland as requiring a non-jury trial, objective and reasonable grounds are provided and that there is a right to challenge these grounds."[63]

In 2014, the Committee once again reiterated its concern at the continuing operation of the Special Criminal Court.[64] It also expressed further concern at the expansion of the remit of the Court to include organised crime. The Committee recommended that the State should:

> "consider abolishing the Special Criminal Court."

The recurring concerns of the Human Rights Committee around the existence and operation of the Special Criminal Court have not had any direct impact in Ireland, as since the last review the second Special Criminal Court came into operation. It is expected that the Human Rights Committee will review Ireland's Fifth Periodic Report in 2022; and the continued existence of the Special Criminal Court and the operation of the OASA may once again be of concern to the Human Rights Committee in its

61 Human Rights Committee, Concluding Observations of the Human Rights Committee on Ireland's Second Periodic Report, A/55/40 (2000) para. 437.
62 Human Rights Committee, Concluding Observations of the Human Rights Committee on Ireland's Third Periodic Report, CCPR/C/IRL/CO/3 (30 July 2008) para. 20.
63 Human Rights Committee, Concluding Observations of the Human Rights Committee on Ireland's Third Periodic Report, CCPR/C/IRL/CO/3 (30 July 2008) para. 20.
64 Human Rights Committee, Concluding observations on the fourth periodic report of Ireland, CCPR/C/IRL/CO/4 (19 August 2014) para. 18.

examination of the State's implementation of the ICCPR and the Concluding Observations of the Committee.

4. Abolition of the Special Criminal Court

The current version of the non-jury Special Criminal Court has been in continual operation since 1972,[65] when it was established principally as a response to violence in Northern Ireland.[66] In the almost fifty years since its establishment, the political and security circumstances have changed significantly, however, there has been no move by the State to abolish the Court.[67] Rather, the State has moved to extend the remit of the Special Criminal Court to certain organised crime offences and bring a second Special Criminal Court into operation. Therefore, while initially the Special Criminal Court may have been regarded as a temporary legislative measure to address a particular security concern, its continued operation in changing environments means that the Special Criminal Court can be considered a near permanent feature of the Irish criminal justice system.

The Commission is concerned that the Government's proclamation that ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace is not subject to parliamentary or judicial oversight. The Supreme Court has held that it is for the Government to decide whether the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order, and the courts have no role in reviewing the Government's determination.[68] The Government is not required to provide any reasons for why it considers ordinary courts are inadequate, nor is it required to set out

65 After the Government issued a proclamation, under section 35(2) of the *Offences Against the State Act 1939*, that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace. Earlier versions of the Court were in existence in 1939–1946 and 1961–1962.

66 Fionnuala Ní Aoláin, 'The Special Criminal Court: A conveyor belt of exceptionality' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?* (Hart 2021) p. 62. In Northern Ireland, the *Northern Ireland (Emergency Provisions) Act 1972* introduced single-judge non-jury courts known as 'Diplock Courts' after Judge Diplock, who chaired the Commission on Legal Procedures to deal with Terrorist Activities in Northern Ireland. The Act was introduced to address witness and juror intimidation by paramilitary organisations, and perverse acquittals along religious or sectarian lines. See Liz Campbell, 'The Offences Against the State Acts and Non-Subversive Offences' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?* (Hart 2021) p. 136.

67 Pursuant to section 35(4) of the *Offences Against the State Act 1939*, the State can issue a proclamation that it is satisfied that the ordinary courts are adequate to secure the effective administration of justice and the preservation of public peace and order.

68 *DPP v Kavanagh* [1997] 1 ILRM 321.

under what conditions and environment the Government would consider that the ordinary courts are adequate.

The wide discretion granted to the Government to determine that the ordinary courts are inadequate has significant consequences for the rights of an accused. While individuals who are tried before the Special Criminal Court may be accused of committing serious criminal offences, they have the right to be presumed innocent so there should be no disproportionate restrictions on their rights, including by holding their trials before the Special Criminal Court. While the Constitution provides for the establishment of special courts, the Special Criminal Court is inherently an exception to the constitutional criminal justice system of the State, which guarantees trial by jury. The limitations placed on the right to jury trial by the operation of the Special Criminal Court should adhere to human rights principles, including necessity and proportionality. The use of the Special Criminal Court has led to two criminal justice systems in Ireland, which has led to an inequality under the law.

The holding of a non-jury trial in the Special Criminal Court has particular effects on the nature, form and experience of a trial for defendants and legal representatives.[69] The Commission has a number of specific concerns with the operation and functioning of the Special Criminal Court including the distinction between scheduled and non-scheduled offences, and the discretion of the DPP to refer cases to the Special Criminal Court. The Commission has a number of concerns with the implications for a right to a fair trial with the rules of admission of evidence before the Special Criminal Court. Central to the Commission's concern is the use of belief evidence and inference drawing from the conduct of an accused or the silence of an accused when questioned in detention. While section 41(4) of the OASA states that the practice and procedure, and the rules of evidence applicable to the trial of a person on indictment in the Central Criminal Court, shall apply to every trial by the Special Criminal Court, the Commission is of the view that these unique evidentiary rules of the OASA along with the absence of a jury make the Special Criminal Court anomalous within the domestic criminal justice system.[70]

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69 Fionnuala Ní Aoláin, 'The Special Criminal Court: A conveyor belt of exceptionality' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?* (Hart 2021) p. 62.

70 See IHRC's discussion in the *amicus curiae* submission in *Donohoe v Ireland*. Submissions of the *amicus curiae* in *Donohoe v Ireland* (09 May 2012) para. 12.

Distinction between scheduled offences and non-scheduled offences

The OASA provide the Government with the power to order that offences of a particular class or kind under any particular enactment shall be scheduled offences, if the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and preservation of public peace and order.[71] In proceedings where an individual is charged with an offence that is not a scheduled offence, the DPP may request to send forward the trial to the Special Criminal Court if they state that the ordinary courts are inadequate to secure the effective administration of justice and preservation of public peace and order.[72] The category of non-scheduled offences leads to uncertainty for defendants around whether their offence or offences may be tried before the Special Criminal Court. This may infringe the principle of legal certainty; that the law is clear, precise and foreseeable. Moreover, two individuals may be charged with the same offence but one may be tried in the Special Criminal Court while the other is charged in the ordinary courts, which may lead to an inequality under the law. The distinction between scheduled and non-scheduled offences is also troubling as it means that it is the offence rather than any specific and grounded concerns with the functioning of the trial and the protection of jurors that will deny an individual the right to a jury trial.

Discretion of the Director of Public Prosecutions

The OASA provide the DPP with the power to refer proceedings involving scheduled and non-scheduled offences to the Special Criminal Court.[73] In relation to non-scheduled offences, the DPP must certify that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of such person on such charge. This discretionary power has significant implications for the rights of an individual as it removes their constitutional right to a jury trial. The State has not addressed concerns with this referral mechanism despite the decision of the Human Rights Committee in *Kavanagh v Ireland* that the DPP should set out objective and reasonable grounds for its decision to refer the case. While the Supreme Court judgement in *Murphy v Ireland* provides that the DPP should

71 Pursuant to section 36 of the *Offences Against the State Act 1939*.
72 Section 46 of the *Offences Against the State Act 1939*.
73 Pursuant to sections 45, 46, 47 and 48 of the *Offences Against the State Act 1939* (as amended).

provide reasons for sending a non-scheduled offence forward for trial to the Special Criminal Court, this only resulted in minimal changes as the DPP can use national security as a justification for not providing reasons.[74] There is limited review of the DPP's referral; the discretionary decision of the DPP is only reviewable on the basis that it was reached in bad faith, or influenced by improper motive or policy, or in other exceptional circumstances where constitutional rights are at stake.[75]

Belief evidence

Section 3(2) of the *Offences Against the State (Amendment) Act 1972* provides that:

> "[w]here an officer of the Garda Síochána, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence [of membership of an unlawful organisation, under section 21], states that he believes that the accused was at a material time a member of an unlawful organisation, the statement shall be evidence that he was then such a member."

This provision places significant weight on the evidence of the Chief Superintendent, and:

> "represents a very serious diminution in the protections ordinarily afforded to an accused person by the law of evidence."[76]

An accused is:

> "in a much less protected position than a person charged with any other offence"

and they are at a:

> "very real risk of conviction."[77]

74 *Murphy v Ireland* [2014] IESC 19. See discussions in Mark Coen, 'A certain ambivalence: Independent Ireland and trial by jury' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?* (Hart 2021) p. 55; Yvonne Marie Daly, 'The Offences Against the State Acts and International Human Rights' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?* (Hart 2021) pp. 190–191.
75 *Murphy v Ireland* [2014] IESC 19; *AG v Marques* [2016] IECA 373. See discussion in Alice Harrison, The Special Criminal Court: Practice and Procedure (Bloomsbury 2019) para. 2.31–2.38.
76 *Redmond v Ireland* [2015] IESC 98, para. 5.
77 *Redmond v Ireland* [2015] IESC 98, para. 6.

While the ECtHR has found that section 3(2) does not violate Article 6 of the ECHR when procedural safeguards are in place[78] and the Irish Supreme Court has found that the constitutional construction of section 3(2) requires corroboration of belief evidence,[79] the Commission is of the view that the use of belief evidence continues to pose human rights concerns.[80] In particular, the reliance on belief evidence has implications for the presumption of innocence and affects the right to cross-examine a witness and the right to disclosure.[81] The majority of the Hederman Committee were of the view that the use of opinion evidence appears to violate a number of rules of evidence including establishing the expertise of experts, expert evidence should not be given on the ultimate issue of guilt and innocence, and the opinion evidence may be based on a mixture of hearsay and other evidence which, in itself, would not be admissible as evidence.[82] The majority of the Hederman Committee recommended that section 3(2) should be amended to require that no person should be convicted of the offence of membership solely based on such opinion, but that such opinion might be treated by the courts as corroborative evidence in appropriate cases.[83] A minority of the Hederman recommended its repeal as it violates the principles of the law of evidence.[84]

78 In *Donohoe v Ireland*, the Court found that the trial court had adopted measures to safeguard the rights of the applicant, by considering other evidence rather than relying on belief evidence as the sole or decisive evidence grounding the applicant's conviction. The Court also found that there is strong counterbalancing factors in the statutory provisions governing belief evidence, including that belief evidence is given by high ranking police officers; belief evidence is not presented as conclusive evidence, rather it is one piece of evidence; there still exists an opportunity to cross-examine the Chief Superintendent. See *Donohoe v Ireland*, Application no. 19165/08, judgement 12 December 2013, §§ 78–94.

79 *Redmond v Ireland* [2015] IESC 98.

80 In an intervention before the European Court of Human Rights, in *Donohoe v Ireland*, the IHRC submitted that the admissibility of belief evidence under section 3(2) of the *Offences Against the State (Amendment) Act 1972* may cause concern in relation to the procedural safeguards for the rights of an accused. See Submissions of the *amicus curiae* in *Donohoe v Ireland* (09 May 2012).

81 See discussion in Liz Heffernan and Eoin O'Connor, 'Threats to Security and Risks to Rights: 'Belief Evidence' under the Offences Against the State Act' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?* (Hart 2021) pp. 95–110.

82 Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) para. 6.91.

83 Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) para. 6.93.

84 Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) para. 6.196.

Such opinion evidence is a direct comment on the guilt of the accused, and in this sense directly relates to the ultimate determination of the trial.[85] There is no requirement that the belief of the Chief Superintendent be 'reasonable' or 'objective'. While belief evidence may not be the sole and decisive reason for a conviction, inference drawing provisions may be used as corroborating evidence to convict an individual.[86] As described in the next subsection, inference drawing provisions are another extraordinary provision within the OASA; therefore, the use of two exceptional evidence provisions to ground a conviction raises significant concerns with regard to the right to a fair trial. Specifically, these two evidential procedures can result in a finding of guilt through statutory provision as a prosecutor does not have to present any real or substantive evidence of guilt, instead the prosecutor can rely on the statutory provisions covering belief evidence and inference drawing to ground a conviction.

A particular concern with the use of belief evidence in the Special Criminal Court is that a Chief Superintendent may claim privilege over the material that formed the basis of their belief evidence.[87] If privilege is claimed, the defendant does not have knowledge of the basis of the belief and is powerless to challenge the basis of the belief in cross examination.[88] If the defence requests disclosure of the privileged evidence, the Special Criminal Court reviews the Chief Superintendent's file which may cause concern as the Court is the ultimate decider of the guilt or innocence of the accused, and the review of the file may cause the Court to be exposed to inadmissible or prejudicial information which the accused cannot test or challenge.[89] In determining issues of admissibility of evidence, even if a judge of the Special Criminal Court excludes evidence they have still

85 Submissions of the *amicus curiae* in *Donohoe v Ireland* (09 May 2012) para. 25.
86 *DPP v Donnelly* [2012] IECCA 78. See also Liz Heffernan and Eoin O'Connor, 'Threats to Security and Risks to Rights: 'Belief Evidence' under the Offences Against the State Act' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?* (Hart 2021) pp. 98–99; Colm Scott-Byrne, Human Rights and the Special Criminal Court: A Call for the Court to be Abolished (2021) 31(3) Irish Criminal Law Journal 54, p. 57.
87 See discussion in Alice Harrison, The Special Criminal Court: Practice and Procedure (Bloomsbury 2019) Chapter 8; Liz Heffernan and Eoin O'Connor, 'Threats to Security and Risks to Rights: 'Belief Evidence' under the Offences Against the State Act' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?* (Hart 2021) pp. 97–98.
88 *DPP v Kelly* [2006] 3 IR 115, p. 135 (per Fennelly J).
89 See discussion in Alice Harrison, 'Disclosure and Privilege: The Dual Role of the Special Criminal Court in Relation to Belief Evidence' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?* (Hart 2021) pp. 111–127; Gemma McLoughlin-Burke, Procedural Fairness and the "Dual Role" of the Special Criminal Court (2021) 31(3) Irish Criminal Law Journal 63–69.

been exposed to this evidence, which will have implications for their determination of the trial, as they cannot ignore that which they already know. This is in stark contrast to a jury trial where the jury, which ultimately decides matters of guilt or innocence, does not hear evidence deemed to be inadmissible, so their deliberations are not tainted by evidence that should never have been before the court in the first place.

The operation of the rules of evidence in a common law system such as the Irish system presupposes and is predicated upon a division of function between the finder of fact (jury) and determiner of law (Judge). However, the operation of the rules of evidence in the Special Criminal Court removes this division, and instead judges of the Special Criminal Court act as both the arbiter of fact and law in determining issues related to admissibility of evidence and ultimately deciding on the guilt or innocence of an accused.[90] The Court of Appeal has held that this procedure is fair;[91] however, the Commission believes this review process has implications for the right to equality before the court and the right to be tried by an independent and impartial court.

The material that grounds belief evidence is not subject to review by the DPP.[92] This is concerning as the Commission is of the view that the DPP has an ongoing obligation to ensure a trial remains fair and upholds procedural rights.[93] This is particularly important in terms of the introduction and use of belief evidence at trial, as it goes right to the heart of a fair trial. The Commission considers that it is a core function of the DPP to assess whether the evidence presented is sufficiently robust that charges should be brought, or maintained.[94] In terms of the introduction of belief evidence, this would involve reviewing the material grounding the belief evidence. However, under the current system, the DPP/a directing officer can only consider the independent supporting evidence when deciding whether a charge should be brought or maintained. There is no means to assess whether the belief is based on solid grounds; no opportunity to identify errors or infirmities in respect of the belief and how it interacts

90 Alice Harrison, 'Disclosure and Privilege: The Dual Role of the Special Criminal Court in Relation to Belief Evidence' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?* (Hart 2021) p. 111.
91 *DPP v Donohoe* [2008] 2 IR 193.
92 *DPP v Palmer* [2015] IECA 153.
93 The High Court have stated the DPP is not "exempt from the general constitutional requirements of fairness and fair procedures"; see *DPP v Monaghan* [2007] IEHC 92, para. 9.
94 See IHREC's recent *amicus curiae* submission to the Court of Appeal; Submissions of the *amicus curiae* in *DPP v RK and LM* (05 July 2021) para. 25.

with the other evidence; and no way of assessing whether exculpatory material can be disclosed.

The material is also not subject to review by the courts, unless requested by the defence.[95] The Court of Appeal has held that while the defence has a right to request the trial court to view the documentation or material that is being withheld due to a claim of privilege, a trial court is not bound to conduct a review of such material simply because it is asked to do so.[96] Rather, it has discretion whether to review the material, but the trial court must exercise that discretion judicially.[97]

Inference drawing

There are a substantial number of provisions within the Irish criminal justice legislative framework that provide that negative conclusions or adverse inferences can be drawn from the conduct of an accused or where a person under Garda questioning fails to answer questions that are material to the investigation of the offence.[98] The extensive use of inference provisions highlights the normalisation of exceptional powers within ordinary criminal law. While a person cannot be convicted on inference alone,[99] it can as previously mentioned, be corroborated by belief evidence, which places an accused at a disadvantage. The right to silence and privilege against self-incrimination is an important safeguard in an adversarial criminal justice system. However, the existence of inference drawing provisions raises concern over whether there are appropriate safeguards to protect an individual in their interactions with members of An Garda Síochána. A number of inference drawing provisions do require that the accused be told in ordinary language when being questioned what the effect of the failure or refusal to account might be and the accused is afforded reasonable opportunity to consult with a solicitor prior to questioning.[100]

The Hederman Committee recommended that section 52 of the 1939 Act and section 2 of the 1972 Act be repealed, with the majority recommending it be replaced with a

95 *DPP v Michael Connolly* [2018] IECA 201, para. 50.
96 *DPP v Michael Connolly* [2018] IECA 201, para. 50.
97 *DPP v Michael Connolly* [2018] IECA 201, para. 50.
98 See section 52 of the *Offences Against the State Act 1939*; section 2 of the *Offences Against the State (Amendment) Act 1972*; sections 18 and 19 of the *Criminal Justice Act 1984*; section 2 of the *Offences Against the State (Amendment) Act 1998*; section 72A of the *Criminal Justice Act 2006*.
99 *Braney v Ireland* [2021] para. 66.
100 See section 2 of *Offences Against the State (Amendment) Act 1998*, as amended by section 31 of the *Criminal Justice Act 2007*.

section allowing inferences to be drawn from the accused's silence, provided safeguards were included.[101] A minority of the Committee recommended the repeal of section 52 of the 1939 Act, section 2 of the 1972 Act, and sections 2 and 5 of the 1998 Act as the task of proving a person's guilt should lie with the prosecution.[102]

Jury intimidation

The Commission believes that the Special Criminal Court can be abolished, if sufficient safeguards are put in place including to protect against intimidation of jurors. The protection of juries from intimidation is one of the principal reasons the State advances for justifying the existence of the Special Criminal Court. The Commission recognises that the risk of jury intimidation is one means by which the normal administration of justice can be undermined. The Commission also acknowledges that social media poses a particular problem for the protection of juries, with the potential for digital intimidation.[103] However, the Commission questions whether jury intimidation is at such a serious level in Ireland to warrant the retention of the Special Criminal Court, in the absence of supporting data to show that the risk of intimidation has been persistent since 1972. The Commission notes that statistics on the number of proceedings and convictions under Section 41 of the Criminal Justice Act 1999 – which makes it an offence to harm, threaten, menace or in any other way intimidate or put in fear a witness, a juror or a potential juror – is not disaggregated on whether the offence is related to intimidation of a juror or a witness.[104]

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101 The safeguards were: i) An explicit warning as to the likely implications of the failure to answer questions posed must be given; ii) The failure to answer questions should be regarded as corroborative only; iii) Adverse inferences could only properly be drawn where the court is of opinion that the prosecution evidence is such that it reasonably calls for an explanation by the accused. Mere failure to answer a question should never in itself be regarded as evidence of guilt; iv) The right of reasonable access to a lawyer during police custody; v) Inferences must not be drawn from silence before the accused has had effective access to legal advice. Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) para. 8.61.

102 Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) paras. 8.68–8.71.

103 See concerns raised in Liz Campbell, 'The Offences Against the State Acts and Non-Subversive Offences' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?* (Hart 2021) pp. 140–141.

104 Department of Justice, Written answer to Parliamentary Question: Jury Service (30 June 2021). See also Conor Gallagher, 'Just 27% of witness or jury intimidation cases result in conviction' *The Irish Times* (Dublin, 6 July 2021); the Irish Times could find no public record of someone being prosecuted for jury intimidation in the past decade.

Therefore, absent any comprehensive data on the levels of intimidation of jurors in Ireland, the Commission considers that there are measures to prevent jury intimidation, which should be explored; such as those proposed by the minority of the Hederman Committee: that juries can be anonymous, they can be protected during the trial, and they can even be located in a different place from where the trial is held with communication by video link.[105] The Law Reform Commission have recommended a number of measures to address the risk of jury tampering including that:

> "access to jury lists should be possible only by the parties' legal advisers (or the parties if they are not legally represented) and only for a period of four days prior to the trial in which the parties have an interest."[106]

The Law Reform Commission also recommends that the daily roll of the jury after empanelment be abolished.[107] Guidance can also be taken from the *Juries (Protection) Act 1929*, which was never commenced and was repealed in 2016. This set out specific protections for juries including secrecy of the jury panel in certain criminal cases, exclusion of the public during the calling of the jury panel, clearing of the court during certain criminal trials, prohibition of the publication of the names of jurors, and penalties for the intimidation of jurors and for loitering in the vicinity of criminal courts.[108]

The Commission considers that these measures are a more proportionate and reasonable alternative to address jury intimidation rather than the continued reliance on a non-jury court.

Necessity of abolition

The existence and functioning of the Special Criminal Court are still the subject of critiques by academics,[109] civil and human rights organisations[110] and international human rights treaty monitoring bodies. Notwithstanding this criticism, the State

105 Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) para. 9.95.
106 Law Reform Commission, Report on Jury Service (LRC 107-2013) (April 2013) para. 7.51.
107 Law Reform Commission, Report on Jury Service (LRC 107-2013) (April 2013) para. 7.52.
108 See discussion in Colm Scott-Byrne, Human Rights and the Special Criminal Court: A Call for the Court to be Abolished (2021) 31(3) Irish Criminal Law Journal 54, p. 60.
109 Alice Harrison, The Special Criminal Court: Practice and Procedure (Bloomsbury 2019); Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?* (Hart 2021).
110 Irish Council for Civil Liberties, ICCL Review of the Special Court (June 2020).

regards the Special Criminal Court as an important institution in protecting the security of the State from the threat of terrorism and organised crime.[111] While the Courts Service and the DPP publish data on the number of cases, types of offences and outcomes[112] and the Government present data on the usage of certain provisions in the OASA,[113] the Commission is of the view that there is no clear linkage between this data and the necessity of a non-jury court. The data does not establish why ordinary courts are inadequate.

The Commission is of the view that the profound implications of the continued operation of the Special Criminal Court on the rights of individuals under the Constitution, the ECHR and the ICCPR mean that retention of the Special Criminal Court can no longer be justified.

The Commission agrees with the view of the minority of the Hederman Committee that while there is a growth in organised crime in Ireland it is not plausible to suggest that Irish social conditions are so perilous as to warrant dispensing with jury trial.[114] The minority held the view that the necessity of non-jury trials had not been established, and accordingly the Special Criminal Court should be dispensed with. The Commission considers that the developed system of criminal justice which exists in Ireland is capable of effectively confronting the problem of organised crime without resorting to a parallel criminal justice system that does not provide the accused with the right to trial by jury. Other jurisdictions have managed to confront effectively cases involving terrorist and organised crime offences without resorting to non-jury courts. In maintaining the existence of the Special Criminal Court and even expanding the remit

111 See most recently in the decision to renew certain provisions of the *Offences Against the State Act (Amendment) Act 1998* and the *Criminal Justice (Amendment) Act 2009*. Department of Justice, Report by the Minister for Justice on the Operation of sections 2 to 4, 6 to 12, 14 and 17 of the Offences Against the State (Amendment) Act 1998 pursuant to section 18(3) of that Act (June 2021); Department of Justice, Report by the Minister for Justice on the Operation of section 8 of the Criminal Justice (Amendment) Act 2009 pursuant to section 8(6) of that Act (June 2021).

112 See most recent data: Office of the Director of Public Prosecutions, Annual Report 2019 (2020) pp. 26–27; Courts Service, Annual Report 2020 (2021) p. 92.

113 Department of Justice, Report by the Minister for Justice on the Operation of sections 2 to 4, 6 to 12, 14 and 17 of the Offences Against the State (Amendment) Act 1998 pursuant to section 18(3) of that Act (June 2021); Department of Justice, Report by the Minister for Justice on the Operation of section 8 of the Criminal Justice (Amendment) Act 2009 pursuant to section 8(6) of that Act (June 2021).

114 The minority recognised the growth in organised crime in Ireland but did not find it plausible to suggest that Irish social conditions were so perilous as to warrant dispensing with jury trial. See Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) paras. 9.89, 9.93, 9.96.

of the Court in opposition to the recommendations of the UN Human Rights Committee, the State is failing to adhere to its constitutional and international obligations to protect the rights of individuals.

5. Repeal of the Offences Against the State Acts

The provisions of the OASA have been justified as emergency and temporary emergency measures, adopted at particular time to address a particular need or concern such as the rise in paramilitary violence; however, the OASA are undoubtedly permanent features of the statute books. While the rationale is the protection of the public, there are clear human rights and equality concerns that arise in the use of emergency powers including gaps in transparency and in systems of democratic scrutiny.[115] There is a tendency of emergency laws to remain longer on the statute books than the demands of the situation require.[116] Over time, these emergency measures are no longer regarded as exceptional, and instead begin to seep into the ordinary criminal justice system.[117] There has been a steady normalisation of extending exceptional provisions within the OASA – such as non-jury trial, powers of detention, belief evidence and inference drawing – to other criminal justice legislation.[118] Furthermore, the requirement of yearly resolutions for certain provisions under the OASA illustrates that the State regards that the powers under these provisions are exceptional within the Irish criminal justice system.[119]

The Commission has already raised its concerns with provisions under the OASA including the scheduling of offences, the discretion of the DPP to refer proceedings, the use of belief evidence and inference provisions. The Commission is also concerned with the extensive powers of arrest and detention provided under the OASA.[120] The OASA

115 The Commission has recently highlighted concerns with Ireland's use of emergency legislation during the COVID-19 pandemic. IHREC/COVID-19 Law and Human Rights Observatory, Ireland's Emergency Powers During the COVID-19 Pandemic (February 2021).
116 Claire Hamilton, '"Contagion" between the Special and the Normal in Criminal Justice: A Comparative Perspective' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?* (Hart 2021) p. 250.
117 Nicola McGarrity, 'Terrorism Trials and the Offences Against the State Acts in Comparative Perspective' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?* (Hart 2021) pp. 93–94. See also Shane Kilcommins and Barry Vaughan, Reconfiguring State-Accused Relations in Ireland (2006) 41(1) The Irish Jurist 90–124.
118 Sections 71B and 72A of the *Criminal Justice Act 2006*; *Criminal Justice Act 2007*; *Criminal Justice (Amendment) Act 2009*. See Claire Hamilton, '"Contagion" between the Special and the Normal in Criminal Justice: A Comparative Perspective' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?* (Hart 2021) pp. 239–252.
119 Colm Scott-Byrne, Human Rights and the Special Criminal Court: A Call for the Court to be Abolished (2021) 31(3) Irish Criminal Law Journal 54, p. 55.
120 Pursuant to section 30 of the OASA. See detailed discussion in Alice Harrison, The Special Criminal Court: Practice and Procedure (Bloomsbury 2019) paras. 2.51–2.58, 4.01–4.52.

provides that while a person may initially be detained for 24 hours, this detention can be extended by a further 24 hours if a member of An Garda Síochána, not below the rank of Chief Superintendent, so directs.[121] The District Court can authorise a further 24 hour period on foot of an application by a member of An Garda Síochána, not below the rank of Superintendent.[122] Accordingly, detention under section 30 can last for up to 72 hours without charge. This period of detention has implications for the right to liberty and security, specifically the right to brought promptly before a court.[123] Lengthy periods of detention are also provided under section 50 of the *Criminal Justice Act 2007* and section 2 of the *Criminal Justice (Drug Trafficking) Act 1996*, which permit detention up to seven days.

The Hederman Committee did not consider that the 72 hour period of detention would present any difficulties for the right to be brought promptly before a court.[124] However, the Committee recognised that prolonged periods in detention are undesirable due to psychological and other pressures; and therefore the Committee stated that any legislation providing for periods of detention longer than 48 hours requires a particular justification.[125] Moreover, some members of the Committee were of the view that the maximum period should be confined to 48 hours, and any move to 72 hours should have been supported by evidence that it was necessary to secure reliable convictions.[126] For these members, the extension of time cannot be justified by:

> "pointing to longer periods of detention permitted in other countries with different forms of criminal procedure or by demonstrating that such a proposal is neither unconstitutional nor contrary to the ECHR."[127]

The Commission is of the view that pre-trial detention should be an exceptional measure and the period of detention should be as short as possible. A prolonged period

121 Section 30(3) of the OASA.
122 Section 30(4) of the OASA, as inserted *Offences Against the State (Amendment) Act 1998*.
123 Article 5(3) ECHR; Article 9 ICCPR.
124 Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) para. 7.35.
125 Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) para. 7.36.
126 Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) para. 7.39.
127 Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) para. 7.39.

of pre-trial detention has the potential to affect detrimentally other fundamental human rights including the right to be presumed innocent until proven guilty, the right to silence and the privilege against self-incrimination. Judicial control over interferences with the right to liberty is an essential safeguard against arbitrary interference. The Commission considers that any extension of periods of detention should only be provided for where it has been demonstrated that such extension is strictly necessary.

These exceptional provisions and their application in the non-jury Special Criminal Court have significant implications for the rights of an accused included the right to a jury trial, right to a fair trial, right to equality before the court and before the law, right to cross examine and right to silence.

A Department of Justice report laid before the Houses of the Oireachtas in June 2021 showed that provisions under sections 3, 4, 6, 8, 10, 12 and 17 of the *Offences Against the State (Amendment) Act 1998* had not been utilised in the previous 12 months.[128] Several of these provisions – sections 4, 6, 8, 12 and 17 – have not been used for a number of years (see Appendix Table 1).[129] The report argues that non-usage of these provisions does not mean that they are no longer necessary and that the State should anticipate all possibilities.[130] However, while the Commission recognises the importance of protecting state security, provisions that have significant implications for the rights of individuals should not remain on the statute books when there is a period of non-usage. The Commission recalls that the Human Rights Committee, in its Concluding Observations on Ireland, has repeatedly expressed concern that the State is not effectively monitoring the necessity for retaining the existing legislation,[131] by

128 Department of Justice, Report by the Minister for Justice on the Operation of sections 2 to 4, 6 to 12, 14 and 17 of the Offences Against the State (Amendment) Act 1998 pursuant to section 18(3) of that Act (June 2021) p. 6.
129 Department of Justice, Report by the Minister for Justice on the Operation of sections 2 to 4, 6 to 12, 14 and 17 of the Offences Against the State (Amendment) Act 1998 pursuant to section 18(3) of that Act (June 2021) p. 8.
130 Department of Justice, Report by the Minister for Justice on the Operation of sections 2 to 4, 6 to 12, 14 and 17 of the Offences Against the State (Amendment) Act 1998 pursuant to section 18(3) of that Act (June 2021) pp. 6–7.
131 Human Rights Committee, Concluding Observations of the Human Rights Committee on Ireland's First Periodic Report, CCPR/C/79/Add.21 (03 August 1993) para. 11; Human Rights Committee, Concluding Observations of the Human Rights Committee on Ireland's Second Periodic Report, A/55/40 (2000) para. 436; Human Rights Committee, Concluding Observations of the Human Rights Committee on Ireland's Third Periodic Report, CCPR/C/IRL/CO/3 (30 July 2008) para. 20; Human Rights Committee,

providing evidence of the inadequacy of ordinary courts to administer justice, particularly when there is a pattern of non-usage of provisions.

While these provisions as well as section 8 of the *Criminal Justice (Amendment) Act 2009* are the subject of annual parliamentary resolutions authorising their continuance the Commission and previously the IHRC have expressed concern with the routine nature of these resolutions.[132]

The Commission is also concerned that the reports laid before the Houses of the Oireachtas on the operation of certain provisions of the OASA highlight a significant disparity between the number of persons arrested under section 30 of the *Offences Against the State Act 1939* and the number of persons prosecuted under the same Act (see Appendix Table 2). While the number of persons arrested under section 30 has fallen significantly in the last number of years, there is still a significant disparity with the number of convictions. The reports provide no detailed discussion on the disparity between the figures; which means that it is difficult therefore to examine the necessity of arresting an individual under section 30 as a means of protecting state security.

The current oversight role played by the Oireachtas is not particularly effective or meaningful as the Oireachtas only reviews certain provisions within the legislation, and the State does not provide detailed reasons for the continued reliance on the provisions.[133] The Commission is concerned that the Government, in the reports that are laid before the Houses of the Oireachtas on the operation of these provisions, is not adequately reviewing the need for these provisions and is rather repeatedly relying on the catch-all justification that these provisions are necessary due to the threats of paramilitaries, international terrorism and organised crime. The Commission is of the view that up-to-date data and evidence of the use of the OASA provisions needs to be collected and published to justify the operation of the OASA, and a blanket threat to state security should not serve to justify an operation of a provision if there is a pattern of non-usage. The exceptional provisions of the OASA, which were intended to address

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Concluding observations on the fourth periodic report of Ireland, CCPR/C/IRL/CO/4 (19 August 2014) para. 17.

132 See IHRC, Submission of the Irish Human Rights Commission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Report under the International Covenant on Civil and Political Rights (June 2014) p. 69; IHREC, Submission to the United Nations Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland (August 2020) pp. 14-15.

133 Mark Coen, 'A certain ambivalence: Independent Ireland and trial by jury' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A model counter-terrorism Act?* (Hart 2021) p. 57.

particular security concerns, should not remain on the statute books permanently without any consideration for the changing security environment. The Commission is of the opinion that the limitations these provisions place on the rights of an accused are not necessary and proportionate to the threat to State security, and these provisions under the OASA should be repealed.

6. Strengthened safeguards in the use of the *Offences Against the State Acts,* if not repealed

While the Commission is in favour of the abolition the Special Criminal Court and the repeal of the OASA, the Commission is aware that as the State has consistently failed to address the recommendation of the UN Human Rights Committee to abolish the Court, the State may not implement the Commission's recommendation. Therefore, if the Special Criminal Court and the OASA continues to be in existence, the Commission is of the view that the State should strengthen procedural safeguards in the use of the legislation.

Independent oversight

While the courts have found that they have no role in determining whether the ordinary courts are inadequate, the Supreme Court has emphasised the necessity of the Government keeping the need for the Special Criminal Court under constant review.[134] The majority of the Hederman Committee, while in favour of the retention of the Special Criminal Court recommended that the necessity for the Court be kept under regular review.[135] Despite these calls for a regular review of the Special Criminal Court, there has been no review of the Special Criminal Court and the OASA since the publication of the Hederman report, until the establishment of the Review Group. This review arises from a recommendation of the Commission on the Future of Policing for a:

> "comprehensive and robust review of the legislative framework within which police and other agencies operate in the area of national security – what powers they should have, how they exercise those powers so as to respect fundamental rights, and what safeguards are in place against abuse or misuse."[136]

The Commission on the Future of Policing also called for the establishment of an Independent Examiner of terrorist and serious crime legislation.[137] Part 7 of the recently published General Scheme of the Policing, Security and Community Safety Bill

134 *Kavanagh v Ireland* [1996] 1 IR 321.
135 Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) para. 9.39.
136 Commission on the Future of Policing, The Future of Policing in Ireland (2018) p. 38.
137 Commission on the Future of Policing, The Future of Policing in Ireland (2018) p. 38.

provides for the establishment of an Independent Examiner of Security Legislation. The Commission is of the view that the development of this legislation, and the role of the Independent Examiner in the review of the necessity of security legislation will need to be monitored in terms of any outcomes and recommendations from this review process.

Parliamentary oversight

The Commission considers that the continued operation of the Special Criminal Court should require the passing of resolutions in both Houses of the Oireachtas. This is following the recommendation of the Hederman Committee, who recommended that section 35 of the OASA should be amended to ensure that a resolution establishing the Special Criminal Court:

> "should automatically lapse unless it is positively affirmed by resolutions passed by both Houses of the Oireachtas at three-yearly intervals."[138]

The Hederman Committee recommended that such resolutions should expressly set out the basis on which the Court is to be established.[139]

The Commission is of the opinion that Special Criminal Court should cease to be in operation unless a resolution has been passed by each House of the Oireachtas every 12 months resolving that the Court should continue in operation. The 12 month interval for passing of resolutions is already provided for certain provisions in the OASA and section 8 of the *Criminal Justice (Amendment) Act 2009*. A report should be laid before the Houses of the Oireachtas prior to voting on the resolution, setting out data and evidence to support the continued operation of the Special Criminal Court and to show the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. A particular focus should be on data related to jury intimidation. The Commission recommends that the data be disaggregated to understand the backgrounds of those before the Special Criminal Court, and to ensure that the State is complying with the principles of non-discrimination and equality before the law. Such a report should also set out the conditions and circumstances that

138 Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) para. 9.44.
139 Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) para. 9.44.

the Government require for it determine that the ordinary courts are adequate, and the Special Criminal Court can be abolished.

The Commission is of the view that such a measure would go some way towards addressing the concerns expressed by the Hederman Committee and the Human Rights Committee, and would ensure a greater level of oversight for a mechanism which has strong potential to infringe upon a number of rights protected under the Constitution, the ECHR and the ICCPR.

If the *Offences Against the State Acts* are not repealed, the Commission recommends:

- **Section 35 of the *Offences Against the State Acts* is amended to include that the Special Criminal Court should cease to be in operation unless resolutions are passed by both Houses of the Oireachtas at 12 months intervals affirming that the Special Criminal Court should continue in operation.**

- **Prior to voting on the resolutions, the Government should lay a report before the Houses of the Oireachtas on the operation of the Special Criminal Court, which should include setting out the conditions that are required for the abolition of the Special Criminal Court.**

The Commission is of the view that the OASA as a whole should be subject to parliamentary oversight through the passing of resolutions authorising the continued operation of provisions, rather than only the specific provisions with the *Offences Against the State Act 1998* being the subject of yearly resolutions. In justifying the continued need for these provisions in reports to be laid before the Houses of the Oireachtas, the Commission considers that the Government should develop and set out a minimum standard of conditions and environment necessary for the Government to repeal the OASA. The development of such a standard should include consultation with stakeholders, civil society and human rights organisation and include views from relevant individuals in other jurisdictions or international organisations.

Greater scrutiny and human rights monitoring of the OASA and the Special Criminal Court can be achieved through the establishment of a Joint Oireachtas Committee on Equality, Human Rights and Diversity. The Commission has called for the establishment

of a dedicated Oireachtas Committee on Human Rights, Equality and Diversity since 2016.[140] A dedicated Oireachtas Committee would have a mandate to examine closely the human rights and equality implications of all legislation, including the OASA and the Special Criminal Court.

If the *Offences Against the State Acts* are not repealed, the Commission recommends:

- **The State continually monitor, through the collection and publication of data and evidence, the need for continued operation of the provisions under the *Offences Against the State Acts*. Furthermore, the Commission recommends the State should set out the conditions and environment necessary for the repeal of the *Offences Against the State Acts*.**

- **The establishment of a Joint Oireachtas Committee on Equality, Human Rights and Diversity, to provide effective oversight of the use of the *Offences Against the State Acts* and the operation and functioning of the Special Criminal Court.**

Collection and publication of data

Throughout this submission, the Commission has emphasised the importance of the collection and reporting of disaggregated data on the Special Criminal Court and the OASA. The publication of comprehensive and detailed disaggregated data ensures that the State can effectively monitor and review the compliance of the OASA, and the Special Criminal Court with human rights and equality standards. This data should be used to inform legislative reform and policy-making. Publically available and accessible data also contributes to transparency and accountability in the use of the OASA, and provides reassurance to the public on the operation of the Special Criminal Court and the OASA. The data collection process should include the meaningful participation of relevant stakeholders. Areas where data should be collected and reported on include: the experience of non-jury trial for an accused; the usage of OASA provisions; the levels

140 IHREC, Statement from the Irish Human Rights and Equality Commission on COVID-19 Oversight in Respect of Human Rights and Equality (Press release, 27 April 2020); IHREC, Submission to the Special Committee on COVID-19 Response Regarding the Adequacy of the State's Legislative Framework to Respond to COVID-19 Pandemic and Potential Future National Emergencies (September 2020) p. 2.

of juror intimidation; and, comparative data on conviction rates in the Special Criminal Court in comparison to jury trials.[141]

If the *Offences Against the State Acts* are not repealed, the Commission recommends that there be a mandatory requirement for the State to collect and publish disaggregated data on the operation of the Special Criminal Court and the usage of the provisions under the *Offences Against the State Acts.*

Category of scheduled offences

The Commission believes that any decision to move a case to a non-jury court should not be based on the category of offence, but rather depend on whether the proceedings present a clear risk to the administration of justice. The Hederman Committee recommended that the distinction between scheduled and non-scheduled offences should not be retained, as it does not provide a sufficiently clear and transparent basis for depriving an accused of the right to jury trial to which he or she is otherwise *prima facie* constitutionally entitled.[142] The Law Reform Commission considers that there is a strong argument in favour of a re-examination of whether the use of scheduling of offences complies with the State's obligations under international law and whether a more individualised case-by-case approach may be justified.[143] The Commission is of the view that the distinction between scheduled and non-scheduled offences should be removed, and cases should only be heard before the Special Criminal Court when the DPP can establish on reasonable and objective grounds that the ordinary courts are inadequate to secure the effective administration of justice and preservation of public peace and order.

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141 The Special Criminal Court has a higher rate of conviction than the Circuit Court and Central Criminal Court, and it is important to examine whether the rate of conviction is related in any way to the non-jury nature of the Court. The Commission recognise that there are several different offences tried in front of the Circuit and Central Criminal Courts which are never tried before the Special Criminal Court, therefore a specific focus should be on comparing conviction rates for comparable crimes between the Special Criminal Court and these jury trial courts. A minority of the Hederman Committee stated that "resort to the Special Criminal Court is highly convenient from the standpoint of the prosecution [as] the prospects of conviction may be considered more likely, not because the members of the Court are unfair but because studies have consistently shown that non-jury courts have a higher conviction rate than courts with trial by jury." See Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) para. 9.90.

142 Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) para. 9.57.

143 Law Reform Commission, Report on Jury Service (LRC 107-2013) (April 2013) para. 7.50.

If the *Offences Against the State Acts* are not repealed, the Commission recommends that the category of 'scheduled offences' be removed from Irish legislation.

Discretion of the Director of Public Prosecutions

There is a need for appropriate safeguards to be in place to ensure that the mechanism for referring cases respects the rights of individuals. One such safeguard is implementing the finding of the UN Human Rights Committee in *Kavanagh v Ireland* that the decision to decide whether a person charged should be sent forward for trial to the Special Criminal Court should be justified on objective and reasonable grounds.[144] Moreover, in its 2008 Concluding Observations on Ireland, the Human Rights Committee recommended that the State:

> "should ensure that, for each case that is certified by the Director of Public Prosecutions for Ireland as requiring a nonjury trial, objective and reasonable grounds are provided and that there is a right to challenge these grounds."[145]

The Hederman Committee was of the view the Human Rights Committee did not have a difficulty with the concept of non-jury courts as such, but only with the mechanism for referring cases to it.[146] Therefore, it recommended that the decision of the DPP to send forward a person to trial in the Special Criminal Court should be subject to a positive review mechanism and suggested four types of review mechanism: review by the High Court following *inter partes* hearing; application to the High Court *ex parte*, but in camera; administrative review by a retired judge; and review by a judge of the Supreme Court.[147]

In relation to the use of non-jury trials in Northern Ireland, the Northern Ireland Human Rights Commission recommended that in deciding whether a case should be tried without a jury the:

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144 *Kavanagh v Ireland*, Communication No. 819/1998, CCPR/C/71/D/819/1998 (26 April 2001).
145 UN Human Rights Committee, Concluding Observations of the Human Rights Committee on Ireland's Third Periodic Report, CCPR/C/IRL/CO/3 (30 July 2008) para. 20.
146 Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) para. 9.62.
147 The Hederman Committee recommended that a review by a serving Supreme Court judge, in conjunction with an independent counsel procedure, would meet the objections raised by the Human Rights Committee in *Kavanagh v Ireland*. Report of the Committee to Review the Offences Against the State Act 1939–1998 and Related Matters (2002) paras. 9.60–9.77.

> "DPP should be required to give reasons for the application, setting out evidence of a real and present danger of jury tampering or intimidation, and evidence that this danger remains regardless of steps that can reasonably be taken to prevent it. Reasons for the application should be made available to the defence to enable it to challenge the application in front of a judge who is not the trial judge in the case."[148]

In line with the State's international obligations, the Commission is of the view that any limitation of the Constitutional right to trial by jury must only take place in exceptional circumstances, where the DPP can clearly establish, on reasonable and objective grounds, that the effective administration of justice cannot be delivered in the ordinary courts in the specific circumstances of a case. The DPP should be required to give reasons for the application, setting out evidence of a real and present danger of jury tampering or intimidation, and evidence that this danger remains regardless of steps that can reasonably be taken to prevent it. Reasons for the application should be made available to the defence to enable it to challenge the application in front of a judge who is not the trial judge in the case.

If the *Offences Against the State Acts* are not repealed, the Commission recommends:

- **The *Offences Against the State Acts* be revised to require the Director of Public Prosecutions in each individual case to advance reasonable and objective grounds to demonstrate that the ordinary courts are inadequate to deal with the administration of justice in the particular case under consideration. This power should be limited to cases which involve alleged offences against the State or alleged organised crime offences.**

- **The *Offences Against the State Acts* should be amended to make the decision of the DPP to refer a case to the Special Criminal Court subject to an independent positive review mechanism.**

148 Northern Ireland Human Rights Commission, Replacement Arrangements for the Diplock Court System: Response of the Northern Ireland Human Rights Commission to the Consultation by the Northern Ireland Office (2006) para. 6.

Admission of evidence before the Special Criminal Court

If the OASA is not repealed, the use of belief and inference provisions as well as similar provisions in other criminal justice legislation require special consideration to ensure there are sufficient safeguards for the rights of an accused, as the Constitution and international law guarantees a right to equality between the prosecution and the defence.[149]

The Commission is of the view that the concerns arising in connection with the use of belief evidence for the rights of the accused and the rules of evidence, as well as its use in the non-jury Special Criminal Court, means that particular attention should be on the procedural safeguards required to admit belief evidence. The Commission recently exercised its *amicus curiae* function in the Court of Appeal case, *DPP v RK and LM*, involving the exclusion of belief evidence under section 3(2) by the Special Criminal Court, where a broad claim of privilege has been upheld in respect of the grounds for such belief.[150] The central submission of the Commission was that significant safeguards are required to ensure that belief evidence remains a proportionate measure.[151] Review by a trial court is not a sufficient safeguard to secure the fairness and proportionality of belief evidence, where broad privilege is being claimed.[152] The Commission stated that:

> "[w]here belief evidence is to be given, there must in the first instance be a process of prosecutorial review of the material grounding the belief. If required,

149 Article 38.1 of the Constitution, Article 6 ECHR and Article 14 ICCPR.

150 The case involves an appeal by the DPP following the acquittal by the Special Criminal Court of two men charged with IRA membership. The Special Criminal Court excluded the belief evidence of a Detective Chief Superintendent given pursuant to section 3(2) of the *Offences Against the State (Amendment) Act 1972*, following the refusal of the Detective Chief Superintendent to provide information on the basis of his belief; and following the decision of the DPP that prosecuting Counsel would not review the file of the Garda witness in order to assess if any disclosure of evidence could be made to the defence. See Submissions of the *amicus curiae* in *DPP v RK and LM* (05 July 2021).

151 The legal submissions presented by the Commission to the Court of Criminal Appeal focused on key principles and rulings from the case law on belief evidence and how other jurisdictions have applied proportionality considerations where intelligence material is being used in prosecution. The Commission's central submission is that significant legal protections are required to ensure that belief evidence remains a proportionate measure to maintain the procedural safeguards required for a fair trial, and that an appropriate balance must be struck between the vital public interest in protecting Garda investigations and, on the other hand, the requirements of a fair trial under the Constitution and the ECHR.

152 Submissions of the *amicus curiae* in *DPP v RK and LM* (05 July 2021) para. 64.

there should also be review by a court. Ideally, this should not be by the trial court."[153]

The Commission submitted that the DPP[154] must have sight of the material grounding belief evidence in order to properly exercise its' statutory functions, with due regard for the Constitutional rights of the accused.[155]

If the *Offences Against the State Acts* are not repealed, the Commission recommends:

- **The admissibility of belief evidence be subject to regular reviews to ensure its compliance with human rights standards.**

- **Significant legal protections are required to ensure that belief evidence remains a proportionate measure to maintain the procedural safeguards required for a fair trial. The Commission recommends that where belief evidence is to be given, there must in the first instance be a process of prosecutorial review of the material grounding the belief. If needs be, there should be a review by a court, that is not the trial court.**

The Commission considers that where adverse inferences are to be drawn from the silence of an accused, this should only happen under narrowly defined circumstances where there is a *prima facie* case against the accused, and the circumstances existing at the time clearly call for an explanation from the accused person. Due to the implications for the right to a fair trial on using inference provisions, the Commission recommends that adverse inference clauses should only apply where the accused person has a legal advisor present throughout police questioning.

If the *Offences Against the State Acts* are not repealed, the Commission recommends that all persons arrested in connection with criminal offences under the *Offences Against the State Acts* should be entitled to have a legal advisor

153 Submissions of the *amicus curiae* in *DPP v RK and LM* (05 July 2021) para. 4.
154 In the context of reviewing belief evidence, the DPP is an existing, institutionally-independent body, with a capacity and a responsibility to provide the requisite safeguards. Submissions of the *amicus curiae* in *DPP v RK and LM* (05 July 2021) para. 58.
155 Submissions of the *amicus curiae* in *DPP v RK and LM* (05 July 2021) para. 65.

present during questioning by the police, particularly in view of increased reliance on adverse inferences in trials.

Withholding information

In its role as *amicus curiae* before the Supreme Court in S*weeney v Ireland, the Attorney General and the Director of Public Prosecutions*[156], the Commission examined the offence of withholding information from An Garda Síochána under section 9(1)(b) of the *Offences Against the State (Amendment) Act 1998*.[157] In its legal submissions to the Supreme Court, the Commission concluded that the risk of self-incrimination does amount to a lawful basis to fail to provide material assistance to An Garda Síochána.[158] Furthermore, the offence under section 9(1)(b) is unconstitutional due to the lack of safeguards within the provision to protect the privilege against self-incrimination,[159] and the overall uncertainty as to the ambit of the provision and what it

156 The case related to a man who was questioned, but not charged, in relation to a criminal investigation. He was subsequently charged with a separate offence, namely withholding information from the Gardaí under section 9(1)(b) of the *Offences Against the State Acts*. When interviewed by Gardaí investigating the original case, he was cautioned that he had the right to remain silent, but he was not informed that his failure to respond to questioning could lead to a separate charge of withholding information, as subsequently happened. In the High Court in 2017 Ms. Justice Baker found section 9(1)(b) of the *Offences Against the State Acts* to be unconstitutional. She found that the current legislation "makes silence of itself an offence" and is "impermissibly vague and uncertain". The Supreme Court reversed the order declaring section 9(1)(b) unconstitutional, stating in its judgement that the section "protects the right to silence of any person who does not wish to speak about their own involvement in a crime. The section protects the right to silence where to speak would incriminate that person. It does not change the principle that unless a participant wishes to speak of their own volition, the law should not compel them to self-incriminate as to their commission of a crime." S*weeney v Ireland, the Attorney General and the Director of Public Prosecutions* [2019] IESC 039, para. 88.

157 The Commission's legal submissions to the Supreme Court explored the nature of the right to silence, as well as the constitutional and human rights aspects of whether a genuine fear of self-incrimination is a reasonable excuse for failing to provide information when questioned as part of a criminal investigation. The Commission provided comparative examples from other jurisdictions, and argued that section 9(1)(b) of the *Offences Against the State Acts* is unconstitutional, having regard to its vagueness and the lack of safeguards provided for under this legislation. See Submissions on behalf of the *amicus curiae* in *Sweeney v Ireland, the Attorney General and the Director of Public Prosecutions* (12 March 2019).

158 Failing to recognise a risk of self-incrimination as a defence under the section would, of itself, mean that section 9(1)(b) fails to comply with the requirements of Article 6 of the ECHR and Article 38.1 of the Constitution. Submissions on behalf of the *amicus curiae* in *Sweeney v Ireland, the Attorney General and the Director of Public Prosecutions* (12 March 2019) para. 32.

159 A person, who the Gardaí suspect of having relevant information in respect of an offence, should be warned of the suspicion and of the existence of the offence of withholding information. The warning should also include reference to the privilege of self-incrimination. The accused person should also be given to opportunity to consult with a legal representative before answering questions. Submissions on behalf of the *amicus curiae* in *Sweeney v Ireland, the Attorney General and the Director of Public Prosecutions* (12 March 2019) paras. 39–43.

criminalises.[160] While the Supreme Court held that Section 9(1)(b) was constitutional, it held that the privilege against self-incrimination could amount to a reasonable excuse for withholding information in certain circumstances.[161] The Court also recognised the importance of effective legal advice during the course of criminal investigations.[162]

If the *Offences Against the State Acts* as a whole are not repealed, the Commission recommends that section 9(1)(b) of the *Offences Against the State (Amendment) Act 1998* be repealed. If the provision is not repealed, it should be amended to allow a legal representative be present throughout questioning by An Garda Síochána.

160 The provision should attain clarity in respect of what conduct is prohibited. The law must be foreseeable, accessible and predictable. Submissions on behalf of the *amicus curiae* in *Sweeney v Ireland, the Attorney General and the Director of Public Prosecutions* (12 March 2019) para. 37.
161 *Sweeney v Ireland, the Attorney General and the Director of Public Prosecutions* [2019] IESC 039, paras. 86–89.
162 *Sweeney v Ireland, the Attorney General and the Director of Public Prosecutions* [2019] IESC 039, para. 77.

7. General concerns with security legislation

Definition of terrorist activity

The former IHRC previously raised concern that the definition of 'terrorist activity' under the *Criminal Justice (Terrorist Offences) Act 2005* is:

> "impermissibly wide and runs the risk of categorising groups opposing dictatorial or oppressive regimes, anti-globalisation, anti-war or environmental protestors, or even militant trade unionists, as terrorists".[163]

While the Commission accepts that terrorism, international or domestic, is a threat to every State and its citizens, any measures taken to protect against such a threat must be proportionate and go no further than necessary. The Commission recommends that the definition of terrorist activities be amended to ensure that groups legitimately opposing dictatorial regimes, and various types of protestors would not be categorised as terrorists.

The Commission recommends the State consider narrowing the scope of the definition of 'terrorist activities'.

Offence of directing a criminal organisation

In observations on the *Criminal Justice (Amendment) Act 2009*, the former IHRC expressed concern that the offence of directing a criminal organisation under section 5 applies to any person who directs, at any level of the organisation's structure, the criminal activities of the organisation.[164] A person who is guilty of the offence is liable on conviction on indictment to imprisonment for life or a lesser term of imprisonment. The Commission considers that the seriousness of the penalty, with the potential for life imprisonment, may give rise to arbitrary or disproportionate sentences for an accused who is proved to have played a more minor role in a criminal organisation. The

163 IHRC, Comments on the Criminal Justice (Terrorist Offences) Bill 2002, p. 3. See also IHRC, Submission of the Irish Human Rights Commission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Report under the International Covenant on Civil and Political Rights (June 2014) pp. 64-65, 69.

164 Section 5(2) of the *Criminal Justice (Amendment) Act 2009* sets out: "A person who directs, at any level of the organisation's structure, the activities of a criminal organisation is guilty of an offence and shall be liable on conviction on indictment to imprisonment for life or a lesser term of imprisonment." See IHRC, *Observations on the Criminal Justice (Amendment) Bill 2009* (2009).

potential for arbitrary or disproportionate sentences is enhanced because of the broad definition of a criminal organisation and the loose nature of the structure that could be considered to make up a criminal organisation.[165]

The Commission recommends that the penalty under section 5 of the *Criminal Justice (Amendment) Act 2009* should be qualified and revised downwards to take account of the level at which the accused directs a criminal organisation.

Ex parte Hearings under Part 4 of the Criminal Justice (Amendment) Act 2009

The former IHRC expressed concern that pursuant to Part 4 of the *Criminal Justice (Amendment) Act 2009*, amendments have been made to various Acts[166]. These allow a judge, when hearing an application by a relevant member of An Garda Síochána to extend a period of detention in respect of an accused, to direct that 'in the public interest' certain evidence relevant to the application be given in the absence of all persons including the accused person but excluding the member(s) of An Garda Síochána whose attendance is necessary to give the information (as well as such court clerks as the judge considers necessary)[167]. While the Commission acknowledges that the legislation allows the judge, having heard the evidence, to direct that it be re-given in open court if he or she is satisfied that this would not, in fact, prejudice the

165 Section 3 of the 2009 Act defines criminal organisation as "a structured group, however organised, that has as its main purpose or activity the commission or facilitation of a serious offence." A structured group is defined as "a group of 3 or more persons, which is not randomly formed for the immediate commission of a single offence, and the involvement in which by 2 or more of those persons is with a view to their acting in concert" in relation to the commission of an offence. The group is not required to have a formal or hierarchical structure and there is no requirement for continuity of involvement by the persons in the group.

166 The Acts (and the relevant sections thereof) which are amended by Part 4 of the *Criminal Justice (Amendment) Act 2009* are the *Offences Against the State Act 1939*, ss.30, 30A; *Criminal Justice (Drug Trafficking) Act 1996*, ss.2, 3, 4, 5, 11; *Criminal Justice Act 2007*, ss.50, 51, 52; and *Criminal Justice Act 1984*, ss.4, 9, 10.

167 The judge may make such a direction either of his/her own volition or on the application of the member of An Garda Síochána. This direction can only be made where the particular evidence to be given by a member of An Garda Síochána: (i) relates to steps taken or to be taken in the investigation of the arrested person's or another person's involvement in the offence concerned or any other offence; and (ii) the nature of the evidence could prejudice in a material way the conduct of the investigation. See s.30(4BA)(b) of the 1939 Act, as inserted by s.21 of Part 4 of the 2009 Act. See discussion in IHRC, Submission of the Irish Human Rights Commission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Report under the International Covenant on Civil and Political Rights (June 2014) pp. 68–69.

investigation, it is concerned at the potential impact that the use of these provisions could have on the rights of the accused.

The Commission recommends that the State monitor the usage of these legislative provisions to ensure that they are used sparingly, and only in cases of absolute necessity.

8. Appendix

Appendix Table 1: Usage of provisions under the Offences Against the State (Amendment) Act 1998

	s.2	s.3	s.4	s.5	s.6	s.7	s.8	s.9	s.10	s.11	s.12	s.14	s.17
2000	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	29	0	N/A	N/A	0
2001	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	27	0	N/A	N/A	0
2002	N/A	2	N/A	13	0	20	N/A	115	39	N/A	N/A	56	0
2003	43	0	0	1	0	18	0	17	32	2	0	83	0
2004	29	0	0	16	0	12	0	30	1	4	0	76	0
2005	30	1	1	20	0	2	0	69	5	2	0	99	0
2006	14	9	2	34	0	2	0	110	15	7	0	54	0
2007	10	9	7	39	1	9	0	79	8	5	0	120	0
2008	80	12	13	34	0	16	14	127	12	32	0	157	0
2009	20	12	0	Repealed	1	28	0	137	41	18	0	166	0
2010	23	4	0	-	0	30	0	117	25	16	0	147	0
2011	48	12	0	-	0	24	1	63	12	5	0	88	0
2012	47	4	0	-	0	15	0	83	11	17	0	98	3
2013	62	19	0	-	0	10	2	40	10	4	0	52	0
2014	41	0	0	-	0	34	0	19	12	4	0	53	1
2015	42	0	1	-	1	21	0	10	19	18	0	9	0
2016	68	16	12	-	0	2	1	32	7	25	0	18	1
2017	31	5	11	-	0	24	1	26	7	18	0	51	0

2018	21	3	10	-	0	0	1	2	3	8	0	11	0
2019	3	0	0	-	0	66	0	0	1	8	0	36	0
2020	11	5	0	-	0	20	0	9	9	4	0	19	0
2021	6	0	0	-	0	7	0	9	0	2	0	10	0

Source: Department of Justice, Report by the Minister for Justice on the Operation of sections 2 to 4, 6 to 12, 14 and 17 of the Offences Against the State (Amendment) Act 1998 pursuant to section 18(3) of that Act (June 2021)[168].

168 Department of Justice, Report by the Minister for Justice on the Operation of sections 2 to 4, 6 to 12, 14 and 17 of the Offences Against the State (Amendment) Act 1998 pursuant to section 18(3) of that Act (June 2021) p. 8.

Appendix Table 2: Arrests, convictions and cases pending under the Offences against the State Act			
Year ending	**Arrests**	**Convictions**	**Cases Pending**
31 May 2021	148	37	31
31 May 2020	146	7	34
31 May 2019	130	13	34
31 May 2018	194	23	84
31 May 2017	192	18	44
31 May 2016	226	16	58
31 May 2015	246	17	49
31 May 2014	331	22	95
31 May 2013	443	9	89
31 May 2012	610	10	126
31 May 2011	764	38	183
31 May 2010	880	35	127
31 May 2009	930	39	202
31 May 2008	792	34	154
31 May 2007	692	21	102
31 May 2006	801	43	189
31 May 2005	691	61	102

Source: Annual Reports by the Minister for Justice on the Operation of sections 2 to 4, 6 to 12, 14 and 17 of the Offences Against the State (Amendment) Act 1998 pursuant to section 18(3) of that Act.



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