Offences Against the State Acts

Independent Review Group

Report of the Majority

INDEPENDENT REVIEW GROUP

To Examine the Offences Against the State Acts

REPORT OF THE MAJORITY

May 2023

Contents

Chapter 1

Introduction

1.1 The Independent Review Group to Examine the Offences Against the State Acts ("the Review Group") was appointed by the Minister for Justice, Helen McEntee, on 16th February 2021.

Terms of Reference

1.2 The Terms of Reference of the Review Group read as follows:

"Recognising the comprehensive review carried out by the Hederman Committee in 2002, the Review Group shall examine all aspects of the Offences against the State Acts 1939 to 1998, taking into account:

- *The current threat posed by domestic/international terrorism and organised crime,*
- *The duty to deliver a fair and effective criminal justice system to ensure the protection of communities and the security of the State, and*
- *Ireland's obligations in relation to constitutional and ECHR rights, and international law.*

The review shall be undertaken in consultation with the relevant stakeholders, statutory agencies and civil society organisations.

The Review Group will provide its intended plan of work to the Minister for Justice within one month of being commissioned.

The Review Group shall submit an interim report to the Minister within three months of being commissioned."

Membership

1.3 The Review Group comprised the following members:

Mr. Justice Michael Peart (chairperson), a former judge of the Court of Appeal and of the High Court.

Dr. Alan Greene, Reader in Constitutional Law and Human Rights, Birmingham Law School.

Ms. Anne-Marie Lawlor S.C., a barrister specialising in criminal law.

Ms. Caitlín Ní Fhlaitheartaigh, a former senior Advisory Counsel in the Office of the Attorney General.

Professor Donncha O'Connell, an Established Professor of Law at the University of Galway.

Mr. Ken O'Leary, a former Deputy Secretary General of the Department of Justice.

Overview

1.4 The Review Group began meeting in March 2021 and agreed on a schedule of work for discussions. It recruited three barristers with criminal law experience in April 2021 to prepare material for consideration by the Group.

1.5 In accordance with the Terms of Reference, the schedule of work was provided to the Minister for Justice in April 2021 and the interim report was provided in June 2021.

1.6 Preliminary thematic discussions on main issues, based on the schedule of work, continued on a regular basis throughout 2021. This was followed by a consultative phase which extended through to June 2022. Further deliberations for the purpose of drafting the final report took place through to March 2023.

Public Consultation

1.7 In May 2021, submissions to the Review Group were invited by advertisement in national print media and on the website of the Group. The secretariat also wrote to an agreed list of key stakeholders inviting them to make a submission to the Group as part of its public consultation process. The Review Group subsequently received submissions from the following organisations and individuals:

- Alice Harrison B.L
- An Garda Síochána
- Bar Council of Ireland
- Defence Forces
- Fionnuala Ní Aoláin, UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism
- Garda Síochána Inspectorate
- Irish Council for Civil Liberties
- Irish Human Rights and Equality Commission
- Law Society of Ireland
- Mark Coen, Assistant Professor, University College Dublin and Niamh Howlin, Associate Professor, University College Dublin
- Office of the Director of Public Prosecutions
- Professor Clive Walker, University of Leeds and Jamie McLoughlin, University College Dublin
- Professor Yvonne Daly, Dublin City University
- Sinn Féin
- Two private individuals

Stakeholder Meetings

1.8 The Review Group was agreed as to the importance of direct engagement with relevant stakeholders, statutory agencies and civil society organisations including human rights organisations. Accordingly, in late 2021, the Group commenced a series of meetings, both in–person and virtual, with relevant stakeholders.

1.9 In the course of its consultations, the Review Group met with the following organisations and individuals:

- An Garda Síochána (two meetings)
- Defence Forces
- Department of Justice
- Dermot Woods, Assistant Secretary, Department of An Taoiseach, with responsibility for the National Security Analysis Centre (NSAC)
- Fionnuala Ní Aoláin, UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism
- Irish Council for Civil Liberties
- Irish Human Rights and Equality Commission
- Jonathan Hall K.C., United Kingdom Independent Reviewer of Terrorism Legislation
- Office of the Director of Public Prosecutions (two meetings)
- Professor Marie Breen-Smyth, Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007
- Ronnie Renucci K.C., Faculty of Advocates, Scotland

1.10 In May 2022, the Review Group held a consultative event in the Criminal Courts of Justice. Following input from the Group, the secretariat contacted an agreed list of invitees. The event was attended by a number of legal practitioners and academics as well as representatives of the statutory agencies and civil society organisations that the Group had met with previously. To facilitate frank discussions, the event was held in line with the Chatham House Rule as to the non-attribution of any views expressed.

1.11 The Review Group is grateful to have had an excellent moderator for that event in Ray Byrne B.L., former Commissioner and Director of Research at the Law Reform Commission; for insightful presentations by Remy Farrell S.C. and Alice Harrison B.L.; and for the perspectives offered by representatives of the community and voluntary sector.

Review Group Deliberations

1.12 Following the conclusion of the consultative phase of its work, the Review Group held a series of plenary meetings to consider the central issues and to formulate its recommendations for inclusion in its final report.

1.13 These deliberations were informed by the views presented to the Review Group during the consultative phase of its work, and a series of issue papers prepared by the Group's legal researchers which summarised the major issues to be considered by the Group.

1.14 In the course of its deliberations, the Review Group endeavoured to achieve as much consensus as possible. There was an acceptance that members had differing views, and therefore that unanimity on all key issues under consideration might not be possible. In the event, in November 2022, Donncha O'Connell and Alan Greene indicated their intention to write a minority report. This document comprises the report of the majority. The report of the minority has been prepared as a separate document. The majority provided the minority with a draft of its report as it was nearing finalisation of its work. The comments of the minority on the draft are incorporated in their separate report. While the majority respectfully disagrees with much of the analysis in the minority report, the majority considers it sufficient, in the context of facilitating submission of the reports to the Minister, to indicate that there is nothing in the minority report which persuades it to alter its conclusions.

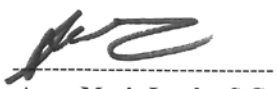
1.15 From its initial meeting in March 2021 to November 2022, when – as set out above – two members indicated that they wished to pursue a minority report, the full Review Group met on 40 occasions, including 13 meetings with stakeholders. Subsequently the majority and minority held a series of separate meetings to draw up their reports.

1.16 In addition to our dedicated research team, the Group had the benefit of reference to important recent publications on the subject matter at hand: notably, Alice Harrison's *Special Criminal Court: Practice and Procedure* (2018, Bloomsbury), and Mark Coen's anthology *The Offences Against the State Act 1939 at 80* (2021, Bloomsbury).

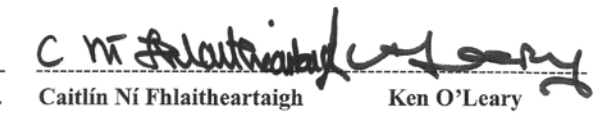
1.17 Extensive legal research and analysis had to be carried out to advance our work. This was carried out by a team of three researchers. The research agenda was set by the Review Group as a whole, and the services of the researchers remained available to all parts of the Review Group at all stages of its work. We were extremely fortunate that David Perry B.L. agreed to lead this aspect of our work, and that he was so ably assisted by Emer Ní Chuagáin B.L. and Joe Holt B.L. The quality of their work was exemplary and has formed an essential underpinning of all aspects of our work.

1.18 Bobby Smyth, an official of the Department of Justice, acted as secretary to the Review Group. He was greatly assisted by David Brown, also an official in the Department. We could not have asked for more efficient, courteous and good-humoured people to assist with the administrative aspects of our work. We owe them a very large debt of gratitude.

Mr. Justice Michael Peart



Anne-Marie Lawlor S.C.



Caitlín Ní Fhlaitheartaigh **Ken O'Leary**

Chapter 2

Background

Introduction

2.1 While the overall security situation is the backdrop to our findings in this report, we have paid particular attention to changes which have taken place since the publication of the Hederman Report.

2.2 In general, while the threat from republican paramilitary groups has diminished, a number of such groups persist in attempting to undermine the State by their efforts to overturn the democratically expressed will of the people, as expressed in support for the Good Friday Agreement.

2.3 While Ireland has not been subject to an international terrorist attack, it is not immune from the growing threat which international terrorism has posed in recent years and must play its full role in countering the threats posed by international terrorist groups both here and elsewhere. The activities and international linkages of organised crime groups have intensified in a manner which challenges the capacity of the State to protect communities from the activities of such groupings.

2.4 There have, of course, been a number of significant legal developments since the Hederman Report. To assist consideration of these matters, the appendix to this report contains a consolidated version of the Offences Against the State Acts 1939 to 1998, and relevant extracts from the Criminal Justice (Terrorist Offences) Act 2005 and Criminal Justice Act 2006. Legal developments of relevance to the Offences Against the State Acts are discussed in detail in the individual chapters which follow.

2.5 We have also been particularly conscious of the human rights considerations applying to our analysis of the issues involved. These arise primarily from the Constitution, the European Convention on Human Rights (*"the Convention"*), and international legal norms. It is noteworthy that, since the publication of the Hederman Report, the European Convention on Human Rights Act 2003 gave further effect in Irish law to the Convention and has ensured that Irish law is developed in ways that respect the rights and freedoms provided by the Convention. Concerns persist among both national and international organisations involved in the advancement of human rights about aspects of the Offences Against the State regime and, in particular, the existence of the Special Criminal Court.

2.6 In the remainder of this chapter, we set out an assessment in relation to the current security situation as well as a series of guiding principles which we agreed should inform our work.

Security Situation in Ireland

2.7 The Review Group was briefed on the security situation by An Garda Síochána, the Defence Forces, the Department of Justice, and the National Security Analysis Centre. What follows is a summary of the security situation based on those briefings, with particular reference to developments since the publication of the Hederman Report.

International Threats

2.8 The development of a framework of international instruments in support of global counter-terrorism efforts is perhaps the most significant change to the security landscape since the September 11th attacks and the report of the Hederman Committee.

2.9 Although Ireland has not been subject to international terrorist attacks, as the United Kingdom and European Union countries have been, the threat from international terrorism has undoubtedly increased in Ireland since the Hederman Report.

2.10 The assessment of the threat level arising from international terrorism as moderate – meaning that an attack is possible, but not likely – has persisted for some time. The security services have concerns about the use of Ireland as a base for the planning and financing of attacks in other jurisdictions. The return of foreign terrorist fighters and the potential for radicalisation, whether within communities or in an online environment, are issues of concern.

2.11 The threat posed by hostile state actors to Ireland's economic interests and political stability is likewise an issue of concern which has received significant attention from the security services. Ireland's role in world affairs and the position adopted in respect of geopolitical conflicts means that the country and its vital infrastructure are not immune from the threat of attack.

Domestic Terrorism

2.12 The overall security situation in Northern Ireland has improved significantly since the Hederman Report, in the context of the Provisional IRA's announcement of the end of its armed campaign, the decommissioning of its weapons and a cessation of paramilitary activities.

2.13 However, dissident republican groups in various manifestations have continued to engage in terrorism, including the deliberate targeting of security services personnel in Northern Ireland. The activities of such groups do not appear to be amenable to political settlement. While their numbers are relatively small, considerable resources continue to be devoted to disrupting the very real threat to life which they pose. The threat level to Northern Ireland from Northern Ireland-related terrorism was recently increased to severe, meaning that an attack is highly likely.

2.14 Such is the nature of the dissident groups that recruitment, planning and financing continue to take place in this jurisdiction. This is reflected in the resources deployed by the security services in respect of the threat. While the threat of attacks within this jurisdiction is considered low, resources deployed are commensurate with the threat level in Northern Ireland. In other words, much of the activities of the security services within the State are devoted to preventing attacks by these groups in Northern Ireland, or elsewhere.

2.15 While the threat of attacks within the Irish State from republican paramilitary groupings is considered to have decreased, An Garda Síochána continue to believe that the nature of these groupings is such that ordinary courts are inadequate to deal with them. In particular, there is a strong concern that attempts would be made to intimidate jury members in cases involving members of such groups, thus rendering the ordinary courts inadequate to secure the effective administration of justice in such cases.

2.16 Successful action against dissident republicans has precipitated a shift to associations with organised crime. Such links have long existed in relation to certain dissident groupings, are fluid as well as occasionally volatile, and blur the distinction between organised crime and paramilitarism. A similar phenomenon is evident in Northern Ireland.

Organised Crime

2.17 The greater international linkages of Irish organised crime groups, including their share of European drug markets, and their capacity for corruption and infiltration are significant developments since the Hederman Report. Specifically, there is strong concern that at least some of these groups have the resources and intent to interfere with the administration of justice, including through putting jurors in fear and danger.

2.18 We have noted the significant increase in the criminal justice response to organised crime in recent years, and the greater reliance on the Special Criminal Court for the trial of certain offences linked with organised crime. We recognise the dangers posed by these groupings and the severe consequences for communities of their activities. In particular, we recognise that failure to bring members of such groups to justice facilitates intimidation of communities by these groups.

2.19 The Review Group obtained figures from An Garda Síochána which indicate that there were 125 organised crime related murders in this jurisdiction from 2010 to 2022:

Year	*Organised Crime Related Homicides/Murders*
2010	*23*
2011	*9*
2012	*15*
2013	*13*
2014	*9*
2015	*8*
2016	*14*
2017	*8*
2018	*7*
2019	*10*
2020	*3*
2021	*1*
2022	*5*
Total	***125***

Other Threats

2.20 The growth of right-wing extremism, in some cases linked to international elements, is a recent development, and though not at the level of organisation which exists in other jurisdictions, nor posing a threat commensurate with those discussed above, is an issue of ongoing concern. It is clearly a development which will need to be carefully monitored.

Guiding Principles

2.21 We note the welcome decrease in recent years in the number of killings associated with organised crime groups, which coincides with the increased use of available legal provisions in relation to the policing and prosecution of such groups. In approaching our task, we were particularly mindful of the need not to undermine the efforts of those authorities charged with dealing with the threat to communities posed by paramilitary and organised crime groups. Equally, we were conscious of the need to ensure that our proposals were consistent with the fundamental respect for human rights which should be the hallmark of any civilised society. Against that background, and in the light of our extensive consultations, we thought it helpful to agree a set of guiding principles which would inform our proposals for change:

(i) Any legislation to replace the Offences Against the State Acts must maintain the legislative basis for an effective state capacity to deal with terrorism and organised crime on an ongoing basis while also achieving human rights and rule of law compliance.

(ii) While the Constitution is enabling in relation to the establishment and use of special courts, there are also important international standards applicable to the State, which must inform the use and operation of such courts.

(iii) Jury trial for indictable offences is an important – though not unqualified – right under the Constitution and throughout the common law world. Any deviation must be exceptional, based on the constitutional test as set out at Article 38.3, and with appropriate legislative safeguards in accordance with the Constitution.

(iv) The various methods of attempting to protect juries in circumstances of perceived or appreciable risk must be addressed in the context of progressing other well-made proposals for reform of juries. Any proposals for reform must have particular regard to the need not to put members of juries or their family members in fear or jeopardy.

(v) The principle of proportionality should apply to any limitations on individual rights arising under any legislative proposals in this area.

(vi) As all policy and law reform should be evidence-led, the need for adequate data, open to rigorous scrutiny through independent and democratic oversight, is especially important in a context in which special courts are operating.

(vii) Legislation in this area needs to be kept under constant review, particularly in the light of any change in the nature and extent of the threats which have to be addressed and international developments in relation to best practice in ensuring the upholding of fundamental rights.

Recommendations – Nature, Implementation and Oversight

2.22 While many significant changes have occurred since the Hederman Report, these have largely been reactive in nature. Many of the recommendations which follow throughout this report are simply a reiteration of what the Hederman Committee recommended in 2002.

2.23 We recognise that the question of where exactly the balance should be struck between devising measures which are effective in countering the threats posed by paramilitary and organised crime groupings, and thus keeping people safe, and at the same time fully complying with human rights and rule of law requirements, is complex and one on which there can be significant and legitimate differences of opinion.

2.24 As indicated in the Introduction chapter, in November 2022, two of our colleagues on the Review Group indicated their intention to write a minority report. The majority of the Group continued their efforts to achieve consensus on a package of measures which can be taken forward and this is reflected in the recommendations contained in the following chapters. As with any such approach to achieving consensus, it should not be assumed that any specific views in the report represent the personal views of any individual member.

2.25 A guiding approach for us is that the recommendations which follow should be read as systemic and based on a stricter approach overall, with more checks and balances. Our recommendations are made on the basis that they would be implemented as a package, with each element a facet of the envisaged reform. What we propose is not being put forward on an individual basis for piecemeal implementation.

2.26 We accept that the operation of legislation in the area of the security of the State – some dating back many decades – has not been subject to the level of structured review which would be now considered best practice. The need for regular meaningful review is set out in the principles above. In this context we particularly welcome in principle the fact that the Office of the Independent Examiner of Security Legislation is due to be established soon and will be uniquely well placed to carry out such reviews.

Chapter 3

Repeal of the Offences Against the State Acts and Summary of Recommendations for Replacement Legislation

3.1 The first matter which we must consider is whether the Offences Against the State Acts should remain on the statute book in some form. If they are to be repealed, the further question arises as to whether the Acts should be replaced by new legislation and the form that this should take. In this chapter, we set out our recommendations on these issues.

Overview of the Law

3.2 Consolidated versions of the Offences Against the State Acts 1939 to 1998 are included in the appendix to this report. In summary, the Acts contain the following notable features, which we discuss in greater detail in the chapters which follow:

- Part V of the 1939 Act provides for the operation of non-jury Special Criminal Courts. Offences which have been *"scheduled"* for the purposes of Part V are automatically tried in the Special Criminal Court unless the DPP directs otherwise. Under s. 46 of the 1939 Act, the DPP also has the power to direct the trial of a non-scheduled offence in the Special Criminal Court where he or she certifies 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 the accused.
- The Acts contain substantive offences relating to the security of the State. These include offences relating to *"unlawful organisations"*; subversive activities such as conducting unauthorised military exercises and usurping the functions of Government; withholding information from An Garda Síochána; and documentary offences.
- Various provisions in the Acts set out matters which may be treated as evidence of certain offences. Those provisions are mainly, though not exclusively, concerned with prosecutions for the offence of membership of an unlawful organisation.
- The 1939 Act provides members of An Garda Síochána with specific powers of search, arrest and detention in respect of offences under the Act and scheduled offences.
- The Offences Against the State (Amendment) Act 1940 provides for internment powers: that is, powers to arrest and detain persons without trial.
- The Acts include provisions dealing with forfeiture of property belonging to unlawful organisations; closure of buildings being used by an unlawful organisation; and forfeiture and disqualification following conviction.

Position of the Hederman Committee and Submissions Received

3.3 The Hederman Committee recommended as follows in respect of the Offences Against the State Acts:

> *"As will be seen from the Committee's detailed analysis of this legislation contained in succeeding chapters of this Report, it believes that what is now required in a modern environment is for the Oireachtas to repeal the existing Offences Against the State Acts and to replace them with one single consolidated item of legislation containing significant reforms in respect of the statutory regime which has heretofore obtained."*[1]

3.4 Similarly, a number of submissions received by the Review Group recommended the repeal and replacement of the Offences Against the State Acts. For example, one submission argued that the Offences Against the State Act 1939 has been in operation for over 80 years and that the use of the legislation has moved significantly from its original intention. The submission stated that it is difficult to justify the continued existence of *"emergency"* legislation and that there is an increasing argument for the need for a modern legal framework that provides certainty and is specifically designed to address the challenges facing communities and the State in relation to organised crime. On that basis, the submission called for the introduction of a modern and appropriate legal framework designed to effectively address organised crime and to adequately protect jurors.

3.5 Other submissions advocated the retention of the Offences Against the State Acts, but subject to amendments to certain provisions, including those relating to the operation of the Special Criminal Court, the substantive offences contained in the legislation, and the evidential provisions impacting on the prosecution of those offences.

Recommendations

3.6 We have carefully considered the arguments made in the submissions received by the Review Group. We have also considered the context in which the Offences Against the State Acts were introduced; the extraordinary features of the legislation; the length of time which has elapsed since the introduction of the Acts; whether there is an ongoing need for legislation to deal with the threat posed by terrorism and organised crime; and whether that need would be best met through bespoke modern legal frameworks or through the continued utilisation of the existing Offences Against the State Acts framework.

3.7 Having had regard to these matters, we recommend that the Offences Against the State Acts be repealed in their entirety, subject to select elements of the legislation being re-enacted in replacement legislation, with in many cases significant amendments and alterations designed to address problematic issues, while other provisions should be repealed without replacement in any form.

3.8 We do not think that we need be overly prescriptive in recommending the exact form that the replacement legislation should take, other than specifying that the establishment of a new non-jury court should be legislated for separately. It would be possible to enact an entirely new statute which comprehensively sets out the law in this area. Equally, it might be possible to enact new legislation dealing with certain issues and insert some re-enacted

[1] Hederman Report, at para. 4.46.

provisions into other existing legislation. While there are a variety of approaches available, we are of the view that were the Oireachtas to legislate in this area, this would present a valuable opportunity to consolidate all legislation on the statute book dealing with terrorist offences, and that consideration ought to be given to taking that approach.

3.9 In the chapters which follow, we set out our recommendations on the aspects of the Offences Against the State Acts which should be re-enacted in replacement legislation and the amendments required. These recommendations are being made on the basis that they would be implemented in their entirety; each recommendation is a facet of the envisaged reform and it is not intended that the recommendations would be implemented on a piecemeal basis. The position which we take can be summarised as follows:

Non-Jury Courts (Chapter 4)

- Rather than providing for a continuation or repurposing of the Special Criminal Courts, legislation should be introduced which establishes and regulates the operation of a new non-jury court. Such a court should operate on a standing basis, rather than its operation being conditional on a proclamation. The court should be available in principle to try any serious criminal offence provided that the high threshold for use of the court is satisfied. The legislation providing for the non-jury court should include specific provisions aimed at ensuring that the court is used only in exceptional cases. Further, the legislation should provide adequate safeguards for the rights of accused persons, and make provision to ensure that the operation of the court is transparent and open to public scrutiny.

- The current system of *"scheduled offences"*, under which certain offences are automatically or presumptively tried by a non-jury court, should be abolished. Instead, the decision as to whether a non-jury court is used should, in every instance, be based on an assessment of the circumstances pertaining to the particular case.

- The power to decide whether the threshold for use of the non-jury court is satisfied in a given case should remain with the DPP alone. However, a judge should be appointed to review whether the provisions of the legislation have been complied with by the DPP in any case where a direction is issued that a case be tried in a non-jury court.

- The legislation regulating the use of the non-jury court should contain specific provisions regulating how the decision by the DPP is to be made. The legislation should clearly set out the test to be applied by the DPP in determining whether a case should be tried in the non-jury court and the procedures to be followed in this regard. It should set out a non-exhaustive list of statutory criteria which must be considered by the DPP in determining whether the test is satisfied on the facts of a particular case. The legislation should impose an obligation on the DPP to consider, in every case, whether there are measures that could be taken, or protections that could be provided, to address any reasonably apprehended or known risk of juror intimidation and thereby negate the need for trial in the non-jury court. The legislation should provide that the Commissioner of An Garda Síochána must

personally approve any submission by the gardaí that the use of the non-jury court is appropriate. Further, the legislation should require the DPP to personally make the decision as to whether the non-jury court should be used. The legislation should oblige the DPP to maintain and publicise detailed statistics in respect of the exercise of the power to order non-jury trials.

- Consideration should be given by the legislature to the introduction of a range of alternative measures, other than non-jury trials, which could be used to protect jurors where potential risks arise and thereby negate the necessity for trial in the non-jury court in some cases.
- Only serving judges should be eligible to be appointed to sit on the new non-jury court.
- The new non-jury court should sit as a formation of three judges, as the Special Criminal Court does. However, a revised system of appointment should be used to determine which judges are chosen to sit on the court. All serving members of the High Court, Circuit Court and District Court should be eligible to serve as members of the court. The President of the High Court should, following consultation with the Presidents of the District and Circuit Courts, designate which judges sit on an individual case and / or for a defined period of time.
- The legislation should specify that an accused person may not be convicted by the non-jury court unless the judges reach a unanimous verdict. If the judges cannot agree a unanimous verdict, the court should have jurisdiction to order a retrial before a differently-constituted court. If the retrial results in a lack of unanimity, the accused should stand acquitted.
- There should be an express statutory requirement that the non-jury court provides written judgments, setting out the reasons for its verdicts. The non-jury court should be required to publish its judgments in like manner as courts of other jurisdictions, with appropriate redactions as required. The court should have the statutory power to order the release of transcripts and books of evidence in an appropriate case.
- The court rules and procedural provisions governing the operation of the non-jury court should be as consistent as possible with those governing the trial of criminal matters in the ordinary courts.
- It should be obligatory for all relevant agencies – including An Garda Síochána, the Office of the Director of Public Prosecutions, and the Courts Service of Ireland – to collect and publish a full array of comprehensive, disaggregated data on the operation of the new non-jury court and the relevant legislative provisions. Data should be made available in relation to intimidation or other interference with jurors and witnesses. All such data should be accessible to the public and open to independent scrutiny.

Substantive Offences (Chapter 5)

- The offences contained in ss. 7 to 9 of the 1939 Act (obstruction of Government or the President, and interference with military and State employees) should be re-enacted as part of any legislation replacing the Offences Against the State Acts, subject to appropriate amendments to ensure that lawful industrial action is not criminalised.

- Sections 10, 11, 13 and 14, which relate to the printing of certain documents, should be repealed. If similar offences are to be provided as part of the legislation replacing the Offences Against the State Acts, they should be more in line with modern printing and publication standards.

- Section 12 of the Act, which creates an offence of possession of treasonable, seditious or incriminating documents, should be re-enacted as part of the legislation replacing the Offences Against the State Acts. However, it should be recast to lay an emphasis on the underlying purpose for possession of the document, and to provide that possession of documents is an offence only where it is part of a process of providing active support for, or advocating, advancing or furthering the activities of an unlawful organisation falling short of actual membership.

- The offence of membership of an unlawful organisation, provided for in s. 21 of the 1939 Act, should be re-enacted as part of legislation replacing the Offences Against the State Acts without any substantive modification.

- The legislation replacing the Offences Against the State Acts should contain similar provisions to ss. 18, 19 and 20 of the 1939 Act, dealing with unlawful organisations. Sections 18(d) and 18(e) should be amended, while s. 18(f) should not be re-enacted. Section 19 is acceptable in its current form. While a provision similar to s. 20 should be re-enacted, allowing for an appeal against the making of a suppression order to be lodged within a prescribed time period, the current provisions in s. 20 which specify the type of evidence that must be given in support of an application, and impose an obligation on the applicant to personally give evidence, are unnecessary and should be excluded from the new provision.

- Section 21A of the 1939 Act (providing assistance to an unlawful organisation) should be retained in its current form as part of the legislation replacing the Offences Against the State Acts.

- Section 25 of the 1939 Act (using or occupying a building subject to a closing order) should be repealed in its entirety and should not be re-enacted.

- Section 28 of the 1939 Act (meetings and processions in vicinity of houses of Oireachtas) is overly broad and should not be re-enacted as part of legislation replacing the Offences Against the State Acts. While it is appropriate in principle to provide An Garda Síochána with particular powers of crowd control in the immediate vicinity of the Houses of Oireachtas, this should be done through a provision which is much more narrowly drawn than s. 28.

- Section 52 of the 1939 Act (failure to provide an account of movements) should be repealed in its entirety and should not be re-enacted as part of any legislation

replacing the Offences Against the State Acts. It is not necessary to recast the provision as a section allowing inferences to be drawn from the silence of the accused.

- Section 2 of the 1972 Act (failure to account for recent movements when found near the place of commission of a scheduled offence) should be repealed in its entirety and should not be re-enacted as part of any legislation replacing the Offences Against the State Acts.
- Section 4 of the 1972 Act (interference with the course of justice) should be repealed. It should not be re-enacted in legislation replacing the Offences Against the State Acts.
- Section 6 of the 1998 Act (directing an unlawful organisation) should be re-enacted as part of the legislation replacing the Offences Against the State Acts, without any substantive modification.
- It is essential to provide for an offence similar to that contained in s. 8 of the 1998 Act (unlawful collection of information) in the legislation replacing the Offences Against the Acts. However, s. 8 in its current formulation may be overly broad and it may not be appropriate to simply re-enact the provision. Consideration should be given to whether the aims of the section could be achieved by a more narrowly-drawn offence.
- Section 9 of the 1998 Act (withholding information) should be re-enacted in legislation replacing the Offences Against the State Acts. The offence should not be limited to specific offences. However, consideration should be given to the inclusion of additional safeguards within any re-enacted statutory provision. There would be particular merit in the introduction of an express statutory requirement that a person be warned about the potential penal consequences of failing to provide information to the gardaí.
- Various offences in the Offences Against the State Acts are linked to obstruction or failure to comply with the exercise of garda powers of search, arrest and detention conferred by the legislation. In circumstances where the Review Group is recommending that those garda powers should not be re-enacted (see below), the related offences should be repealed and should not be re-enacted.
- There are a number of other offences in respect of which no controversy appears to arise. These should be re-enacted without amendment in any legislation replacing the Offences Against the State Acts. These offences are: s. 6 of the 1939 Act (usurpation of the functions of Government); s. 15 of the 1939 Act (unauthorised military exercises); s. 16 of the 1939 Act (secret societies in army or police); s. 17 of the 1939 Act (administering unlawful oaths); s. 27 of the 1939 Act (public meetings connected to unlawful organisations); s. 7 of the 1998 Act (possession of articles for purposes connected with certain offences); and s. 12 of the 1998 Act (training persons in the making or use of firearms, etc.).

Evidential Provisions (Chapter 6)

- It is appropriate to continue to provide for the admission of belief evidence from a chief superintendent in trials for the offence of membership of an unlawful organisation. However, the statutory provisions providing for admission of that evidence should make clear that in a case where belief evidence is relied on by the prosecution, the accused may not be convicted solely on the basis of that evidence, and that such evidence must be supported by some other evidence that implicates the accused in the offence charged, is seen by the trial court as credible in itself, and is independent of the witness who gives the belief evidence. The legislation should go on to provide that the necessary support or corroboration may not be derived solely from adverse inferences drawn from the silence of the accused during questioning by gardaí under any statutory provision.

- Consideration should be given to legislating for procedures to deal with claims of privilege over belief evidence, other than inspection by the trial court. Particular consideration ought to be given to legislating to provide for a fourth *"privilege"* judge to sit on trials for membership offences, who would be tasked exclusively with resolving any issues that might arise in respect of privilege and would hear the evidence in the case so that he or she has the necessary context for making a decision on such privilege issues.

- There is merit to retaining a provision akin to s. 26 of the 1939 Act, which allows for the admission of belief evidence where the question of whether a particular treasonable document, seditious document, or incriminating document was or was not published by the accused is in issue. However, the legislation should expressly provide that the accused may not be convicted solely based on that belief evidence, and further provide that corroboration or support for belief evidence cannot be supplied solely on the basis of adverse inferences drawn from the silence of the accused.

- It is appropriate that continued provision is made in law for inferences to be drawn from the silence of the accused in the manner provided for under s. 2 of the 1998 Act and this provision should be re-enacted in any legislation that replaces the Offences Against the State Acts. However, provision should be made in the legislation to the effect that an inference drawn from the silence of an accused under s. 2 of the 1998 Act should not be capable of providing the sole corroboration for belief evidence. Similarly, belief evidence should not be capable of providing the sole corroboration for inferences drawn from silence.

- Section 24 of the 1939 Act, which provides for proof of membership of an unlawful organisation based on possession of an incriminating document, should be repealed. It should not be re-enacted as part of any replacement legislation.

- Section 3(1)(b)(ii) of the 1972 Act should be repealed, so that the failure to deny published reports is not included as *"conduct"* which may be treated as evidence that a person is a member of an unlawful organisation.

Powers of Search, Arrest and Detention (Chapter 7)

- The garda powers of search, arrest and detention contained in the 1939 Act should not be re-enacted. Instead, general garda powers should be available to deal with offences against the State.
- The Garda Síochána (Powers) Bill should be drafted in such a manner that the consolidated powers contained therein are broad enough to cover offences against the State.

Powers of Internment (Chapter 8)

- The Offences Against the State (Amendment) Act 1940 should be repealed in its entirety. The powers of internment contained therein should not be re-enacted as part of any legislation replacing the Offences Against the State Acts.

Forfeiture, Closing Orders and Disqualification (Chapter 9)

- The forfeiture provisions contained in s. 22 and ss. 22A to 22I of the 1939 Act, as well as relevant provisions of the 1985 Act, should be re-enacted as part of any legislation which replaces the Offences Against the State Acts.
- Consideration should be given to drafting consolidated forfeiture provisions dealing with both property of unlawful organisations and funds intended to finance terrorism.
- Section 25 of the 1939 Act, which deals with orders for the closing of certain buildings, should be repealed in its entirety and should not be re-enacted in any legislation that might replace the Offences Against the State Acts.
- Section 34 of the 1939 Act, which provides for forfeiture and disqualification where a public servant is convicted of a scheduled offence in the Special Criminal Court, should not be re-enacted in any legislation which might be introduced to replace the Offences Against the State Acts.

Chapter 4

Non-Jury Courts

4.1 The Offences Against the State Act 1939 provides for the establishment and operation of non-jury Special Criminal Courts. In this chapter, we assess whether non-jury courts should continue to be provided for in law and, if so, the manner in which they should operate.

Existence of Non-Jury Court

Overview of the Law

4.2 Article 38.3.1° of the Constitution states that *"[s]pecial courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order."* As per Article 38.3.2°, the constitution, powers, jurisdiction and procedure of special courts shall be prescribed by law.

4.3 As noted by the Supreme Court in *Dowdall and Hutch v. DPP*, the consequence of these constitutional provisions is that legislation is required to establish special courts, to establish the procedure, power and jurisdiction of the courts, and to provide for an *"adequacy determination"* of the ordinary courts.[2] Any law enacted for the purposes of Article 38.3 must itself accord with the Constitution. O'Donnell C.J. noted that if any such law were challenged, the question would simply be if such legislation was consistent with the Constitution. He further noted that *"since, however, the creation of special courts is contemplated by the Constitution, it would not be correct to approach that question as if a trial in the ordinary courts is a constitutional right, interference with which requires justification or the application of a proportionality test."*[3]

4.4 Article 38.5 provides that no person shall be tried on any criminal charge without a jury, save for an offence tried before a special court established under Article 38.3; a minor offence tried by a court of summary jurisdiction; or an offence tried by a military tribunal.

4.5 Part V of the Offences Against the State Act 1939 makes provision for the establishment of the *"special courts"* envisaged by Article 38.3.1°. Part V comes into force whenever the Government makes and publishes a proclamation pursuant to s. 35(2) of the Act to the effect 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"*. The proclamation remains in force until the Government makes and publishes a proclamation declaring that Part V shall cease to be in force, or alternatively until Dáil Éireann passes a resolution annulling the proclamation.

4.6 Section 38 of the 1939 Act provides that as soon as may be after Part V comes into force, there shall stand established a court known as *"a Special Criminal Court"*. Section 38(2) makes provision for the Government to establish such additional number of Special Criminal Courts for the purposes of the 1939 Act as it thinks fit. A Special Criminal

[2] [2022] IESC 36, (Unreported, Supreme Court, 29th July 2022) per O'Donnell C.J. at paras. 40 and 41.

[3] *Ibid.*

Court operates as a non-jury court and, under s. 43 of the 1939 Act, it is conferred *inter alia* with the jurisdiction to try any person lawfully brought before it for trial.

4.7 Part V of the 1939 Act is currently in force on foot of a proclamation which was made by the Government in May 1972. Special Criminal Courts have operated on a continuous basis since that date. A second Special Criminal Court was established by Government order on 14th December 2004. A further Government order appointing judges to the second court was made on 28th October 2015.

4.8 In *Dowdall and Hutch v. DPP*, the Supreme Court held that there is no temporal limitation on a proclamation made under s. 35(2) or the duration for which the Special Criminal Court may remain in existence.[4] However, the Government is obliged to keep the situation under review to permit it, if necessary, to make the relevant determination that a proclamation should be made rescinding Part V. There is no formality required in that process and, in particular, there is no requirement for periodic formal review. The court held that Dáil Éireann is not under a similar obligation to review circumstances to consider the exercise of its functions under s. 35(5).

Position of the Hederman Committee and Submissions Received

4.9 The majority of the Hederman Committee recommended the retention of the Special Criminal Court, on the basis that the threat posed by paramilitaries and organised crime was sufficient to justify the existence of the court. However, the majority stressed that this recommendation was subject to two important qualifications. The first was that the necessity for the court must be kept under regular review. The second was that the Oireachtas should amend certain provisions of the 1939 Act relating to the operation of the court and that steps should be taken to ensure that judges of the court enjoy traditional guarantees regarding tenure, salary and independence.

4.10 A minority of the Committee took the view that the case for the continued existence of the Special Criminal Court had not been made out, stating the *"arguments adduced in support of the very existence of the court do not stand up to scrutiny in the light of constitutional values and human rights norms."*[5] The minority summed up its views as follows:

"The existence of the Special Criminal Court can best be explained not by factually justified and specifically focused concerns relating to the risk of jury intimidation unique in the common law world, but by the desire to use strong means to put down violent, politically inspired crime. That desire is understandable but the means are, unfortunately, inconsistent with the values of a modern liberal democratic society and the protection of human rights. In our judgment, the best course is for Ireland to join all other common law countries with jury trial and dispense with the Special Criminal Court."[6]

4.11 The submissions to the Review Group were heavily divided as to whether the Special Criminal Court should remain in existence. Some contributors argued that the continuation of the Special Criminal Court is necessary to adequately manage the threat of jury intimidation and deal effectively with terrorist and organised crime offences. One submission argued that the use of the Special Criminal Court has significantly minimised the level of interference with jurors in the State and has preserved the integrity of the

[4] [2022] IESC 36, (Unreported, Supreme Court, 29th July 2022).

[5] Hederman Report, at para. 9.89.

[6] Hederman Report, at para. 9.96.

criminal justice system. This submission stated that without the Special Criminal Court, it would be impossible to adequately manage the threat of jury intimidation and this would endanger prosecutions. A further submission advocated the continuation of the Special Criminal Court in order to deal with subversive and organised crime, but recommended changes to the manner in which the court operates.

4.12 Other submissions contended that the Special Criminal Court should be abolished. One submission stated that the Special Criminal Court can now be considered a near permanent feature of the Irish criminal justice system and argued that it is not plausible to suggest that Irish social conditions are so perilous as to warrant dispensing with the right to trial by jury. Another submission recommended the abolition of the Special Criminal Court to ensure that the State is in full compliance with its international human rights obligations.

4.13 We think that in considering this issue, it is also important to note that the UN Human Rights Committee has expressed concerns on a number of occasions relating to the operation of the Special Criminal Court.[7] For instance, in 2014, following its fourth periodic review of the State, the Human Rights Committee recommended that the State consider abolishing the Special Criminal Court and expressed concern at the expansion of the remit of the court to include organised crime.[8]

Recommendations

4.14 We have considered whether there is an ongoing need for a non-jury court to try criminal offences; and, if so, whether the Special Criminal Court should carry out that function, or whether it should be replaced by a new non-jury court.

4.15 It seems to us that the existence of a non-jury court capable of trying serious offences is justified in principle if the court is needed to counter a real risk of juror intimidation which might imperil the integrity of the criminal justice system. While we believe that jury trials should be the norm for non-minor criminal offences, we note that the right to trial by jury is not absolute and that right may be justifiably interfered with in limited circumstances. In an exceptional case, the right may have to give way to the public interest in effectively prosecuting serious criminal offences. Other neighbouring jurisdictions – such as Northern Ireland, England and Wales – appear to take a similar view, as evidenced by their legislative provisions which allow for non-jury trials to be held in certain circumstances.

4.16 To assist it in considering whether there is justification for the continued existence of a non-jury court, the Review Group sought information from relevant bodies as to the nature and extent of the risk to jurors and witnesses in the State at present. There is an absence of concrete evidence about these matters. This can be partly explained by the typically covert nature of such intimidation, but the situation is exacerbated by the

[7] See, for example, United Nations Human Rights Committee CCPR/C/79/Add.21, 3rd August 1993 (Consideration of reports submitted by states parties under art. 40 of the Covenant: comments of the Human Rights Committee) at para. 19; United Nations Human Rights Committee, CCPR/C/IRL/CO/3, 30th July 2008 (Consideration of reports submitted by state parties under art. 40 of the Covenant: concluding observations of the Human Rights Committee) at para. 20; and United Nations Human Rights Committee, CCPR/C/IRL/CO/4, 19th August 2014 (Concluding observations on the fourth periodic report of Ireland) at para. 18. The issue was not commented on in the Committee's fifth periodic report: see United Nations Human Rights Committee, CCPR/C/IRL/CO/5, 26th January 2023 (Concluding observations on the fifth periodic report of Ireland).

[8] United Nations Human Rights Committee, CCPR/C/IRL/CO/4, 19th August 2014 (Concluding observations on the fourth periodic report of Ireland) at para. 18.

fact that separate statistics have not been maintained in respect of witness and juror intimidation. The position is complicated by the fact that offences connected with paramilitary organisations have been tried in a non-jury court for many decades, and for that reason the question of jury tampering could not have arisen. The same issue arises in the case of organised crime offences where there has been a growing practice in recent years to have such trials dealt with by the Special Criminal Court. Clearly there is no value in looking for evidence of jury intimidation where juries have not, in fact, been used.

4.17 In these circumstances, particular regard must be had to the nature of paramilitary organisations and organised crime groups, and to whether their general behaviour and *modus operandi*, in terms of their sophistication and willingness to seek the subversion of the criminal justice system, means that in some cases the ordinary courts would not be sufficient to secure the effective administration of justice and the preservation of public peace and order. In this regard we received strong submissions from the relevant authorities to the effect that there are serious ongoing concerns for the safety of jurors in dealing with trials for certain offences; that non-jury courts have proven effective in this respect in trying terrorist and organised crime offences in the past; and that, in total, a non-jury court remains necessary to ensure an effective criminal justice system.

4.18 We have attached considerable weight to these submissions. While it would have been open to us to reject the assessments of bodies charged with responsibility for maintaining public safety, we believe that this is something which should not be done without compelling reasons. In all of the circumstances, we have arrived at the conclusion that there is an ongoing need for a non-jury court, as envisaged in the Constitution, to try serious or *"non-minor"* criminal offences in limited and exceptional circumstances, where the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order.

4.19 However, we do not believe that it is appropriate to simply maintain the Special Criminal Court in existence to fulfil this function. Instead, we recommend the introduction of legislation establishing and regulating the operation of a new non-jury court. Such a court should operate on a standing basis, rather than its operation being conditional on a proclamation. The court should be available in principle to try any serious criminal offence provided that the high threshold for use of the court is satisfied. The legislation providing for the non-jury court should include specific provisions aimed at ensuring that the court is used only in exceptional cases; that it provides adequate safeguards for the rights of accused persons; and that it is transparent and open to public scrutiny.

4.20 We go on below to set out further recommendations as to how the proposed court should operate. We stress that our recommendation for the establishment of a new non-jury court is contingent on these other recommendations being followed. In other words, our view is that the establishment of a new non-jury court is only acceptable if these other recommendations relating to the operation of the court are also adopted in full.

4.21 The question might arise as to why we recommend the establishment of a new court, rather than a continuation or repurposing of the Special Criminal Court. We are conscious that the Special Criminal Court is the creation of exceptional legislation enacted to deal with specific offences. Insofar as there is a continued need in this

jurisdiction for a non-jury court to deal with a range of serious offences, it is more appropriately met through the introduction of a bespoke court designed for that purpose. Further, for reasons elaborated on below, we are of the opinion that the way in which the Special Criminal Court operates at present could be improved in the light of changing circumstances and that this would be best addressed through the introduction of legislation establishing a new court, rather than trying to modify the way in which the Special Criminal Court currently operates.

4.22 For clarity, we note that our recommendations in this chapter are based on our view that, under Article 38.5 of the Constitution, a non-jury trial for non-minor offences can only take place in a *"special court"* established by law pursuant to Article 38.3.1°.[9] It does not appear possible under the current constitutional framework to make provision for a non-minor offence to be tried without a jury in the *"ordinary"* criminal courts. If non-jury trials for serious offences are to be available, legislation must be enacted which provides for the establishment of a special court. It would be possible to amend the Constitution by way of referendum to expressly provide for the establishment of a non-jury court, in the same way as the Constitution provides for the High Court, Court of Appeal and Supreme Court. However, we thought it best to make recommendations consistent with, and operable within, the current constitutional framework.

Decisions on Use of Non-Jury Court

Overview of the Law

4.23 Under ss. 45 to 48 of the Offences Against the State Act 1939, the DPP has exclusive power to determine whether an accused will be tried in the Special Criminal Court or in the ordinary courts. While the 1939 Act refers in these sections to the *"Attorney General"*, the Attorney's functions under the sections are exercised by the DPP by virtue of s. 3 of the Prosecution of Offences Act 1974.

4.24 Under s. 45 of the 1939 Act, *"scheduled offences"* are automatically tried in the Special Criminal Court unless the DPP directs that the offence be tried instead in the ordinary courts. There are two means by which an offence may become a scheduled offence. Section 36 states that while Part V of the 1939 Act is in force, the Government has the power to make orders declaring that offences of any particular class or kind or under any particular enactment are scheduled offences. The Oireachtas may also enact legislative provisions providing that specific offences are to be treated as scheduled offences: see, for example, s. 8 of the Criminal Justice (Amendment) Act 2009. A full list of scheduled offences is included as an appendix to our report.

4.25 Sections 46, 47 and 48 of the 1939 Act further provide that a person may be tried before the Special Criminal Court in respect of a non-scheduled offence where the DPP certifies that the ordinary courts are, in his or her opinion, inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of that person.

4.26 The constitutionality of these provisions has been repeatedly upheld by the courts.[10] For instance, in *Re MacCurtain*, the applicant argued that the 1939 Act was unconstitutional

[9] We note for completeness that a trial without jury is also permitted under Article 38.4.1° for the trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war or armed rebellion. This is not of relevance in the present context.

[10] See, for example, *Re MacCurtain* [1941] I.R. 83; *State (Bollard) v. Special Criminal Court* (Unreported, High Court, Kenny J., 20th September 1972); *Judge v. DPP* [1984] I.L.R.M. 224; and *Murphy v. Ireland* [2014] IESC 19, [2014] 1 I.R. 198.

as it bestowed legislative and judicial powers on the Attorney General in relation to determining the venue for trial. The Supreme Court rejected this argument. Sullivan C.J. referred to Article 38.3.1° and stated that:

"[Article 38.3] is a specific Article dealing with the establishment of Special Courts and in the face of that Article no question can arise as to delegation of the legislative and judicial powers dealt with by other Articles of the Constitution. Clause 3, par. 1, expressly provides that the question whether the ordinary Courts are inadequate to secure the effective administration of justice and the preservation of public peace and order is to be determined in the manner provided by the Act by which the Special Courts are established. It was left to the Legislature to choose the particular method by which that question should be determined and to provide accordingly, and any provision so made is in compliance with the Constitution."[11]

4.27 The High Court rejected a similar argument in *State (Bollard) v. Special Criminal Court*.[12] The applicant contended that the exercise by the Attorney General of the power to direct trial in the Special Criminal Court amounted to an exercise of the judicial power. Kenny J. held that no issue of constitutionality arose. He stated that Article 38.3 provided that the use of special courts is to be determined in accordance with law and that the Attorney General had complied with the 1939 Act. Kenny J. stated that, in any event, the certification by the Attorney General did not amount to the exercise of the judicial power. This decision was subsequently affirmed by the Supreme Court in an ex tempore judgment.

4.28 In *Re Criminal Law (Jurisdiction) Bill 1976*, the Supreme Court referred to *MacCurtain and Bollard* and held that they were authority for the proposition that:

"…[I]t was constitutional for the Oireachtas to have provided by the Act of 1939 that the question of the inadequacy of the ordinary Courts should be decided by a proclamation and declaration of the Government or by a certificate of the Attorney General whose function is now discharged by the Director of Public Prosecutions."[13]

4.29 In *Judge v. DPP*, the applicant argued that s. 47 of the 1939 Act was unconstitutional and that it was unlawful for the DPP to exercise the powers in that section.[14] Carroll J. referred to the authorities set out above. She stated that these showed that the Constitution authorised the legislature to choose the method by which the question of the inadequacy of the courts is to be determined. She noted that the determination *"does not have to be a judicial determination"* and that the legislature had formerly chosen the method of certification by the Attorney General. It had now chosen that it was to be the DPP who makes the decision on the use of the Special Criminal Court and there was no constitutional bar to this situation. Carroll J. further held that if there was any interference with the rights of a citizen, this flowed from an act which itself was authorised by the Constitution: that is, a determination in accordance with law that the ordinary courts are inadequate.

4.30 However, in *Kavanagh v. Ireland*, the UN Human Rights Committee held that the State had failed to demonstrate that the DPP's decision to the try the applicant for non-scheduled offences before the Special Criminal Court was based upon reasonable grounds

[11] [1941] I.R. 83 at pp. 89 and 90.

[12] Unreported, High Court, Kenny J., 20th September 1972.

[13] [1977] I.R. 129 at p. 151.

[14] [1984] I.L.R.M. 224.

and consequently found that there was a violation of the applicant's right to equality before the law and to the equal protection of the law under the International Covenant on Civil and Political Rights.[15] The Committee said that it:

"…[R]egards it as problematic that, even assuming that a truncated criminal system for certain serious offences is acceptable so long as it is fair, Parliament through legislation set out specific serious offences that were to come within the Special Criminal Court's jurisdiction in the DPP's unfettered discretion ('thinks proper'), and goes on to allow, as in the author's case, any other offences also to be so tried if the DPP considers the ordinary courts inadequate. No reasons are required to be given for the decisions that the Special Criminal Court would be 'proper', or that the ordinary courts are 'inadequate', and no reasons for the decision in the particular case have been provided to the Committee. Moreover, judicial review of the DPP's decisions is effectively restricted to the most exceptional and virtually undemonstrable circumstances."

4.31 The decision of the DPP to direct trial in the Special Criminal Court cannot be appealed. Further, the case law establishes that the DPP's decision is only subject to judicial review by the courts in very limited circumstances. The underlying rationale of the case law appears to be that as the 1939 Act entrusts the DPP with the function of deciding when a trial before the special courts should happen, the courts should not lightly interfere with the exercise of that power. The courts have expressed views that to act otherwise would impinge on the functions of the DPP and/or compromise the intentions of the 1939 Act.

4.32 The position adopted in this case law has progressed over time, with the courts moving from the position that review was never permissible to accepting that review may be possible in certain limited situations.

4.33 In *Savage v. DPP*, the applicant argued that the DPP had acted unreasonably in directing trial in the Special Criminal Court.[16] Finlay P. held that this decision was not reviewable by the courts. He noted that the 1939 Act was brought into force to give effect to Article 38.3, which expressly envisaged that the manner for determining which offences would be tried before special courts would be set down in law. The 1939 Act gave the DPP certain powers in respect of deciding whether a person should be tried by the Special Criminal Court and did not appear to envisage any review by the courts of the DPP's decision. Finlay P. further stated that the legislation had to be interpreted in light of its clear intentions. If the opinion of the DPP were reviewable by a court, it would be necessary for the DPP to reveal in open court all of the information, knowledge and facts upon which he or she formed the opinion. Finlay P. noted that this would make the operation of Part V of the 1939 Act impossible. He stated at p. 13 that:

"The revealing of such information in open court under conditions under which persons are seeking to overthrow the established organs of the State would be a security impossibility and to interpret Section 46 sub-section 2 of the Act of 1939 so as to make that necessary would be to vitiate the entire of that sub-section."

4.34 In *Judge v. DPP*, the applicant asked the High Court to privately enquire into the reasons for the DPP's decision to direct trial before the Special Criminal Court to determine if there were any grounds for reaching that opinion.[17] Carroll J. stated that based on

[15] Human Rights Committee Communication No. 819/1998, CCPR/C/71/D/1998, 26th April 2001.

[16] [1982] I.L.R.M. 385.

[17] [1984] I.L.R.M. 224.

the terms of Article 38.3, she was of the view that the courts did not have the power to enquire into the grounds for the DPP's decision and decide whether such grounds are reasonable or not. She noted at p. 13 that:

"The Oireachtas have determined the method under Article 38(3) by which the inadequacy of the ordinary Courts is to be determined, i.e. the opinion of the D.P.P. evidenced by his certificate. The Courts do not have power to set that opinion aside, for to do so would be to substitute in a negative way their opinion as to the adequacy of the grounds on which the opinion was based… No analogy can in my opinion be drawn between the opinion of the D.P.P. under legislation authorised under Article 38(3) and the exercise by a Minister of a power conferred by an ordinary Act of the Oireachtas which is reviewable."

4.35 In *Kavanagh v. Ireland*, Barrington J. noted that:

"…[T]he primary control over the powers of the Government under Article 38, s. 3 of the Constitution and under Part V of the Offences Against the State Act, 1939, is a political control. This means that normally the proclamations of the Government under s. 35, sub-ss. 2 and 4 of the Offences Against the State Act, 1939, or the certificates or directions of the Director of Public Prosecutions under s. 47 of the same Act will not be subject to judicial review in the absence of evidence of mala fides." [18]

4.36 In *Byrne and Dempsey v. Ireland*, the applicants sought to challenge the certification given by the DPP on the grounds that there was no factual basis for the opinion that the ordinary courts were inadequate.[19] Delivering judgment for the Supreme Court, Hamilton C.J. stated that *"normally, the certificates or directions of the Director of Public Prosecutions under either Section 46 or 47 of the Offences Against the State Act will not be subject to judicial review in the absence of mala fides or improper motives"*. He said that it was not the case that all decisions of the DPP under the 1939 Act would be subject to review by the courts for the purpose of obtaining an objective assessment as to whether or not the ordinary courts are inadequate. This would *"involve the courts in determining whether or not the ordinary courts are effective for the said purpose"* and this was *"clearly not the intention of the legislature"*.

4.37 In *Murphy v. Ireland*, the Supreme Court held that the DPP's decision to direct trial in the Special Criminal Court was reviewable if it could be demonstrated that it was reached *mala fides* or influenced by improper motive or improper policy, or other exceptional circumstances.[20] The court went on to note that the scope of review is *"most limited and attenuated"*, because of the subject matter of the decision, the sensitivity of the matters routinely considered, and the fact that the end result of a decision to prosecute will be a trial in open court. However, the court held that the DPP was obliged to give reasons on request for a decision to direct trial in the Special Criminal Court extending to why he or she considers that the ordinary courts are not suitable for a trial of the accused or, alternatively, to justify a refusal to provide such reasons. The court noted that a statement of reasons that the DPP believes the accused to be a member of, or associated with, an organisation that is prepared to interfere with the administration of justice will be sufficient unless the accused challenges the decision and provides sufficient information to the court, to presumptively undermine the DPP's reasons. Further, the court held that the entitlement to obtain reasons does not entail any right to obtain the gist of information

[18] [1996] 1 I.R. 321 at p. 360.

[19] Unreported, Supreme Court, 11th March 1999.

[20] [2014] IESC 19, [2014] 1 I.R. 198.

grounding such a decision or to have a hearing or to make submissions before a decision on venue is made.

4.38 It is obvious to us that the decision to try cases before the Special Criminal Court is typically made so as to negate the possibility of intimidation of or interference with jurors. In this context, it is relevant to consider whether there are other existing measures which might be used to deal with such risks and to prosecute persons for engaging in conduct of that nature. We note in particular the following:

- Section 41 of the Criminal Justice Act 1999 provides for an offence of intimidation of witnesses and jurors. The offence is punishable by a maximum penalty of up to 15 years imprisonment. The constitutionality of this offence was upheld in *McNulty v. Ireland*.[21]

- Various common law offences exist in relation to jury intimidation or tampering, including the offences of perverting the course of justice, contempt of court, and embracery. The offence of embracery involves *"any attempt whatsoever to corrupt or influence or instruct a jury or any way to incline them to be more favourable to the one side than to the other by money, promises, letters, threats or persuasions, except only by the strength of the evidence and the arguments of the counsel in open court."*[22] Although infrequently prosecuted, embracery remains an offence under Irish law.[23]

- Certain statutory powers allow a matter to be transferred for trial from one part of the State to another. Section 32(1) of the Courts and Court Officers Act 1995 provides that where an accused person has been sent forward for trial to a Circuit Court sitting outside of the Dublin Circuit, the judge before whom the case is triable may transfer the trial to the Dublin Circuit if satisfied that it would be *"manifestly unjust not to do so"*.[24] Under s. 26(1) of the Courts (Supplemental Provisions) Act 1961, a judge may, if he or she *"thinks fit"*, transfer the trial of a case from one place to another within a circuit. These provisions could conceivably be of assistance in dealing with a localised risk of witness or juror intimidation in a specific case.

4.39 During our work, we also gave detailed consideration to the regimes for non-jury trials which are in place in Northern Ireland, England and Wales. The Criminal Justice Act 2003 contains two provisions dealing with non-jury trials:

- Section 44 provides that where a defendant is to be tried on indictment, the prosecution may apply to a judge of the Crown Court for the trial to be conducted without a jury.[25] The application must be made not more than 10 business days after the defendant pleads not guilty. It is ruled on at an *inter partes* hearing during which the defendant may make submissions. There is provision for information grounding the application to be withheld from the defendant and for the hearing to be conducted wholly or partly in the absence of a defendant. The judge must order that the trial be conducted before a judge sitting alone without a jury if satisfied beyond

[21] [2015] IESC 2, [2015] 2 I.R. 592.

[22] *Re M.M.* [1933] I.R. 299 at p. 323.

[23] See *Re M.M.* [1933] I.R. 299 and *DPP v. Walsh* [2006] IECCA 40, [2009] 2 I.R. 1.

[24] See *DPP v. Joel* [2016] IECA 120, (Unreported, Court of Appeal, 4th March 2016).

[25] The procedure for an application under s. 44 of the Criminal Justice Act 2003 is set out in Rules 3.23 to 3.25 of the Criminal Procedure Rules 2020 (S.I. 2020/759).

reasonable doubt that: (i) there is evidence of a real and present danger that jury tampering would take place; and (ii) that notwithstanding any steps which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury. An appeal can be taken from the granting or refusal of an application.

- Section 46 provides that where a trial judge is satisfied beyond a reasonable doubt that jury tampering has taken place, he or she may discharge the jury and continue the trial as a judge sitting alone without a jury, provided it would not be unfair to the accused to do so. The jury should not be discharged under s. 46 unless the judge is satisfied that the problem is incapable of being remedied by any other means, including the discharge of an individual juror. Before taking steps to discharge the jury, the judge must allow the parties an opportunity to make submissions. If the judge considers it necessary in the interests of justice for the trial to be terminated, he or she must terminate the trial. The judge may then make an order that any new trial must be conducted without a jury if satisfied that both of the conditions set out in s. 44 are likely to be fulfilled.

4.40 The courts have emphasised that an order under s. 44 *"must remain the decision of last resort"*.[26] Conversely, where a judge finds that jury tampering appears to have taken place, the default position is that, save in unusual circumstances, the judge should order the discharge of the jury and continue the trial without a jury pursuant to s. 46.[27] For reasons explained earlier in this chapter, we note that the approach taken in this legislation, whereby a non-jury trial for an indictable offence may take place before a judge sitting alone in the ordinary courts, would not be possible under our constitutional framework.

4.41 We also gave consideration to the Justice and Security (Northern Ireland) Act 2007, which makes further provision for the circumstances in which non-jury trials may take place in Northern Ireland. The circumstances applying to paramilitary organisations in that jurisdiction could be considered the closest to that which obtains in this jurisdiction. That Act repealed the legislation underpinning the Diplock Court system.[28] The 2007 Act entitles the Director of Public Prosecutions for Northern Ireland to issue a certificate in relation to any trial on indictment of an accused. Where a certificate issues, proceedings are heard by a single judge sitting without a jury in the Crown Court. A certificate cannot issue unless the Director suspects that one of four statutory conditions is met:

(i) That the defendant is a member, or is an associate of a person who is a member, of a proscribed organisation, or has at any time been a member of an organisation that was, at that time, a proscribed organisation.

(ii) That the offence or any of the offences were committed on behalf of a proscribed organisation or a proscribed organisation was otherwise involved with, or assisted in the carrying out of the offences.

(iii) That an attempt has been made to prejudice the investigation or prosecution of the offences and the attempt was made on behalf of a proscribed organisation or a proscribed organisation was otherwise involved with, or assisted in, the attempt.

[26] *R. v. J., S. and M.* [2010] EWCA Crim 1755, [2011] 1 Cr. App. R. 5 at para. 8.

[27] *R. v. Twomey* [2009] EWCA Crim 1035, [2010] 1 W.L.R. 630 at para. 20.

[28] *Re Arthurs' Application* [2010] NIQB 75, (Unreported, High Court of Northern Ireland, Girvan L.J., 30th June 2010) at paras. 16 and 17.

(iv) That the offences were committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person or groups of persons towards another person or group of persons.

4.42 The Director must also be satisfied that there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.

4.43 In addition to the statutory conditions provided for in s.1 of the 2007 Act, it is now the case that before the Director issues a certificate, consideration is given as a matter of practice to (i) screening and/or sequestering the jury; and (ii) moving the trial to another location. These non-statutory practices arose from the Tenth Annual Report of the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007 where it was recommended that the Director note on a certificate that prior consideration had been given to jury protection measures.[29]

Position of the Hederman Committee and Submissions Received

4.44 The Hederman Committee was of the view that the distinction between scheduled and non-scheduled offences should not be retained, at least as far as the triggering of the jurisdiction of the Special Criminal Court was concerned. The Committee considered that the distinction *"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."*.[30] The Committee said that it would be preferable that any such decision would be based on the merits of the individual case, rather than on a preconceived statutory assumption that persons charged with certain types of offences should be sent to the Special Criminal Court unless the DPP directs otherwise. The Committee noted that it might well be argued that the constitutional jurisdiction to try an accused in the non-jury courts rests on an assessment that the ordinary courts are inadequate in that individual case, and that this constitutional requirement is not satisfied by the scheduling of certain offences.

4.45 A majority of the Hederman Committee recommended that any decision of the DPP to send an accused for trial to the Special Criminal Court should be subject to a positive review mechanism. The Committee considered four alternative methods which could be used to decide on the use of the Special Criminal Court: (i) the making of an *inter partes* application by the DPP to the High Court to have a trial heard in the Special Criminal Court; (ii) the making by the DPP of *ex parte* application to the High Court to have a trial heard in the Special Criminal Court; (iii) administrative review of the DPP's decision by a retired judge; and (iv) review of the DPP's decision by a judge of the Supreme Court. Having outlined these options, the majority suggested that consideration should be given to implementing the fourth option, perhaps in conjunction with an *"independent counsel"* procedure whereby the case against use of the Special Criminal Court would be made by court-appointed counsel who would be apprised of the material the prosecution was relying on in deciding that a non-jury trial was necessary.

4.46 A minority of the Hederman Committee did not believe that there was a case in favour of the continued existence of the Special Criminal Court. It further expressed the view that even if non-jury trials were considered appropriate in certain circumstances, the Special

[29] Northern Ireland Office, *"Non-Jury Trials Working Group Report to the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007"* (December 2021) at para. 11.

[30] Hederman Report, at para. 9.57.

Criminal Court is unacceptable as the DPP makes a discretionary decision as to whether a person forfeits the right to a jury trial. The minority noted that the DPP represents one side of an adversarial process and should not be given powers relating to trial which can detrimentally affect the interests of the accused. The minority stated that even if the DPP's powers were exercised in good faith in all cases, *"they do not have the appearance of the impartial and objective protection of the right of accused persons to a fair trial."* [31]

4.47 Certain submissions received by the Review Group argued that the distinction between scheduled and non-scheduled offences should be abolished, and that the use of the Special Criminal Court should be determined on a case-by-case basis. One of these submissions argued that the distinction between scheduled and non-scheduled offences gives rise to legal uncertainty and inequality for defendants.

4.48 Many of the submissions engaged with the role of the DPP in deciding on the use of the Special Criminal Court. Starkly different views were evident. Some contributors argued in favour of retention of the current system whereby the DPP has exclusive decision-making power. They made the case that a decision on the appropriate venue and mode of trial is inherently part of the DPP's prosecutorial remit and that the DPP is best placed to assess whether a case should be tried in the Special Criminal Court, as he or she has access to all relevant information and can evaluate the case in the broader context of subversive and organised crime. The submissions also contended that the introduction of a judicial process to decide on use of the Special Criminal Court – which might well involve appeals and judicial review applications – could lead to delays and thereby pose a significant impediment to the efficient and effective processing of cases in that venue.

4.49 Other submissions suggested that the law be amended so that a judge decides on whether a case is tried before the Special Criminal Court, on foot of an application in that regard by the DPP. One submission made the point that this would equalise the position of the defence and the prosecution, rather than allowing the prosecution to make the decision on where the case is to be tried. Other submissions argued that, rather than making the decision on use of the Special Criminal Court, a judge of the Superior Courts should provide oversight of the DPP's decisions on use of the court and publish annual reports.

4.50 Certain submissions made the case for implementation of detailed statutory criteria, identifying the circumstances in which a non-jury trial is permitted. These submissions also made the point that there is room to introduce alternative measures which might negate the need for a non-jury trial in certain circumstances. Such alternatives include the use of juries which are protected by gardaí; remote juries watching the proceedings from a location outside the court room; anonymised juries whose identities are not disclosed to the parties to proceedings; and the possibility of transferring the trial to a different part of the country. The submissions argued that there should be a statutory requirement to give consideration to the use of such alternative measures before directing trial in the Special Criminal Court. Other submissions drew attention to the limitations of these measures, noting for instance that the measures are of limited efficacy given the relatively small population of the State.

[31] Hederman Report, at para. 9.97.

Recommendations

4.51 We have proposed the establishment of a new non-jury court, to be used in exceptional circumstances where the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. We have given detailed consideration to the follow-on question of who should make the decision that this threshold is reached on the facts of a particular case, and how that decision should be made.

4.52 As a starting point, we recommend that there should be no situation in which an offence is automatically or presumptively tried before a non-jury court. Instead, the decision as to whether a non-jury court is used should, in every instance, be based on an assessment of the circumstances pertaining to the individual case. For that reason, we recommend that the current distinction between scheduled and unscheduled offences – whereby scheduled offences are tried by default in a non-jury court – should not be retained. We agree with the views expressed by the Hederman Committee and in the submissions received, summarised above, in respect of the current system of scheduled offences.

4.53 Having considered the Hederman Report and the submissions received, it appears to us that there are essentially three options which need to be considered in assessing who should make a decision on the use of the new non-jury court:

(i) The current situation, whereby the DPP makes the decision on the use of the court without review by an external oversight mechanism, could be retained.

(ii) The courts could be provided with the power to decide on whether a non-jury trial should take place, following either an *ex parte* application by the DPP or an *inter partes* hearing involving the accused.

(iii) The DPP could retain power to make the decision, but subject to external review by, for example, a serving judge or retired judge.

4.54 We considered the question of whether there would be a constitutional impediment to making legislative provision for any of these options. In particular, we considered whether the involvement of the courts in the determination as to whether a non-jury court is used could be seen as the judicial power intruding on the functions of the executive. There does not appear to be any authority indicating that the decision that the ordinary courts are inadequate or that a matter should be tried in a special court is exclusively a matter for the executive power, such that it is unconstitutional for the judiciary or legislature to have some control over same. Indeed, we note that in *Dowdall and Hutch*, the Supreme Court stated as follows:

"The power to determine the adequacy of the ordinary courts is not treated by the Constitution as part of the executive power under Art. 28.2, and is not inherently a power which can only be exercised by the executive. Any other mechanism or body could have been utilised for the purposes of the determination required under Art. 38.3." [32]

4.55 This statement is consistent with the *MacCurtain, Bollard* and *Judge* judgments. It appears to us that the legislature is authorised under Article 38.3 to choose the method by which a decision on the use of special courts is to be made. The legislature has chosen at present

[32] [2022] IESC 36, (Unreported, Supreme Court, 29th July 2022) per O'Donnell C.J. at para. 40.

to provide that the DPP makes the decision on the use of such courts, but there is nothing in the case law to suggest that the legislature was bound to do so or is prohibited from providing for a different means by which the use of non-jury courts is decided on. Accordingly, it would appear open to the legislature to exercise its power under Article 38.3 to introduce a system whereby the judiciary can decide on the use of a non-jury court.

4.56 For similar reasons, our view is that there is no constitutional impediment to the legislature making provision for review of the DPP's decisions on the use of a non-jury court. The Prosecution of Offences Act 1974 stresses that the DPP is to be independent in relation to the prosecution of offences. This is clearly a matter which would have to be respected and borne in mind when deciding on the form of a review mechanism, but the legislation does not prevent the introduction of an oversight system.

4.57 Based on those considerations, we do not believe that any constitutional impediment exists in relation to any of the three options set out above. Each option is available in principle. The question then arises as to which one is preferable. We have carefully weighed up the options and believe that there are advantages and disadvantages associated with each one which must be factored into account.

4.58 We agree that the DPP is best placed to make an informed decision on whether the use of a non-jury court is necessary in the circumstances of a particular case. The DPP will have been provided with available facts and information pertaining to a particular case, but can also ensure consistency of approach which would be lost if the case is heard in isolation as might happen in a court process. Some argue, however, that, in essence, the DPP is a party to criminal proceedings and is making a decision as to whether the accused should enjoy the right to trial by jury or not, without any opportunity for the accused to influence that decision. However, the DPP is called on to exercise very grave powers affecting persons, most notably whether a person is to be prosecuted. The DPP also decides on whether a person should be tried summarily or on indictment notwithstanding the fact that the DPP is a party to those proceedings. We note that at present, there is no systematic oversight of the DPP's decisions. While the DPP is under an obligation to provide reasons for the use of the Special Criminal Court, it appears from *Murphy* that somewhat generic reasons might suffice, or that the DPP can refuse to give reasons on the basis that to do so would impair national security.

4.59 A court process would ensure that the decision is made by an entirely independent party, rather than one of the parties to the criminal proceedings. It might additionally provide oversight over the DPP's choice of the non-jury court as a venue and, in doing so, give a better level of protection for the rights of the accused. However, there are practical issues with how such a court process would operate. For instance, questions arise as to the point at which the decision is made; the procedure to be followed; the role (if any) of the accused in the process; the manner in which evidence is adduced; how claims of privilege are to be dealt with; and the possibility of appeal or review of the decision. In our opinion, these are complex issues to which there is no ready solution. Each potential answer carries its own disadvantages. It also seems reasonable to suggest that any form of judge-made decision as to venue would add potentially a lengthy procedure at the pre-trial stage,

which could lead to delays when compared with the present system. It is, of course, entirely speculative to suggest that courts deciding whether a non-jury court is to be used would result in an overall reduction of non-jury trials. The opposite could equally occur.

4.60 While it would be possible to provide for some level of independent oversight of the DPP's decisions, questions arise as to how that system would operate. If the DPP is, in effect, required to obtain approval from another body for the decision, it is difficult to see why such a system would be preferable to a system where a court makes the decision on venue. If the DPP is, instead, simply subject to a form of administrative review whereby an independent party assesses the decisions that have been made, some would argue that this is inadequate as a safeguard compared to a direct judicial role in determining the trial venue.

4.61 There are clearly competing issues at play in determining the question of who should decide on whether a non-jury court should be used in a particular case. It is clear from what we have outlined that the current role of the DPP in this regard is consistent with the Constitution and the law in this area is well-established. Allowing the courts to decide on these matters instead could result in both foreseeable and unforeseeable obstacles to the timely securing of justice in particular cases. There is nothing to suggest that the DPP has been anything other than rigorous in deciding what cases should be referred to the Special Criminal Court. Furthermore, the DPP has informed the Review Group that each request from An Garda Síochána to have a matter tried in the Special Criminal Court is assessed personally by her on an individual basis and on its own facts and merits. On the other hand, we have to be mindful of concerns which have been expressed to us about a lack of a systematic review mechanism of the DPP's decisions in this regard.

4.62 Taking account of the matters set out above, we recommend that the power to decide whether the threshold for use of the non-jury court is satisfied in a given case should remain with the DPP alone. However, the legislation regulating the use of the non-jury court should contain a number of specific provisions regulating how this decision is to be made:

(i) The legislation governing the use of the non-jury court should clearly set out the test to be applied by the DPP in determining whether a case should be tried in that venue and the procedures to be followed in this regard. It would appear to us that this must relate to the threshold set out in the Constitution: that *"the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order."*

(ii) The legislation should set out a non-exhaustive list of statutory criteria which must be considered by the DPP in determining whether that test is satisfied on the facts of a particular case. These might include, for example, the existence of evidence or information giving rise to a reasonable apprehension of jury intimidation. In determining what factors should be included, it may be useful to draw guidance from s. 1 of the Justice and Security (Northern Ireland) Act 2007. This includes factors such as whether it is suspected that the defendant is, or has at any time been, a member of a proscribed organisation; that the offence was committed on behalf of a proscribed organisation; or that an attempt has been made on behalf of a

proscribed organisation to prejudice the investigation or prosecution of the offence. Given the particular issues which apply to organised crime in this jurisdiction, similar provisions should be included in relation to organised crime groups.

(iii) The legislation should impose an obligation on the DPP to consider, in every case, whether there are measures that could be taken, or protections that could be provided, to address any reasonably apprehended or known risk of juror intimidation and thereby negate the need for trial in the non-jury court. This would help to ensure that the decision that a trial takes place without a jury is made only in a case where those other options have been considered and are found to be inadequate to address the perceived risk to the safety of the jury.

(iv) The legislation should provide that the Commissioner of An Garda Síochána must personally approve any submission by the gardaí that the use of the non-jury court is appropriate. Further, the legislation should require the DPP to personally make the decision as to whether the non-jury court should be used.

(v) The legislation should also oblige the DPP to maintain and publicise detailed statistics in respect of the exercise of the power to order non-jury trials.

4.63 To give proper effect to the recommendation at subpara. (iii) above, we recommend that consideration be given to the introduction by the legislature of a range of alternative measures, other than non-jury trials, which could be used to protect jurors where potential risks arise. As noted, the submissions to the Review Group drew attention to various such measures, including protected juries, remote juries and anonymised juries. We are of the view that it might be particularly appropriate to consider legislating for these measures. We accept that these measures will not completely eliminate the risk of jury intimidation in every case, but they may in a particular case avoid the need for a non-jury trial.

4.64 We further note the recommendations made by the Law Reform Commission in its Report on Jury Service as to measures which might be introduced to reduce the risk of jury tampering.[33] These recommendations included: (a) that the elements of the common law offence of embracery which remain of relevance and which do not already overlap with the offence of intimidation in s. 41 of the Criminal Justice Act 1999 should be incorporated into a single offence that deals with all forms of jury tampering; (b) 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; (c) that access to the jury list should not be permitted once the jury has been sworn, except for some exceptional reason and then only with the sanction of the court on application; and (d) the abolition of the daily roll call after the empanelling of the jury. We think that consideration should be given also to the introduction of these measures.

4.65 We believe that the recommendations above would help to allay concerns that have been expressed about the DPP's role. However, in an effort to sustain public confidence in the DPP's decisions as to use of a non-jury court, we further recommend that a judge should be appointed to review that the provisions of the legislation have been complied with by the DPP in any case where a direction is issued that a case be tried in a non-jury court.

[33] Law Reform Commission, *Jury Service* (LRC 107-2013) at paras. 7.49 to 7.53.

We would envisage that after some years of the operation of this system, the Government would review, in consultation in particular with the DPP and the judge appointed to review the DPP's decisions, whether further changes might be made in this area, including greater court involvement in such decisions.

Composition and Operation of Non-Jury Court

Overview of the Law

4.66 Part V of the Offences Against the State Act 1939 contains provisions dealing with the composition and operation of Special Criminal Courts.

4.67 Section 39 of the 1939 Act provides that every Special Criminal Court established under Part V of the 1939 Act shall consist of such uneven number of members – not being less than three – as the Government shall determine. Each member of a Special Criminal Court is appointed by and is removable by the Government. The Minister for Finance may fix the remuneration and allowances to be paid to members. Section 39(3) specifies the persons who may be made members of the court, stating that:

"No person shall be appointed to be a member of a Special Criminal Court unless he is a judge of the High Court or the Circuit Court, or a justice of the District Court, or a barrister of not less than seven years standing, or a solicitor of not less than seven years standing, or an officer of the Defence Forces not below the rank of commandant."

4.68 The constitutionality of s. 39 was unsuccessfully challenged in *Eccles v. Ireland*.[34] Finlay C.J. noted that the power of the Minister for Finance to fix the remuneration of the members of the court did not extend to the power to refuse to pay such remuneration by reason only that their decisions did not suit the executive. He said that any attempt to do so would be prevented and corrected by the courts. Following this decision, the applicants unsuccessfully complained to the European Commission of Human Rights that the appointments system did not comply with Article 6 of the Convention.[35]

4.69 We note that since 1972, the membership of the Special Criminal Court has consisted solely of members of the judiciary or former members of the judiciary. Whilst it is no longer the practice of the Special Criminal Court to have retired judges amongst its membership, there is no bar on a retired judge sitting: *McGlinchey v. Governor of Portlaoise Prison*.[36]

4.70 Section 40 of the 1939 Act provides that the determination of every question before a Special Criminal Court shall be according to the opinion of the majority of the members of the court. Every decision must be pronounced by one member of the court. No member of the court may pronounce or indicate his or her concurrence or dissent from the decision. The section provides that no member of the court shall disclose whether the decision was unanimous or, if it was not unanimous, the opinion of any individual member of the court.

4.71 There is no express requirement in the 1939 Act for reasons to be given for a judgment. The courts have accepted that such an obligation arises as a matter of fair procedures,

[34] [1985] I.R. 545.

[35] App. No. 12839/87, 9th December 1988.

[36] [1998] I.R. 671.

though there is no obligation to engage with each point of credibility or every individual piece of evidence which was before the court.[37]

4.72 Section 41 of the 1939 Act provides that every Special Criminal Court shall have control of its own procedure in all respects and shall, for that purpose, make rules regulating its practice and procedure with the concurrence of the Minister for Justice. The rules currently in place under this section are the Offences Against the State Acts 1939 to 1998 Special Criminal Court No. 1 and 2 Rules 2016.[38] Section 41 further states that the practice and procedure applicable to the trial of a person on indictment in the Central Criminal Court shall, so far as practicable, apply to the trial of a person by a Special Criminal Court, and the rules of evidence applicable upon such trial in the Central Criminal Court shall apply to every trial by a Special Criminal Court.

4.73 Section 53 of the 1939 Act provides that no action, prosecution, or other proceeding, civil or criminal, shall lie against any member of a Special Criminal Court in respect of any order made, conviction or sentence pronounced, or other thing done by that court or in respect of anything done by such member in the course of the performance of his duties or the exercise of his powers as a member of that court or otherwise in his capacity as a member of that court, whether such thing was or was not necessary to the performance of such duties or the exercise of such powers.

4.74 Article 35 of the Constitution contains guarantees designed to protect the independence of the judiciary. These include a guarantee of judicial independence in the exercise of judicial functions *"subject only to this Constitution and the law"*; a guarantee of non-removal from office except for *"stated misbehaviour or incapacity"*, and then only on resolutions passed by both Houses of the Oireachtas; and a guarantee that the remuneration of a judge *"shall not be reduced during his continuation in office"* save in certain circumstances. By virtue of Article 38.6, these guarantees do not apply to a *"special court"* established under Article 38.3.1°. However, in *Eccles v. Ireland*, Finlay C.J. stated that while the Special Criminal Court does not attract the express guarantees of judicial independence contained in Article 35, it does have a guarantee of independence in the carrying out of its functions, derived from the Constitution.[39]

Position of the Hederman Committee and Submissions Received

4.75 The Hederman Committee was of the view that s. 39 should be overhauled to bring it into line with modern practice and Ireland's international obligations. It recommended that the section should be recast to provide that only serving judges of the High Court, Circuit Court and District Court should be liable to serve as judges of the Special Criminal Court. It further recommended that the Government should no longer appoint particular judges to be judges of the Special Criminal Court. Instead, all serving members of the High Court, Circuit Court and District Court should be liable to serve as members of the Special Criminal Court, with the President of the High Court exclusively responsible for designating which judges should sit on any particular case in the Special Criminal Court.

[37] See *DPP v. Murphy* [2005] IECCA 1, [2005] 2 I.R. 125; *DPP v. Gilligan* [2005] IESC 78, [2006] 1 I.R. 107; and *DPP v. McKevitt* [2008] IESC 51, [2009] 1 I.R. 525.

[38] S.I. 182/2016 and S.I. 183/2016.

[39] [1985] I.R. 545.

4.76 A minority of the Hederman Committee was of the view that District Court judges should not be eligible to sit as members of the Special Criminal Court. This was on the basis that *"such judges have no judicial experience of jury trial and trial on indictment"* and that there was a risk that *"disparity in judicial status might tend to inhibit District Judges from disagreeing with their more senior judicial colleagues."*[40] A majority of the Committee took the view however that such judges should continue to be eligible to sit as members of the Special Criminal Court, as *"such judges have considerable experience of sitting in criminal cases without a jury where they are required to form conclusions as to facts in general and with regard to the credibility of individual witnesses in particular."*[41]

4.77 In relation to s. 40 of the 1939 Act, a majority of the Hederman Committee recommended that no person should be convicted by the Special Criminal Court unless there is unanimity on the part of the judges trying the case. The majority stated that if the members cannot agree, the court should have jurisdiction to order one further retrial before a differently constituted court. If, following a retrial, there was still a lack of unanimity, then the accused would have to be acquitted. The majority stated that this would provide a further safeguard for the accused. A minority was of the opinion that the case for such a change had not been made out by the majority.

4.78 The Hederman Committee took the view that where the Special Criminal Court proposes to convict an accused of an offence, it ought to be required to give its decision and the reasons for that decision in writing. The Committee believed that it was important that a written judgment accompany any decision to convict an accused, stating that *"not only is the giving of reasons nowadays regarded as an indispensable and constitutionally required feature of the proper administration of justice and the determination of legal rights, the giving of such reasons in writing provides a basis by which the reasoning of the Court in arriving at its decision to convict the accused can be subject to the appropriate level of scrutiny"* by an appellate court.[42]

4.79 The Hederman Committee further recommended that Article 38.6 of the Constitution should be amended so as to provide that the guarantees of independence and tenure contained in Articles 34 and 35 of the Constitution should apply to judges of the Special Criminal Court.

4.80 The submissions received by the Review Group were largely silent on issues relating to the composition and operation of the Special Criminal Court. However, one submission supported the reforms proposed by the majority of the Hederman Committee.

Recommendations

4.81 We recommend certain fundamental changes in how the new non-jury court should operate as compared to the Special Criminal Court. These are largely in line with the recommendations made by the Hederman Committee, set out above.

4.82 At present, s. 39(3) of the 1939 Act provides for the appointment to the Special Criminal Court of retired judges, barristers, solicitors, officers of the Defence Forces. We recommend that such persons should not be eligible to serve as members of the new non-jury court. Instead, only serving judges should be eligible to be appointed.

[40] Hederman Report, at para. 9.54.

[41] Hederman Report, at para. 9.53.

[42] Hederman Report, at para. 9.86.

4.83 We consider that the new non-jury court should sit as a formation of three judges, as the Special Criminal Court does. However, we recommend the use of a revised system of appointment to determine which judges are chosen to sit on the court. We consider that all serving members of the High Court, Circuit Court and District Court should be eligible to serve as members of the court. We further consider that the President of the High Court should, following consultation with the Presidents of the District and Circuit Courts, designate which judges should sit on an individual case and/or for a defined period of time. This reformed appointment system would ensure that the non-jury court is seen to be independent and would avoid any perception that the Government might be able to influence the administration of justice by appointing particular judges to hear a case.

4.84 We have considered whether the non-jury court's verdicts should be determined according to the opinion of the majority of the judges, or whether there should be a requirement for unanimity. We agree with the views of the Hederman Committee. We recommend that the legislation specify that an accused person may not be convicted by the non-jury court unless the judges can reach a unanimous verdict. If the judges cannot agree a verdict, the court should have jurisdiction to order a retrial before a differently-constituted court. If the retrial results in a lack of unanimity, the accused should stand acquitted.

4.85 Further, we recommend that there should be an express statutory requirement that the non-jury court provides written judgments, setting out the reasons for its verdicts. We note that as a matter of practice, the Special Criminal Court provides a written judgment to the parties in cases, but it would be desirable to enshrine the requirement to provide written judgments in legislation. We are also of the view that these judgments should be published, and we make further recommendations in this regard below.

4.86 We do not propose to make detailed recommendations as to the rules of court and procedural provisions which should govern the operation of the non-jury court. We recommend generally that any such rules and provisions should be as consistent as possible with those governing the trial of criminal matters in the ordinary courts. In particular, the ability to make an application under s. 4E of the Criminal Procedure Act 1967 (which allows for an accused to seek dismissal of the charges at any time after being sent forward for trial) should apply to all cases that come before the non-jury court. We note that, at present, it does not appear possible to make such applications in respect of cases where the accused is charged before the Special Criminal Court, rather than being sent forward for trial in that court.

Oversight and Transparency

Overview of the Law

4.87 The Offences Against the State Acts provide in limited form for review of the continued necessity of the Special Criminal Court. Section 35(4) states that if, at any time while Part V is in force, the Government is satisfied that the ordinary courts are adequate to secure the effective administration of justice and the preservation of public peace and order, the Government shall make and publish a proclamation declaring that Part V

shall cease to be in force. Under s. 35(5), the Dáil is also empowered to pass a resolution annulling the proclamation.

4.88 There are also renewal provisions built into certain provisions of the Offences Against the State Acts. Under s. 18 of the 1998 Act, ss. 2 to 4, 6 to 12, 14 and 17 of the 1998 Act cease to operate unless a resolution is passed by each House of the Oireachtas to continue in operation the relevant sections for such period not exceeding 12 months as may be specified in the resolution. Section 18 also provides that before such resolutions may be passed, the Minister for Justice must lay before each House a report on the operation of the sections in question covering the period starting on the last day covered by the previous report on the operation of the Act and ending not later than 21 days before the date of the moving of the resolution in that House. A similar renewal requirement exists in respect of s. 8 of the Criminal Justice (Amendment) Act 2009, which inserted offences relating to organised crime into the schedule of the 1939 Act.

4.89 At present, a limited amount of data is available on the use of the Special Criminal Court. The Minister for Justice prepares annual reports pursuant to s. 18(3) of the Offences Against the State Act 1998 and s. 8(6) of the Criminal Justice (Amendment) Act 2009, relating to renewal of the provisions of the Offences Against the State Acts mentioned above. The Director of Public Prosecutions and the Courts Service of Ireland also publish annual reports, which contain certain statistics on the use of the Special Criminal Court. Beyond this, however, there is no publicly available data on the Special Criminal Court.

4.90 As noted above, the judgments of the Special Criminal Court are typically given in writing. However, those judgments are not published and are not publicly available. Transcripts of cases are not made publicly available either. If a party wishes to obtain transcripts from a Special Criminal Court case, it is necessary to make an application to the High Court for same. The practice of the Special Criminal Court, however, is to permit parties to a trial to have access to the transcripts of the proceedings.

Position of the Hederman Committee and Submissions Received

4.91 A majority of Hederman Committee recommended that 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"*, with the resolutions setting out the basis on which the court is to be established or continued in force.[43] The Committee further recommended that there should be a requirement for the Government to submit a three-yearly report to the Oireachtas on the working of the Special Criminal Court and the necessity for its continued existence (if such be the case).

4.92 A number of submissions received by the Review Group recommended a system of regular reviews of the necessity for the Special Criminal Court. One submission made the case that the Special Criminal Court should cease to be in operation unless a resolution is passed by each House of the Oireachtas every 12 months. It suggested that a report should be laid before the Oireachtas prior to voting on the resolution setting out data and evidence in support of the continued operation of the Special Criminal Court. Another contributor suggested that a regular review of the necessity for the 1972 proclamation, which brought Part V of the 1939 Act into effect, should be undertaken on an annual basis by the Houses of the Oireachtas.

[43] Hederman Report, at para. 9.44

4.93 A further submission referred to the value of regular review of counter-terrorism legislation to ensure it is fit for purpose and compliant with international human rights law. The submission expressed the view that permanent and independent oversight was the best means of ensuring robust review of counter-terrorism legislation. It went on to note that that the Independent Reviewer of Terrorism legislation in the United Kingdom represented a good comparator in this regard and that it would be best practice for Ireland to adopt a similar mechanism of oversight to that jurisdiction, or to Australia or South Korea.

4.94 The Review Group also received submissions which favoured the publication of all judgments of the Special Criminal Court. It was argued that publication would assist in improving public confidence in the court and in countering any impression that it operates in secret and in a manner different to other courts that produce written judgments.

4.95 A further submission received by the Review Group recommended that there be a mandatory requirement for the State to collect and publish comprehensive, disaggregated data on the operation of the Special Criminal Court and the usage of the provisions under the Offences Against the State Acts. The submission stated that such data should be accessible to the public and open to independent scrutiny. It noted that the publication of data ensures that the State can effectively monitor and review the compliance of the Offences Against the State Acts with human rights and equality standards.

Recommendations

4.96 We have considered whether sunset clause or renewal provisions should be included in the proposed legislation establishing a new non-jury court. We do not believe that such provisions are necessary in circumstances where the need for a non-jury court is unlikely to change in the foreseeable future. However, we are of the opinion that certain measures should be introduced to facilitate any review of the operation of the non-jury court.

4.97 It appears to us that data collection in relation to the operation of the Special Criminal Court could be considerably enhanced. In the course of its work, the Review Group was provided with data from various sources. We were disappointed with the paucity of the available data. This is an unsatisfactory situation and the same situation should not arise in relation to the new non-jury court.

4.98 With this in mind, we recommend that it be obligatory for all relevant agencies – including An Garda Síochána, the Office of the Director of Public Prosecutions, and the Courts Service of Ireland – to collect and publish a full array of comprehensive, disaggregated data on the operation of the new non-jury court and the relevant legislative provisions. We particularly recommend that data be made available in relation to intimidation or other interference with witnesses and/or jurors. All such data should be accessible to the public and open to independent scrutiny. This is vital for the purposes of monitoring compliance with human rights standards, guaranteeing transparency, and promoting public confidence. It is particularly important to facilitate the work of the Independent Examiner of Security Legislation, to be established by the Policing, Security and Community Safety Bill.

4.99 We further recommend that the non-jury court should be required to publish its judgments in like manner as courts of other jurisdictions, with appropriate redactions as required. We also recommend that the new non-jury court should have the statutory power to order the release of transcripts and books of evidence in an appropriate case. Making provision in this regard would promote public confidence in the court and enhance its transparency.

Chapter 5

Substantive Offences in the Offences Against the State Acts

5.1 As set out above, we recommend that the Offences Against the State Acts be repealed and replaced. In this chapter, we consider whether the substantive offences currently contained within those Acts should be re-enacted in replacement legislation and, if so, whether any amendments are required to those offences in their current form.

Overview of the Law

5.2 The Offences Against the State Act 1939 contains the following offences:

- Usurpation of the functions of Government (s. 6)
- Obstruction of Government (s. 7)
- Obstruction of the President (s. 8)
- Interference with military or other employees of the State (s. 9)
- Activities in relation to incriminating, treasonable or seditious documents (s. 10)
- Possession of treasonable, seditious or incriminating documents (s. 12)
- Failure to comply with requirements in respect of documents printed for reward (s. 13)
- Failure to print printer's name and address on certain documents (s. 14)
- Unauthorised military exercises (s. 15)
- Secret societies in army or police (s. 16)
- Administering unlawful oaths (s. 17)
- Membership of an unlawful organisation (s. 21)
- Providing assistance to an unlawful organisation (s. 21A)
- Use or occupation of a building in contravention of a closing order (s. 25)
- Public meetings connected to unlawful organisations (s. 27)
- Public meetings or processions in the vicinity of the Oireachtas (s. 28)
- Obstruction of execution of search warrant (s. 29)
- Broadcast of details regarding application for extension of detention (s. 30(4))
- Failure or refusal to give name and address (s. 30(6))
- Offences by bodies corporate (s. 31)
- Aiding or abetting a person to escape detention or avoid recapture (s. 32)
- Failure to provide account of movements (s. 52)

5.3 Two offences are contained in the Offences Against the State (Amendment) Act 1972:

- Failure to provide name, address or account of recent movements when found near place of commission of scheduled offence (s. 2)
- Statements and meetings constituting an interference with course of justice (s. 4)

5.4 The Offences Against the State (Amendment) Act 1998 contains the following offences:

- Directing an unlawful organisation (s. 6)
- Possession of articles for purposes connected with certain offences (s. 7)
- Unlawful collection of information (s. 8)
- Withholding information (s. 9)
- Training persons in the making or use of firearms (s. 12)

5.5 The consolidated versions of the Offences Against the State Acts, included in the appendix to this report, set out the full text of each of the above offences. The Hederman Report contains a helpful analysis of these offences. However, it is important to note the following developments which have taken place since the publication of the Hederman Report.

Providing Assistance to Unlawful Organisation

5.6 The Criminal Justice (Terrorist Offences) Act 2005 inserted a new s. 21A into the Offences Against the State Act 1939. This section creates the offence of providing assistance to an unlawful organisation. Section 21A(1) states that:

"A person who knowingly renders assistance (including financial assistance) to an unlawful organisation, whether directly or indirectly, in the performance or furtherance of an unlawful object is guilty of an offence."

5.7 The offence is punishable on summary conviction by a fine not exceeding €4,000 and/or imprisonment for a term not exceeding 12 months. It is punishable on indictment by a fine and/or imprisonment for a term not exceeding eight years.

5.8 This offence was recently considered by the Court of Appeal in *DPP v. Hannaway*.[44] The first and second appellants were convicted by the Special Criminal Court of providing assistance to an unlawful organisation on the basis that they had conducted interviews to ascertain whether information relating to previous IRA operations had been disclosed to An Garda Síochána. This was with a view to ensuring that future criminal offences could be committed without detection. On appeal, the appellants argued that these alleged actions could not amount to assistance in the performance or furtherance of *"an unlawful object"*. The Court of Appeal disagreed. It held that the alleged objective was undoubtedly unlawful and there was clear evidence suggesting that the assistance was rendered with that object in mind. The Court of Appeal held that, in those circumstances, the Special Criminal Court was correct to refuse a direction of no case to answer.

[44] [2020] IECA 38, (Unreported, Court of Appeal, 6th February 2020).

Directing Unlawful Organisation

5.9 Section 6 of the Offences Against the State (Amendment) 1998 sets out the offence of directing an unlawful organisation. The Criminal Justice (Amendment) Act 2009 substituted an entirely new s. 6 into the 1998 Act. This appears to have been done to bring the section into line with s. 71A of the Criminal Justice Act 2006, which creates a similar offence of directing a criminal organisation.

5.10 Section 6, in its original form, consisted of a single provision which stated as follows:

"A person who directs, at any level of the organisation's structure, the activities of an organisation in respect of which a suppression order has been made under section 19 of the Act of 1939 shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life."

5.11 The 2009 amendment substituted this single provision with six new subsections. The offence itself is now set out in s. 6(2) of the 1998 Act, which provides that:

"A person who directs, at any level of the organisation's structure, the activities of an unlawful organisation shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life or a lesser term of imprisonment."

5.12 The significance of this amendment is that a prosecution may now be brought for the offence of directing any unlawful organisation even where a suppression order has not been made in respect of that organisation.

5.13 The other subsections introduced in 2009 may be summarised as follows:

- Section 6(1) contains definitions. Notably, it defines the term *"directs"* as meaning the control or supervision of activities, or giving an order, instruction or guidance or making a request with respect to the carrying on of activities.
- Section 6(3) provides that a statement or conduct by a defendant implying or leading to a reasonable inference that he or she was at a material time directing the activities of an unlawful organisation shall, in proceedings for an offence under the section, be admissible as evidence that the defendant was directing those activities at that time.
- Section 6(4) provides that in determining whether an offence of directing an unlawful organisation has been committed, the court or jury may give consideration to the following: any evidence of a pattern of behaviour on the part of the defendant consistent with his or her having directed the activities of the organisation concerned; whether the defendant has received any benefit from the organisation; and evidence as to possession by the defendant of documents giving rise to a reasonable suspicion that the documents were in his or her possession for a purpose connected with directing the activities of the organisation concerned.
- Section 6(5) states that any document or other record emanating or purporting to emanate from the organisation concerned, from which there can be inferred either the giving of an instruction by the defendant to a person involved in the organisation, the making by the defendant of a request to a person involved in the organisation, or the seeking by a person so involved of assistance or guidance

from the defendant, is admissible as evidence that the defendant was directing the activities of the organisation concerned at the material time. The term *"other record"* is defined in s. 6(6).

5.14 There have been few prosecutions for the offence of directing an unlawful organisation. The accused in *DPP v. McKevitt* was the first person to be convicted of the offence.[45] He was convicted of directing the activities of the IRA and sentenced to 20 years imprisonment. Similarly, the accused in *DPP v. McGrane* was convicted of directing the activities of the IRA at a general level and in respect of a specific operation.[46]

Membership of Unlawful Organisation

5.15 Section 21 of the 1939 Act criminalises membership of an unlawful organisation. The Criminal Justice (Terrorist Offences) Act 2005 and the Fines Act 2010 amended the maximum penalties for the offence. The penalties on summary conviction were increased from a £50 fine and/or three months imprisonment to a €4,000 fine and/or 12 months imprisonment. The penalty on indictment was increased from a fine and/or seven years imprisonment to a fine and/or imprisonment for a term not exceeding eight years.

Withholding Information

5.16 Section 9(1) of the Offences Against the State (Amendment) Act 1998 provides that a person shall be guilty of an offence if he or she has information which he or she knows or believes might be of material assistance in preventing the commission by any other person of a *"serious offence"*, or in securing the apprehension, prosecution, or conviction of any other person for a *"serious offence"*, and fails without reasonable excuse to disclose that information as soon as it is practicable to a member of An Garda Síochána. The offence is punishable by a fine, imprisonment for a term not exceeding five years, or both.

5.17 A *"serious offence"* for the purposes of this section is defined as an offence which satisfies both of the following conditions:

> *"(a) It is an offence for which a person of full age and capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of 5 years or by a more severe penalty, and*
>
> *(b) It is an offence that involves loss of human life, serious personal injury (other than injury that constitutes an offence of a sexual nature), false imprisonment or serious loss of or damage to property or a serious risk of any such loss, injury, imprisonment or damage."*

5.18 The Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 creates specific offences relating to non-disclosure of information relating to offences against children. For that reason, it introduced a new subsection into s. 9 of the 1998 Act. This provides that the term *"serious offence"* does not include *"an offence that is committed, or that it is anticipated will be committed, against a child"*, or the common law offence of false imprisonment where it is committed, or it is anticipated that it will be committed, *"against a person other than a child"*. This amendment has the effect that non-disclosure of information relating to offences committed against children fall to be dealt with under the specific offences created by the 2012 Act, rather than under the 1998 Act.

[45] [2005] IECCA 139, (Unreported, Court of Criminal Appeal, 9th December 2005); [2008] IESC 51, [2009] 1 I.R. 525 (S.C.).

[46] Unreported, Special Criminal Court, 31st October 2017.

5.19 The constitutionality of s. 9 was considered in *Sweeney v. Ireland*.[47] The plaintiff was charged with an offence contrary to s. 9. After being sent forward for trial to the Circuit Court, the plaintiff brought a challenge to the constitutionality of s. 9(1)(b). This challenge was successful in the High Court. Baker J. took the view that the section amounted to an impermissible interference with the constitutional right to silence. Baker J. further held that the offence was unconstitutional as it was impermissibly vague and uncertain.

5.20 The Supreme Court reversed this decision and upheld the constitutionality of the section. The court held that s. 9 expressly preserved the right to silence, and specifically ruled out those who had a reasonable excuse for not coming forward and thus the compulsion to provide information arose only in respect of events to which a person was a witness, and not a participant. In the Supreme Court's view, the section *"is not about compelling participants in the offence to break their right to remain silent and to not incriminate themselves."*[48] Further, the court took the view that the definitional elements of the offence were clear and did not infringe the constitutional prohibition against vagueness.

Extraterritoriality

5.21 Certain legislative changes have been made which facilitate the possibility of persons being tried for offences under the Offences Against the State Acts in respect of acts that took place outside of the State.

5.22 Section 7 of the 1939 Act provides that it is an offence to prevent or obstruct the carrying on of the Government of the State by force of arms, other violent means, or by any form of intimidation. By virtue of amendments introduced by s. 18 of the Criminal Justice (Amendment) Act 2009 and Schedule 4 of the Merchant Shipping (Registration of Ships) Act 2014, this offence can now be committed by a person *"whether in or outside the State"*. However, s. 7(3) provides that:

"A person shall be guilty of an offence under this section for conduct that the person engages in outside the State only if –

(a) the conduct takes place on board an Irish ship (within the meaning of section 33 of the Merchant Shipping (Registration of Ships) Act 2014),

(b) the conduct takes place on an aircraft registered in the State,

(c) the person is an Irish citizen, or

(d) the person is ordinarily resident in the State."

5.23 Section 7(4) states that a person who has his principal residence in the State for the 12 months immediately preceding the commission of an offence is considered to be ordinarily resident in the State on the date of the commission of the offence.

5.24 Section 6(1) of the Criminal Justice (Terrorist Offences) Act 2005 provides, *inter alia,* that a person is guilty of an offence if the person commits outside the State an act that, if committed in the State, would constitute an offence under s. 21 of the 1939 Act (membership of an unlawful organisation), s. 21A of the 1939 Act (assisting an unlawful

[47] [2017] IEHC 702, [2018] 1 I.L.R.M. 338 (H.C.); [2019] IESC 39, [2019] 3 I.R. 431 (S.C.).

[48] [2019] IESC 39, [2019] 3 I.R. 431 at p. 476.

organisation), or s. 6 of the 1998 Act (directing an unlawful organisation). In general, the act must be one which was:

(a) committed on board an Irish ship,

(b) committed on an aircraft registered in the State,

(c) committed by a person who is a citizen of Ireland or is resident in the State,

(d) committed for the benefit of a legal person established in the State,

(e) directed against the State or an Irish citizen, or

(f) directed against an institution of the European Union that is based in the State, or a body that is based in the State and is set up in accordance with the Treaty establishing the European Community or the Treaty on European Union.

5.25 The 2005 Act also permits the prosecution of an offence where the extraterritorial act falls outside of the list set out above, but only where the DPP is satisfied that extradition of the accused has been refused. Section 6(6) of the 2005 Act further provides that where a person is charged with an offence under s. 6(1) which, in the opinion of the Attorney General, was committed in or outside the State with the intention of (a) unduly compelling the Government of a state (other than a member state of the European Union) to perform or abstain from performing an act; or (b) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of such a state, then no further proceedings in the matter (other than any remand in custody or on bail) may be taken except with the consent of the Attorney General.

Position of the Hederman Committee and Submissions Received

5.26 The Hederman Committee examined the substantive offences contained in the Offences Against the State Acts. It recommended no change in respect of certain offences; modest change in respect of others; and the outright repeal of particular offences.[49]

5.27 Various submissions received by the Review Group made recommendations for reform in respect of substantive offences. Some of these mirrored the recommendations of the Hederman Committee, but a number went further, particularly in respect of the offence of membership of an unlawful organisation.

5.28 The views set out by the Hederman Committee and the arguments presented in the submissions received by the Review Group are considered in more detail below.

Recommendations

5.29 We have conducted a detailed analysis of each of the substantive offences contained in the Offences Against the State Acts and considered whether they should be re-enacted as part of replacement legislation and, if so, whether the relevant offence provisions should be amended in any way from their current form. As a general comment, it appears to us that some of the offences contained in the Offences Against the State Act 1939 are archaic in nature. This may be an inevitable consequence of the legislation having been drafted over 80 years ago. There would be considerable merit in replacing several of these offences with more modern formulations.

[49] Hederman Report, at paras. 6.1 to 6.190.

Obstruction of Government/President and Interference with Military and State Employees

5.30 These offences are provided for in ss. 7 to 9 of the Offences Against the State Act 1939. The Hederman Committee was of the view that these offences were *"satisfactory and defensible"* but that this was *"subject to the inclusion of specific protection for persons engaging in industrial relations disputes."*[50]

5.31 We agree with the Hederman Committee. We think that the offences contained in ss. 7 to 9 of the 1939 Act should be re-enacted as part of any legislation replacing the Offences Against the State Acts, subject to an appropriate amendment to ensure that lawful industrial action is not criminalised.

5.32 We note the recommendation of the Hederman Committee that the word *"unlawful"* be inserted before *"intimidation"* in both ss. 7(1) and 8(1), and that s. 9(2) be repealed or, at the very least, restricted to members of An Garda Síochána and the Defence Forces. There may well be other means of making clear that those engaging in lawful industrial action do not come within the scope of these offences, which would be worth considering in detailed drafting of an amendment to address this issue.

Documentary Matters

5.33 Sections 10, 11, 13 and 14 of the Offences Against the State Act 1939 relate to the printing of certain documents. The Hederman Committee took the view that these provisions were "*overbroad, outdated in the modern era of the internet and effectively unenforceable.*"[51]

5.34 We agree with this assessment and recommend that these offences be repealed. If similar offences are to be provided as part of the legislation replacing the Offences Against the State Acts, they should be more in line with modern printing and publication standards.

5.35 Section 12 of the 1939 Act creates an offence of possession of treasonable, seditious or incriminating documents. We note the view of the Hederman Committee that this offence should be recast to lay an emphasis on the underlying purpose for possession of the document, and that possession of documents should be an offence only where it is part of a process of providing active support for, or advocating, advancing or furthering the activities of an unlawful organisation falling short of actual membership.[52] We accept this analysis and recommend that this offence should be re-enacted as part of the legislation replacing the Offences Against the State Acts, subject to amendment as per the recommendations of the Hederman Committee.

5.36 Further, we note that the reference to a *"seditious document"* in the 1939 Act appears to be encompassed within the definition of *"treasonable documents"* in s. 2 of the Act.[53] The drafting of offence provisions in future legislation should take account of this issue.

[50] Hederman Report, at para. 6.6.

[51] Hederman Report, at para. 6.123.

[52] Hederman Report, at para. 6.123.

[53] Hederman Report, at para. 6.121.

Membership of Unlawful Organisation

5.37 Section 18 of the Offences Against the State Act 1939 declares that any organisation which engages in one of the following activities is deemed to be an *"unlawful organisation"* for the purposes of the Offences Against the State Acts:

> *"(a) engages in, promotes, encourages, or advocates the commission of treason or any activity of a treasonable nature, or*
>
> *(b) advocates, encourages, or attempts the procuring by force, violence, or other unconstitutional means of an alteration of the Constitution, or*
>
> *(c) raises or maintains or attempts to raise or maintain a military or armed force in contravention of the Constitution or without constitutional authority, or*
>
> *(d) engages in, promotes, encourages, or advocates the commission of any criminal offence or the obstruction of or interference with the administration of justice or the enforcement of the law, or*
>
> *(e) engages in, promotes, encourages, or advocates the attainment of any particular object, lawful or unlawful, by violent, criminal, or other unlawful means, or*
>
> *(f) promotes, encourages, or advocates the non-payment of moneys payable to the Central Fund or any other public fund or the non-payment of local taxation."*

5.38 Section 19 of the 1939 Act further provides that if and whenever the Government is of the opinion that any particular organisation is an unlawful organisation, it may make a *"suppression order"*, declaring that the organisation is an unlawful organisation and ought, in the public interest, to be suppressed. A suppression order is conclusive evidence that the organisation is an *"unlawful organisation"* for the purposes of the Offences Against the State Acts. A suppression order must be published in Iris Oifigiúil *"as soon as conveniently may be"* after it is made. The Government may amend or revoke the order at any time.

5.39 Section 20 of the 1939 Act allows any person who claims to be a member of an organisation in respect of which a suppression order has been made to apply to the High Court for a *"declaration of legality"* in respect of the organisation. The application may be made within 30 days after the publication of the order in Iris Oifigiúil. If the High Court is "satisfied" that the organisation is not an unlawful organisation, then the court may make a declaration of legality in respect of the organisation. However, the section provides that the High Court shall not make a declaration of legality unless the applicant for the declaration *"gives evidence in support of the application and submits himself to cross-examination by counsel for the Attorney General"*, or alternatively *"satisfies the High Court that he is unable by reason of illness or other sufficient cause to give such evidence and adduces in support of the application the evidence of at least one person who submits himself to cross-examination by counsel for the Attorney General"*. If a declaration of legality is made, the suppression order in respect of the organisation is rendered null and void, though this is *"without prejudice to the validity of anything previously done thereunder."*

5.40 Section 21 of the 1939 Act provides for the offence of membership of an unlawful organisation. The offence is simply formulated: *"It shall not be lawful for any person to be a member of an unlawful organisation."* There is no definition of *"member"* or *"membership"*

in the Act. Section 21(3) provides that it is a defence for a person to show that he or she did not know that the organisation was unlawful or that, as soon as reasonably possible after the person became aware of the real nature of such organisation or after the making of a suppression order in relation to such organisation, he or she ceased to be a member thereof and disassociated himself therefrom.

5.41 The Hederman Committee considered whether membership of an unlawful organisation should continue to be a criminal offence. A majority was satisfied that it should. There was division as to whether the offence should be restricted to membership of an unlawful organisation which has been the subject of a suppression order, but most members of the majority considered that it was imprudent to qualify the offence in that way. The majority noted that s. 21 does not define membership but did not believe that this made the offence impermissibly uncertain in its scope.[54]

5.42 A minority of the Committee took the view that the offence of membership is *"unacceptable and unnecessary in a State based on respect for fundamental human rights and civil liberties"*.[55] The minority opined that the offence infringes upon fundamental freedoms, such as association and expression, but also appears to run contrary to certain basic principles of legality and due process in criminal matters.

5.43 The Hederman Committee recommended changes to ss. 18 to 20 of the 1939 Act. In respect of s. 18, the Committee recommended the abolition of para. (f) on the basis that it appears *"inappropriate and out of harmony with the contemporary values as to the permissible scope of political speech and action"*.[56] The Committee was of the view that paras. (d) and (e) were drafted too broadly and recommended that they be replaced with a single paragraph in the following terms:

"engages in, promotes, encourages or advocates the commission of any criminal offence or the obstruction of, or interference with, the administration of justice or the enforcement of the law, with the purpose of undermining the authority of the State." [57]

5.44 The Committee was of the view that the decision to proscribe illegal organisations should continue to rest with the Government, subject to a full right of appeal to the High Court.[58] The Committee took the view that the Government should not be required to give prior notice of the making of a suppression order, but was of the opinion that s. 20 needed to be amended to provide that the order would not take permanent effect until after the affected organisation has had an opportunity of appealing the order to the High Court.[59]

5.45 The Committee recommended in respect of s. 20 that (a) the right of appeal in relation to a suppression order should not be confined to 30 days from publication of the order in Iris Oifigiúil; (b) that the section should make clear that the High Court's jurisdiction is not confined to narrow, judicial review-type grounds of review; and (c) that the restrictive requirement that the appellant give evidence in person should be deleted.[60] The

[54] Hederman Report, at paras. 6.42 to 6.50.

[55] Hederman Report, at p. 259.

[56] Hederman Report, at para. 6.12.

[57] Hederman Report, at para. 6.14.

[58] Hederman Report, at para. 6.25.

[59] Hederman Report, at para. 6.34.

[60] Hederman Report, at para. 6.38.

Committee noted that the onus of proof under s. 20 was on the person challenging the making of the suppression order, but recommended no change to the burden of proof.[61]

5.46 The Committee further recommended amendment of s. 19 to ensure that the Government could make suppression orders in respect of foreign terrorist organisations.[62]

5.47 None of these recommended amendments to the 1939 Act were made. However, the recommendation in respect of s. 19 appears to have been given effect to by the Criminal Justice (Terrorist Offences) Act 2005, s. 5 of which provides:

> *"(1) A terrorist group that engages in, promotes, encourages or advocates the commission, in or outside the State, of a terrorist activity is an unlawful organisation within the meaning and for the purposes of the Offences against the State Acts 1939 to 1998 and section 3 of the Criminal Law Act 1976.*
>
> *(2) For the purposes of this Act, the Offences against the State Acts 1939 to 1998 and section 3 of the Criminal Law Act 1976 apply with any necessary modifications and have effect in relation to a terrorist group referred to in subsection (1) as if that group were an organisation referred to in section 18 of the Act of 1939.*
>
> *(3) Subsections (1) and (2) are not to be taken to be limited by any other provision of this Act that refers to provisions of the Offences against the State Acts 1939 to 1998 or that makes provisions of those Acts applicable in relation to offences under this Act.*
>
> *(4) Subsections (1) and (2) apply whether the terrorist group is based in or outside the State."*

5.48 Accordingly, although the 1939 Act has not been amended directly, the provisions above effectively provide that a terrorist group will be an *"unlawful organisation"* once it meets the definition in s. 5(1), irrespective of whether it is based within the State.

5.49 One of the submissions received by the Review Group suggested that the 1939 Act be amended to define more extensively what is meant by *"membership"*. The submission argued that the offence should centre on active engagement relating to violent crimes or preparations, logistics or action in pursuit of campaigns against law enforcement and so on, rather than passive forms of engagement.

5.50 This submission further argued that some of the pathways to proscription under s. 18 of the 1939 Act are disproportionate. It recommended the inclusion in the section of a requirement that, before a group can be considered to be an *"unlawful organisation"*, it must be one which relies upon or advocates violent crimes or substantial obstruction of, or interference with, the administration or enforcement of the law.

5.51 In relation to s. 19, the submission recommended that the Government should be allowed to issue a provisional suppression order which must then be confirmed on the merits by a court within a set period. The submission suggested that this should replace the appeal mechanism under s. 20, which the submission characterised as inadequate and unfair, particularly having regard to the short timeframe and the burden and standard of proof involved. The submission further contended that the provision under s. 19(4) that a suppression order is *"conclusive evidence"* of unlawfulness should be modified.

[61] Hederman Report, at para. 6.41.

[62] Hederman Report, at para. 6.31.

5.52 We have carefully considered whether the offence of membership should be retained and, if so, whether the offence should be modified in any way. We recommend that the offence of membership of an unlawful organisation should be re-enacted as part of legislation replacing the Offences Against the State Acts without any substantive modification. We do not think that the legislation should define what is meant by membership, prescribe a degree of participation in an unlawful organisation which is necessary for a person to be considered a *"member"*, or limit the offence to membership of organisations which are the subject of suppression orders.

5.53 A point emphasised to us during our consultations was that proscription is an essential element of modern counter-terrorism legislation. For this reason, we recommend that the legislation replacing the Offences Against the State Acts should contain similar provisions to ss. 18, 19 and 20 of the 1939 Act. While we are of the view that s. 19 is acceptable in its current form, we recommended modifications to ss. 18 and 20.

5.54 In relation to s. 18, we agree with the view of the Hederman Committee that para. (f) should be deleted in any re-enacted version of the section. Unlike the Hederman Committee, we think that a provision along the lines of para. (e) should be retained, as it captures an important type of conduct. We note the recommendation of the Hederman Committee that the words *"with the purpose of undermining the authority of the State"* should be added to a revised para. (d). While this formulation could be considered in any recasting of paras. (d) and (e), we recognise that there is a difficult balance to be drawn in ensuring that the section captures the full range of activity of terrorist organisations, while not inadvertently making it too wide-ranging.

5.55 We recommend that a provision similar to s. 20 should be re-enacted, allowing for an appeal against the making of a suppression order to be lodged within a prescribed time period. However, we are of the view that the current restrictive provisions which are contained in s. 20 – which specify the type of evidence that must be given in support of an application and impose an obligation on the applicant to personally give evidence – are unnecessary and should be excluded from the new provision. It is more appropriate in our view to leave it to the court to decide whether, on the evidence before it, it is satisfied that an organisation is not an unlawful organisation, without prescribing the specific type of evidence the court must hear before it is allowed to reach that conclusion.

Providing Assistance to Unlawful Organisation

5.56 Section 21A of the 1939 Act creates the offence of providing assistance to an unlawful organisation. The offence was introduced on foot of a recommendation by a majority of the Hederman Committee that the offence of membership of an unlawful organisation *"should be supplemented by another offence, viz. 'to knowingly render assistance to an unlawful organisation in the performance or furtherance of an unlawful object.'"* [63]

5.57 We are of the opinion that this offence should be retained in its current form as part of the legislation replacing the Offences Against the State Acts. We further note that s. 21A creates a broad offence, and consideration might be given in drafting to whether its existence negates the need for some of the more specific and archaic offences contained in the 1939 Act.

[63] Hederman Report, at para. 6.49.

Using or Occupying Building Subject to Closing Order

5.58 Section 25 of the Offences Against the State Act 1939 creates an offence of occupying a building subject to a closing order. As discussed in more detail in chapter 9, we are of the view that s. 25 should be repealed in its entirety and should not be re-enacted.

Meetings and Processions in Vicinity of Houses of Oireachtas

5.59 Section 28 of the 1939 Act provides that:

> *"It shall not be lawful for any public meeting to be held in, or any procession to pass along or through, any public street or unenclosed place which or any part of which is situate within one-half of a mile from any building in which both Houses or either Houses of the Oireachtas are or is sitting or about to sit if either:*
>
> > *an officer of the Garda Síochána not below the rank of Chief Superintendent has, by notice given to a person concerned in the holding or organisation of such meeting or procession or published in a manner reasonably calculated to come to the knowledge of the persons of such meeting or procession or published in a manner reasonably entitled to come to the knowledge of the persons so concerned, prohibited the holding of such meeting in or the passing of such procession or published in a manner reasonably calculated to come to the knowledge of such persons so concerned, prohibited the holding of such meeting in or the passing of such procession along or through any such public street or unenclosed place as aforesaid, or*
> >
> > *a member of the Garda Síochána calls on the persons taking part in such meeting or procession to disperse."*

5.60 The Hederman Committee recommended that this section should be deleted in its entirety.[64] It stated that s. 28 places almost no constraint on the power of a chief superintendent to ban a meeting or a member of An Garda Síochána to call upon marchers to disperse. For this reason, the section seemed to the Committee to be *"impermissibly overbroad and… probably unconstitutional in its present form"*.[65]

5.61 We agree with this assessment. We are of the view that the offence is overly broad and should not be re-enacted as part of legislation replacing the Offences Against the State Acts.

5.62 We note the further comment by the Hederman Committee that it is appropriate in principle to provide An Garda Síochána with particular powers of crowd control in the immediate vicinity of the Houses of Oireachtas.[66] We agree and recommend that this be done through a provision which is much more narrowly drawn than s. 28, included in the legislation replacing the Offences Against the State Acts.

Failure to Provide Account of Movements

5.63 Section 52 of the Offences Against the State Act 1939 provides that whenever a person is detained in custody under s. 30 of the 1939 Act, any member of An Garda Síochána may demand of such person, at any time while he is so detained, a full account of such person's movements and actions during any specified period and all information in his possession

[64] Hederman Report, at paras. 6.130 to 6.139.

[65] Hederman Report, at para. 6.134.

[66] Hederman Report, at para. 6.138.

in relation to the commission or intended commission by another person of any offence under any section of the 1939 Act or any scheduled offence. It is a criminal offence for the person to fail or refuse to give to such member such account or any such information or to give to the member any account or information which is false or misleading. The offence is punishable by up to six months imprisonment.

5.64 Section 52 survived a constitutional challenge.[67] However, the European Court of Human Rights found the section to be incompatible with Article 6 of the Convention, as it imposed a degree of compulsion on a person being questioned which *"destroyed the very essence of their privilege against self-incrimination and their right to remain silent."* [68]

5.65 The Hederman Committee unanimously recommended the repeal of this section.[69] A number of the submissions to the Review Group agreed with this recommendation, making the point that the section should be removed from the statute book in its entirety as it represents an undue and disproportionate interference with a person's right to silence. The Review Group was advised that the DPP has not directed a prosecution under s. 52 since the provision was deemed to be incompatible with Article 6 of the Convention.

5.66 Having regard to these considerations, we recommend that s. 52 should be repealed in its entirety and should not be re-enacted as part of any legislation replacing the Offences Against the State Acts. We note the further recommendation by a majority of the Hederman Committee to the effect that s. 52 *"could be replaced with a section allowing inferences to be drawn from the accused's silence"*.[70] However, on balance, we do not believe that it is necessary to provide for same.

Failure to Account for Recent Movements When Found Near Place of Commission of Scheduled Offence

5.67 Section 2 of the 1972 Act provides that a garda may require a person found at or near a place where it is reasonably believed that a scheduled offence is being or was committed to give his name, address, and an account of his recent movements. If the person fails or refuses to give the information, or gives information which is false or misleading, this is an offence punishable by up to 12 months imprisonment.

5.68 The Hederman Committee was unanimously of the view that s. 2 of the 1972 Act should be repealed, considering it *"inconceivable"* that the section should be left on the statute book in its present form.[71] We agree. We recommend that s. 2 of the 1972 Act should be repealed in its entirety and should not be re-enacted as part of any legislation replacing the Offences Against the State Acts.

Interference with Course of Justice

5.69 Section 4 of the Offences Against the State (Amendment) Act 1972 creates an offence relating to the making of statements or holding of meetings constituting *"an interference with the course of justice"*.

[67] *Heaney v. Ireland* [1994] 3 I.R. 593 (H.C.); [1996] 1 I.R. 580 (S.C.).

[68] *Heaney and McGuinness v. Ireland* (2001) 33 E.H.R.R. 264 at para. 55.

[69] Hederman Report, at para. 8.60.

[70] Hederman Report, at para. 8.61.

[71] Hederman Report, at para. 8.60.

5.70 The Hederman Committee was *"struck by the very breadth of this section"* and noted that it was difficult to see how it would survive a constitutional challenge as it was *"plainly at odds with the right of free speech"*.[72] The Committee further noted that the law of contempt of court already provides sufficient protection for judges, jurors, litigants and other persons associated with the administration of justice.[73]

5.71 We agree with this analysis. We are of the view that the law of contempt is sufficient to deal with the issues currently addressed by s. 4 of the 1972 Act. For that reason, we recommend that this offence be repealed and should not be re-enacted in any legislation replacing the Offences Against the State Acts.

Directing an Unlawful Organisation

5.72 The offence of directing an unlawful organisation is set out in s. 6 of the Offences Against the State (Amendment) Act 1998. The Hederman Committee was of the view that this offence should be retained.[74]

5.73 We agree and recommend that this offence should be re-enacted as part of the legislation replacing the Offences Against the State Acts. Although it appears that the offence is seldom prosecuted, we think that it is vital to have the offence on the statute book. In this regard, we concur with the comments of the Hederman Committee that *"it is desirable that those shadowy figures who control, supervise and direct the actions of paramilitaries and illegal organisations should not remain beyond the reach of the law."* [75]

5.74 A submission received by the Review Group made the point that a person can be guilty of an offence under s. 6 regardless of the level of the organisation's structure at which he or she acts. The submission considered whether the use of the wording *"at any level of the organisation's structure"* is too broad, given the severity of the potential punishment of life imprisonment if found guilty. The submission concluded that s. 6 should remain in its present form as it does not seem that the provision had been used in a flagrant or widespread manner against those who are not believed to be in the upper echelons of the organisation.

5.75 We have considered these points and whether the offence, as presently drafted, is overly broad. On balance, we are of the view that it is appropriate for the offence to remain framed as it is. Removing the reference to *"any level of the organisation's structure"* would likely require the prosecution to assume the enormous burden of proving that an accused was a senior member of an unlawful organisation. In our opinion, the fact that an accused played a minor role in an organisation is a matter which more properly goes to assessment of culpability during a sentence hearing rather than an assessment of criminal liability.

Unlawful Collection of Information

5.76 Section 8(1) of the Offences Against the State (Amendment) Act 1998 provides that:

> *"It shall be an offence for a person to collect, record or possess information which is of such a nature that it is likely to be useful in the commission by members of an unlawful organisation of serious offences generally or of any kind of serious offences."*

[72] Hederman Report, at para. 6.179.

[73] Hederman Report, at para. 6.182.

[74] Hederman Report, at para. 6.146 to 6.149.

[75] Hederman Report, at para. 6.148.

5.77 Section 8(2) provides a defence in the following terms:

"It shall be a defence for a person charged with an offence under this section to prove that at the time of the alleged offence the information in question was not being collected or recorded by him or her, or in his or her possession, for the purpose of its being used in such commission of any serious offences or offences."

5.78 A majority of the Hederman Committee was of the view that this offence is too widely drawn and ought to be repealed.[76] The majority stated that if it was thought necessary to replace this section with a new offence, then any such offence should be carefully drawn to ensure that the prosecution must prove that the information was knowingly collected for the purpose of assisting members of an illegal organisation to commit serious offences. A minority took the view that the offence, or an offence along similar lines, is essential to combat the activities of terrorists and paramilitary organisations.[77]

5.79 Certain submissions received by the Review Group addressed this offence. One submission recommended that the section should be repealed. It argued that the section is too broad and purports to criminalise activities and behaviour that are *prima facie* lawful. The submission further contended that the focus on the *"nature"* of the information, and not the purpose for which it was obtained, is too vague, and technically allows for prosecution in an extremely wide array of circumstances. It was submitted that the offence should be amended to include an element of intent on the part of the accused.

5.80 Another submission argued that the section is too widely formulated. However, it stated that there is no evidence of overuse of the section and so it would be sufficient to reformulate the section so that it captures the knowing collection of information likely to be useful to the commission by members of any unlawful organisation of serious offences generally or any particular kind of serious offence.

5.81 We are of the view that, in order to effectively combat the activities or terrorists and paramilitary organisations, it is essential to provide for an offence similar to that contained in s. 8 of the 1998 Act in the legislation replacing the Offences Against the Acts. However, having considered the views of the Hederman Committee and the submissions received, we agree that s. 8 in its current formulation may be overly broad and it may not be appropriate to simply re-enact the provision. We recommend that consideration be given to whether the aims of the section could be achieved by a more narrowly-drawn offence.

Withholding Information

5.82 This offence is provided for in s. 9 of the 1998 Act. The nature of the offence, as well as the recent constitutional challenges to the section, are outlined above.

5.83 The majority of the Hederman Committee considered that no change was required to this section, concluding that the group *"does not consider it unfair that members of the public should commit an offence where in these circumstances they fail to assist the Gardaí in their law enforcement duties."*[78] A minority was critical of the section and referred to it as being *"fundamentally objectionable"*.[79]

[76] Hederman Report, at para. 6.167 to 6.169.

[77] Hederman Report, at para. 6.170.

[78] Hederman Report, at paras. 6.173 to 6.175.

[79] Hederman Report, at p. 279.

5.84 Despite the recent decision of the Supreme Court in *Sweeney*, some of the submissions received by the Review Group raised the issue of whether s. 9 would benefit from the inclusion of further express statutory safeguards. Certain submissions suggested that the section should include an express requirement that a person be warned about the consequences of failing to provide information. Another submission suggested that the offence should relate specifically to failure to give information regarding offences with an organised crime or subversive element. A further submission recommended a review of the garda use of s. 9 and a consideration of the practical reality for suspects in protecting their privilege against self-incrimination thereunder.

5.85 We recommend that the offence of withholding information should be re-enacted in any legislation replacing the Offences Against the State Acts. We do not believe that the offence should be limited to specific offences, as was suggested in the submissions received. However, we recommend that consideration be given to the inclusion of additional safeguards within any re-enacted statutory provision. There would be particular merit to the introduction of an express statutory requirement that a person be warned about the potential penal consequences of failing to provide information to the gardaí.

Obstruction of Gardaí

5.86 Various offences in the Offences Against the State Acts are linked to obstruction or failure to comply with the exercise of garda powers conferred by the legislation.

5.87 As set out in chapter 7, we recommend that the specific garda powers contained in the Offences Against the State Acts should be repealed and should not be re-enacted in replacement legislation. It follows that the specific offences in the Offences Against the State Acts dealing with obstruction of those powers should likewise be repealed and should not be re-enacted. These offences are:

- Obstruction of execution of search warrant (s. 29 of the 1939 Act)
- Broadcast of details regarding application for extension of detention (s. 30(4) of the 1939 Act)
- Failure or refusal to give name and address (s. 30(6) of the 1939 Act)
- Aiding or abetting a person to escape detention or avoid recapture (s. 32 of the 1939 Act)

Other Offences

5.88 Detailed consideration has been given above to the offences in respect of which we received submissions or in respect of which we believed that particular issues arose. There are other offences currently contained in the Offences Against the State Acts which we believe serve an essential purpose and in respect of which no major issues appear to arise. The Hederman Committee recommended the retention of these offences without modification. Similarly, we recommend that these offences be re-enacted as part of legislation replacing the Offences Against the State Acts without any amendment:

- Usurpation of the functions of Government (s. 6 of the 1939 Act)

- Unauthorised military exercises (s. 15 of the 1939 Act)
- Secret societies in army or police (s. 16 of the 1939 Act)
- Administering unlawful oaths (s. 17 of the 1939 Act)
- Public meetings connected to unlawful organisations (s. 27 of the 1939 Act)
- Possession of articles for purposes connected with certain offences (s. 7 of the 1998 Act)
- Training persons in the making or use of firearms, *etc.* (s. 12 of the 1998 Act)

Chapter 6

Evidential Provisions

6.1 The Offences Against the State Acts contain several provisions which deal with matters that may be treated as evidence of certain offences. These provisions are mainly, though not exclusively, concerned with prosecutions for the offence of membership of an unlawful organisation. Amongst other things, the legislation provides that the belief of a senior garda officer that an accused person is a member of an unlawful organisation can be treated as evidence of that fact, and that inferences may be drawn from the failure of a person accused of a membership offence to answer material questions during the garda investigation.

6.2 In this chapter, we consider these evidential provisions and set out our recommendations as to whether they should be re-enacted as part of any legislation replacing the Offences Against the State Acts.

Belief Evidence in Membership Trials

Overview of the Law

6.3 Section 3(2) of the Offences Against the State (Amendment) Act 1972 provides for the admission of belief evidence in membership trials. In essence, the section carves out an exception to the common law rule that ordinarily excludes the admission of opinion evidence. It provides that in a trial for the offence of membership of an unlawful organisation contrary to s. 21 of the 1939 Act, the belief of a garda not below the rank of chief superintendent that an accused person was a member of an unlawful organisation at a material time shall be evidence that the accused was then such a member.

6.4 The courts have emphasised that s. 3(2) permits the belief of a chief superintendent to be admitted in evidence, and not the material upon which that belief is based. The evidence which is admissible under the section is a *"belief based on confidential information from a variety of sources"*.[80] It has been held that, for this reason, the section does not permit a chief superintendent to pass on hearsay evidence.[81]

6.5 Section 3(3) of the 1972 Act provides that the provision in relation to belief evidence *"shall be in force whenever and for so long as Part V of the Act of 1939 is in force"*. In other words, belief evidence is only admissible so long as the Government proclamation to the effect that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order remains in force.

6.6 The Hederman Report contains an analysis of s. 3(2).[82] There have been a number of important developments in the law relating to belief evidence since the publication of that Report and these are summarised below.

[80] *DPP v. Palmer* [2015] IECA 153, (Unreported, Court of Appeal, 20th July 2015) at p. 24.

[81] *DPP v. Donnelly* [2012] IECCA 78, (Unreported, Court of Criminal Appeal, 30th July 2012).

[82] Hederman Report, at paras. 6.84 to 6.92.

Requirement for Corroboration

6.7 The Offences Against the State Acts do not specifically require that the belief evidence of a chief superintendent be independently corroborated by other forms of evidence that suggest that the accused is a member of an unlawful organisation. In principle, the legislation leaves open the possibility that an accused could be convicted of a membership offence based on the chief superintendent's belief alone, without any supporting evidence.

6.8 In the early years after 1972, prosecutions for membership were often based solely on belief evidence.[83] At a certain stage, the DPP adopted the practice of not initiating prosecutions based solely on such evidence. The Special Criminal Court adopted a similar practice of not convicting on belief evidence alone.[84] Despite this, in *DPP v. Kelly*, the Supreme Court held open the possibility that there could be *"exceptional cases where the Special Criminal Court in its wisdom would be entitled to convict on the belief evidence alone."*[85]

6.9 The position changed following the Supreme Court's judgment in *Redmond v. Ireland*.[86] In that case, the plaintiff had been convicted of a membership offence on foot of, *inter alia*, belief evidence. He brought a constitutional challenge to s. 3(2) of the 1972 Act. The Supreme Court rejected this challenge but made it clear that a defendant could not be lawfully convicted on uncorroborated belief evidence. Delivering the judgment for the majority, Hardiman J. expressed this requirement in the following terms:

> *"[A] constitutional construction of s.3(2) of the Act of 1972 requires that the belief evidence of a Chief Superintendent be supported by some other evidence that implicates the accused in the offence charged, is seen by the trial court as credible in itself, and is independent of the witness who gives the belief evidence."*[87]

6.10 In reaching this conclusion, Hardiman J. accepted that s. 3(2) would not be consistent with the Constitution if it permitted the conviction of a person solely on the basis of belief evidence. He noted in this regard that privilege is almost invariably claimed by a chief superintendent over the sources that have led to his or her belief. This tends to exclude any *"examinable reality"* from the case and undermine any potential avenue to effectively challenge the opinion evidence through cross-examination. This created the possibility for conviction based solely on opinion evidence which was *"effectively unchallengeable"*.[88] Hardiman J. held however that s. 3(2) was capable of being interpreted in a constitutional fashion, by excluding the possibility of conviction save where there was independent corroborating evidence, as set out above.

6.11 In *DPP v. Gannon*, the Court of Criminal Appeal held that if there is a possibility that certain facts formed the basis for the chief superintendent's belief, those facts may not also be taken into account as corroboration.[89] This would amount to a form of impermissible *"double counting"*. As a result of this ruling, a chief superintendent will typically give evidence that his or her belief is not based on any matter arising in the investigation.

[83] See the comments to this effect in *DPP v. Kelly* [2006] IESC 20, [2006] 3 I.R. 115 at p. 131. For an example of such a case, see *DPP v. Ferguson* (Unreported, Court of Criminal Appeal, 27th October 1975).

[84] *DPP v. Kelly* [2006] IESC 20, [2006] 3 I.R. 115 at p. 122.

[85] *Ibid.*

[86] *Redmond v. Ireland* [2015] IESC 98, [2015] 4 I.R. 84

[87] [2015] IESC 98, [2015] 4 I.R. 84 at pp. 99 and 100.

[88] [2015] IESC 98, [2015] 4 I.R. 84 at p. 97.

[89] Unreported, Court of Criminal Appeal, 2nd April 2003.

6.12 This issue of *"double counting"* was further considered by the Supreme Court in *DPP v. Cassidy*.[90] In that case, the appellant was convicted of membership of an unlawful organisation following a trial at which belief evidence was given by a chief superintendent. When asked directly by the trial court, the chief superintendent could not eliminate the possibility that some of the evidence being relied upon by the prosecution to support his belief had in fact contributed to that belief. For that reason, the trial court held it would not have regard to certain prosecution evidence when considering whether the belief evidence was corroborated, given that the chief superintendent had been unable to say that it had not contributed to his belief or not. The court went on to find that the belief evidence was corroborated by inferences which could be drawn from the appellant's failure to answer questions which were material to the investigation, pursuant to s. 2 of the 1998 Act. In deciding that the questions that the appellant had not answered were *"material"*, the court took into account the prosecution evidence which it had excluded from its reckoning in assessing whether the belief evidence was corroborated or not.

6.13 O'Malley J. delivered the judgment of the Supreme Court in *Cassidy*. She noted that the trial court had not *"excluded"* the evidence in question and that there was no reason to suggest that it was inadmissible under any rule of evidence. What it said was that the evidence would be disregarded for one particular purpose but taken into account for a wholly different purpose. This was a permissible approach and did not create an issue of double counting.

6.14 The case law provides various examples of the sort of evidence which may corroborate the belief of a chief superintendent. For instance:

- In *DPP v. Birney*, the belief evidence was corroborated by inferences drawn from the failure by the accused to answer questions; evidence that the accused were found together in a van in possession of paraphernalia suggestive of criminality such as balaclavas, cable ties and garda clothing; and evidence that some of the accused bore tattoos with the words *"Óglaigh na hÉireann"*.[91]
- In *DPP v. Flohr*, the Court of Appeal held that the belief evidence was corroborated by evidence that the appellant was found in a vehicle in a remote location; that there was a training mortar in the vehicle; and that there was soil on the mortar indicating that it had been recently buried.[92]
- In *DPP v. Metcalfe*, the Court of Appeal affirmed that inferences drawn from a failure to answer material questions, under s. 2 of the 1998 Act, could be treated as corroboration of belief evidence.[93]

6.15 It is worth stressing that, under the law as it stands, an inference drawn from the silence of the accused under s. 2 of the 1998 Act may suffice as the sole evidence corroborating the chief superintendent's belief: see, for example, *DPP v. Binéad*[94]; *DPP v. Donnelly*[95]; and *DPP v. Metcalfe*.[96] In other words, it is possible to convict solely based on (i) belief evidence and (ii) inference evidence, with each piece of evidence corroborating the other.

[90] [2021] IESC 60, (Unreported, Supreme Court, 13th September 2021).

[91] [2006] IECCA 58, [2007] 1 I.R. 337.

[92] [2020] IECA 67, (Unreported, Court of Appeal, 12th March 2020).

[93] [2021] IECA 44, (Unreported, Court of Appeal, 18th February 2021).

[94] [2006] IECCA 147, [2007] 1 I.R. 374.

[95] [2012] IECCA 78, (Unreported, Court of Criminal Appeal, 30th July 2012).

[96] [2021] IECA 44, (Unreported, Court of Appeal, 18th February 2021).

6.16 An error by the trial court in treating evidence as corroboration may be grounds for overturning a conviction. In *DPP v. Weldon*, the trial court held that the belief evidence was supported by two photographs found on the appellant's mobile phone, which were alleged to show the appellant with two other individuals who were said to have criminal convictions for membership of an unlawful organisation.[97] This finding was factually incorrect: the photographs did not actually contain the appellant, and the two individuals in the photographs did not have membership convictions. The Court of Appeal remarked that s. 3(2) was a very special evidential provision and the application of the section had to attract the closest scrutiny by a court. Although there was other evidence in support of the belief, it was difficult to know which piece of evidence was treated as conclusive by the trial court, and the error made by the trial court was grounds for quashing the conviction.

6.17 The Supreme Court has recently indicated that, where a broad claim of privilege is made by a chief superintendent over the basis for his or her belief, this may mean that strong corroborating evidence is required: see *DPP v. Cassidy* [98] and *DPP v. Banks*.[99] This point is discussed in further detail below.

Privilege

6.18 A chief superintendent giving belief evidence will often rely on information received from confidential informants or derived from security operations. For that reason, the chief superintendent will typically claim privilege over the basis for his or her belief. The trial court must decide whether to uphold such a claim of privilege or not. Where a claim of privilege is upheld, a chief superintendent is not required to answer any questions in relation to the underlying facts, materials or sources which led to the formation of the belief.

6.19 The Supreme Court has stated that a claim of privilege in this context will *"inevitably be acceded to"*.[100] The scope of the privilege claim may be extensive. For instance, in *DPP v. Flohr*, the Court of Appeal upheld a broad claim of privilege which precluded questions on matters which were answered on previous occasions by other chief superintendent witnesses, such as whether the sources were human or non-human.[101]

6.20 The constitutionality of s. 3(2) of the 1972 Act was upheld in *O'Leary v. Attorney General* [102] and *Redmond v. Ireland*.[103] However, a number of accused persons have advanced the distinct argument that the limitation on the ability to cross-examine that follows when privilege is claimed in respect of belief evidence is such as to breach the right to a fair trial under Article 38 of the Constitution and Article 6 of the Convention. These arguments have been advanced before the Irish courts and the European Court of Human Rights. To date, all such challenges have failed.

6.21 In *DPP v. Kelly*, the appellant was convicted of a membership offence on foot, *inter alia,* of the belief evidence of a chief superintendent.[104] The trial court upheld a claim of

[97] [2018] IECA 197, (Unreported, Court of Appeal, 27th June 2018).

[98] [2021] IESC 60, [2021] 2 I.R. 710.

[99] [2022] IESC 7, [2022] 1 I.L.R.M. 323.

[100] *DPP v. Kelly* [2006] IESC 20, [2006] 3 I.R. 115 at p. 135 and *Redmond v. Ireland* [2015] IESC 98, [2015] 4 I.R. 84 at p. 88.

[101] [2020] IECA 67, (Unreported, Court of Appeal, 12th March 2020).

[102] [1993] 1 I.R. 102.

[103] [2015] IESC 98, [2015] 4 I.R. 84.

[104] [2006] IESC 20, [2006] 3 I.R. 115.

privilege by the chief superintendent over the sources of his belief, thus limiting cross-examination on that issue. The appellant argued that this limitation deprived him of a fair trial under Article 38.1 of the Constitution.

6.22 The Supreme Court rejected this argument. Delivering the majority judgment, Geoghegan J. held that insofar as defence counsel was limited in cross-examination, permission for this limitation was inherent in the terms of s. 3(2) of the 1972 Act. This section enjoyed the presumption of constitutionality. However, Geoghegan J. remarked that there was a constitutional requirement to keep the infringement of the rights of an accused to a minimum. For that reason, he rejected the argument by the prosecution that s. 3(2) prohibited the giving of any evidence by the chief superintendent as to the basis for his or her belief. Instead, the subsection had to be interpreted as authorising the giving of evidence by the chief superintendent for the basis of the belief, but not to the extent that it interfered with or defeated a legitimate plea of privilege.

6.23 Fennelly J. delivered a concurring judgment. He noted that belief evidence under s. 3(2) was *"evidence of a quite exceptional kind"* which constituted a restriction on the ability to cross-examine. However, he held that compelling circumstances justified this restriction, including the fact that belief evidence could only be permitted in respect of membership offences, that evidence could only be given by gardaí of a particularly high rank, and that the evidence was only permitted while the relevant Government proclamation was in force. The restriction on rights did not go further than strictly necessary.

6.24 The appellant subsequently brought a case to the European Court of Human Rights. His complaint was declared inadmissible on the basis that it was manifestly ill-founded.[105] The court held that the weight of the additional evidence of the applicant's membership of an illegal organisation was such that the admission and acceptance of the impugned belief evidence was insufficient to render the proceedings in their entirety unfair.

6.25 In *DPP v. Matthews,* the Court of Criminal Appeal held that the invocation of privilege over the sources of the chief superintendent's belief did not infringe either Article 38 of the Constitution or Article 6 of the Convention.[106] It stated that the restriction on cross-examination caused by the invocation of privilege was necessary and was the least invasive approach available to meet the objectives of the legislation, and that the restriction was counterbalanced by other measures such as the practice of the Special Criminal Court in refusing to convict on belief evidence alone.

6.26 Similarly, in *DPP v. Donnelly*, the Court of Criminal Appeal rejected the appellant's argument that the admission of belief evidence in circumstances where privilege was claimed amounted to a breach of his fair trial rights under Article 6 of the Convention.[107] In reaching this conclusion, O'Donnell J. noted, *inter alia,* that belief evidence could only be given in relation to one category of offence; that the evidence was not treated under the Act as being conclusive and could be challenged, tested or contradicted; that the belief of the chief superintendent was admissible as evidence, rather than the material upon which that belief was based; that the category of persons who could give belief evidence was limited; and that the chief superintendent was available for cross-examination, and was not an anonymous or absent witness.

[105] *Kelly v. Ireland* (App. No. 41130/06, 14th December 2010).

[106] [2006] IECCA 103, [2007] 2 I.R. 169.

[107] [2012] IECCA 78, (Unreported, Court of Criminal Appeal, 30th July 2012).

6.27 Similar challenges failed in *DPP v. Binéad*[108] and *DPP v. Donohue*.[109] The accused in the latter case subsequently made an application to the European Court of Human Rights in which he argued that the non-disclosure of the source material underlying the chief superintendent's belief seriously restricted his defence rights and that this had not been counterbalanced by commensurate safeguards.[110] In particular, he objected to the fact that the Special Criminal Court, which was the ultimate finder of fact, had itself reviewed the privileged materials underpinning the chief superintendent's belief.

6.28 The European Court of Human Rights held that, in assessing whether there had been a violation of the accused's right to a fair trial under Article 6 of the Convention, it was necessary to consider the overall fairness of the proceedings. The court held that the weight of the evidence other than the belief evidence, combined with counterbalancing safeguards and factors in the trial, were sufficient to conclude that the grant of privilege as regards the sources of the chief superintendent's belief did not render the accused's trial unfair.

6.29 In *Connolly v. DPP*, the appellant was convicted of membership of an unlawful organisation on the basis, *inter alia,* of belief evidence. He appealed to the Supreme Court, where he argued that the *Kelly* decision was no longer applicable following the enactment of the European Convention on Human Rights Act 2003.[111] The Supreme Court rejected this argument. It held that the law in relation to belief evidence, as set out in *Kelly* and *Donnelly*, was still applicable. The court noted that insofar as any issue arose in relation to Article 6 of the Convention, that question and the procedure involved had been found to be compliant by the European Court of Human Rights in *Donohoe v. Ireland*.[112]

6.30 Further similar challenges failed in *DPP v. Bullman*[113], *DPP v. Nolan*[114], *DPP v. Maguire*[115] and *DPP v. Metcalfe*.[116] A point made by the courts in these cases is that although a claim of privilege may place limitations on cross-examination, that does not set cross-examination at naught as there are still peripheral or collateral issues that may be tackled. In addition, the statutory provisions have built-in features which are intended to counterbalance any procedural unfairness that might arise.

6.31 The courts have emphasised that the invocation of privilege over the sources on which belief is based may affect the weight given to the belief evidence by the trial court. As the Court of Criminal Appeal stated in *DPP v. Maguire*, the *"absence of a full opportunity to cross-examine the Chief Superintendent, or other witnesses, as to belief evidence, as here, must affect the weight to be attached to the evidence."*[117] However, in *DPP v. Mulligan*[118] and *DPP v. Redmond*[119], the Court of Criminal Appeal rejected the argument that no weight should be attached to a *"bare belief"* expressed by a chief superintendent.

[108] [2006] IECCA 147, [2007] 1 I.R. 374.
[109] [2007] IECCA 97, [2008] 2 I.R. 193.
[110] App. No. 19165/08, 12th December 2013.
[111] [2015] IESC 40, [2015] 4 I.R. 60.
[112] App. No. 19165/08, 12th December 2013.
[113] [2009] IECCA 84, (Unreported, Court of Criminal Appeal, 28th July 2009).
[114] [2015] IECA 165, (Unreported, Court of Appeal, 27th July 2015).
[115] [2018] IECA 10, (Unreported, Court of Appeal, 20th December 2019).
[116] [2020] IECA 176, (Unreported, Court of Appeal, 1st July 2020).
[117] [2008] IECCA 67, (Unreported, Court of Criminal Appeal, 7th May 2008) at p. 6.
[118] Unreported, Court of Criminal Appeal, 17th May 2004.
[119] Unreported, Court of Criminal Appeal, 24th February 2004.

6.32 As noted above, the Supreme Court has recently indicated that a broad claim of privilege may have consequences for the nature of the corroborating evidence required for the belief of a chief superintendent.

6.33 *DPP v. Cassidy* involved an appeal from the appellant's conviction for membership of an unlawful organisation.[120] Belief evidence was given at the trial by a chief superintendent, who invoked a very broad claim over the basis for his belief. Delivering the judgment of the Supreme Court, O'Malley J. considered the impact of this claim of privilege on the overall fairness of the trial. She remarked that the claim of privilege made by belief witnesses in membership trials is getting broader, and the range of potential cross-examination narrower. O'Malley J. stated that, in this case, there was no doubt that the privilege claimed was about as broad as could be envisaged and stopped defence counsel making even limited headway in cross-examination. She went on to note:

"…[T]he solution to the problem is not, in my view, to exclude other admissible evidence or to decline to apply relevant legislation as some form of counterbalance. The Constitution requires the trial courts to ensure that trials are fair, but the way to deal with potential unfairness is to focus on its source – in these cases, the belief evidence. Since the effect of a broad claim of privilege is to insulate that evidence from a cross-examination that might demonstrate that the belief is wrong, the appropriate course of action is to attribute significantly reduced weight to the belief and to require correspondingly strong supportive evidence. I think, therefore, that it is appropriate to say that if there is a very wide claim of privilege, there will be a correspondingly greater need for strong supportive evidence that clearly did not form part of the basis for the belief. It will of course remain necessary to disregard any individual piece of evidence for that purpose, if it is unclear to the court whether it was or was not the basis, or part of the basis, for the belief." [121]

6.34 O'Malley J. noted that this was the approach taken by the trial court in the instant case. The trial court's judgment made it clear that, in view of the breadth of the privilege claim and the effect thereof on the defence ability to cross-examine, the strength of the supporting evidence had to be high on the scale. The court concluded that it was, and that it was correct to reach that decision. Accordingly, the appeal was dismissed.

6.35 The Supreme Court took the same approach in *DPP v. Banks*.[122] The appellant argued that the breadth of the claim of privilege made by the chief superintendent giving belief evidence was such that no meaningful cross-examination could be conducted, and that the evidence offered in support of the belief evidence did not meet the high standard required in such circumstances. The Supreme Court agreed. It held that the belief evidence of the chief superintendent had to be supported by strong independent evidence. The court held that the evidence in this case did not reach that standard and allowed the appeal.

Inspection by Trial Court

6.36 The appeal courts have upheld the practice engaged in by the Special Criminal Court in certain cases where claims of privilege are raised, of privately reviewing the materials upon which a chief superintendent relied to form his or her belief, without disclosing same to the defence. The purpose of this exercise is to assess whether the chief superintendent could legitimately form the belief on the basis of those materials and to determine whether the materials contain information that could assist the accused in his or her defence.

[120] [2021] IESC 60, [2021] 2 I.R. 710.

[121] *Ibid* at pp. 750 to 751, para. 144.

[122] [2022] IESC 7, [2022] 1 I.L.R.M. 323.

6.37 In *DPP v. Binéad*, the chief superintendent claimed privilege over the sources of his belief.[123] The Special Criminal Court required the chief superintendent to produce the documentation upon which he relied to the court for inspection, without disclosing same to the defence. Following a review of this documentation, the court ruled that it was satisfied that the belief evidence was based on adequate and reliable information and that nothing in the documentation would assist the defence in proving the innocence of the accused. The appellant argued that the trial court had erred in taking this approach, and that it should have instead appointed a special advocate to consider and report on the material underlying the belief evidence. The Court of Criminal Appeal approved of the trial court's approach and rejected the argument that the appellant was exposed to prejudice by the arbiter of fact reviewing potentially prejudicial material which was not seen by the accused. The court further held that the trial court did not have jurisdiction to appoint a special advocate.

6.38 In *DPP v. Donohue*, a chief superintendent claimed privilege over material upon which he based his belief.[124] The Special Criminal Court examined this material and concluded that it provided an adequate and reliable basis for the formation of the belief and that there was nothing in the material which would assist the appellant in proving his innocence. It refused to order disclosure of the material to the defence. The appellant was ultimately convicted. On appeal, he argued that the consideration of the material by the trial court without the defence viewing same was inconsistent with his fair trial rights. The Court of Criminal Appeal held that the examination by the trial court of the material in order to determine whether that material should be disclosed and the belief evidence should be admitted was in compliance with both the Constitution and the Convention. The court emphasised that there was no obligation to disclose material which does not damage the prosecution or assist the defence, and the trial judges had clearly stated that they had no regard to the material which they had seen in reaching their verdict.

6.39 In *Redmond v. Ireland*, the Supreme Court reiterated that there was no power for a court to order the use of a *"special advocate"* procedure to review the material over which a chief superintendent claims privilege.[125] Hardiman J. stated as follows:

> *"I do not consider that this court has the power, even if it were inclined to do so, to order the use of some sort of 'special advocate', as they are dubbed in other jurisdictions, to secretly examine the papers which point to the concerns of the authorities and to make representations on behalf of an accused person, though not on his instructions. I am disposed to agree with the judgment of Carney J. in Director of Public Prosecutions v. Special Criminal Court [1999] 1 I.R. 60 but the salient point is that the merits or otherwise of a special advocate system is for the legislature to consider and not for this court to pronounce upon. The fact that such a system has been introduced, in one degree or another, in other jurisdictions is simply nihil ad rem to the question of whether or not s. 3(2) of the Act of 1972 is, or is not, repugnant to the Constitution."* [126]

6.40 In *DPP v. Flohr*, the appellant requested that the issue of privilege be determined by a differently constituted division of the Special Criminal Court.[127] The trial court refused

[123] [2006] IECCA 147, [2007] 1 I.R. 374.

[124] [2007] IECCA 97, [2008] 2 I.R. 193.

[125] [2015] IESC 98, [2015] 4 I.R. 84.

[126] [2015] IESC 98, [2015] 4 I.R. 84 at p. 95.

[127] [2020] IECA 67, (Unreported, Court of Appeal, 12th March 2020).

to take this course of action, and instead reviewed the material to determine whether privilege was properly asserted and whether any of the material was of assistance to the defence. The Court of Appeal upheld this approach.

6.41 In *DPP v. Connolly*, the trial court refused the appellant's request to examine the material upon which the chief superintendent based his belief evidence for the purpose of determining whether a claim of privilege was justified.[128] The Court of Appeal held that an accused has a right to request that a trial court view material over which privilege is claimed. A trial court has a discretion over whether to accede to such a request but must exercise that discretion judicially. The Court of Appeal was satisfied that the particular reasons provided by the trial court for rejecting the request in this case were insufficient to justify their refusal to do so. In particular, the trial judges refused on the basis that they did not have the necessary expertise to review the documentation. However, in the Court of Appeal's view, the judges were experienced in almost all aspects of information analysis in the context of criminal proceedings and the administration of justice, and a perceived lack of expertise in the subject matter to be reviewed was not a reason for refusal to embark on the task. For this reason, the appellant's conviction was quashed.

6.42 The prosecution has traditionally been viewed as playing a *"critical role"* in assessing general matters of privilege.[129] However, in *DPP v. Palmer*, the Court of Appeal rejected the argument that belief evidence should be excluded if the prosecution has not reviewed the material informing the chief superintendent's belief.[130] The court emphasised that s. 3(2) does not make provision for consideration of material by the DPP and the DPP's functions do not include consideration of the material on which the belief was based.

6.43 In *DPP v. R.K. and L.M.*, a chief superintendent made a blanket claim of privilege over the material on which he based his belief.[131] The Special Criminal Court ruled that prosecution counsel should view the material to ensure that disclosure of all appropriate material had been made, but the gardaí refused to provide same to the prosecution due to security concerns relating to the nature of the material. In those circumstances, the trial court held that the belief evidence was inadmissible, as the defence was unable to carry out meaningful cross-examination of the chief superintendent.

6.44 The Court of Appeal allowed an appeal by the prosecution. The court held that the trial court ought to have admitted the belief evidence and then proceeded to consider what weight, if any, should be attached to it. The court reasoned as follows:

"While not wishing to state the position in absolute terms and for all cases, because it may be that there will be some very exceptional cases where different considerations apply, it would seem to us that, in general, the proper approach is to admit the evidence and then to ask the question whether there are circumstances present which would render it unfair to the accused to attach any (or any significant) weight. Again, we do not agree with the trial court's suggestion that the belief evidence of only some, but not all, chief superintendents is to be admitted in evidence, if that indeed was the position of the trial court. The background, experience, and career path of an individual chief superintendent providing belief evidence may be highly relevant when it comes to assessing the weight to be attached. That relevance can go both ways. There are a number of examples where trial courts, and indeed, appellate courts have been impressed when chief

[128] [2018] IECA 201, (Unreported, Court of Appeal, 26th June 2018).

[129] *DPP v. Special Criminal Court* [1999] 1 I.R. 60 and *Redmond v. Ireland* [2015] IESC 98, [2015] 4 I.R. 84 at p. 119.

[130] [2015] IECA 153, (Unreported, Court of Appeal, 20th July 2015).

[131] [2021] IECA 342, (Unreported, Court of Appeal, 21st December 2021).

superintendents have been able to point to a long career combatting subversion. However, there may be other cases where the defence would be able to point to an absence of directly relevant career experience, suggesting that less weight should be attached than might otherwise have been the case." [132]

Independence From Investigation

6.45 In *DPP v. Cassidy*, belief evidence was given by a chief superintendent during the appellant's trial.[133] That chief superintendent had granted an order extending the appellant's detention during the course of the garda investigation. The appellant argued that the involvement of the chief superintendent in the investigation precluded him from giving evidence pursuant to s. 3(2). The Court of Appeal rejected this argument. It held that the section does not provide that the senior officer giving the belief evidence must be independent of the investigation or cannot perform one or more functions in the investigation. The court held that no issue of objective bias arose on the facts.

Disclosure

6.46 In *DPP v. Farrell*, the Court of Criminal Appeal quashed a conviction in circumstances where the defence had not been provided with notice of factual material which the chief superintendent referred to during cross-examination.[134] Hardiman J. noted that where the prosecution wishes to rely on the belief of a chief superintendent and intends to give no further details at all as to the basis for the belief, it is not necessary to put the defendant on notice of any further details or supporting material. In that event, no further details of the basis of the belief may be provided in evidence. Alternatively, if the chief superintendent does intend to offer a basis and supporting details for the belief, that basis and those details must be set out in the book of evidence. If evidential material beyond what is set out in the book is given by the chief superintendent, the prosecution must decide whether they intend to rely on the material or not. If they do, they must seek leave to serve a statement of additional evidence on such terms as to adjournment as the court may think proper.

Weight Given to Belief Evidence

6.47 The courts have repeatedly stated that belief evidence does not enjoy any special status, and that it is simply a piece of evidence to be considered and it is a matter for the trial court to decide what weight, if any, to attach to such evidence in the individual case.[135] It is desirable for the trial court to explain the weight attached to the belief evidence.[136]

6.48 In its judgment in *DPP v. Kelly,* the Court of Criminal Appeal outlined several matters that might affect the weight to be given to belief evidence. These included:

i. The connection of the belief evidence with events relating to matters occurring on the date of arrest.

ii. The association of the belief with actions or admissions by the accused at that time.

[132] *Ibid* at para. 60.

[133] [2020] IECA 124, (Unreported, Court of Appeal, 1st May 2020). See also *DPP v. Glennon* [2018] IECA 211, (Unreported, Court of Appeal, 28th June 2018).

[134] [2014] IECCA 37, (Unreported, Court of Criminal Appeal, 10th April 2014).

[135] See, for example, *DPP v. Kelly* [2006] IESC 20, [2006] 3 I.R. 115 at p. 122; *DPP v. Kelly* [2007] IECCA 110, (Unreported, Court of Criminal Appeal, 6th December 2007) at p. 13; and *Redmond v. Ireland* [2015] IESC 98, [2015] 4 I.R. 84 at p. 100.

[136] See *DPP v. Kelly* [2006] IESC 20, [2006] 3 I.R. 115.

iii. The connection of the belief with questioning pursuant to s. 2 of the Offence Against the State (Amendment) Act 1972.

iv. The length of time for which the chief superintendent has held the view.

v. The experience of the chief superintendent.

vi. The demeanour of the chief superintendent when giving evidence and the manner in which he or she responded in cross-examination.

Position of the Hederman Committee and Submissions Received

6.49 A majority of the Hederman Committee was of the view that belief evidence admitted under s. 3(2) of the 1972 Act violates *"three established rules of evidence"*:

"First, while acknowledged experts are permitted to give evidence of opinion, their expertise must be established and their opinion is generally confined to scientific, medical, engineering and cognate matters, and the application of such knowledge to factual data, in accordance with established professional norms. Secondly, even experts, strictly speaking, are not allowed to give evidence on the ultimate issue, in this case whether or not the accused is a member of an illegal organisation, although this rule is often in practice ignored. Finally, the Chief Superintendent's opinion may be based on a mixture of hearsay and other inadmissible evidence which would not, in themselves, be admissible as evidence."[137]

6.50 However, the majority recommended that s. 3(2) should be retained, subject to an amendment to expressly provide that no person should be convicted of the offence of membership solely based on belief evidence and that such evidence should be treated by the courts as corroborative evidence in appropriate cases. The majority was of the view that this would add a further safeguard to the section.

6.51 A minority of the Hederman Committee took the view that s. 3(2) violates certain crucial principles of the laws of evidence and should be repealed, stating as follows:

"The evidence which section 3(2) renders admissible is not evidence given by a recognised expert in a relevant field of scientific knowledge; it may be based on hearsay and otherwise inadmissible evidence; it addresses the ultimate issue of the guilt or innocence of the accused and in practice is not easy to challenge since its source will not normally be required to be identified. It is probable that section 3(2) would be held to be incompatible with Article 6 of the European Convention on Human Rights; it is possible that, even with the amendment proposed by the majority, it would still be found to violate Article 6, since the quantum of evidence adduced by the prosecution, independent of the opinion evidence, might be minuscule."[138]

6.52 A similar division of opinion was evident in the submissions received by the Review Group which dealt with the issue of belief evidence in membership trials.

6.53 Certain submissions addressed the question of whether belief evidence should be admissible at all. One submission made the case that belief evidence should no longer be admissible as it amounts to a severe breach of the right to a fair trial. The submission made the point that there are several alternative potential sources of evidence of membership of an unlawful organisation available to law enforcement today that were

[137] Hederman Report, at para. 6.91.

[138] Hederman Report, at para. 6.197.

not available in 1972 – such as surveillance evidence – and this negates the need for belief evidence. Other submissions disagreed and made the case that belief evidence should remain admissible because it is difficult to envisage how a conviction could be secured in the absence of belief evidence, given the secretive and oath-bound nature of dissident organisations.

6.54 The submissions addressed the further issues as to whether, in the event that belief evidence is admissible, there should be any further limitations on the circumstances in which it may be admitted beyond those currently contained in s. 3(2) of the 1972 Act, or any further processes put in place to review the basis for the belief before the evidence is admitted at trial. One submission suggested that there should be a requirement that the chief superintendent has spoken directly with informants before giving belief evidence. Another submission argued that if s. 3(2) is to be retained, the relevant officer should be required to disclose all data on which the opinion is based to the trial judge and to a special advocate who can make representations to the judge based on the interests of the defendant. Similarly, another submission suggested that it was necessary to introduce a legislative procedure to enable an independent review of information underpinning belief evidence.

6.55 A number of submissions made the case that s. 3(2) of the 1972 Act should be amended to expressly provide that a conviction for membership of an unlawful organisation may not be based solely on the belief evidence of a chief superintendent, and that the belief evidence must be supported by some other evidence that implicates the accused in the offence. These submissions further stated that inferences drawn from the failure of the accused to answer material questions, under s. 2 of the 1998 Act, should not be the sole piece of evidence used to support the belief of a chief superintendent. As one submission put it, *"where both belief and inference evidence represent exceptional forms of evidence, the conviction of an accused on these forms of evidence alone represents too much of a departure from the normal rules of which govern the ordinary courts."*

6.56 The submissions engaged with the issue of how claims of privilege by a chief superintendent should be handled. The submissions noted that, typically, the only means by which the defence can seek to challenge a claim of privilege is to have the trial court look at the material over which privilege is claimed. They made the point that, for the accused, exposing the court to unknown and possibly prejudicial material may be a risk that is not worth taking. The submissions suggested various alternative methods of dealing with claims of privilege, including the use of special advocates; the use of pre-trial hearings to deal with disputes over disclosure and privilege in front of a differently constituted court to the one hearing the substantive proceedings; and the review of material by prosecution counsel to determine whether a claim of privilege properly arises.

Recommendations

6.57 The first issue to consider is whether, in principle, belief evidence should continue to be admissible in trials for membership of an unlawful organisation.

6.58 We accept that belief evidence is an exceptional type of evidence. Notwithstanding this, we agree with view expressed by the majority of the Hederman Committee and take the

view that it is appropriate to continue to provide for the admission of belief evidence in membership trials. Trials for membership offences almost invariably relate to secretive organisations. It is difficult to see how the offence could be effectively prosecuted in many instances without relying, at least in part, on belief evidence. In that context, it appears essential to us to make provision for the admission of belief evidence.

6.59 However, having considered the views expressed in the Hederman Report and the submissions received, we recommend that the statutory provisions providing for the admission of belief evidence should expressly capture the requirement for corroboration of belief evidence set out by the Supreme Court in *Redmond*. The legislation should make clear that, in a case where the belief evidence of a chief superintendent is relied on by the prosecution, the accused may not be convicted solely on the basis of that evidence. Instead, that evidence must be supported by some other evidence that implicates the accused in the offence charged, is seen by the trial court as credible in itself, and is independent of the witness who gives the belief evidence. Enshrining this principle in statute is, in our view, essential to ensure that the rights of an accused person are safeguarded.

6.60 We recommend that the legislation should go on to provide that the necessary support or corroboration may not be derived solely from adverse inferences drawn from the silence of the accused during questioning by gardaí. The statutory provisions allowing for the admission of belief evidence are exceptional in nature, as are the statutory provisions which provide for adverse inferences to be drawn from the silence of an accused. We do not believe that exceptional evidential provisions should be operated in tandem to form the basis for a criminal conviction. In other words, an accused person should not be convicted on the basis solely of belief evidence and adverse inferences drawn from his or her silence.

6.61 While the submissions we received focused on adverse inferences drawn under s. 2 of the 1998 Act, we think that the principle we have articulated above applies to adverse inferences drawn from silence under any provision on the statute book, including ss. 18, 19 and 19A of the Criminal Justice Act 1984.[139] The legislation should accordingly make clear that adverse inferences drawn from the silence of an accused under any statutory provision may not relied on to provide the necessary support for belief evidence.

6.62 We note that should belief evidence continue to be admissible in membership trials, it would seem inevitable that claims of privilege will be successfully asserted over the basis for the belief in virtually all cases. We are conscious that where a claim of privilege is upheld, the chief superintendent is not required to disclose any documents to the defence or answer any questions in relation to the underlying facts, materials or sources which led to the belief. This greatly limits the extent of cross-examination by the defence.

6.63 We think that, in those circumstances, the question of whether an accused person has an effective method to test a claim of privilege and establish whether any of the material over which privilege is claimed might be of assistance to his or her defence is of fundamental importance. At present, the only means by which the defence can challenge a claim of privilege is to have the trial court inspect the material over which privilege is claimed. For instance, the Supreme Court has held that the introduction of a special advocates procedure is not permissible in the absence of legislation.[140] While cognisant that the

[139] The adverse inferences which might be drawn under other statutory provisions are discussed further below.

[140] *Redmond v. Ireland* [2015] IESC 98, [2015] 4 I.R. 84 at p. 95.

practice of inspection by the trial court has been held to be permissible, we note the criticism expressed in the submissions that this runs the risk of exposing trial judges to material which prejudices the accused; though, we note also that it is not unusual for judges to consider materials for one purpose which might be prejudicial and to exclude those materials from consideration when arriving at a decision in another context, and it is a fundamental part of the judicial capacity to do so. Taking account of all of these matters, we recommend that the Oireachtas considers legislating to allow for alternative procedures, other than inspection by the trial court, to deal with claims of privilege over belief evidence. It appears to us that there are various procedures which could be provided for by the Oireachtas and which might be usefully considered.

6.64 Perhaps the least problematic of such procedures would be to legislate for the appointment of a fourth judge to sit on a court hearing a trial for a membership offence. The fourth judge would be tasked exclusively with resolving any issues that might arise in respect of privilege and would hear the evidence in the case so that he or she has the context necessary for making a decision on privilege issues. The judge would not have a role in deciding on any other legal issues that might arise during the trial, would not have a vote on the verdict, and would not play any role in the deliberations of the other judges on the verdict. Should a claim of privilege be made during the course of the proceedings, the matter would be dealt with exclusively by the fourth judge, sitting in the absence of the other judges, who would inspect materials as necessary. The other judges would play no role in adjudicating on privilege claims and would not see any of the material over which privilege is claimed.

6.65 It would also be possible to legislate for privilege issues to be resolved through a preliminary trial hearing in front of a differently constituted court. It seems to us that this might be a relatively straightforward option to legislate for, as the infrastructure appears largely to be in place. Such preliminary trial hearings are provided for under the Criminal Procedure Act 2021. We note however that some modifications to the legislation may be necessary. In particular, under s. 6 of the 2021 Act, as it presently stands, a preliminary trial hearing can only take place where an accused has *"been sent forward for trial"*. On its face, this would appear to preclude a preliminary trial hearing taking place in circumstances where an accused has been charged directly before a court (as can be done at present in the Special Criminal Court). We note that difficulties might arise in the event that an unanticipated privilege issue arises mid-trial. The resolution of a privilege issue might also require the hearing of a substantial volume of evidence in order to avoid the risk that the material would be reviewed in a vacuum, and essentially lead to two trials taking place.

6.66 Further, it has been suggested in some submissions that provision could be made for a *"special advocate"* system. This would involve an independent lawyer being appointed to represent the interests of the accused when a claim of privilege is made in respect of belief evidence. Although the special advocate is not instructed by the accused, he or she would review the privileged materials and make representations to the court on the accused's behalf. This could, however, involve the wider dissemination of sensitive information. Another possible means of dealing with privilege issues could be to provide for the review of material by prosecution counsel to determine whether a claim of privilege

properly arises. We note the concerns expressed to the Special Criminal Court by An Garda Síochána in *R.K. and L.M.*, considered above, relating to disclosure of materials to prosecution counsel. Whatever the merits of any such concerns, and accepting the validity of general concerns about the sensitivity of the material in question, it is in any event unlikely that a review by the prosecution itself would satisfy concerns about unfairness which have been expressed about this matter.

6.67 We recognise the particular complexities that arise in this area and that there are difficulties attached to each of the above options. However, having evaluated the different potential options which are available, we recommend that particular consideration be given to legislating to provide for a fourth *"privilege"* judge to sit on trials for membership offences, in the manner set out above.

Belief Evidence in Other Contexts

6.68 Section 26 of the 1939 Act allows for admission of belief evidence by a garda not below the rank of chief superintendent in any criminal proceedings where the question whether a particular treasonable document, seditious document, or incriminating document was or was not published by the accused is in issue. The section provides that where the garda:

"[S]tates on oath that he believes that such document was published (as the case may be) by the accused or by the accused in concert with other persons or by arrangement between the accused and other persons, such statement shall be evidence (until the accused denies on oath that he published such document either himself or in concert or by arrangement as aforesaid) that the accused published such document as alleged in the said statement on oath of such officer."

6.69 The Hederman Committee noted two objections to this section. It stated that *"the language of the section may serve to create the impression that the burden shifts to an accused."*[141] However, the Committee believed that, on a true construction, the section merely shifted the evidential burden to an accused following the evidence of a chief superintendent. The Committee went on to note a second objection, which was that the section *"purports to give evidential status and weight to something which may have no probative or evidential value at all"*.[142] Overall, however, the majority adopted the view taken in respect of s. 3(2) of the 1972 Act, recommending that the section be amended to provide that no person should be convicted solely based on belief evidence under s. 26.

6.70 We refer to our recommendation in the previous chapter in respect of the need to reform the documentary offences contained in the 1939 Act. On balance, we consider that there is merit to retaining a provision akin to s. 26 in any legislation replacing the Offences Against the State Acts. Any such provision should, however, be subject to the same restrictions recommended by us above in respect of belief evidence under s. 3(2) of the 1972 Act. In other words, the legislation permitting belief evidence in relation to documents should expressly provide that a person may not be convicted solely on the basis of that belief evidence, and further provide that corroboration or support for belief evidence cannot be supplied solely on the basis of adverse inferences drawn from the silence of the accused.

[141] Hederman Report, at para. 6.69.

[142] Hederman Report, at para. 6.70.

Inferences from Silence

Overview of the Law

6.71 Section 2(1) of the Offences Against the State (Amendment) Act 1998 Act provides that in determining whether a person is guilty of the offence of membership of an unlawful organisation, it is permissible to draw such inferences as appear proper from the fact that the accused, on being questioned by a member of An Garda Síochána in relation to the offence prior to being charged, *"failed to answer any question material to the investigation of the offence"*. The section provides that inferences may be treated as corroboration of any evidence in relation to the offence, but that a person shall not be convicted solely or mainly on the basis of such inferences.

6.72 The section states that a *"question material to the investigation"* includes references to any question *"requesting the accused to give a full account of his or her movements, actions, activities or associations during any specified period"*. The giving of a false or misleading answer can be treated as a failure to answer.

6.73 A number of safeguards are built into the section. The section applies only where the questioning of an accused is recorded by electronic or similar means, or the accused consents in writing to it not being so recorded. Further, the section only has effect where the accused was (a) told in ordinary language when being questioned what the effect of a failure to answer questions might be, and (b) afforded a reasonable opportunity to consult a solicitor before the failure occurred. This opportunity to consult a solicitor must be given in the particular context of the invocation of the statutory provision. It does not suffice to have provided general access to a solicitor at an earlier stage of the investigation.[143]

6.74 Section 10 of the Criminal Justice Act 2011 provides for the amendment of the 1998 Act, so as to provide that inferences may only be drawn from a failure to answer questions where *"the accused was informed before such failure occurred that he or she had the right to consult a solicitor and, other than where he or she waived that right, the accused was afforded an opportunity to so consult before such failure occurred."* As of the date of writing, this provision has not been commenced and this amendment has not taken effect. It is the Review Group's understanding that this section was not commenced in light of subsequent Superior Court judgments on the right of access to a lawyer and the introduction of the practice by An Garda Síochána of allowing a solicitor to be present during an interview in any case where this is requested. It is also understood that it is intended to deal with the right to legal representation in the forthcoming Garda Síochána (Powers) Bill. The question of whether there may still be a need for a provision along the lines of s. 10 should be examined in that context.

6.75 A survey of the case law makes clear that inferences drawn pursuant to s. 2 have played a significant role in trials for membership offences before the Special Criminal Court.[144]

[143] *DPP v. Fitzpatrick* [2013] 3 I.R. 656 at p. 680.

[144] See, for example, *DPP v. Binéad* [2006] IECCA 147, [2007] 1 I.R. 374; *People (DPP) v. Kelly* [2007] IECCA 110, (Unreported, Court of Criminal Appeal, 6th December 2007); *DPP v. Donnelly* [2012] IECCA 78, (Unreported, Court of Criminal Appeal, 30th July 2012); *DPP v. Palmer* [2015] IECA 153, (Unreported, Court of Appeal, 20th July 2015); *DPP v. Nolan* [2015] IECA 165, (Unreported, Court of Appeal, 27th July 2015); *DPP v. Kenna,* (Unreported, Special Criminal Court, 3rd May 2017); *DPP v. McGrane,* (Unreported, Special Criminal Court, 31st October 2017); *DPP v. Metcalfe* [2021] IECA 44, (Unreported, Court of Appeal, 18th February 2021); *Braney v. Ireland* [2021] IESC 7, [2022] 1 I.L.R.M. 141; *DPP v. Cassidy* [2021] IESC 60, [2021] 2 I.R. 710; and *DPP v. Banks* [2022] IESC 7, [2022] 1 I.L.R.M. 323.

As referred to above, there are a number of cases in which a s. 2 inference has acted as the sole evidence corroborating the belief evidence given by a chief superintendent: see, for example, *DPP v. Binéad*[145]; *DPP v. Donnelly*[146]; and *DPP v. Metcalfe*.[147]

6.76 There are a number of other statutory provisions outside of the Offences Against the State Acts which permit inferences to be drawn at trial from the accused's failure to answer material questions, account for certain matters, or mention facts later relied on in his or her defence. The most significant are of these are contained in the Criminal Justice Act 1984, as amended by the Criminal Justice Act 2007. Section 18 permits inferences to be drawn from the failure or refusal of an accused to account for any object, substance or mark on his person, clothing, or other items. Section 19 permits inferences to be drawn from the failure or refusal of the accused to account for his or her presence at a particular place at or about the time of an offence. Section 19A permits inferences to be drawn where the accused, during questioning or when being charged, failed to mention any fact relied on in his or her defence in those proceedings, being a fact which in the circumstances existing at the time clearly called for an explanation from him or her. There have been a number of important judgments in respect of these inference provisions in recent years.[148]

6.77 Various safeguards apply to these three provisions. These mirror the safeguards which are in place in s. 2 of the 1998 Act. A person may not be convicted of an offence solely or mainly based on an inference drawn under ss. 18, 19 or 19A of the 1984 Act. The sections shall not have effect unless the accused was told in ordinary language what the effect of the failure or refusal might be and was afforded a reasonable opportunity to consult a solicitor. The sections do not apply in relation to the questioning unless it is recorded by electronic or similar means or the person consents in writing to it not being so recorded.

6.78 The inference provisions in the 1984 Act apply *"in any proceedings against a person for an arrestable offence"*. The term *"arrestable offence"* means an offence punishable by imprisonment of five years or more. For this reason, these inference provisions might – and often are – used in the prosecution of offences under the Offences Against the State Acts. This point is underscored by the fact that s. 5 of the 1998 Act, which provided that inferences could be drawn from the accused's failure to mention a matter later relied upon at trial for an offence under the Offences Against the State Acts or a scheduled offence, was repealed by the Criminal Justice Act 2007 and replaced by s. 19A of the 1984 Act.

6.79 Section 72A of the Criminal Justice Act 2006 applies in trials for organised crime offences. Like s. 2 of the 1998 Act, it allows for inferences to be drawn from a failure to answer material questions when being questioned by a member of An Garda Síochána in relation to the offence. Unlike s. 2 of the 1998 Act, the section provides considerable detail as to the type of question to be considered as *"material to the investigation of the offence"*.

[145] [2006] IECCA 147, [2007] 1 I.R. 374.

[146] [2012] IECCA 78, (Unreported, Court of Criminal Appeal, 30th July 2012).

[147] [2021] IECA 44, (Unreported, Court of Appeal, 18th February 2021).

[148] See, for example, *DPP v. Devlin* [2012] IECCA 70, (Unreported, Court of Criminal Appeal, 6th July 2012); *DPP v. Fitzpatrick* [2012] IECCA 74, [2013] 3 I.R. 656; *DPP v. A McD.* [2016] IESC 71, [2016] 3 I.R. 123; *DPP v. Wilson* [2017] IESC 53, [2019] 2 I.R. 158; *DPP v. Roche* [2019] IECA 317, (Unreported, Court of Appeal, 19th December 2019); *DPP v. Sheehan* [2021] IESC 49, [2021] 1 I.R. 33; and *DPP v. Maguire* [2021] IECA 223, (Unreported, Court of Appeal, 30th July 2021).

Position of the Hederman Committee and Submissions Received

6.80 A majority of the Hederman Committee was of the view that s. 2 of the 1998 Act should be retained.[149] It noted that the power to draw inferences under the section is a limited one and that the section contains the necessary safeguards to protect the right to silence.

6.81 A minority of the Committee recommended repeal of the section.[150] Certain minority members argued that s. 2 seemed to permit adverse inferences to be drawn even where there is no *prima facie* case or other set of circumstances which call for an explanation from the accused. They stated that the provision is capable of operating in a manner that is potentially unfair to an accused. Other members of the minority agreed with these criticisms, but also took the position that the use of inference-drawing provisions is objectionable in principle.

6.82 Section 2 was addressed in a number of the submissions received by the Review Group. Some submissions argued that s. 2 should be repealed on the basis that it poses an unacceptable interference with the right to silence. Other submissions took the view that the section should be retained, arguing that it is an important provision which is invaluable in the prosecution of the offence of membership of an unlawful organisation and contains adequate safeguards which protect the rights of the accused.

6.83 Certain submissions accepted that s. 2 should be retained, but advocated a narrowing of the circumstances in which inferences from silence can be used: for instance, arguing that s. 2 should be amended to provide that inferences from silence cannot corroborate other circumstantial evidence; to provide specifically that inferences cannot corroborate the belief evidence of a chief superintendent given under s. 3 of the 1972 Act; or to provide that inferences may only be drawn where the trier of fact is satisfied beyond a reasonable doubt that there is no innocent explanation for the failure to answer a material question.

Recommendations

6.84 The right to silence is protected by both the Constitution and the Convention.[151] We are of the view that effective protection of that right is of vital importance in ensuring the fair trial of accused persons. That said, the right to silence is not absolute. The Irish courts[152] and the European Court of Human Rights[153] have accepted that, in principle, provision may be made for inferences to be drawn from the silence of an accused person in certain circumstances, provided that adequate safeguards are in place.

6.85 In determining whether s. 2 of the 1998 Act should be retained, we have carefully assessed the safeguards contained in that provision. We note in the first instance that there are limitations inherent in the inference-drawing power. Only such inferences as *"appear proper"* may be drawn. As the Supreme Court held in *Rock v. Ireland* – when considering similar wording in ss. 18 and 19 of the 1984 Act – this means that a court could refuse to allow an inference to be drawn in circumstances where its prejudicial effect would wholly

[149] Hederman Report, at para. 8.63.

[150] Hederman Report, at paras. 8.64 to 8.69.

[151] The constitutional protection is clearly established in cases such as *Heaney v. Ireland* [1994] 3 I.R. 593 (H.C.); [1996] 1 I.R. 580 (S.C.); *Re National Irish Bank Ltd (No. 1)* [1999] 3 I.R. 145; and *DPP v. Finnerty* [1999] 4 I.R. 364. Protection under Article 6 of the Convention is considered in cases such as *Heaney and McGuinness v. Ireland* (2001) 33 E.H.R.R. 264 and *Averill v. United Kingdom* (1996) 22 E.H.R.R. 29.

[152] See, for example, *Rock v. Ireland* [1997] 3 I.R. 484.

[153] See, for example, *Murray v. United Kingdom* (1996) 22 E.H.R.R. 29.

outweigh its probative value as evidence.[154] In addition, the accused must be told in ordinary language when being questioned what the effect of a failure to answer questions might be, and must be afforded a specific opportunity to consult with a solicitor in the particular context of the statutory provision. Another safeguard is provided by the fact that an accused person may not be convicted solely or mainly based on such inferences.

6.86 These are important and valuable safeguards. However, as discussed earlier in this chapter, we believe that a further safeguard on the use of s. 2 of the 1998 Act is required. As set out above, there have been a number of cases in which an accused person has been convicted solely based on the combination of inferences drawn from silence under s. 2 of the 1998 Act and the belief evidence of a chief superintendent given under s. 3 of the 1972 Act. We are of the view that it is not appropriate that two exceptional pieces of evidence be used to ground a conviction in this way. We therefore recommend that provision be made in legislation to the effect that an inference drawn from the silence of an accused under s. 2 of the 1998 Act should not be capable of providing the sole corroboration for belief evidence. Similarly, belief evidence should not be capable of providing the sole corroboration for inferences drawn from silence.

6.87 Subject to the addition of this further safeguard, we think that it is appropriate that continued provision is made in law for inferences to be drawn in the manner provided for under s. 2 of the 1998 Act and we recommend that this provision be re-enacted in any legislation that replaces the Offences Against the State Acts.

6.88 For completeness, we have considered whether there is an ongoing need for s. 2 of the 1998 Act given the existence of other inference provisions on the statute book. However, it appears to us that those provisions have a different purpose and do not serve the same function as s. 2 of the 1998 Act, which deals specifically with inferences that might be drawn in the course of the trial of a membership offence.

Incriminating Documents

6.89 Section 24 of the 1939 Act provides for proof of membership of an unlawful organisation based on possession of an incriminating document. The section states as follows:

> *"On the trial of a person charged with the offence of being a member of an unlawful organisation, proof to the satisfaction of the court that an incriminating document relating to the said organisation was found on such person or in his possession or on lands or in premises owned or occupied by him or under his control shall, without more, be evidence until the contrary is proved that such person was a member of the organisation at the time alleged in the said charge."*

6.90 Section 2 of the 1939 Act defines an *"incriminating document"* as *"a document of whatsoever date, or bearing no date, issued by or emanating from an unlawful organisation or appearing to be so issued or so to emanate or purporting or appearing to aid or abet any such organisation or calculated to promote the formation of an unlawful organisation."*

6.91 The constitutionality of s. 24 was upheld in *O'Leary v. Attorney General*.[155] The plaintiff in that case had been convicted of membership of an unlawful organisation. He sought a declaration that the section infringed the constitutional right to a trial in due course of law by placing the burden of disproving his guilt upon him. This argument was rejected

[154] [1997] 3 I.R. 484.

[155] [1993] 1 I.R. 102 (H.C.); [1995] 1 I.R. 254 (S.C.).

by the Supreme Court, which held that proof of possession of the document amounted to evidence only and not proof of membership. Its probative value would depend on the circumstances and did not compel a court to convict. Section 24 did not, therefore, displace the presumption of innocence.

6.92 The Hederman Committee noted that this section has on occasion led to the conviction of persons charged with membership simply by reason of their possession of incriminating documents, even if on occasion these documents might be regarded as equivocal or where the accused has otherwise denied membership of an illegal organisation.[156]

6.93 A majority of the Hederman Committee considered that s. 24 is not entirely satisfactory, principally because it might have the effect of transferring the evidential burden to an accused in circumstances where it would be unfair to do so and also because it could readily have the effect of declaring one thing to be evidence of another thing, when as a matter of ordinary experience and common sense this would often not be the case.[157] The majority recommended the deletion of the section in its current form and suggested that it might be recast so as to provide that possession of such documentation could only be evidence of membership of an illegal organisation where the possession was of such a kind as to give rise to a reasonable suspicion that the accused was a member of an unlawful organisation. The majority also commented that part of the difficulty caused by the section was due to the very wide definition of *"incriminating document"*, which would embrace, for example, statements and press releases purporting to emanate from an illegal organisation.

6.94 Other members of the Hederman Committee recommended that the section be repealed without being replaced.[158] This was on the basis that the section is unnecessary as it goes no further than expressing, in statutory form, a process of inferential reasoning which a court would be obliged to adopt in the absence of such a provision. A further minority view was that s. 24 is satisfactory as it stands, as the courts have made it clear that they will assess the significance and value of evidence of possession in each case.[159]

6.95 The section was addressed in a single submission received by the Review Group. This submission stated that possession of an incriminating document should only be evidence of membership where the nature of the document is enough to give rise to a reasonable suspicion that the accused is a member of an unlawful organisation.

6.96 We recommend that s. 24 of the 1939 Act should be repealed and should not be re-enacted as part of legislation replacing the Offences Against the State Acts. We are conscious of the difficulties with the section pointed out by the Hederman Committee. We are also of the view that a section of this nature is not necessary or appropriate. We consider instead that evidence of incriminating documents should be dealt with in accordance with the ordinary rules of evidence. If a person is found in possession of an incriminating document, evidence of that fact may be adduced by the prosecution in accordance with the ordinary rules of evidence. The weight to be given to that evidence is a matter to be properly weighed by the tribunal of fact based on the circumstances of the case.

[156] Hederman Report, at para. 6.54.

[157] Hederman Report, at paras. 6.63 and 6.64.

[158] Hederman Report, at para. 6.65.

[159] Hederman Report, at para. 6.66.

Evidence of Statements and Conduct

6.97 Section 3(1)(a) of the 1972 Act makes further provision for evidence in a trial for the offence of membership of an unlawful organisation. It provides that *"any statement made orally, in writing or otherwise, or any conduct, by an accused person implying or leading to a reasonable inference that he was at a material time a member of an unlawful organisation shall, in proceedings under section 21 of the Act of 1939, be evidence that he was then such a member."*

6.98 The term *"conduct"* is defined in s. 3(1)(b) as including:

> *"(i) movements, actions, activities or associations on the part of the accused person, and*
>
> *(ii) omission by the accused person to deny published reports that he was a member of an unlawful organisation, but the fact of such denial shall not by itself be conclusive."*

6.99 In *DPP v. McGurk*, the Court of Criminal Appeal indicated that conduct must have some connection with membership of an unlawful organisation in order to give rise to the reasonable inference that the accused was a member of that organisation.[160]

6.100 The Hederman Committee stated that s. 3(1)(a) was unobjectionable insofar as it dealt with oral and written statements implying membership.[161] It noted that, at common law, statements against interest are admissible as an exception to the hearsay rule, and written or oral statements of this kind from an accused often constitute highly probative evidence.

6.101 The Hederman Committee recommended the deletion of s. 3(1)(b)(ii) so that the failure to deny published reports should not be regarded as evidence from which an inference as to membership of an unlawful organisation could be made by the court of trial.[162] The Committee stated that the failure to deny the report might arise for any number of reasons, and it seemed unacceptable that the Oireachtas should artificially deem a certain state of affairs to be evidence from which an inference of membership might be drawn when the reports themselves might be entirely valueless.

6.102 However, the Hederman Committee did not see any issue with the section providing that other aspects of the conduct of the accused could be taken into account: it stated that *"this imports no arbitrary or contrived evidential rule, but seems merely to state in statutory form a rule of evidence which the court would presumably otherwise apply in the absence of this statutory provision."*[163] One member of the Committee did object to the inclusion of the word *"association"* in s. 3(1)(b)(i), on the basis that it opens up the possibility of the accused being contaminated merely by the company that he or she keeps, even if unaware that his or her companions are members of an unlawful organisation.

6.103 These provisions were addressed in two of the submissions received by the Review Group. Both submissions recommended that the failure to deny published reports should be removed from the definition of *"conduct"*. One of the submissions made the further argument that, insofar as associations with other persons can be taken into account under this section, factors such as the closeness of the association, and the time when such association was said to have taken place, should go to the weight of that evidence and consideration should be given as to whether any amendment to the legislation is required to make provision in this regard.

[160] [1994] 2 I.R. 579.

[161] Hederman Report, at para. 6.73.

[162] Hederman Report, at paras. 6.76 to 6.83.

[163] Hederman Report, at para. 6.81.

6.104 Having considered the views expressed by the Hederman Committee and in the submissions, we recommend the deletion of s. 3(1)(b)(ii) of the 1972 Act, so that the failure to deny published reports is not included as *"conduct"* which may be taken into account under s. 3(1)(a). We do not consider that it is necessary to make any legislative change in respect of association evidence. We are of the view that the factors highlighted in the above submission will be taken into account by the trial court in deciding what weight, if any, should be afforded to the evidence.

Chapter 7

Powers of Search, Arrest and Detention

7.1 The Offences Against the State Act 1939 provides members of An Garda Síochána with powers of search, arrest and detention in relation to offences under the Act and scheduled offences. In this chapter, we consider whether those powers should be retained and re-enacted as part of any legislation replacing the Offences Against the State Acts.

Overview of the Law

Search Powers

7.2 Section 29 of the Offences Against the State Act 1939 Act provides for a search warrant to be issued for the search of a place where there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence under the 1939 Act, an offence under the Criminal Law Act 1976, treason, or a scheduled offence is to be found.

7.3 The section as originally drafted – and as it stood following its amendment by s. 5 of the Criminal Law Act 1976 – provided that a garda of a particular rank could issue a search warrant to another garda, without any significant restrictions on this power. In *Damache v. DPP*, the Supreme Court declared that this was unconstitutional.[164]

7.4 The essential basis for the Supreme Court's decision in *Damache* was that the section did not include any requirement that the garda issuing the search warrant was independent of the investigation in relation to which the warrant was being issued. Denham C.J. stated that for the process in obtaining a search warrant to be meaningful, it is necessary for the person authorising the search to be able to assess the conflicting interests of the State and the individual in an impartial manner. The court highlighted the fact that s. 29 allowed for a warrant to be issued by a member of the investigation team and who therefore was not independent on matters related to the investigation.

7.5 Following *Damache*, the Criminal Justice (Search Warrants) Act 2012 substituted a new s. 29 into the 1939 Act. Section 29 now provides that:

- A judge of the District Court may issue a warrant for the search of a place and any persons found at that place where satisfied by information on oath of a member of An Garda Síochána not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence under the 1939 Act, an offence under the Criminal Law Act 1976, treason, or a scheduled offence is to be found there. The warrant remains valid for seven days.
- Alternatively, where a member of An Garda Síochána not below the rank of superintendent is satisfied that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence to which the section applies is to be found in any place, he or she may issue a search warrant to a member of An Garda Síochána not below the rank of sergeant. The issuing member must

[164] [2012] IESC 11, [2012] 2 I.R. 266.

be satisfied that the search warrant is necessary for the proper investigation of an offence and that *"circumstances of urgency giving rise to the need for the immediate issue of the search warrant"* would render it impracticable to apply to a judge of the District Court for the warrant. Moreover, the member may only issue a search warrant if he or she is independent of the investigation of the offence in relation to which the search warrant is being sought. A warrant issued by a member of An Garda Síochána ceases to have effect after a period of 48 hours has elapsed from the time of the issue of the warrant.

7.6 In *DPP v. Behan*, the Supreme Court considered the requirement in s. 29 that the garda issuing the warrant must be independent of the investigation of the offence.[165] In that case, the appellant was convicted of offences arising out of an attempted armed robbery of a pizzeria in a shopping centre. The evidence adduced against him at trial included evidence that a glove bearing traces of firearms residue and the DNA of the appellant was found in a search of the appellant's home. That search was carried out on foot of a warrant issued by a detective superintendent pursuant to s. 29 of the Offences Against the State Act 1939. The appellant argued in this case that the detective superintendent in question was not sufficiently independent and therefore the warrant was unlawfully issued.

7.7 A majority of the Supreme Court held that the warrant had been issued in breach of s. 29 of the 1939 Act. O'Malley J. noted that the superintendent who issued the warrant held the role of division detective superintendent. It was his job to be involved in any serious incident, in order to take on an oversight function and to ensure that the investigation was carried out as effectively as possible. For that reason, he had to be considered *"part of an investigating team"*. Accordingly, the warrant was issued in breach of s. 29.

7.8 A warrant issued under s. 29 permits the garda named in the warrant, accompanied by other garda members or members of the Defences Forces, to enter the place named on the warrant and search it and any persons found at that place. Section 29(8) provides that a member of An Garda Síochána or the Defence Forces acting under the authority of the warrant may (a) require anyone present at the place to give their name and address; and (b) arrest without warrant any person who fails to comply with this requirement, gives a name or address which is reasonably believed to be false or misleading, or obstructs the carrying out of his or her duties. It is a criminal offence to so obstruct or attempt to obstruct a member of An Garda Síochána or the Defence Forces acting under the authority of a warrant or to fail to comply with a requirement to provide one's name and address when required.

7.9 For completeness, it should be noted that s. 30 of the 1939 Act also provides gardaí with a search power. It states that a member of An Garda Síochána may, without warrant, stop and search any person whom he or she suspects of: having committed or being about to commit or being or having been concerned in the commission of an offence under the 1939 Act or a scheduled offence; carrying a document relating to the commission or intended commission of any such offence; or of being in possession of information relating to the commission or intended commission of any such offence.

[165] [2022] IESC 23, (Unreported, Supreme Court, 30th May 2022).

Powers of Arrest

7.10 Section 30 of the 1939 Act states that a member of An Garda Síochána may, without warrant, arrest any person whom he or she suspects of having committed or being about to commit or being or having been concerned in the commission of an offence under the 1939 Act or a scheduled offence; carrying a document relating to the commission or intended commission of any such offence; or being in possession of information relating to the commission or intended commission of any such offence.

7.11 Section 30 does not expressly say that the suspicion grounding the arrest must be a reasonable one. Nonetheless, the courts have read such a requirement into the provision.[166] There must also be evidence before the court of the suspicion underpinning the arrest pursuant to s. 30.[167] The requirement as to the underlying suspicion in respect of the commission of an offence incorporates both a subjective and an objective element. It must be genuinely held[168] and it must be based on reasonable grounds.[169] In *Walshe v. Fennessy*, the Supreme Court stated that the relevant suspicion in the context of s. 30 is *"a suspicion which, to be found not unreasonable, must find some objective justification from the surrounding circumstances and the information available to the arresting officer."*[170]

7.12 The courts have held that, subject to certain exceptions, a person who is being arrested pursuant to s. 30 is entitled to be told by the arresting officer of the fact of the arrest and the reason for the arrest.[171] The requirement that he or she should be so informed does not mean that technical or precise language must be used. It is sufficient if the person being arrested knows in substance the reason for the restraint on his or her liberty.[172]

7.13 Under the 1939 Act as originally enacted, a person who had been arrested and detained pursuant to s. 30 and released without charge could not be re-arrested for the same offence. This changed with the insertion of a new s. 30A into the 1939 Act. This section was originally inserted by s. 11 of the 1998 Act, but the section was substituted by s. 21 of the Criminal Justice (Amendment) Act 2009. Section 30A provides that a person previously arrested and detained pursuant to s. 30 and released without charge shall not be arrested again in connection with the offence to which such detention related or any other offence which, at the time of the first arrest, the arresting garda suspected or ought reasonably to have suspected him or her of, except under the authority of a warrant issued by a judge of the District Court. Such a warrant may only be issued where the judge is satisfied on information supplied on oath by a member of An Garda Síochána not below the rank of superintendent that either:

(i) Further information has come to the knowledge of An Garda Síochána since the person's release as to his suspected participation in the offence for which his arrest is sought; or

[166] See, for example, *State (Trimbole) v. Governor of Mountjoy Prison* [1985] I.R. 550; *DPP v. Quilligan* [1986] I.R. 495; *DPP v. Tyndall* [2005] IESC 28, [2005] 1 I.R. 593; *DPP v. Quilligan* (No. 3) [1993] 2 I.R. 305; and *Braney v. Ireland* [2021] IESC 7, [2022] 1 I.L.R.M. 141.

[167] *DPP v. Tyndall* [2005] IESC 28, [2005] 1 I.R. 593.

[168] *State (Trimbole) v. Governor of Mountjoy Prison* [1985] I.R. 550.

[169] *DPP v. Quilligan* [1986] I.R. 495; *DPP v. Quilligan* (No. 3) [1993] 2 I.R. 305; and *Braney v. Ireland* [2021] IESC 7, [2022] 1 I.L.R.M. 141.

[170] *Walshe v. Fennessy* [2005] IESC 51, [2005] 3 I.R. 516 at p. 542.

[171] See, for example, *Re Ó Laighléis* [1960] I.R. 93; *DPP v. Walsh* [1980] I.R. 294; *DPP v. Byrne* [1987] I.R. 363; and *DPP v. Quilligan* (No. 3) [1993] 2 I.R. 305.

[172] *Mulligan v. DPP* [2008] IEHC 334, [2009] 1 I.R. 794.

(ii) Notwithstanding that An Garda Síochána had knowledge, prior to the person's release, of the person's suspected participation in the offence for which his arrest is sought, the questioning of the person in relation to that offence, prior to his release, would not have been in the interests of the proper investigation of the offence.

7.14 In *DPP v. Banks*, the Supreme Court considered the requirements of s. 30A of the 1939 Act in relation to the offence of membership of an unlawful organisation.[173] The court noted that s. 30A applied not just to an arrest *"for"* the same offence, but also to an arrest *"in connection with the same offence"*. The court held that in examining this limitation in the case of an arrest for the offence of membership of an unlawful organisation, it was essential to bear in mind both elements of the membership offence: these were adherence, as well as the act of participation. The court noted that an investigation into a particular occurrence may well, as an investigation, be concerned with acts of participation on the part of a suspect that are entirely separate from those with which the gardaí were concerned at an earlier time. However, it would be difficult to describe the element of adherence, which by its nature implies at least some degree of continuity, as being *"unconnected"*. The court therefore held that the statute applies to an arrest on suspicion of membership if the person was previously arrested on suspicion of membership and released without charge.

Detention Powers

7.15 Sections 30(3) and (4) of the 1939 Act provide for a power of detention for up to 72 hours in respect of persons arrested under s. 30(1). Those subsections provide as follows:

> *"(3) Whenever a person is arrested under this section, he may be removed to and detained in custody in a Garda Síochána station, a prison, or some other convenient place for a period of twenty-four hours from the time of his arrest and may, if an officer of the Garda Síochána not below the rank of Chief Superintendent so directs, be so detained for a further period of twenty-four hours.*
>
> *(4) An officer of the Garda Síochána not below the rank of superintendent may apply to a judge of the District Court for a warrant authorising the detention of a person detained pursuant to a direction under subsection (3) of this section for a further period not exceeding 24 hours if he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned."*

7.16 Accordingly, a person arrested under s. 30 may be detained in a garda station or other place for up to 72 hours.[174] The initial 24 hours of detention is grounded on the reasonable suspicion of the member who effected the arrest under s. 30(1). An extension of 24 hours may be granted by a member not below the rank of chief superintendent. Such extension may be authorised only if the member has a *bona fide* suspicion that the detainee was involved in the offence for which he or she was arrested.[175] A further 24-hour extension may be authorised by a judge of the District Court. The judge may issue a warrant for such further detention only if satisfied that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously.[176]

[173] [2022] IESC 7, (Unreported, Supreme Court, 10th February 2022).

[174] See ss. 30(3) and (4) of the 1939 Act, as amended, discussed below.

[175] *DPP v. Eccles* (1986) 3 Frewen 36; *DPP v. Howley* [1989] I.L.R.M. 629.

[176] Section 30(4A) of the 1939 Act.

7.17 The Supreme Court upheld the constitutional validity of the s. 30 detention provisions in *DPP v. Quilligan (No. 3)*.[177] The Supreme Court upheld the constitutionality of those provisions again in *Braney v. Ireland*.[178] In *Braney*, the applicant claimed that because the detention provisions in s. 30 differ from those applying to other forms of detention, his detention was unconstitutional. The Supreme Court was not satisfied that there was any compelling reason to depart from its decision in *Quilligan (No. 3)*. The court further held that, in any event, there was a legitimate basis for the distinction between the detention regime under s. 30 and that found in other statutory enactments, given the focus of s. 30 on combatting terrorism and organised crime. Moreover, the court was satisfied that s. 30 is not constitutionally infirm because it contains adequate safeguards and adheres to the *"floor of rights"* which is required of all detention provisions.

Other Garda Powers

7.18 An analysis of the law in this area would be incomplete without reference to other garda powers which are provided for under the general corpus of criminal law, but which may be invoked in relation to investigations into offences against the State.

7.19 Various statutes provide for the issuance of search warrants in respect of individual offences or classes of offences. Section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 also provides a general power for a District Court judge to issue a warrant for the search of a place if satisfied by information on oath of a member not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of or relating to the commission of an *"arrestable offence"* – that is, any offence punishable by five or more years imprisonment – is to be found there.

7.20 Powers of arrest are to be found in a range of statutory provisions. The most significant is the power of arrest in respect of an *"arrestable offence"* – again, any offence punishable by five or more years imprisonment – provided in s. 4 of the Criminal Law Act 1997.

7.21 There are also a number of statutory powers of detention outside of s. 30 of the 1939 Act. For instance, s. 4 of the Criminal Justice Act 1984 allows for detention of up to 24 hours for any offence punishable by five or more years imprisonment. Other enactments permit lengthier periods of detention: s. 50 of the Criminal Justice Act 2007, for instance, provides for detention of up to seven days for persons arrested for certain serious offences, including certain firearms and organised crime offences. Section 2 of the Criminal Justice (Drug Trafficking) Act 1996 makes similar provision for drug trafficking offences.

7.22 Gardaí have a number of other powers, contained in legislation other than the Offences Against the State Acts, which can be invoked in the context of subversive and organised crime as well as other offences. These include powers to take fingerprints, palmprints, photographs and intimate and non-intimate bodily samples; powers of search consequent on arrest or detention; powers to enter premises to effect an arrest; powers of stop, question and search; powers of surveillance; powers to intercept telecommunications and postal messages; and powers to access and retain certain communications records.

7.23 We note that, at present, efforts are being made to consolidate the law in relation to garda powers of search, arrest and detention *via* the Garda Siochána (Powers) Bill. This

[177] [1993] 2 I.R. 305.

[178] *Braney v. Ireland* [2021] IESC 7, [2022] 1 I.L.R.M. 141.

Bill intends to draw together certain garda powers which are split amongst different enactments, leading to consistency in the powers that can be exercised by gardaí in respect of different offences. The general scheme of the Bill indicates that, pending the completion of the work of the Review Group, it is not proposed that the general powers in the Bill would replace those contained in the Offences Against the State Acts.

Position of the Hederman Committee and Submissions Received

7.24 Regarding s. 29 of the 1939 Act, a majority of the Hederman Committee recommended that the legislature should introduce a maximum period of 24 hours during which a warrant issued under that section must be executed. Other Committee members considered that a warrant should remain valid for seven days.[179] The Committee did not believe that members of the Defence Forces should be provided with a power of arrest under the section.[180] Further, the Committee rejected the proposal that the power to issue a search warrant under s. 29 should be confined to certain predefined offences set out in the 1939 Act.

7.25 The Hederman Committee made a number of recommendations in respect of s. 30 of the 1939 Act, which may be summarised as follows:

- The introduction of a provision providing that if, at any time during the detention of a person pursuant to s. 30, there are no longer reasonable grounds for suspecting that the person has committed the offence for which he or she was arrested, he or she shall be released from custody forthwith unless detention is authorised apart from the Act.[181]
- The offences that trigger the application of s. 30 ought to be determined by the Oireachtas itself by means of primary legislation.[182] The situation whereby s. 30 applied to all scheduled offences allowed the Government the right to decide the category of offences which may trigger the powers of arrest and detention under that section.
- The word *"interrogate"* should be deleted from s. 30(1).[183]
- The power under s. 30(1) to arrest a person who is suspected of *"being in possession of information relating to the commission or intended commission of any such offence"* should be deleted.[184]
- The words *"being about to commit"* should be deleted from s. 30(1) and replaced with a power to affect an arrest *"when it is reasonably considered necessary to prevent the imminent commission of an offence."*[185]
- To remove any room for misunderstanding, s. 30 should be amended so as to expressly provide a requirement that the arresting garda have a *"reasonable suspicion"*.[186]

[179] Hederman Report, at paras. 6.140 to 6.143.
[180] Hederman Report, at para. 6.144.
[181] Hederman Report, at paras. 7.17 to 7.19.
[182] Hederman Report, at para. 7.23 to 7.31.
[183] Hederman Report, at paras. 7.41 to 7.43.
[184] Hederman Report, at paras. 7.44 to 7.50.
[185] Hederman Report, at paras. 7.51 to 7.57.
[186] Hederman Report, at paras. 7.66 to 7.69.

7.26 The Hederman Committee was evenly divided on the question of whether the period of detention provided under s. 30 was too long, and whether the possibility of an extension of 24 hours by a District Court judge should be removed.[187]

7.27 The Review Group received a number of submissions which recommended that s. 30 of the 1939 Act be amended so as to include the specific requirement that a suspect be immediately released if there are no longer reasonable grounds to suspect them of committing the offence to which the section applies, so as to make the provision consistent with the equivalent detention power in s. 4 of the Criminal Justice Act 1984. Another submission called for an amendment to s. 30 to require that a suspect be charged with the relevant offence as soon as there is enough evidence to bring that person before the court.

7.28 Other submissions recommended that s. 30A of the 1939 Act should be amended to provide that where a person is to be re-arrested in relation to the commission of a membership offence contrary to s. 21 of the 1939 Act, that person should be arrested pursuant to warrant issued by a District Court Judge under s. 30A(1), save where the arresting garda has reason to believe that the membership offence for which the accused was previously arrested is distinct from the current offence.

7.29 One submission expressed concern that the periods of detention without charge under the Offences Against the State Acts have increased over time; that persons may be arrested on suspicion of being about to commit an offence; and that the majority of persons arrested under s. 30 are never charged with an offence. This submission queried the compatibility of s. 30 with Articles 9 and 14 of the International Covenant on Civil and Political Rights, and emphasised the disparity between the number of persons arrested under s. 30 of the 1939 Act and the number of persons prosecuted and convicted under the same Act.

Recommendations

7.30 We have considered whether the powers of search, arrest and detention contained in the 1939 Act should be re-enacted in any legislation which replaces the Offences Against the State Acts and, if so, whether these powers should be subject to the modifications recommended in the Hederman Report and the submissions received. We think that this ties into the broader question as to whether there should be specific garda powers designed to deal with offences against the State, or whether such offences are more properly dealt with through the usual garda powers that apply to the general body of criminal offences.

7.31 It appears to us that it would certainly be open to the Oireachtas to provide specific powers of search, arrest and detention for the purposes of dealing with offences against the State. This follows from *Braney v. Ireland*, where the Supreme Court held that it is legitimate for the Oireachtas, when conferring garda powers, to differentiate between the offences under the 1939 Act, which are aimed at targeting terrorist and organised crime activities, and those general offences referred to in the Criminal Justice Act 1984, provided that a floor of rights is observed.[188]

7.32 However, we believe that having one set of garda powers which apply to all serious offences – rather than specific garda powers applying to subversive crime – would be of considerable benefit in promoting clarity and consistency in the law.

[187] Hederman Report, at paras. 7.32 to 7.40.

[188] [2021] IESC 7, [2022] 1 I.L.R.M. 141 at para. 78.

7.33 Further, as a matter of principle, we think that it is undesirable to provide garda powers to deal with special categories of offences unless there is good reason to do so. It does not appear to us that there is a continuing necessity to provide for specific garda powers in respect of offences against the State as done in the 1939 Act, given that those powers are often matched or exceeded by the general powers which are now available to gardaí. When first introduced, ss. 29 and 30 of the 1939 Act were novel provisions which conferred powers on An Garda Síochána in respect of offences under the 1939 Act and scheduled offences in circumstances where no equivalent powers existed under the general criminal law. The legislative landscape has undergone dramatic change since then.

7.34 Having regard to these considerations, we recommend that the powers of search, arrest and detention contained in the 1939 Act should not be re-enacted. Instead, general garda powers should be used to deal with offences against the State.

7.35 As set out above, the law in relation to garda powers is being consolidated at present via the Garda Síochána (Powers) Bill. We recommend that this Bill should be drafted in such a manner that the consolidated powers contained therein are broad enough to cover offences against the State. We have considered whether this approach would lead to a diminution of the powers available to gardaí for dealing with subversive offences. Given the early stage at which the Garda Síochána (Powers) Bill is at, it is difficult to provide a definitive answer to this question. However, we note that the Bill makes provision for powers of stop and search (Head 9); for search warrants to be issued by a District Court judge (Head 15) and, in urgent circumstances, by a member of An Garda Síochána (Head 21); for a general power of arrest (Head 23); and for extended periods of detention for certain serious offences (Head 47). Having regard to these provisions, it does not appear to us that a situation in which the general powers contained in the Garda Síochána (Powers) Bill would extend to offences against the State would result in any diminution of the powers currently available to gardaí to effectively tackle such offences.

Chapter 8

Powers of Internment

8.1 Part II of the Offences Against the State (Amendment) Act 1940 provides for powers to arrest and detain persons without trial in certain circumstances. In other words, it provides for powers of internment. In this chapter, we consider whether those powers should be re-enacted as part of any legislation which replaces the Offences Against the State Acts.

Overview of the Law

8.2 Part VI of the Offences Against the State Act 1939 contained internment provisions. However, this Part of the legislation was declared to be unconstitutional in *State (Burke) v. Lennon* on the basis that internment was at odds with the constitutional rights to trial in due course of law and personal liberty.[189]

8.3 The Offences Against the State (Amendment) Act 1940 was introduced following the decision in *Burke*, ostensibly to replace Part VI of the 1939 Act.

8.4 Part II of the 1940 Act comes into force if and when the Government makes and publishes a proclamation declaring that internment is necessary to secure the preservation of public peace and order. It then remains in force until such time as the Government makes and publishes a further proclamation that Part II is no longer in force, or Dáil Éireann passes a resolution annulling the proclamation declaring that internment is necessary.

8.5 When Part II is in force, a Minister of the Government may by warrant order the arrest and detention of any person who, in the opinion of the Minister, is engaged in activities that are prejudicial to the preservation of public peace and order or to the security of the State. Once the order is made, the person may be arrested by a member of An Garda Síochána and detained in a prison or other place of detention prescribed for that purpose by regulations made under Part II. The release of a detainee may be ordered at any time by a Minister of the Government, if he or she thinks it proper.

8.6 Whenever Part II is in force, the Government is required to set up a Commission tasked with carrying out reviews of the detention of persons detained under the legislation. The Commission must consist of three persons. Two of these persons must be judges, former judges, barristers or solicitors. One must be an officer of the Defence Forces. Any detained person may apply in writing to the Government to have the continuation of his or her detention considered by the Commission. The Commission must then inquire into the grounds of detention and report to the Government. If the Commission reports that there are no reasonable grounds for the person's continued detention, the person must be released.

8.7 While Part II is in force, the Government is required to report to each House of the Oireachtas at least every six months, giving particulars of: persons detained under the Act;

[189] [1940] I.R. 136.

persons in respect of whom the Commission has reported to the Government that no reasonable grounds exist for continued detention; persons who were released on foot of a report by the Commission; and persons released without a report by the Commission.

8.8 Part II of the 1940 Act was activated by way of Government proclamation in July 1957. It thereafter remained in force until 1962. It has not been activated since.

8.9 The 1940 Act was the subject of an Article 26 reference to the Supreme Court.[190] The Supreme Court upheld the constitutionality of the legislation, meaning that it enjoys immunity from further constitutional challenge. The court rejected the view expressed by Gavan Duffy J. in *Burke* that powers of internment create or purport to create a criminal offence. Instead, a majority of the Supreme Court held that *"the detention is not in the nature of punishment, but is a precautionary measure taken for the purpose of preserving the public peace and order and the security of the State."*[191]

8.10 In *Lawless v. Ireland*, the European Court of Human Rights held that the use of the internment powers contained in the 1940 Act amounted to a breach of the right to liberty enshrined in Article 5 of the Convention.[192] However, the court went on to hold that there was no violation of the Convention in that case, as the State's use of those powers amounted in the circumstances to a valid derogation under Article 15.

Position of the Hederman Committee and Submissions Received

8.11 The Hederman Committee gave extensive consideration to the powers of internment contained in the 1940 Act.[193] The members of the Committee expressed different views.

8.12 A minority of the Committee was of the view that internment is so fundamentally in breach of the most basic rights and freedoms inherent in a society based on the rule of law that there are no conceivable circumstances in which it could be justified. The minority noted that internment amounts to a denial of liberty based not on what that citizen has done but rather on an apprehension by the executive of what the citizen may do in the future. This deprives the citizen of due process, constitutes punishment for conduct that has not occurred, violates the separation of powers, and denies the citizen access to justice through the courts. For these reasons, the minority recommended the abolition of the 1940 Act.

8.13 A separate minority was not opposed to the use of internment measures or the 1940 Act in its current form. They took the view that, while there was a case for reform of the legislation, its deficiencies were not such as to rule out its use in appropriate circumstances pending the introduction of any revised legislation.

8.14 A majority of the Hederman Committee took the view that the use of internment cannot be ruled out as a matter of principle in all circumstances. The majority saw internment as a measure which could, under appropriate conditions, constitute a legitimate exceptional response to exceptional circumstances. However, the majority was of the further view that the 1940 Act was unsatisfactory and opposed the use of the legislation in its current form. The majority noted that the Act authorised an individual *"being detained indefinitely on the*

[190] *In Re Article 26 of the Constitution and the Offences Against the State (Amendment) Bill* 1940 [1940] I.R. 470.

[191] [1940] I.R. 470 at p. 479.

[192] *Lawless v. Ireland* (1979-80) 1 E.H.R.R. 27.

[193] Hederman Report, at paras. 5.1 to 5.83

subjective suspicion and direction of a Minister"[194] and that, taken at its most extreme, the Act *"enables every Minister of State to take out of public circulation any individual whom he or she considers to pose a significant threat to public order."*[195] The majority was of the view that the 1940 Act constitutes *"a draconian interference with fundamental rights to liberty, due process, freedom of expression and freedom of association"* and that *"the powers in question are inconsistent with the basic tenets of democracy and the rule of law, and it is inappropriate that a liberal democracy should retain them on its statute book in the twenty-first century."*[196]

8.15 Accordingly, the majority recommended that the provisions of the 1940 Act should be thoroughly recast. It recommended that:

- Only the Minister for Justice should be empowered to order the internment of a person.
- The Minister should not be empowered to order the internment of any person unless satisfied that such person had engaged in or was imminently about to commit certain specified serious offences.
- The Government should be statutorily obliged to reconsider the necessity for the introduction of internment at regular intervals. If the Government was not satisfied that the maintenance in force of the internment provisions was essential to ensure the security of the State, then it should be obliged to end the operation of those provisions.
- Provision should be made for the regular review by independent third parties of the necessity for the operation of the internment provisions.
- The members of the Commission should enjoy fixity of tenure for a reasonable period of years and should be removable only following the passage of resolutions to this effect by both Houses of the Oireachtas. Members of the Defence Forces should not be eligible to sit on the Commission.
- The Commission should be statutorily obliged to hold its hearings in public, save where exceptional circumstances justified an *in camera* hearing.
- The Commission should be statutorily obliged to follow constitutionally required modern principles of fair procedures. Express provision should be made for the granting of legal aid to suspects in detention.

8.16 A view expressed by one member of the Hederman Committee was that a provision for internment should never be part of the corpus of ordinary statute law and that if the State is to resort to such methods, it should enact such a new law providing for internment for a strictly limited period in accordance with carefully drafted resolutions promulgated pursuant to the emergency powers provisions in Article 28.3.3° of the Constitution.

8.17 The 1940 Act remains in force. No amendments to the legislation were made following the publication of the Hederman Report.

8.18 The powers of internment contained in the 1940 Act were not addressed in any of the submissions received by the Review Group.

[194] Hederman Report, at para. 5.66.

[195] Hederman Report, at para. 5.67.

[196] Hederman Report, at para. 5.67.

Recommendations

8.19 We have carefully considered the 1940 Act and the various views expressed by the members of the Hederman Committee. Having done so, we recommend that the Offences Against the State (Amendment) Act 1940 be repealed in its entirety. The powers of internment contained therein should not be re-enacted as part of any legislation replacing the Offences Against the State Acts.

8.20 It is not necessary for us to go further and decide whether there might be exceptional circumstances in which internment could be justified. However, we are of the opinion that even if such circumstances were to arise, the situation would be more appropriately dealt with through the introduction of a new law providing for internment for a strictly limited period in accordance with carefully drafted resolutions promulgated pursuant to the emergency powers provisions in Article 28.3.3° of the Constitution, along with a derogation which accords with Article 15 of the European Convention on Human Rights. In our view, it is not appropriate that extraordinary powers of internment should remain on the statute book, as part of the corpus of ordinary statute law, waiting to be invoked in the event that they are required.

Chapter 9

Forfeiture, Closing Orders and Disqualification

9.1 This chapter sets out our recommendations as to whether certain provisions of the Offences Against the State Act 1939 which impact on the property rights of persons should be retained as part of any legislation which replaces the Offences Against the State Acts.

Forfeiture Provisions

9.2 Section 22 of the Offences Against the State Act 1939 provides that immediately upon the making of a suppression order, all the property of the organisation to which the order relates shall be forfeited to and become vested in the Minister for Justice. *"Property"* is defined as including *"money and all other property, real or personal, heritable or moveable, including choses in action and other intangible or incorporeal property"*, as well as *"funds"* within the meaning of s. 12 of the Criminal Justice (Terrorist Offences) Act 2005.

9.3 Section 22(g) provides that the Minister may not dispose of any property forfeited under the section until after the expiration of the 30-day time limit for an application for a declaration of legality in respect of the organisation at issue (under s. 20 of the Act). If an application for a declaration of legality is made within that time limit, the Minister may not dispose of the property until after the final determination of that application.

9.4 The majority of the Hederman Committee recommended the deletion of s. 22 on the basis that it was *"ineffective"*, *"unworkable"*, and lacked *"special safeguards"* designed to ensure compensation for those whose assets were improperly confiscated. For those reasons, the majority did not think that it would serve any useful purpose to retain s. 22. A minority took the view however that it was appropriate in principle to provide in law for forfeiture of the assets of an unlawful organisation, and that s. 22 should be retained subject to the provision of an effective mechanism for the recovery of such assets.[197]

9.5 The Criminal Justice (Terrorist Offences) Act 2005 was enacted following the publication of the Hederman Report. This Act introduced additional forfeiture provisions – ss. 22A to 22I – into the 1939 Act. These sections provide for a comprehensive procedure for the disposal of property forfeited under s. 22, which may be summarised as follows:

- Section 22B provides that the Minister for Justice may apply *ex parte* to the High Court in respect of specified property where the Minister is of the opinion that (a) it is the property of an unlawful organisation, and (b) it stands forfeited and vested in the Minister by virtue of s. 22. On foot of this application, the court may issue an interim order which prohibits persons from disposing of or otherwise dealing with the property specified in the order, or from diminishing its value. An interim order may contain such provisions, conditions and restrictions as the court considers necessary or expedient, and any person named in or affected by the order must be provided with notice of it.

[197] Hederman Report, at paras. 6.97 to 6.99.

- The court may discharge or vary the interim order on application by any person claiming ownership of the property specified in the order, provided that it is shown to the court's satisfaction that the property is not the property of an unlawful organisation.

- Section 22C states that once an interim order has been in force for 12 months or more, the High Court may make a disposal order, authorising the Minister to dispose of the property as he or she sees fit. The section provides that the court shall make the disposal order unless it is satisfied that the property is not the property of an unlawful organisation. The application must be made on notice to all persons who may be affected. The court must give any person claiming ownership of the specified property an opportunity to be heard and to show cause why the order should not be made.

- Section 22D states that the High Court may make such orders as it considers necessary or expedient to enable an interim order to have full effect.

- Section 22E deals with evidential matters. It provides that a document signed by the Minister and stating that the property specified in the document would, but for the operation of s. 22, have been the property of an unlawful organisation is evidence of same, unless the contrary is shown.

- Section 22F states that where an interim order or a disposal order is in force, a member of An Garda Síochána or an officer of customs and excise may seize any property that is the subject of the order for the purpose of preventing the property being removed from the State. The section provides that property seized in this manner shall be dealt with in accordance with the directions of the High Court.

- Section 22G provides that where an interim order is discharged or lapses and a disposal order is not made (or, if made, is discharged), or where an interim or disposal order is varied on appeal, the owner of property to which that order related may apply to the High Court for compensation. The court may award such compensation as it considers just in respect of any loss incurred by the person by reason of the order concerned.

- Section 22H applies ss. 6, 7 and 9 to 13 of the Proceeds of Crime Act 1996 (with modifications) as if an interim order or a disposal order made under the 1939 Act, or an application for such order, had been made under the 1996 Act.

- Section 22I provides that no action or proceeding of any kind lies against a person in any court in respect of any act done or omission made in compliance with an order under any of ss. 22B to 22D and 22H.

9.6 Section 22A provides certain definitions for the purposes of ss. 22B to 22I. Most notably, the section states that *"'property' does not include moneys held in a bank"*. This has the practical result that the procedure set out in ss. 22A to 22I does not apply to moneys held in bank accounts. The procedure applying to such moneys is instead dealt with in the Offences Against the State (Amendment) Act 1985.[198] Section 2(1)(a) of the 1985 Act enables the Minister to require any bank to pay into the High Court moneys which, in his or her opinion, stand forfeited under s. 22 of the 1939 Act.

[198] The constitutionality of this Act was upheld by the High Court in *Clancy v. Ireland* [1988] I.R. 326.

9.7 Section 2(1)(c) of the 1985 Act, as originally enacted, provided that s. 2(1)(a) would initially be in force for three months from the date of commencement and would thereafter cease to operate unless periodically renewed by Government order. At the time of the Hederman Review, s. 2 had lapsed and was not in force; accordingly, the 1985 Act received limited consideration by the Hederman Committee. Subsequently, s. 54 of the Criminal Justice (Terrorist Offences) Act 2005 replaced s. 2(1)(c) of the 1985 Act with a new provision, stating that s. 2 *"comes into operation on the passing of this Act."* This removed the need for renewal orders. Accordingly, the entirety of the 1985 Act is in force at present.

9.8 The forfeiture provisions considered above were only briefly commented on in the submissions received by the Review Group. One submission argued that s. 22 should be abolished, as suggested by the Hederman Committee.

9.9 As a starting point, we are of the opinion that, as a matter of law, the State should be empowered to seize the assets of an unlawful organisation that is the subject of a suppression order. For that reason, s. 22 of the 1939 Act is an appropriate provision in principle to be included in legislation dealing with offences against the State.

9.10 We note the criticisms of s. 22 advanced by the Hederman Committee. However, those criticisms were made in the context of the legislative framework which existed at that time. That framework has been substantially modified through the introduction of ss. 22A to 22I to the 1939 Act. We consider that these new provisions operate to give practical effect to the forfeiture provision in s. 22 and to provide a mechanism to enable those affected to challenge forfeiture. We think that the introduction of these provisions addresses the issues raised by the Hederman Committee.

9.11 Having regard to these considerations, we recommend the retention of s. 22, the procedure created by ss. 22A to 22I of the 1939 Act, and the relevant provisions of the 1985 Act as part of any legislation which replaces the Offences Against the State Acts.

9.12 However, we further note that, in many ways, the statutory regime set out above bears similarities with the procedure contained in Part 4 of the Criminal Justice (Terrorist Offences) Act 2005 to deal with the suppression of financing of terrorism. Part 4 provides, *inter alia,* for the making of interim and interlocutory orders freezing funds intended for the financing of terrorism; the making of disposal orders in respect of such funds; the making of ancillary orders; and for the payment of compensation in certain circumstances.

9.13 The procedure under each Act is also similar: an initial *ex parte* application for a freezing order, concluding with an application for a disposal order at which the respondent is entitled to be heard. Both Acts provide for the making of ancillary orders by the High Court, including in respect of any profit, gain or interest in connection with the property or funds. Both Acts include evidentiary provisions which ease the burden on the applicant. They also provide the payment of compensation where loss has been incurred by the property owner in respect of an order which is discharged, lapses, or is varied on appeal.

9.14 Given the extensive similarities between these statutory regimes, we recommend that consideration be given to drafting consolidated forfeiture provisions dealing with both the property of unlawful organisations and funds intended to be used to finance terrorism.

Closing Orders

9.15 Section 25 of the Offences Against the State Act 1939 provides that whenever a garda not below the rank of chief superintendent is satisfied that a building is being used or has been used in any way for the purposes, direct or indirect, of an unlawful organisation, the garda may make a *"closing order"* directing that the building be closed for 12 months. This order can be further extended and may remain in force for a maximum of three years.

9.16 When a closing order is in force, it is unlawful for any person to use or occupy the building to which the order relates (or any part thereof). Doing so amounts to a criminal offence, punishable by up to three months imprisonment. Any garda not below the rank of inspector may take such steps as he or she shall consider necessary or expedient to prevent such building or any part thereof being used or occupied in contravention of the order.

9.17 Section 25(3) provides that whenever a closing order has been made or has been extended, any person having an estate or interest in the building to which the order relates may apply to the High Court for relief. If the court is satisfied that, having regard to all the circumstances of the case, the making or the extension of the closing order was not reasonable, the court may quash the closing order or the extension of the order.

9.18 The Hederman Committee recommended that s. 25 be repealed in its entirety.[199] It took the view that that it was unsatisfactory as a matter of principle that such a drastic order could be made without any apparent requirement for notice and that s. 25(3) placed the onus on the person affected to have the order set aside. The Committee also noted that the *"sweeping"* nature of the order radically impacted on both the property rights and right to earn a livelihood of the persons affected. The Committee stated that it was very difficult to see how such a section could withstand a constitutional challenge on these grounds. The section remains on the statute book notwithstanding the Committee's recommendation.

9.19 Having considered s. 25 and having regard to the views expressed by the Hederman Committee, we recommend that the section should be repealed in its entirety. It should not be re-enacted in any legislation that might replace the Offences Against the State Acts.

Disqualification

9.20 Section 34 of the Offences Against the State Act 1939 provides that where any public servant is convicted of a scheduled offence in the Special Criminal Court, such a person shall immediately forfeit *"such office, employment, place or emolument"* and all pension and superannuation allowances, and shall be disqualified *"from holding, within seven years after the date of such conviction"* any such public service position.

9.21 In *Cox v. Ireland*, the Supreme Court struck down s. 34 as unconstitutional.[200] The court held that s. 34 could potentially constitute an attack upon the right to earn a livelihood. It further held that the section was impermissibly wide and indiscriminate, as it was mandatory in nature and applied to all scheduled offences. In light of this judgment, the Hederman Committee recommended that s. 34 should be repealed.[201]

[199] Hederman Report, at paras. 6.124 to 6.129.

[200] [1992] 2 I.R. 503.

[201] Hederman Report, at paras. 6.183 to 6.190.

9.22 Having regard to these matters, we are of the view that the section should not be re-enacted in any legislation which might be introduced to replace the Offences Against the State Acts.

APPENDIX 1
CONSOLIDATED LIST OF SCHEDULED OFFENCES

MALICIOUS DAMAGE ACT 1861		
SECTION	*OFFENCE*	*Scheduling Provision*
S 36	Obstructing engines, or carriages on railways.	Offences Against the State Act 1939 (Scheduled Offences) Order 1972 (SI 142/1972)
S 37	Causing injuries to electric or magnetic telegraphs.	SI 142/1972
S 38	Attempt to injure electric or magnetic telegraphs.	SI 142/1972
S 40	Killing or maiming cattle.	SI 142/1972
S 41	Killing or maiming other animals, second offence.	SI 142/1972
S 48	Removing or concealing buoys or other sea marks.	SI 142/1972
EXPLOSIVE SUBSTANCES ACT 1883		
S 2	Causing an explosion likely to endanger life or property.	Offences Against the State Act 1939 (Scheduled Offences) Order 1972 (SI 142/1972)
S 3	Attempt to cause explosion, or for making or keeping explosives with an intent to endanger life or property.	SI 142/1972
S 4	Making or possession of explosive under suspicious circumstances.	SI 142/1972
FIREARMS ACT 1925		
S 2	Possession, use and carriage of firearms or ammunition.	Offences Against the State Act 1939 (Scheduled Offences) Order 1972 (SI 142/1972)
S 2A	Failure to comply with conditions of firearms training certificate.	SI 142/1972
S 2C	Possession, use, carriage, manufacture, sale, hire, offer or exposure for sale or hire, display, loan, give, import a prohibited firearm or ammunition.	SI 142/1972

S 3	Gives false information in respect of a firearm certificate.	SI 142/1972
S 3(13)(A)	Gives false information in respect of a firearm certificate.	SI 142/1972
S 3(13)(B)	Forges a document purporting to be a firearm certificate.	SI 142/1972
S 3(13)(C)	Uses or alters a firearm certificate.	SI 142/1972
S 4A	Obstructing a member of An Garda Síochána in his functions relating to the authorisation of rifle or pistol clubs or shooting ranges.	SI 142/1972
S 4C	Prohibition of practical or dynamic shooting.	SI 142/1972
S 5A	Failure by firearm certificate holder to report firearm or ammunition as lost or stolen within 3 days of becoming aware of the loss.	SI 142/1972
S 9(8)	Conditional grant of certificate.	SI 142/1972
S 10	Restrictions on manufacture and sale of firearms.	SI 142/1972
S 10(1)	Manufacture, sale etc. of firearms.	SI 142/1972
S 10(2)	Manufacture, sale etc. of firearms.	SI 142/1972
S 10(3A)	Manufacture, sale etc. of firearms.	SI 142/1972
S 10(4)	Manufacture, sale etc. of firearms.	SI 142/1972
S 10A	Not complying with conditions of certificate in reloading ammunition.	SI 142/1972
S 11	Failure to deliver certificate of registration and register.	SI 142/1972
S 12	Register to be kept by firearms dealer.	SI 142/1972
S 12(4)	Failure to keep register.	SI 142/1972
S 12(5)	Misleading information.	SI 142/1972
S 13	Obstructing or impeding inspection of stock of firearms dealers.	SI 142/1972
S 15	Possession of firearms with intent to endanger life.	SI 142/1972
S 16	Export or removal of firearms or ammunition.	SI 142/1972

S 17	Import of firearms.	SI 142/1972
S 21	Obstruction of An Garda Síochána.	SI 142/1972
S 22	Failure to give name and address.	SI 142/1972
S 25B	Failure to surrender a firearm for ballistic testing without reasonable excuse.	SI 142/1972
OFFENCES AGAINST THE STATE ACT 1939		
S 6	Usurpation of functions of Government.	Offences Against the State Act 1939 (Scheduled Offences) Order 1972 (SI 142/1972)
S 7	Obstruction of Government.	SI 142/1972
S 8	Obstruction of the President.	SI 142/1972
S 9	Interference with military or other employees of the State.	SI 142/1972
S 10	Prohibition of printing etc, certain documents.	SI 142/1972
S 11	Foreign newspapers etc containing seditious or unlawful matter.	SI 142/1972
S 12	Possession of treasonable, seditious or incriminating documents.	SI 142/1972
S 13	Documents printed for reward.	SI 142/1972
S 14	Obligation to print printer's name and address on documents.	SI 142/1972
S 15	Prohibition on unauthorised military exercises.	SI 142/1972
S 16	Prohibition on secret societies in the army or police forces.	SI 142/1972
S 17	Administering unlawful oaths.	SI 142/1972
S 18	Unlawful organisations.	SI 142/1972
S 21	Prohibition on membership of unlawful organisations.	SI 142/1972
S 21A	Offence of providing assistance to an unlawful organisation.	SI 142/1972
S 27	Prohibition on certain public meetings.	SI 142/1972

S 28	Prohibition of meetings in the vicinity of the Oireachtas.	SI 142/1972
S 37	Attempting or conspiring or inciting to commit or aiding or abetting the commission of, any such scheduled offence under this Act shall be a scheduled offence.	SI 142/1972
	FIREARMS ACT 1964	
S 3	Temporary prohibition of game shooting.	Offences Against the State Act 1939 (Scheduled Offences) Order 1972 (SI 142/1972)
S 4	Temporary custody of firearms.	SI 142/1972
S 13	Conditional authorisations for possession and sale.	SI 142/1972
S 26	Possession of a firearm while taking a vehicle without authority.	SI 142/1972
S 27	Use of firearms to resist or aid escape.	SI 142/1972
S 27A	Possession of a firearm or ammunition in suspicious circumstances.	SI 142/1972
S 27B	Carrying a firearm with criminal intent.	SI 142/1972
	FIREARMS (PROOFING) ACT 1968	
S 4	Contravention of sale, etc order.	Offences Against the State Act 1939 (Scheduled Offences) Order 1972 (SI 142/1972)
S 6(1)(A)	Application of prescribed marks.	SI 142/1972
S 6(1)(B)	Sale, etc of prescribed marks.	SI 142/1972
S 6(1)(C)	Making, etc of prescribed marks.	SI 142/1972
	FIREARMS AND OFFENSIVE WEAPONS ACT 1990	
S 7(1)	Possession of a Silencer.	Offences Against the State Act 1939 (Scheduled Offences) Order 1972 (SI 142/1972)

S 7(5)	Contravention of a condition attached to an authorisation (to possess, sell or transfer a silencer).	SI 142/1972
S 8	Reckless discharge of a firearm.	SI 142/1972
OFFENCES AGAINST THE STATE (AMENDMENT) ACT 1998		
S 6	Directing an unlawful organisation.	S.14 of the Offences Against the State Act (Amendment) Act 1998 (s.14 OAS(A)A 1998)
S 7	Possession of articles for purpose connected with certain offences.	s.14 OAS(A)A 1998
S 8	Unlawful collection of information.	s.14 OAS(A)A 1998
S 9	Withholding information.	s.14 OAS(A)A 1998
S 12	Training of persons in the making of, or use of firearms etc.	s.14 OAS(A)A 1998
CRIMINAL JUSTICE ACT 2006		
S 71A	Directing a criminal organisation.	Criminal Justice (Amendment) Act 2009, s 8 (CJ(A)A 2009, s 8)
S 72	Participating in or contributing to the activities of a criminal organisation.	CJ(A)A 2009, s 8
S 73	Commission of an offence for a criminal organisation.	CJ(A)A 2009, s 8
S 76	Liability for offences by bodies corporate.	CJ(A)A 2009, s 8

APPENDIX 2
CONSOLIDATED OFFENCES AGAINST THE STATE ACTS 1939 TO 1998

OFFENCES AGAINST THE STATE ACT 1939
Number 13 of 1939

Part I
Preliminary and General

Part II
Offences against the State

Part III
Unlawful Organisation

Part V
Special Criminal Courts

Part VI

Powers of Internment

An Act to make provision in relation to actions and conduct calculated to undermine public order and the authority of the State, and for that purpose to provide for the punishment of persons guilty of offences against the State, to regulate and control in the public interest the formation of associations, to establish Special Criminal Courts in accordance with Article 38 of the Constitution and provide for the constitution, powers, jurisdiction, and procedure of such courts, to repeal certain enactments and to make provision generally in relation to matters connected with the matters aforesaid. [14th June, 1939]

BE IT ENACTED BY THE OIREACTHAS AS FOLLOWS:—

Part I
Preliminary and General

1. Short title

This Act may be cited as the Offences against the State Act, 1939.

2. Definitions

In this Act—

the word "organisation" includes associations, societies, and other organisations or combinations of persons of whatsoever nature or kind, whether known or not known by a distinctive name;

the word "document" includes a book and also a newspaper, magazine, or other periodical publication, and also a pamphlet, leaflet, circular, or advertisement; [and also—

(a) any map, plan, graph or drawing,
(b) any photograph,

(c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom, and

(d) any film, microfilm, negative, tape or other device in which one or more visual images are embodied (whether with or without sounds or other data) so as to be capable (as aforesaid) of being reproduced therefrom and a reproduction or still reproduction of the image or images embodied therein whether enlarged or not and whether with or without sounds or other data.][1]

the expression "incriminating document" means a document of whatsoever date, or bearing no date, issued by or emanating from an unlawful organisation or appearing to be so issued or so to emanate or purporting or appearing to aid or abet any such organisation or calculated to promote the formation of an unlawful organisation;

the expression "treasonable document" includes a document which relates directly or indirectly to the commission of treason;

the expression "seditious document" includes—

(a) a document consisting of or containing matter calculated or tending to undermine the public order or the authority of the State, and

(b) a document which alleges, implies, or suggests or is calculated to suggest that the government functioning under the Constitution is not the lawful government of the State or that there is in existence in the State any body or organisation not functioning under the Constitution which is entitled to be recognised as being the government of the country, and

(c) a document which alleges, implies, or suggests or is calculated to suggest that the military forces maintained under the Constitution are not the lawful military forces of the State, or that there is in existence in the State a body or organisation not established and maintained by virtue of the Constitution which is entitled to be recognised as a military force, and

(d) a document in which words, abbreviations, or symbols referable to a military body are used in referring to an unlawful organisation;
the word "offence" includes treason, felonies, misdemeanours, and statutory and other offences;

references to printing include every mode of representing or reproducing words in a visible form, and the word "print" and all cognate words shall be construed accordingly.

Amendments

1. As amended by section 5 of the Offences Against the State (Amendment) Act 1972.

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3. Exercise of powers by superintendent of the Garda Síochána

Any power conferred by this Act on an officer of the Garda Síochána not below the rank of chief superintendent may be exercised by any superintendent of the Garda Síochána who is authorised (in respect of any particular power or any particular case) in that behalf in writing by the Commissioner of the Garda Síochána.

4. Expenses

The expenses incurred by any Minister of State in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.

5. Repeals

The Treasonable Offences Act 1925 (No. 18 of 1925) and the Public Safety (Emergency Powers) Act 1926 (No. 42 of 1926), are hereby repealed.

Part II
Offences against the State

6. Usurpation of functions of government

(1) Every person who usurps or unlawfully exercises any function of government, whether by setting up, maintaining or taking part in any way in a body of persons purporting to be a government or a legislature but not authorised in that behalf by or under the Constitution, or by setting up, maintaining, or taking part in any way in a purported court or other tribunal not lawfully established, or by forming, maintaining, or being a member of an armed force or a purported police force not so authorised, or by any other action or conduct whatsoever, shall be guilty of felony and shall be liable on conviction thereof [to imprisonment for a term not exceeding 20 years].[1]

(2) Every person who shall attempt to do any thing the doing of which is a felony under the foregoing sub-section of this section or who aids or abets or conspires with another person to do or attempt to do any such thing or advocates or encourages the doing of any such thing shall be guilty of a misdemeanour and shall be liable on conviction thereof to [imprisonment for a term not exceeding 20 years].[2]

Amendments

1. As amended by s.2(1) of the Criminal Law Act 1976.
2. As amended by s.2(2) of the Criminal Law Act 1976.

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7. Obstruction of government

(1) Every person who [(whether in or outside the State)][1] prevents or obstructs, or attempts or is concerned in an attempt to prevent or obstruct, by force of arms or other violent means or by any form of intimidation the carrying on of the government of the State or any branch (whether legislative, judicial, or executive) of the government of the State or the exercise or performance by any member of the legislature, the judiciary, or the executive or by any officer or employee (whether civil (including police) or military) of the State of any of his functions, powers, or duties shall be guilty of felony and shall be liable on conviction thereof [to imprisonment for a term not exceeding 20 years].[2]

(2) Every person who [(whether in or outside the State)] [3] aids or abets or conspires with another person to do any thing the doing of which is a felony under the foregoing sub-section of this section or advocates or encourages the doing of any such thing shall be guilty of a misdemeanour and shall be liable on conviction thereof to [imprisonment for a term not exceeding 20 years][4].

[(3) A person shall be guilty of an offence under this section for conduct that the person engages in outside the State only if—

(a) the conduct takes place on board an Irish ship [(within the meaning of section 33 of the Merchant Shipping (Registration of Ships) Act 2014)] [5],

(b) the conduct takes place on an aircraft registered in the State,

(c) the person is an Irish citizen, or

(d) the person is ordinarily resident in the State.

(4) A person who has his principal residence in the State for the 12 months immediately preceding the commission of an offence under subsection (1) or (2) of this section is, for the purposes of subsection (3)(d) of this section, ordinarily resident in the State on the date of the commission of the offence.][6]

Amendments

1. Words inserted by s.18(1)(a) of the Criminal Justice (Amendment) Act 2009.
2. As amended by s.2(3) of the Criminal Law Act1976.
3. Words inserted by s.18(1)(a) of the Criminal Justice (Amendment) Act 2009.
4. Substituted by s.2(4) of the Criminal Law Act 1976.
5. Substituted by sch. 4 of the Merchant Shipping (Registration of Ships) Act 2014.
6. As inserted by s.18(2) of the Criminal Justice (Amendment) Act 2009.

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8. Obstruction of the President

(1) Every person who prevents, or obstructs, or attempts or is concerned in an attempt to prevent or obstruct, by force of arms or other violent means or by any form of intimidation the exercise or performance by the President of any of his functions, powers, or duties shall be guilty of felony and shall be liable on conviction thereof to suffer penal servitude for a term not exceeding seven years or to imprisonment for a term not exceeding two years.

(2) Every person who aids or abets or conspires with another person to do any thing the doing of which is a felony under the foregoing sub-section of this section or advocates or encourages the doing of any such thing shall be guilty of a misdemeanour and shall be liable on, conviction thereof to imprisonment for a term not exceeding two years.

9. Interference with military or other employees of the State

(1) Every person who shall with intent to undermine public order or the authority of the State commit any act of violence against or of interference with a member of a lawfully established military or police force (whether such member is or is not on duty) or shall take away, injure, or otherwise interfere with the arms or equipment, or any part of the arms or equipment, of any such member shall be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for a term not exceeding two years.

(2) Every person who shall incite or encourage any person employed in any capacity by the State to refuse, neglect, or omit (in a manner or to an extent calculated to dislocate the public service or a branch thereof) to perform his duty or shall incite or encourage any person so employed to be negligent or insubordinate (in such manner or to such extent as aforesaid) in the performance of his duty shall be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for a term not exceeding two years

(3) Every person who attempts to do anything the doing of which is a misdemeanour under either of the foregoing sub-sections of this section or who aids or abets or conspires with another person to do or attempt to do any such thing or advocates or encourages the doing of any such thing shall be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for a term not exceeding twelve months.

10. Prohibition on printing, etc, certain documents

(1) It shall not be lawful to set up in type, print, publish, send through the post, distribute, sell, or offer for sale any document—

(a) which is or contains or includes an incriminating document, or

(b) which is or contains or includes a treasonable document, or

(c) which is or contains or includes a seditious document.

(2) In particular and without prejudice to the generality of the foregoing sub-section of this section, it shall not be lawful for any person to send or contribute to any newspaper or other periodical publication or for the proprietor of any newspaper or other periodical publication to publish in such newspaper or publication any letter, article, or communication which is sent or contributed or purports to be sent or contributed by or on behalf of an unlawful organisation or which is of such nature or character that the printing of it would be a contravention of the foregoing sub-section of this section.

(3) Every person who shall contravene either of the foregoing sub-sections of this section shall be guilty of an offence under this sub-section and shall be liable on summary conviction thereof to a fine not exceeding €4,000, or, at the discretion of the Court, to imprisonment for a term not exceeding six months or to both such fine and such imprisonment and also (in any case), if the Court so directs, to forfeit every copy in his possession of the document, newspaper, or publication in relation to which the offence, was committed and also (where the act constituting the offence was the setting up in type or the printing of a document) to forfeit, if the Court so directs, so much of the printing machinery in his possession as is specified in that behalf by the Court.

(4) Every person who unlawfully has in his possession a document which was printed or published in contravention of this section or a newspaper or other periodical publication containing a letter, article, or other communication published therein in contravention of this section shall, when so requested by a member of the Garda, Síochána, deliver up to such member every copy in his possession of such document or of such newspaper or publication (as the case may be), and if he fails or refuses so to do he shall be guilty of an offence under this sub-section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding three months and also, if the Court so directs, to forfeit every copy in his possession of the document, newspaper or publication in relation to which the offence was committed.

(5) Nothing in this section shall render unlawful the setting tip in type, printing, publishing, sending through the post, distributing, selling, offering for sale, or having possession of a document or a copy of a document which is published at the request or by permission of the Government or is published in the course or as part of a fair report of the proceedings in either House of the Oireachtas or in a court of justice or before any other court or tribunal lawfully exercising jurisdiction.

11. Foreign newspapers, etc, containing seditious or unlawful matter

(1) Whenever the Minister for Justice is of opinion, in respect of a newspaper or other periodical publication ordinarily printed outside the State, that a particular issue of such publication either is seditious contains any matter the publication of which is a

contravention of this Act, the said Minister may by order, if he considers that it is in the public interest so to do, do either or both of the, following things, that is to say:—

(a) authorise members of the Garda Síochána to seize and destroy all copies of the said issue of such publication wherever they may be found;

(b) prohibit the importation of any copy of any issue of such publication published within a specified period (not exceeding three months) after the publication of the said issue of such publication.

(2) The Minister for Justice may by order, whenever he thinks proper so to do, revoke or amend any order made by him under the foregoing sub-section of this section or any order (made by him under this sub-section) amending any such order.

(3) It shall not be lawful for any person to import any copy of an issue of a periodical publication the importation of which is prohibited by an order under this section, […][1]

Amendments

1. As amended by s.13 of the Customs (Temporary Provisions) Act 1945

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12. Possession of treasonable, seditious, or incriminating documents

(1) It shall not be lawful for any person to have any treasonable document, seditious document, or incriminating document in his possession or on any lands or premises owned or occupied by him or under his control.

(2) Every person who has a treasonable document, seditious document, or incriminating document in his possession or on any lands or premises owned or occupied by him or under his control shall be guilty of an offence under this sub-section and shall be liable on summary conviction thereof to a fine not exceeding [€2,500] or, at the discretion of the Court, to imprisonment for a term not exceeding three mouths or to both such fine and such imprisonment.

(3) Where a person is charged with an offence under this section, it shall be a good defence to such charge for Such person to prove—

(a) that he is an officer of the State and had possession or custody of the document in respect of which the offence is alleged to have been committed in the course of his duties as such officer, or

(b) that he did not know that the said document was in his possession or on any lands or premises owned or occupied by him or under his control, or

(c) that he did not know the nature or contents of the said document.

(4) Every person who has in his possession a treasonable document, seditious document, or incriminating document shall, when so requested by a member of the Garda Síochána, deliver up to such member the said document and every copy thereof in his possession, and if he fails or refuses so to do he shall be guilty of an offence under this sub-section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding three months.

(5) Where the proprietor or the editor or other chief officer of a newspaper or other periodical publication receives a document which appears to him to be a treasonable document, a seditious document, or an incriminating document and such document is not published in such newspaper or periodical publication, the following provisions shall have effect, that is to say:—

(a) if such proprietor, editor, or chief officer is requested by a member of the Garda Síochána to deliver up such document to such member, such proprietor, editor, or chief officer may, in lieu of so delivering up such document, destroy such document and every (if any) copy thereof in his possession in the presence and to the satisfaction of such member;

(b) if such proprietor, editor, or chief officer destroys under the next preceding paragraph of this sub-section such document and every (if any) copy thereof in his possession or of his own motion destroys such document within twenty-four hours after receiving it and without having made any copy of it or permitted any such copy to be made, such destruction shall be a good defence to any charge against such proprietor, editor, or chief officer of an offence under any sub-section of this section in respect of such document and no civil or criminal action or other proceeding shall lie against such proprietor, editor, or chief officer on account of such destruction.

13. Provisions in respect of documents printed for reward

(1) Every person who shall print for reward any document shall do every of the following things, that is to say:—

(a) at the time of or within twenty-four hours after printing such document, print or write on at least one copy of such document the name and address of the person for whom or on whose instructions such document was printed;

(b) retain, for six months from the date on which such document was printed, a copy of such document on which the said name and address is printed or written as aforesaid;

(c) on the request of a member of the Garda Síochána at any time during the said period of six months, produce for the inspection of such member the said copy of such document so retained as aforesaid.

(2) Every person who shall print for reward any document and shall fail to comply in any respect with the foregoing sub-section of this section shall be guilty of an offence under this section and shall be liable on summary conviction thereof, in the case of a first such offence, to a fine not exceeding €1,000 and, in the case of a second or any subsequent such offence, to a fine not exceeding €2,500.

(3) This section does not apply to any newspaper, magazine or other periodical publication which is printed by the proprietor thereof on his own premises.

14. Obligation to print printer's name and address on documents

(1) Every person who shall print for reward any document (other than a document to which this section does not apply) which he knows or has reason to believe is intended to be sold or distributed (whether to the public generally or to a restricted class or number of persons) or to be publicly or privately displayed shall, if such document consists only of one page or sheet printed on one side only, print his name and the address of his place of business on the front of such document and shall, in every other case, print the said name and address on the first or the last page of such document.

(2) Every person who shall contravene by act or omission the foregoing sub-section of this section shall be guilty of an offence under this section and shall be liable on summary conviction thereof, in the case of a first such offence, to a fine not exceeding [€1,000] and, in the case of a second or any subsequent such offence, to a fine not exceeding [€2,500].

(3) This section does not apply to any of the following documents, that is to say:—

(a) currency notes, bank notes, bills of exchange, promissory notes, cheques, receipts and other financial or commercial documents,

(b) writs, orders, summonses, warrants, affidavits, and other documents for the purposes of or for use in any lawful court or tribunal,

(c) any document printed by order of the Government, either House of the Oireachtas, a Minister of State, or any officer of the State in the execution of his duties as such officer,

(d) any document which the Minister for Justice shall by order declare to be a document to which this section does not apply.

15. Unauthorised military exercises prohibited

(1) Save as authorised by a Minister of State under this section, and subject to the exceptions hereinafter mentioned, it shall not be lawful for any assembly of persons to practise or to train or drill themselves in or be trained or drilled in the use of arms or the performance of military exercises, evolutions, or manoeuvres nor for any persons to meet together or assemble for the purpose of so practising or training or drilling or being trained or drilled.

(2) A Minister of State may at his discretion by order, subject to such limitations, qualifications and conditions as he shall think fit to impose and shall express in the order, authorise the members of any organisation to meet together and do such one or more of the following things as shall be specified in such order, that is to say, to practise or train or drill themselves in or be trained or drilled in the use of arms or the performance of military exercises, evolutions, or manoeuvres.

(3) If any person is present at or takes part in or gives instruction to or trains or drills an assembly of persons who without or otherwise than in accordance with an authorisation, granted by a Minister of State under this section practise, or train or drill themselves in, or are trained or drilled in the use of arms or the performance of any military exercise, evolution, or manoeuvre or who without or otherwise than in accordance with such authorisation have assembled or met together for the purpose of so practising, or training or drilling or being trained or drilled, such person shall be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for a term not exceeding [15 years].[1]

(4) This section shall not apply to any assembly of members of any military or police force lawfully maintained by the Government.

(5) In any prosecution under this section the burden of proof that any act was authorised under this section shall lie on the person prosecuted.

Amendments

1. As substituted by s.2(5) of the Criminal Law Act 1976.

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16. Secret societies in army or police

(1) Every person who shall—

(a) form, organise, promote, or maintain any secret society amongst or consisting of or including members of any military or police force lawfully maintained by the Government, or

(b) attempt to form, organise, promote or maintain any such secret society, or

(c) take part, assist, or be concerned in any way in the formation, organisation, promotion, management, or maintenance of any such society, or

(d) induce, solicit, or assist any member of a military or police force lawfully maintained by the Government to join any secret society whatsoever,

shall be guilty of a misdemeanour and shall be liable on conviction thereof to suffer penal servitude for any term not exceeding five years or imprisonment for any term not exceeding two years.

(2) In this section the expression "secret society" means an association, society, or other body the members of which are required by the regulations thereof to take or enter into, or do in fact take or enter into, an oath, affirmation, declaration or agreement not to disclose the proceedings or some part of the proceedings of the association, society, or body.

17. Administering unlawful oaths

(1) Every person who shall administer or cause to be administered or take part in, be present at, or consent to the administering or taking in any form or manner of any oath, declaration, or engagement purporting or intended to bind the person taking the same to do all or any of the following things, that is to say:—

(a) to commit or to plan, contrive, promote, assist, or conceal the commission of any crime or any breach of the peace, or

(b) to join or become a member of or associated with any organisation having for its object or one of its objects the commission of any crime, or breach of the peace, or

(c) to abstain from disclosing or giving information of the existence or formation or proposed or intended formation of any such organisation, association, or other body as aforesaid or from informing or giving evidence against any member of or person concerned in the formation of any such organisation, association, or other body, or

(d) to abstain from disclosing or giving information of the Commission or intended or proposed commission of any crime, breach of the peace, or from informing or giving evidence against the person who committed such an act,

shall be guilty of a misdemeanour and shall be liable on conviction thereof to suffer imprisonment for any term not exceeding two years.

(2) Every person who shall take any such oath, declaration, or engagement as is mentioned in the foregoing sub-section shall be guilty of a misdemeanour and be liable on conviction thereof to suffer imprisonment for any term not exceeding two years unless he shall show—

(a) that he was compelled by force or duress to take such oath, declaration, or engagement (as the case may be), and

(b) that within four days after the taking, of such oath, declaration, or engagement, if not prevented by actual force or incapacitated by illness or other sufficient cause, or where so prevented or incapacitated then within four days after the cessor of the hindrance caused by such force, illness or other cause, he declared to an officer of the Garda Síochána the fact of his having taken such oath, declaration, or engagement, and all the circumstances connected therewith and the names and descriptions of all persons concerned in the administering thereof so far as such circumstances, names, and descriptions were known to him.

Part III
Unlawful Organisation

18. Unlawful organisations

In order to regulate and control in the public interest the exercise of the constitutional right of citizens to form associations, it is hereby declared that any organisation which—

(a) engages in, promotes, encourages, or advocates the commission of treason or any activity of a treasonable nature, or

(b) advocates, encourages, or attempts the procuring by force, violence, or other unconstitutional means of an alteration of the Constitution, or

(c) raises or maintains or attempts to raise or maintain a military or armed force in contravention of the Constitution or without constitutional authority, or

(d) engages in, promotes, encourages, or advocates the commission of any criminal offence or the obstruction of or interference with the administration of justice or the enforcement of the law, or

(e) engages in, promotes, encourages, or advocates the attainment of any particular object, lawful or unlawful, by violent, criminal, or other unlawful means, or

(f) promotes, encourages, or advocates the non-payment of moneys payable to the Central Fund or any other public fund or the non-payment of local taxation,

shall be an unlawful organisation within the meaning and for the purposes of this Act, and this Act shall apply and have effect in relation to such organisation accordingly.

19. Suppression orders

(1) If and whenever the Government are of opinion that any particular organisation is an unlawful organisation, it shall be lawful for the Government by order (in this Act referred to as a suppression order) to declare that such organisation is an unlawful organisation and ought, in the public interest, to be suppressed.

(2) The Government may by order, whenever they so think proper, amend or revoke a suppression order.

(3) Every suppression order shall be published in the Iris Oifigiúil as soon as conveniently may be after the making thereof.

(4) A suppression order shall be conclusive evidence for any purposes other than an application for a declaration of legality that the organisation to which it relates is an unlawful organisation within the meaning of this Act.

20. Declaration of legality

(1) Any person (in this section referred to as the applicant) who claims to be a member of an organisation in respect of which a suppression order has been made may, at any time within thirty days after the publication of such order in the Iris Oifigiúil, apply to the High Court in a summary manner on notice to the Attorney-General for a declaration (in this Act referred to as a declaration of legality) that such organisation is not an unlawful organisation.

(2) Where, on an application under the foregoing sub-section of this section, the High Court, after hearing such evidence as may be adduced by the applicant or by the Attorney-General, is satisfied that the organisation to which such application relates is not an unlawful organisation, it shall be lawful for the High Court to make a declaration of legality in respect of such organisation.

(3) The High Court shall not make a declaration of legality unless the applicant for such declaration either—

(a) gives evidence in support of the application and submits himself to cross-examination by counsel for the Attorney-General, or

(b) satisfies the High Court that he is unable by reason of illness or other sufficient cause to give such evidence and adduces in support of the application the evidence of at least one person who submits himself to cross-examination by counsel for the Attorney-General.

(4) Whenever, on an application under this section, the High Court, or the Supreme Court on appeal from the High Court, makes a declaration of legality in respect of an organisation, the suppression order relating to such organisation shall forthwith become null and void, but without prejudice to the validity of anything previously done thereunder.

(5) Where the High Court makes a declaration of legality, it shall be lawful for that court, on the application of the Attorney-General, to suspend the operation of the next preceding sub-section of this section in respect of such declaration until the final determination of an appeal by the Attorney-General to the Supreme Court against such declaration, and if the High Court so suspends the said sub-section, the said sub-section shall only come into operation in respect of such declaration if and when the Supreme Court affirms the order of the High Court making such declaration.

(6) Whenever an application for a declaration of legality is made under this section and is refused by the High Court, or by the Supreme Court on appeal from the High Court, it shall not be lawful, in any prosecution of the applicant for the offence of being a member of the organisation to which such application relates, to give in evidence against the applicant any of the following matters, that is to say:—

(a) the fact that he made the said application, or

(b) any admission made by him or on his behalf for the purposes of or during the hearing of the said application, or

(c) any statement made in the oral evidence given by him or on his behalf (whether on examination in chief, cross examination, or re-examination) at the hearing of the said application, or

(d) any affidavit made by him or on his behalf for the purposes of the said application.

21. Prohibition of membership of an unlawful organisation

(1) It shall not be lawful for any person to be a member of an unlawful organisation.

(2) Every person who is a member of an unlawful organisation in contravention of this section shall be guilty of an offence under this section and shall—

(a) on summary conviction thereof, be liable to a fine not exceeding €4,000 or, at the discretion of the court, to imprisonment for a term not exceeding [twelve months][1] or to both such fine and such imprisonment, or

(b) on conviction thereof on indictment, be liable to [a fine or imprisonment for a term not exceeding 8 years or both].[2]

(3) It shall be a good defence for a person charged with the offence under this section of being a member of an unlawful organisation, to show—

(a) that he did not know that such organisation was an unlawful organisation, or

(b) that, as soon as reasonably possible after he became aware of the real nature of such organisation or after the making of a suppression order in relation to such organisation, he ceased to be a member thereof and dissociated himself therefrom.

(4) Where an application has been made to the High Court for a declaration of legality in respect of an organisation no person who is, before the final determination of such application, charged with an offence under this section in relation to that organisation shall be brought to trial on such charge before such final determination, but a postponement of the said trial in pursuance of this sub-section shall not prevent the detention of such person in custody during the period of such postponement.

Amendments

1. As substituted by s.48(a)(i) of the Criminal Justice (Terrorist Offences) Act 2005.
2. As substituted by s.48(b) of the Criminal Justice (Terrorist Offences) Act 2005.

21A. [Offence of providing assistance to an unlawful organisation

(1) A person who knowingly renders assistance (including financial assistance) to an unlawful organisation, whether directly or indirectly, in the performance or furtherance of an unlawful object is guilty of an offence.

(2) A person guilty of an offence under this section is liable—

(a) on summary conviction, to a fine not exceeding €4,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment, to a fine or imprisonment for a term not exceeding 8 years or both.][1]

Amendments

1. As inserted by s.49 of the Criminal Justice (Terrorist Offences) Act 2005.

22. Provisions consequent upon the making of a suppression order

Immediately upon the making of a suppression order, the following provisions shall have effect in respect of the organisation to which such order relates, that is to say:—

(a) [all the property (including money and all other property, real or personal, heritable or moveable, including choses in action and other intangible or incorporeal property, including funds as defined in s.12 of the Criminal Justice (Terrorist Offences) Act 2005 of such organization];

(b) the said Minister shall take possession of all lands and premises which become forfeited to him under his section and the said Minister may cause all such things to be done by members of the Garda Síochána as appear to him to be necessary or expedient for the purpose of such taking possession;

(c) subject to the subsequent provisions of this section, it shall be lawful for the said Minister to sell or let, on such terms as he shall, with the sanction of the Minister for Finance, think proper, any lands or premises which become forfeited to him under this section or to use any such lands or premises for such government purposes as he shall, with the sanction aforesaid, think proper;

(d) the Minister for Justice shall take possession of, recover, and get in all personal property which becomes forfeited to him under this section and may take such legal proceedings and other steps as shall appear to him to be necessary or expedient for that purpose;

(e) subject to the subsequent provisions of this section, it shall be lawful for the said Minister to sell or otherwise realise, in such manner and upon such terms as he shall, with the sanction of the Minister for Finance, think proper, all personal property which becomes forfeited to him under this section;

(f) the Minister for Justice shall pay into or dispose of for the benefit of the Exchequer, in accordance with the directions of the Minister for Finance, all money which becomes forfeited to him under this section and the net proceeds of every sale, letting, realisation, or other disposal of any other property which becomes so forfeited;

(g) no property which becomes forfeited to the Minister for Justice under this section shall be sold, let, realised, or otherwise disposed of by him until the happening of whichever of the following events is applicable, that is to say:—

(i) if no application is made under this Act for a declaration of legality in respect of the said organisation within the time limited by this Act for the making of such application, the expiration of the time so limited,

(ii) if any such application is so made, the final determination of such application.

Amendments

1. As substituted by s.50 of the Criminal Justice (Terrorist Offences) Act 2005.

22A. [Definitions for, and operation of, section 22 B to 22I

(1) For the purposes of sections 22B to 22I—

"disposal order" means an order under section 22C;

"interim order" means an order made under section 22B;

"Minister" means Minister for Justice, Equality and Law Reform;

"property" does not include moneys held in a bank;

"respondent" means—

(a) a person in respect of whom an application for an interim order has been made, or

(b) a person in respect of whom an interim order has been made,

and includes a person who, but for this Act, would become entitled on the death of a person referred to in paragraph (a)or(b) to any property to which such an order relates (being an order that is in force and is in respect of that person).

(2) Sections 22B to 22I shall not be construed to limit the generality of section 22.]

Amendments

1. As inserted by s.51 of the Criminal Justice (Terrorist Offences) Act 2005.

22B. [Interim order respecting specified property

(1) The Minister may apply ex parte to the High Court for an interim order under subsection

(2) in respect of specified property where the Minister is of the opinion that it—

(a) is the property of an unlawful organisation, whether or not the property is in the possession or control of that organisation, and

(b) is forfeited to and vested in the Minister by virtue of section 22.

(2) On application under subs.(1), the Court may issue an interim order prohibiting any of the following from disposing of or otherwise dealing with the property specified in the order or from diminishing its value:

(a) any person in possession or control of the property;

(b) any person having notice the order;

(c) any other person specified in the order.

(3) An interim order—

(a) may contain such provisions, conditions and restrictions as the Court considers necessary or expedient, and

(b) shall provide for notice of the order to be given to—

(i) any person named in the order, and

(ii) any other person who is or appears to be affected by it,

unless the Court is satisfied that it is not reasonably possible to ascertain the person's whereabouts.

(4) On application by the respondent or any other person claiming ownership of any property specified in an interim order that is in force under this section, the Court may discharge or vary the order, as it considers appropriate, if it is shown to the Court's satisfaction that the property is not the property of an unlawful organisation.

(5) On application at any time by the Minister, the Court shall discharge an interim order.

(6) Subject to subss.(4) and (5), an interim order continues in force until the expiry of 12 months from the date of its making and then lapses, unless an application for a disposal order in respect of any property specified in the interim order is brought during that period.

(7) If an application for a disposal order is brought within the period allowed under subs.(6), the interim order lapses on—

(a) the determination of the application,

(b) the expiry of the ordinary time for bringing an appeal against the determination, or

(c) if such appeal is brought, the determination or abandonment of the appeal or any further appeal or the expiry of the time for bringing any further appeal,

whichever is the latest.

(8) Notice of an application under subs.(4) shall be given by the respondent or other person making the application to—

(a) the Minister, and

(b) any person to whom the Court directs that notice of the application be given.

(9) Notice of an application under subs.(5) shall be given by the Minister to—

(a) the respondent, unless the Court is satisfied that it is not reasonably possible to ascertain the respondent's whereabouts, and

(b) any person to whom the Court directs that notice of the application be given.][1]

Amendments

1. As inserted by s.51 of the Criminal Justice (Terrorist Offences) Act 2005.

22C. [Disposal order respecting specified property

(1) Subject to subs.(2), where an interim order has been in force for not less than 12 months in relation to specified property, the High Court may, on application by the Minister, make an order authorising the Minister to dispose of the property as he sees fit.

(2) Subject to subs.(4), the Court shall make a disposal order in relation to any property that is the subject of an application under subsection (1) unless it is satisfied that the property is not the property of an unlawful organisation.

(3) The Minister shall give notice of an application under this section to—

(a) the respondent unless the Court is satisfied that it is not reasonably possible to ascertain the respondent's whereabouts, and

(b) such other (if any) persons as the Court may direct.

(4) Before deciding whether to make a disposal order under subs.(1), the Court shall give any person claiming ownership of the specified property an opportunity to be heard by the Court and to show cause why the order should not be made.

(5) On application by the respondent or, if the respondent's whereabouts cannot be ascertained, on the Court's own initiative, the Court may, if it considers it appropriate to do so in the interests of justice, adjourn the hearing of an application under subsection (1) for such period not exceeding 2 years as it considers reasonable.][1]

Amendments

1. As inserted by s.51 of the Criminal Justice (Terrorist Offences) Act 2005.

22D. [Ancillary orders and provisions in relation to certain profits or gains, etc

(1) At any time while an interim order is in force, the High Court may, on application by the Minister, make such orders as it considers necessary or expedient to enable the interim order to have full effect.

(2) The Minister shall give notice of an application under this section to—

(a) the respondent unless the Court is satisfied that it is not reasonably possible to ascertain the respondent's whereabouts, and

(b) such other (if any) persons as the Court may direct.

(3) An interim order or disposal order may be expressed to apply to—

(a) any profit, gain or interest,

(b) any dividend or other payment, or

(c) any other property,

payable or arising, after the making of the order, in connection with any other property to which the order relates.][1]

Amendments

1. As inserted by s.51 of the Criminal Justice (Terrorist Offences) Act 2005.

22E. [Evidence

(1) Production in court in any proceedings of a document signed by the Minister and stating that the property specified in the document would, but for the operation of s.22, have been the property of an unlawful organisation is evidence that the specified property would, but

for the operation of that section, have been the property of an unlawful organisation, unless the contrary is shown.

(2) A document purporting to be a document of the Minister under subs.(1) and to be signed by the Minister shall be deemed for the purposes of this section to be such a document and to have been so signed, unless the contrary is shown.][1]

Amendments

1. As inserted by s.51 of the Criminal Justice (Terrorist Offences) Act 2005.

22F. [Seizure of certain property

(1) Where an interim order or a disposal order is in force, a member of the Garda Síochána or an officer of customs and excise may seize any property that is the subject of the order for the purpose of preventing the property being removed from the State.

(2) Property seized under this section shall be dealt with in accordance with the directions of the High Court.][1]

Amendments

1. As inserted by s.51 of the Criminal Justice (Terrorist Offences) Act 2005.

22G. [Compensation

(1) An application to the High Court for an order under this section may be made where—

(a) an interim order is discharged or lapses and a disposal order in relation to the matter is not made or, if made, is discharged, or

(b) an interim order or a disposal order is varied on appeal.

(2) On application under subs.(1) by a person who satisfies the Court that the person is the owner of any property to which—

(a) an interim order referred to in subs.(1)(a) related,

(b) an order referred to in subs.(1)(b) had related, but, by reason of its being varied by a court, has ceased to relate,

the Court may award the person such (if any) compensation payable by the Minister as it considers just in the circumstances in respect of any loss incurred by the person by reason of the order concerned.

(3) The Minister shall be given notice of, and be entitled to be heard in, any proceedings under this section.][1]

Amendments

1. As inserted by s.51 of the Criminal Justice (Terrorist Offences) Act 2005.

22H. [Application of certain provisions of Act of 1996

For the purposes of this Part, ss.6, 7 and 9 to 13 of the Act of 1996 apply with the following modifications and any other necessary modifications as if an interim order or a disposal order made under this Part, or an application for such order, had been made under the Act of 1996:

(a) a reference in any of the applicable provisions of the Act of 1996 to applicant or Minister shall be construed as referring to the Minister for Justice, Equality and Law Reform;

(b) a reference in any of the applicable provisions of the Act of 1996 to respondent shall be construed as defined in s.22A of this Act.][1]

Amendments

1. As inserted by s.51 of the Criminal Justice (Terrorist Offences) Act 2005.

22I. [Immunity from proceedings

No action or proceeding of any kind lies against a person in any court in respect of any act done or omission made in compliance with an order under any of ss.22B to 22D and 22H.][1]

Amendments

1. As inserted by s.51 of the Criminal Justice (Terrorist Offences) Act 2005.

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23. Provisions consequent upon the making of a declaration of illegality

(1) Whenever a declaration of legality is made, the following provisions shall have effect, that is to say:—

(a) every person who is detained in custody charged with the offence of being a member of the organisation to which such declaration of legality relates shall forthwith be released from such custody;

(b) all the property of the said organisation which became forfeited to the Minister for Justice by virtue of this Act on the making of the suppression order in respect of the said organisation shall become and be the property of the said organisation and shall be delivered to the said organisation by the said Minister on demand.

(2) Where the High Court makes a declaration of legality, it shall be lawful for that court, on the application of the Attorney-General, to suspend the operation of the foregoing sub-section of this section in respect of such declaration until the final determination of an appeal by the Attorney-General to the Supreme Court against such declaration, and if the High Court so suspends the said sub-section, the said sub-section shall only come into operation in respect of such declaration if and when the Supreme Court affirms the order of the High Court making such declaration.

24. Proof of membership of an unlawful organisation by possession of incriminating document

On the trial of a person charged with the offence of being a member of an unlawful organisation, Proof to the satisfaction of the court that an incriminating document relating to the said organisation was found on such person or in his possession or on lands or in premises owned or occupied by him or under his control shall, without more, be evidence until the contrary is proved that such person was a member of the said organisation at the time alleged in the said charge.

25. Closing of buildings

(1) Whenever an officer of the Garda Síochána not below the rank of chief superintendent is satisfied that a building is being used or has been used in any way for the purposes, direct or indirect, of an unlawful organisation, such officer may make an order (in this section referred to as a closing order) that such building be closed for the period of [12 months] from the date of such order.

(2) Whenever a closing order has been made an officer of the Garda Síochána not below the rank of chief superintendent may—

(a) extend the operation of such closing order for a farther period not exceeding [12 months] [1] from the expiration of the period mentioned in such closing order;

(b) terminate the operation of such closing order.

(3) Whenever a closing order has been made or has been extended, any person having an estate or interest in the building to which such closing order relates may apply to the High Court, in a summary manner on notice to the Attorney-General, for such order as is hereinafter mentioned, and on such application the High Court, if it is satisfied that, having regard to all the circumstances of the case, the making or the extension (as the case may be) of such closing order was not reasonable, may make an order quashing such closing order or the said extension thereof, as the case may be.

(4) Whenever and so long as a closing order is in operation, the following provisions shall have effect, that is to say:—

(a) it shall not be lawful for any person to use or occupy the building to which such closing order relates or any part of such building;

(b) any member of the Garda Síochána not below the rank of inspector may take all such steps as he shall consider necessary or expedient to prevent such building or any part thereof being used or occupied in contravention of this sub-section;

(c) every person who uses or occupies such building or any part of such building in contravention of this sub-section shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding three months.

(5) In this section the word "building" includes a part of a building and also all outhouses, yards, and gardens within the curtilage of the building.

[(6) Whenever a closing order has been extended, a member of the Garda Síochána not below the rank of chief superintendent may extend the operation of such closing order for a further period or periods each of which shall not exceed 12 months, but a closing order shall not be in operation for more than three years.][2]

Amendments

1. As substituted by s.4(a) of the Criminal Law Act 1976.
2. As inserted by s.4(b) of the Criminal Law Act 1976.

Part IV
Miscellaneous

26. Evidence of publication of treasonable, seditious or incriminating document

Where in any criminal proceedings the question whether a particular treasonable document, seditious document, or incriminating document was or was not published by the accused (whether by himself or in concert with other persons or by arrangement between himself and other persons) is in issue and an officer of the Garda Síochána not below the rank of chief superintendent states on oath that he believes that such document was published (as the case may be) by the accused or by the accused in concert with other persons or by arrangement between the accused and other persons, such statement shall be evidence (until the accused denies on oath that he published such document either himself or in concert or by arrangement as aforesaid) that the accused published such document as alleged in the said statement on oath of such officer.

27. Prohibition of certain public meetings

(1) It shall not be lawful to hold a public meeting which is held or purports to be held by or on behalf of or by arrangement or in concert with an unlawful organisation or which is held or purports to be held for the purpose of supporting, aiding, abetting, or encouraging an unlawful organisation or of advocating the support of an unlawful organisation.

(2) Whenever an officer of the Garda Síochána not below the rank of chief superintendent is of opinion that the holding of a particular public meeting about to be or proposed to be held would be a contravention of the next preceding sub-section of this section, it shall be lawful for such officer by notice given to a person concerned in the holding or organisation of such meeting or published in a manner reasonably calculated to come to the knowledge of the persons so concerned, to prohibit the holding of such meeting, and thereupon the holding of such meeting shall become and be unlawful.

(3) Whenever an officer of the Garda Síochána gives any such notice as is mentioned in the next preceding sub-section of this section, any person claiming to be aggrieved by such notice may apply to the High Court in a summary manner on notice to the Attorney General for such order as is hereinafter mentioned and, upon the hearing of such application, the High Court if it so thinks proper, may make an order annulling such notice.

(4) Every person who organises or holds or attempts to organise or hold a public meeting the holding of which is a contravention of this section or who takes part or is concerned in the organising or the holding of any such meeting shall be guilty of an offence under this section and shall be liable on summary conviction thereof to a fine not exceeding €4,000 or, at the discretion of the court, to imprisonment for a term not exceeding [12 months][1] or to both such fine and such imprisonment.

(5) In this section the expression "public meeting" includes a procession and also includes (in addition to a meeting held in a public place or on unenclosed land) a meeting held in a building or on enclosed land to which the public are admitted, whether with or without payment.

Amendments

1. As substituted by s.2(7) of the Criminal Law Act 1976.

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28. Prohibition of meetings in the vicinity of the Oireachtas

(1) It shall not be lawful for any public meeting to be held in, or any procession to pass along or through, any public street or unenclosed place which or any part of which is situate within one-half of a mile from any building in which both Houses or either House of the Oireachtas are or is sitting or about to sit if either—

(a) an officer of the Garda Síochána not below the rank of chief superintendent has, by notice given to a person concerned in the holding or organisation of such meeting or procession or published in a manner reasonably calculated to come to the knowledge of the persons so concerned, prohibited the hold-ing of such meeting in or the passing of such procession along or through any such public street or unenclosed place as aforesaid, or

(b) a member of the Garda Síochána calls on the persons taking part in such meeting or procession to disperse.

(2) Every person who—

(a) shall organise, hold, or take part in or attempt to organise, hold or take part in a public meeting or a procession in any such public street or unenclosed place as is mentioned in the foregoing sub-section of this section after such meeting or procession has been prohibited by a notice under paragraph (a) of the said sub-section,

(b) shall hold or take part in or attempt to hold or take part in a public meeting or a procession in any such Public street or unenclosed place as aforesaid after a member of the Garda Síochána has, under paragraph (b) of the said sub-section, called upon the persons taking part in such meeting or procession to disperse, or

(c) shall remain in or enter into any such public street or unenclosed space after being called upon to disperse as aforesaid,

shall be guilty of an offence under this section and shall be liable on summary conviction thereof to a fine not exceeding €2,500 or, at the discretion of the court, to imprisonment for a term not exceeding three months or to both such fine and such imprisonment.

29. [Search warrants relating to commission of offense under this Act, etc

(1) In this section "an offence to which this section applies" means—

(a) an offence under this Act,

(b) an offence under the Criminal Law Act 1976,

(c) an offence which is for the time being a scheduled offence for the purposes of Part V of this Act,

(d) treason, or

(e) an offence of attempting or conspiring to commit, or inciting the commission of, an offence referred to in paragraph (a), (b) or (d).

(2) If a judge of the District Court is satisfied by information on oath of a member of the Garda Síochána not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence to which this section applies is to be found in any place, the judge may issue a warrant for the search of that place and any persons found at that place.

(3) Subject to subsections (4) and (5), if a member of the Garda Síochána not below the rank of superintendent is satisfied that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence to which this section applies is to be found in any place, the member may issue to a member of the Garda Síochána not below the rank of sergeant a warrant for the search of that place and any persons found at that place.

(4) A member of the Garda Síochána not below the rank of superintendent shall not issue a search warrant under this section unless he or she is satisfied—

(a) that the search warrant is necessary for the proper investigation of an offence to which this section applies, and

(b) that circumstances of urgency giving rise to the need for the immediate issue of the search warrant would render it impracticable to apply to a judge of the District Court under this section for the issue of the warrant.

(5) A member of the Garda Síochána not below the rank of superintendent may issue a search warrant under this section only if he or she is independent of the investigation of the offence in relation to which the search warrant is being sought.

(6) A search warrant under this section shall be expressed, and shall operate, to authorise the member of the Garda Síochána named in the warrant, accompanied by such members of the Garda Síochána or of the Defence Forces as the member considers necessary—

(a) to enter, at any time or times within one week of the date of issue of the warrant, on production if so requested of the warrant or a copy of it, and if necessary by the use of reasonable force, the place named in the warrant,

(b) to search it and any persons found at that place, and

(c) to seize anything found at that place, or anything found in the possession of a person present at that place at the time of the search, that that member

reasonably believes to be evidence of, or relating to, the commission of an offence to which this section applies.

(7) Notwithstanding subsection (6), a search warrant issued by a member of the Garda Síochána not below the rank of superintendent under this section shall cease to have effect after a period of 48 hours has elapsed from the time of the issue of the warrant.

(8) A member of the Garda Síochána or of the Defence Forces acting under the authority of a search warrant under this section may—

(a) require any person present at the place where the search is being carried out to give to the member his or her name and address, and

(b) arrest without warrant any person who—

(i) obstructs or attempts to obstruct the member in the carrying out of his or her duties,

(ii) fails to comply with a requirement under paragraph (a), or

(iii) gives a name or address which the member has reasonable cause for believing is false or misleading.

(9) A person who obstructs or attempts to obstruct a member of the Garda Síochána or of the Defence Forces acting under the authority of a search warrant under this section, who fails to comply with a requirement under subsection (8)(a) or who gives a false or misleading name or address to the member shall be guilty of an offence and shall be liable on summary conviction to a class A fine or imprisonment for a term not exceeding 12 months or both.

(10) The power to issue a search warrant under this section is without prejudice to any other power conferred by statute to issue a warrant for the search of any place or person.

(11) A member of the Garda Síochána not below the rank of superintendent who issues a search warrant under this section shall, either at the time the warrant is issued or as soon as reasonably practicable thereafter, record in writing the grounds on which the warrant was issued, including how he or she was satisfied as to the matters referred to in subsection (4).

(12) In this section—

"independent of", in relation to the investigation of an offence, means not being in charge of, or involved in, that investigation;

"place" includes—

(a) a dwelling or a part thereof,

(b) a building or a part thereof,

(c) a vehicle, whether mechanically propelled or not,

(d) a vessel, whether sea-going or not,

(e) an aircraft, whether capable of operation or not, and

(f) a hovercraft.][1]

Amendments

1. As substituted by s.1 of the Criminal Justice (Search Warrants) Act 2012.

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30. Arrest and detention of suspected persons

(1) A member of the Garda Síochána (if he is not in uniform on production of his identification card if demanded) may without warrant stop, search, interrogate, and arrest any person, or do any one or more of those things in respect of any person, whom he suspects of having committed or being about to commit or being or having been concerned in the commission of an offence under any section or sub-section of this Act or an offence which is for the time being a scheduled offence for the purposes of Part V of this Act or whom he suspects of carrying a document relating to the commission or intended commission of any such offence as aforesaid or whom he suspects of being in possession of information relating to the commission or intended commission of any such offence as aforesaid.

(2) Any member of the Garda Síochána (if he is not in uniform on production of his identification card if demanded) may, for the purpose of the exercise of any of the powers conferred by the next preceding sub-section of this section, stop and search (if necessary by force) any vehicle or any ship, boat, or other vessel which he suspects to contain a person whom he is empowered by the said sub-section to arrest without warrant.

(3) Whenever a person is arrested under this section, he may be removed to and detained in custody in a Garda Síochána station, a prison, or some other convenient place for a period of twenty-four hours from the time of his arrest and may, if an officer of the Garda Síochána not below the rank of Chief Superintendent so directs, be so detained for a further period of twenty-four hours.

[(3A) If at any time during the detention of a person pursuant to this section a member of the Garda Síochána, with reasonable cause, suspects that person of having committed an offence (the "other offence") referred to in subsection (1) of this section, being an offence other than the offence to which the detention relates, and—

(a) the member of the Garda Síochána then in charge of the Garda Síochána station, or

(b) in case the person is being detained in a place of detention, other than a Garda Síochána station, an officer of the Garda Síochána not below the rank of inspector who is not investigating the offence to which the detention relates or the other offence, has reasonable grounds for believing that the continued detention of the person is necessary for the proper investigation of the other offence, the person may continue to be detained in relation to the other offence as if that offence was the offence for which the person was originally detained, but nothing in this subsection authorises the detention of the person for a period that is longer than the period which is authorised by or under the other provisions of this section.][1]

[(4) An officer of the Garda Síochána not below the rank of superintendent may apply to a judge of the District Court for a warrant authorising the detention of a person detained pursuant to a direction under subsection (3) of this section for a further period not exceeding 24 hours if he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned.

(4A) On an application under subsection (4) of this section the judge concerned shall issue a warrant authorising the detention of the person to whom the application relates for a further period not exceeding 24 hours if, but only if, the judge is satisfied that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously.

(4B) On an application under subsection (4) of this section the person to whom the application relates shall be produced before the judge concerned and the judge shall hear any submissions made and consider any evidence adduced by or on behalf of the person and the officer of the Garda Síochána making the application.][2]

[(4BA)

(a) Without prejudice to paragraph (b) of this subsection, where a judge hearing an application under subsection (4) of this section is satisfied, in order to avoid a risk of prejudice to the investigation concerned, that it is desirable to do so, he may—

(i) direct that the application be heard otherwise than in public, or

(ii) exclude from the Court during the hearing all persons except officers of the Court, persons directly concerned in the proceedings, bona fide representatives of the Press and such other persons as the Court may permit to remain.

(b) On the hearing of an application under subsection (4) of this section, the judge may, of his own motion or on application by the officer of the Garda Síochána making the application under that subsection (4), where it appears that—

(i) particular evidence to be given by any member of the Garda Síochána during the hearing (including evidence by way of answer to a question asked of the member in cross-examination) concerns steps that have been, or may be, taken in the course of any inquiry or investigation being conducted by the Garda Síochána with respect to the suspected involvement of the person to whom the application relates, or any other person, in the commission of the offence to which the detention relates or any other offence, and

(ii) the nature of those steps is such that the giving of that evidence concerning them could prejudice, in a material respect, the proper conducting of any foregoing inquiry or investigation, direct that, in the public interest, the particular evidence shall be given in the absence of every person, including the person to whom the application relates and any legal representative (whether of that person or the applicant), other than—

(I) the member or members whose attendance is necessary for the purpose of giving the evidence to the judge; and

(II) if the judge deems it appropriate, such one or more of the clerks of the Court as the judge determines.

(c) If, having heard such evidence given in that manner, the judge considers the disclosure of the matters to which that evidence relates would not have the effect referred to in paragraph (b)(ii) of this subsection, the judge shall direct the evidence to be re-given in the presence of all the other persons (or, as the case may be, those of them not otherwise excluded from the Court under paragraph (a) of this subsection).

(d) No person shall publish or broadcast or cause to be published or broadcast any information about an application under subsection (4) of this section other than a statement of—

(i) the fact that the application has been made by the Garda Síochána in relation to a particular investigation, and

(ii) any decision resulting from the application.

(e) If any matter is published or broadcast in contravention of paragraph (d) of this subsection, the following persons, namely—

(i) in the case of a publication in a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical,

(ii) in the case of any other publication, the person who publishes it, and

(iii) in the case of a broadcast, any person who transmits or provides the programme in which the broadcast is made and any person having functions in relation to the programme corresponding to those of the editor of a newspaper, shall be guilty of an offence and shall be liable—

(I) on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 12 months or to both, or

(II) on conviction on indictment, to a fine not exceeding €50,000 or to imprisonment for a term not exceeding 3 years or to both.

(f) In this subsection—

"broadcast" means the transmission, relaying or distribution by wireless telegraphy, cable or the internet of communications, sounds, signs, visual images or signals, intended for direct reception by the general public whether such communications, sounds, signs, visual images or signals are actually received or not;

"publish" means publish, other than by way of broadcast, to the public or a portion of the public.]

[(4BB) Save where any rule of law requires such an issue to be determined by the Court, in an application under subsection (4) of this section no issue as to the lawfulness of the arrest or detention of the person to whom the application relates may be raised.]

[(4BC)

(a) In an application under subsection (4) of this section it shall not be necessary for a member of the Garda Síochána, other than the officer making the application, to give oral evidence for the purposes of the application and the

latter officer may testify in relation to any matter within the knowledge of another member of the Garda Síochána that is relevant to the application notwithstanding that it is not within the personal knowledge of the officer.

(b) However, the Court hearing such an application may, if it considers it to be in the interests of justice to do so, direct that another member of the Garda Síochána give oral evidence and the Court may adjourn the hearing of the application for the purpose of receiving such evidence.][3]

(4C) A person detained under this section may, at any time during such detention, be charged before the District Court or a Special Criminal Court with an offence or be released by direction of an officer of the Garda Síochána and shall, if not so charged or released, be released at the expiration of the period of detention authorised by or under subsection (3) of this section or, as the case may be, that subsection and subsection (4A) of this section,] [or, in case the detention follows an arrest under a warrant issued pursuant to section 30A of this Act, by subsection (3) of this subsection as substituted by the said section 30A.][4]

[(4D) If—

(a) an application is to be made, or is made, under subsection (4) of this section for a warrant authorising the detention for a further period of a person detained pursuant to a direction under subsection (3) of this section, and

(b) the period of detention under subsection (3) of this section has not expired at the time of the arrival of the person concerned at the court house for the purposes of the hearing of the application but would, but for this subsection, expire before, or during the hearing (including, if such should occur, any adjournment of the hearing), it shall be deemed not to expire until the final determination of the application; and, for purposes of this subsection—

(i) a certificate signed by the court clerk in attendance at the court house concerned stating the time of the arrival of the person concerned at that court house shall be evidence, until the contrary is shown, of the time of that person's arrival there;

(ii) "court house" includes any venue at which the hearing of the application takes place.][5]

(5) A member of the Garda Síochána may do all or any of the following things in respect of a person detained under this section, that is to say:—

(a) demand of such person his name and address;

(b) search such person or cause him to be searched;

(c) photograph such person or cause him to be photographed;

(d) take, or cause to be taken, the fingerprints of such person.

(6) Every person who shall obstruct or impede the exercise in respect of him by a member of the Garda Síochána of any of the powers conferred by the next preceding sub-section of this section or shall fail or refuse to give his name and address or shall give, in response to any such demand, a name or an address which is false or misleading shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding six months.

Amendments

1. As inserted by s.21(1)(a) of the Criminal Justice (Amendment) Act 2009.
2. As substituted and inserted by s.10 of the Offences Against the State (Amendment) Act 1998.
3. As inserted by s.21(1)(b) of the Criminal Justice (Amendment) Act 2009.
4. As inserted by s.10 of the Offences Against the State (Amendment) Act 1998.
5. As inserted by s.187(a) of the Criminal Justice Act 2006 and substituted by s.21(1)(c) of the Criminal Justice (Amendment) Act 2009.

30A. [Rearrest under section 30][1]

[(1) Where a person arrested on suspicion of having committed an offence is detained pursuant to section 30 of this Act and is released without any charge having been made against him, he shall not—

(a) be arrested again in connection with the offence to which the detention related, or

(b) be arrested for any other offence of which, at the time of the first arrest, the member of the Garda Síochána by whom he was arrested, suspected, or ought reasonably to have suspected, him of having committed, except under the authority of a warrant issued by a judge of the District Court who is satisfied on information supplied on oath by a member of the Garda Síochána not below the rank of superintendent that either of the following cases apply, namely—

(i) further information has come to the knowledge of the Garda Síochána since the person's release as to his suspected participation in the offence for which his arrest is sought,

(ii) notwithstanding that the Garda Síochána had knowledge, prior to the person's release, of the person's suspected participation in the offence for which his arrest is sought, the questioning of the person in relation to that offence, prior to his release, would not have been in the interests of the proper investigation of the offence.

(1A) An application for a warrant under this section shall be heard otherwise than in public.][2]

(2) Section 30 of this Act, and, in particular, any powers conferred thereby, shall apply to or in respect of a person arrested in connection with an offence to which that section relates under a warrant issued pursuant to subsection (1) of this section as it applies to or in respect of a person to whom that section applies, with the following and any other necessary modifications:

(a) the substitution of the following subsection for subsection (3):

'(3) Whenever a person is arrested under a warrant issued pursuant to section 30A(1) of this Act, he may be removed to and detained in custody in a Garda Síochána station, a prison or some other convenient place for a period of 24 hours from the time of his arrest.',

(b) the deletion of subsections [(4), (4A), [(4B), (4BA), (4BB), (4BC)][3] and (4D)][4], and

(c) the addition of the following at the end of subsection (4C):

'or, in case the detention follows an arrest under a warrant issued pursuant to section 30A of this Act, by subsection (3) of this section as substituted by the said section 30A.'.

(3) Notwithstanding subsection (1) of this section, a person to whom that subsection relates may be arrested for any offence [for the purpose of charging him or her with that offence forthwith or bringing him or her before the Special Criminal Court as soon as practicable so that he or she may be charged with that offence before that Court.][5]

Amendments

1. As inserted by s.11 of the Offences Against the State Act 1998.
2. As substituted and inserted by s.21(2) of the Criminal Justice (Amendment) Act 2009.
3. As substituted by s.21(3) of the Criminal Justice (Amendment) Act 2009.
4. As substituted by s.187(b)(i) of the Criminal Justice Act 2006.
5. As substituted by s.187(b)(ii) of the Criminal Justice Act 2006.

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31. Offences by bodies corporate

Where an offence under any section or sub-section of this Act is committed by a body corporate and is proved to have been so committed with the consent or approval of or to have been facilitated by any neglect on the part of, any director, manager, secretary, or other officer of such body corporate, such director, manager, secretary, or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded

against and punished accordingly, whether such body corporate has or has not been proceeded, against in respect of the said offence.

32. Re-capture of escaped prisoners

(1) Whenever any person detained under this Act shall have escaped from such detention, such person may be arrested without warrant by any member of the Garda Síochána and shall thereupon be returned in custody to the place from which he so escaped.

(2) Every person who shall aid or abet a person detained under this Act to escape from such detention or to avoid recapture after having so escaped shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding three months.

33. Remission etc, in respect of convictions by a Special Criminal Court

(1) Except in capital cases, the Government may, at their absolute discretion, at any time remit in whole or in part or modify (by way of mitigation only) or defer any punishment imposed by a Special Criminal Court.

(2) Whenever the Government remits in whole or in part or defers a punishment imposed by a Special Criminal Court, the Government may attach to such remittal or deferment such conditions (if any) as they may think proper.

(3) Whenever the Government defers under the next preceding sub-section of this section the whole or any part of a sentence of imprisonment, the person on whom such sentence was imposed shall be bound to serve such deferred sentence, or part of a sentence, of imprisonment when the same comes into operation and may for that purpose be arrested without warrant.

34. Forfeiture and disqualifications on certain convictions by a Special Criminal Court

(1) Whenever a person who is convicted by a Special Criminal Court of an offence which is, at the time of such conviction, a scheduled offence for the purposes of Part V of this Act, holds at the time of such conviction an office or employment remunerated out of the Central Fund or moneys provided by the Oireachtas or moneys raised by local taxation, or in or under or as a paid member of a board or body established by or under statutory authority, such person shall immediately on such conviction forfeit such office, employment, place, or emolument and the same shall forthwith become and be vacant.

(2) Whenever a person who is convicted by a Special Criminal Court of an offence which is, at the time of such conviction, a scheduled offence for the purposes of Part V

of this Act, is at the time of such conviction in receipt of a pension or superannuation allowance payable out of the Central Fund or moneys provided by the Oireachtas or moneys raised by local taxation, or the funds of a board or body established by or under statutory authority, such person shall immediately upon such conviction forfeit such pension or superannuation allowance and such pension or superannuation allowance shall forthwith cease to be payable.

(3) Every person who is convicted by a Special Criminal Court of an offence which is, at the time of such conviction, a scheduled offence for the purposes of Part V of this Act, shall be disqualified—

(a) for holding, within seven years after the date of such conviction, any office or employment remunerated out of the Central Fund or moneys provided by the Oireachtas or moneys raised by local taxation or in or under or as a paid member of a board or body established by or under statutory authority, and

(b) for being granted out of the Central Fund or any such moneys or the funds of any such board or body, at any time after the date of such conviction, any pension, superannuation allowance, or gratuity in respect wholly or partly of any service rendered or thing done by him before the date of such conviction, and

(c) for receiving at any time after such conviction any such pension, superannuation allowance, or gratuity as is mentioned in the next preceding paragraph of this section which was granted but not paid on or before the date of such conviction.

(4) Whenever a conviction which occasions by virtue of this section any forfeiture or disqualification is quashed or annulled or the convicted person is granted a free pardon such forfeiture or disqualification shall be annulled, in the case of a quashing or annulment, as from the date of the conviction and, in the case of a free pardon, as from the date of such pardon.

(5) The Government may, at their absolute discretion, remit, in whole or in part, any forfeiture or disqualification incurred under this section and restore or revive, in whole or in part, the subject of such forfeiture as from the date of such remission.

Part V
Special Criminal Courts

35. Commencement and cesser of this Part of the Act

(1) This Part of this Act shall not come into or be in force save as and when and for so long as is provided by the subsequent sub-sections of this section.

(2) If and whenever and so often as the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order and that it is therefore necessary that this Part of this Act should come into force, the Government may make and publish a proclamation declaring that the Government is satisfied as aforesaid and ordering that this Part of this Act shall come into force.

(3) Whenever the Government makes and publishes, under the next preceding sub-section of this section, such proclamation as is mentioned in that sub-section, this Part of this Act shall come into force forthwith.

(4) If at any time while this Part of this Act is in force the Government is satisfied that the ordinary courts are adequate to secure the effective administration of justice and the preservation of public peace and order, the Government shall make and publish a proclamation declaring that this Part of this Act shall cease to be in force, and thereupon this Part of this Act shall forthwith cease to be in force.

(5) It shall be lawful for Dáil Éireann, at any time while this Part of this Act is in force, to pass a resolution annulling the proclamation by virtue of which this Part of this Act is then in force, and thereupon such proclamation shall be annulled and this Part of this Act shall cease to be in force, but without prejudice to the validity of anything done under this Part of this Act after the making of such proclamation and before the passing of such resolution.

(6) A proclamation made by the Government under this section shall be published by publishing a copy thereof in the Iris Oifigiúil and may also be published in any other manner which the Government shall think proper.

36. Schedule offences

(1) Whenever while this Part of this Act is in force the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to offences of any particular class or kind or under any particular enactment, the Government may by order declare that offences of that particular class or kind or under that particular enactment shall be scheduled offences for the purposes of this Part of this Act.

(2) Whenever the Government has made under the foregoing sub-section of this section any such declaration as is authorised by that sub-section, every offence of the particular

class or kind or under the particular enactment to which such declaration relates shall, until otherwise provided by an order under the next following sub-section of this section, be a scheduled offence for the purposes of this Part of this Act.

(3) Whenever the Government is satisfied that the effective administration of justice and the preservation of public peace and order in relation to offences of any particular class or kind or under any particular enactment which are for the time being scheduled offences for the purposes of this Part of this Act can be secured through the medium of the ordinary courts, the Government may by order declare that offences of that particular class or kind or under that particular enactment shall, upon the making of such order, cease to be scheduled offences for the purposes of this Part of this Act.

37. Attempting, etc, to commit a scheduled offence

In addition to the offences which are, by virtue of an order made under the next preceding section, for the time being scheduled offences for the purposes of this Part of this Act, each of the following acts, that is to say, attempting or conspiring or inciting to commit, or aiding or abetting the commission of, any such schedule offence shall itself be a scheduled offence for the said purposes.

38. Establishment of Special Criminal Courts

(1) As soon as may be after the coming into force of this Part of this Act, there shall be established for the purposes of this Part of this Act, a court which shall be styled and known and is in this Act referred to as a Special Criminal Court.

(2) The Government may, whenever they consider it necessary or desirable so to do, establish such additional number of courts for the purposes of this Part of this Act as they think fit, and each court so established shall also be styled and known and is in this Act referred to as a Special Criminal Court.

(3) Whenever two or more Special Criminal Courts are in existence under this Act, the Government may, if and so often as they so think fit, reduce the number of such Courts and for that purpose abolish such of those existing Courts as appear to the Government to be redundant.

[(4) For the purposes of this Act, a Special Criminal Court is in existence if it has been established under this section and has at the relevant time not fewer than 3 members appointed under s.39.][1]

Amendments

1. As inserted by s.52 of the Criminal Justice (Terrorist Offences) Act 2005.

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39. Constitution of Special Criminal Courts

(1) Every Special Criminal Court established under this Part of this Act shall consist of such uneven number (not being less than three) of members as the Government shall, from time to time determine, and different numbers of members may be so fixed in respect of different Special Criminal Courts.

(2) Each member of a Special Criminal Court shall be appointed, and be removable at will, by the Government.

(3) No person shall be appointed to be a member of a Special Criminal Court unless he is a judge of the High Court or the Circuit Court, or a justice of the District Court, or a barrister of not less than seven years standing, or a solicitor of not less than seven years standing, or an officer of the Defence Forces not below the rank of commandant.

(4) The Minister for Finance may pay to every member of a Special Criminal Court such (if any) remuneration and allowances as the said Minister may think proper, and different rates of remuneration and allowances may be so paid to different members of any such Court, or to the members of different such Courts.

(5) The Government may appoint such registrars for the purposes of any Special Criminal Court as they think proper, and every such registrar shall hold his office on such terms and conditions and shall receive such (if any) remuneration as the Minister for Finance shall from time to time direct.

40. Verdicts of Special Criminal Courts

(1) The determination of every question before a Special Criminal Court shall be according to the opinion of the majority of the members of such Special Criminal Court present at and taking part in such determination, but no member or officer of such Court shall disclose whether any such determination was or was not unanimous or, where such determination was not unanimous, the opinion of any individual member of such Court.

(2) Every decision of a Special Criminal Court shall be pronounced by such one member of the Court as the Court shall determine, and no other member of the Court shall pronounce or indicate his concurrence in or dissent from such decision.

41. Procedure of Special Criminal Courts

(1) Every Special Criminal Court shall have power, in its absolute discretion, to appoint the times and places of its sittings, and shall have control of its own procedure in all respects and, shall for that purpose make, with the concurrence of the Minister for

Justice, rules regulating its practice and procedure and may in particular provide by such rules for the issuing of summonses, the procedure for bringing (in custody or on bail) persons before it for trial, the admission or exclusion of the public to or from its sittings, the enforcing of the attendance of witnesses, and the production of documents.

(2) A Special Criminal Court sitting for the purpose of the trial of a person, the making of any order, or the exercise of any other jurisdiction or function shall consist of an uneven number (not less than three) of members of such Court present at and taking part in such sitting.

(3) Subject and without prejudice to the provisions of the next preceding sub-section of this section, a Special Criminal Court may exercise any power, jurisdiction, or function notwithstanding one or more vacancies in the membership of such court.

(4) Subject to the provisions of this Act, the practice and procedure applicable to the trial of a person on indictment in the Central Criminal Court shall, so far as practicable, apply to the trial of a person by a Special Criminal Court, and the rules of evidence applicable upon such trial in the Central Criminal Court shall apply to every trial by a Special Criminal Court.

42. Authentication of orders of Special Criminal Courts

(1) Every order or other act of a Special Criminal Court shall be authenticated by the signature of a registrar of that Court.

(2) Every document which purports to be an order or other act of a Special Criminal Court and to be authenticated by the signature of a registrar of that Court shall be received in evidence in all Courts and be deemed to be an order or other act (as the case may require) of such Special Criminal Court without proof of the signature by which such order or act purports to be authenticated or that the person whose signature such signature purports to be was a registrar of the said Special Criminal Court.

43. Jurisdiction of Special Criminal Courts

(1) A Special Criminal Court shall have jurisdiction to try and to convict or acquit any person lawfully brought before that Court for trial under this Act, and shall also have the following ancillary jurisdictions, that is to say:—

(a) jurisdiction to sentence every person convicted by that Court of any offence to suffer the punishment provided by law in, respect of such offence;

(b) jurisdiction, in lieu of or in addition to making any other order in respect of a person, to require such person to enter into a recognisance before such Special Criminal Court or before a justice of the District Court, in such amount and with

or without sureties as such Special Criminal Court shall direct, to keep the peace and be of good behaviour for such period as that Court shall specify;

(c) jurisdiction to order the detention of and to detain in civil or military custody, or to admit to bail in such amount and with or without sureties as that Court shall direct, pending trial by that Court and during and after such trial until conviction or acquittal, any person sent, sent forward, transferred, or otherwise brought for trial by that Court;

(d) power to administer oaths to witnesses;

(e) jurisdiction and power to punish, in the same manner and in the like cases as the High Court, all persons whom such Special Criminal Court finds guilty of contempt of that Court or any member thereof, whether such contempt is or is not committed in the presence of that Court;

(f) power, in relation to recognisances and bail bonds entered into before such Special Criminal Court, to estreat such recognisances and bail bonds in the like manner and in the like cases as the District Court estreats recognisances and bail bonds entered into before it.

(2) The provisions of this Part of this Act in relation to the carrying out of sentences of imprisonment pronounced by Special Criminal Courts and the regulations made under those provisions shall apply and have effect in relation to the carrying out of orders made by Special Criminal Courts under the foregoing sub-section of this section for the detention of persons in custody, whether civil or military.

44. Appeal to Court of Criminal Appeal

[(1) A person convicted by a Special Criminal Court of any offence or sentenced by a Special Criminal Court to suffer any punishment may appeal to the Court of Criminal Appeal from such conviction or sentence.][1]

(2) Sections 28 to 30 and sections 32 to 35 of the Courts of Justice Act, 1924 (No. 10 of 1924), and sections 5, 6, and 7 of the Courts of Justice Act, 1928 (No. 15 of 1928), shall apply and have effect in relation to appeals under this section in like manner as they apply and have effect in relation to appeals under section 31 of the Courts of Justice Act, 1924.

Amendments

1. Subsection (1) substituted by s.32 of the Criminal Procedure Act 2010

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45. Proceedings in the District Court in relation to scheduled offences

(1) Whenever a person is brought before a justice of the District Court charged with a scheduled offence which such justice has jurisdiction to dispose of summarily, such justice shall, if the Attorney-General so requests; send such person (in custody or on bail) for trial by a Special Criminal Court on such charge.

(2) Whenever a person is brought before a justice of the District Court charged with a scheduled offence which is an indictable offence and such justice […][1] sends such person forward for trial on such charge, such justice shall (unless the Attorney-General otherwise directs) send such person forward in custody or, with the consent of the Attorney-General, at liberty on bail for trial by a Special Criminal Court on such charge.

(3) Where under this section a person is sent or sent forward in custody for trial by a Special Criminal Court, it shall be lawful for the High Court, on the application of such person, to allow him to be at liberty on such bail (with or without sureties) as the High Court shall fix for his due attendance before the proper Special Criminal Court for trial on the charge on which he was so sent forward.

Amendments

1. Words deleted by s.11 of the Criminal Justice Act 1999.

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46. Proceedings in the District Court in relation to non-scheduled offences

(1) Whenever a person is brought before a justice of the District Court charged with an offence which is not a scheduled offence and which such justice has jurisdiction to dispose of summarily, such justice shall, if the Attorney-General so requests and certifies in writing that the ordinary courts are in his opinion 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, send such person (in custody or on bail) for trial by a Special Criminal Court on such charge.

(2) Whenever a person is brought before a justice of the District Court charged with an indictable offence which is not a scheduled offence and such justice […] sends such person forward for trial on such charge, such justice shall, if an application in this behalf is made to him by or on behalf of the Attorney-General grounded on the certificate of the Attorney-General that the ordinary Courts are, in his opinion 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, send such person forward in custody or, with the consent of the Attorney-General, at liberty on bail for trial by a Special Criminal Court on such charge.

(3) Where under this section a person is sent or sent forward in custody for trial by a Special Criminal Court, it shall be lawful for the High Court, on the application of such person, to allow him to be at liberty on such bail (with or without sureties) as the High

Court shall fix for his due attendance before the proper Special Criminal Court for trial on the charge on which he was so sent forward.

Amendments

1. Words deleted by s.11 of the Criminal Justice Act 1999.

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47. Charge before Special Criminal Court in lieu of District Court

(1) Whenever it is intended to charge a person with a scheduled offence, the Attorney-General may, if he so thinks proper, direct that such person shall, in lieu of being, charged with such offence before a justice of the District Court, be brought before a Special Criminal Court and there charged with such offence and, upon such direction being so given, such person shall be brought before a Special Criminal Court and shall be charged before that Court with such offence and shall be tried by such Court on such charge.

(2) Whenever it is intended to charge a person with an offence which is not a scheduled offence and the Attorney-General certifies that the ordinary Courts are, in his opinion, 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, the foregoing sub-section of this section shall apply and have effect as if the offence with which such person is so intended to be charged were a scheduled offence.

(3) Whenever a person is required by this section to be brought before a Special Criminal Court and charged before that Court with such offence, it shall be lawful for such Special Criminal Court to issue a warrant for the arrest of such person and the bringing of him before such Court and, upon the issue of such warrant, it shall be lawful for such person to be arrested thereunder and brought in custody before such Court.

48. Transfer of trials from ordinary Courts to a Special Criminal Court

Whenever a person charged with an offence has been sent forward by a justice of the District Court for trial by the Central Criminal Court or the Circuit Court on such charge, then and in every such case the following provisions shall have effect, that is to say:—

> (a) if the Attorney-General certifies that the ordinary Courts are, in his opinion, 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, the Attorney-General shall cause an application, grounded on his said certificate, to be made on his behalf to the High Court for the transfer of the trial of such person on such charge to a Special Criminal Court, and on the hearing of such application the High Court shall make the order applied for, and

thereupon such person shall be deemed to have been sent forward to a Special Criminal Court for trial on such charge;

(b) whenever the High Court has made, under the next preceding paragraph of this sub-section, such order as is mentioned in that Paragraph, the following provisions shall have effect, that is to say:—

(i) a copy of such order shall be served on such person by a member of the Garda Síochána,

(ii) a copy of such order shall be sent to the appropriate county registrar,

(iii) such person shall be brought before a Special Criminal Court for trial at such time and place as that Court shall direct,

(iv) if such person is in custody when such order is made, he may be detained in custody until brought before such Special Criminal Court for trial,

(v) if such person is at liberty on bail when such order is made, such bail shall be deemed to be for his attendance before a Special Criminal Court for trial at such time and place as that Court shall direct and, if he fails so to attend before the said Court, he shall be deemed to have broken his bail and his bail bond shall be estreated accordingly.

49. Selection of the Special Criminal Court by which a person is to be tried

[(1)] Where a person is (in the case of an offence triable summarily) sent or (in the case of an indictable offence) sent forward by a justice of the District Court to a Special Criminal Court for trial or the trial of a person is transferred under this Act to a Special Criminal Court or a person is to be charged before and tried by a Special Criminal Court, such of the following, provisions as are applicable shall have effect, that is to say:—

(a) where a person is so sent or sent forward, the justice shall not specify the particular Special Criminal Court to which he sends or sends forward such person for trial;

(b) where the trial of a person is so transferred, the order effecting such transfer shall not specify the particular Special Criminal Court to which such trial is transferred;

(c) if only one Special Criminal Court is in existence under this Act at the time of such sending or sending forward or such transfer (as the case may be), such

sending, sending forward, or transfer shall be deemed to be to such one Special Criminal Court;

(d) if only one Special Criminal Court is in existence under this Act when such person is to be so charged and tried, such person shall be charged before and tried by that Special Criminal Court;

(e) if two or more Special Criminal Courts are in existence under this Act at the time of such sending or sending forward or such transfer or such charging (as the case may be), it shall be lawful for the Attorney General to cause an application to be made on his behalf to such Special Criminal Court as he shall think proper for an order that such person be tried by or charged before and tried by that Court and thereupon the said Court shall make the order so applied for;

(f) upon the making of the order mentioned in the next preceding paragraph of this section, whichever of the following provisions is applicable shall have effect, that is to say:—

(i) such person shall be deemed to have been sent or sent forward for trial by the Special Criminal Court which made the said order and all persons concerned shall act accordingly, or

(ii) the trial of such person shall be deemed to have been transferred to the said Special Criminal Court and all persons concerned shall act accordingly, or

(iii) such person shall be charged before and tried by the said Special Criminal Court and all persons concerned shall act accordingly.

[(2) A trial that is to be heard before a Special Criminal Court may be transferred by the Court, on its own motion or on the application of a triable person or the Director of Public Prosecutions, to another Special Criminal Court, but only if the first Court decides that it would be in the interests of justice to do so.]

[(3) In deciding whether it is in the interests of justice to transfer a trial, the Special Criminal Court may consider any factors it thinks relevant, including—

(a) whether the transfer would be in the interests of the expeditious administration of justice, and

(b) whether the transfer would prejudice the triable person or persons or the prosecution.]

[(4) A trial may be transferred under this section notwithstanding that an order has been made under subsection (1)(e) in relation to the triable person or persons.]

[(5) Where 2 or more triable persons are to be tried jointly, the decision of the Special Criminal Court to transfer the trial applies in relation to all of them.]

[(6) Subsection (5) does not affect the right of a triable person to apply for a separate trial and, if the application is granted, then to apply for a transfer of that trial.]

[(7) The decision of a Special Criminal Court to transfer a trial is final and unappealable.]

[(8) In this section 'triable person' means a person sent or sent forward for trial to, or charged before or transferred under this Act to, a Special Criminal Court.] [1]

Amendments

1. S.49 Renumbered and ss.2-8 inserted by s.53 of the Criminal Justice (Terrorist Offences) Act 2005.

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50. Orders and sentences of Special Criminal Courts

(1) Save as shall be otherwise provided by regulations made under this section, every order made or sentence pronounced by a Special Criminal Court shall be carried out by the authorities and officers by whom, and in the like manner as, a like order made or sentence pronounced by the Central Criminal Court is required by law to be carried out.

(2) Every order, conviction, and sentence made or pronounced by a Special Criminal Court shall have the like consequences in law as a like order, conviction, or sentence made or pronounced by the Central Criminal Court would have and, in particular, every order made and every sentence pronounced by a Special Criminal Court shall confer on the persons carrying out the same the like protections and immunities as are conferred by law on such persons when carrying out a like order made or a like sentence pronounced by the Central Criminal Court.

(3) The Minister for Justice may make regulations in relation to the carrying out of sentences of penal servitude or of imprisonment pronounced by Special Criminal Courts and the prisons and other places in which persons so sentenced shall be imprisoned and the maintenance and management of such places, and the said Minister may also, if he so thinks proper, make by writing under his hand such special provision as he shall think fit in relation to the carrying out of any such sentence in respect of any particular individual, including transferring to military custody any particular individual so sentenced.

(4) The Minister for Defence may make regulations in relation to the places and the manner generally in which persons transferred to military custody under the next preceding sub-section of this section shall be kept in such custody, and the said Minister may also, if he so thinks proper, make by writing under his hand such special provision as he shall think fit in respect of the custody of any particular such person.

51. Standing mute of malice and refusal to plead etc

(1) Whenever a person brought before a Special Criminal Court for trial stands mute when called upon to plead to the charge made against him, that Court shall hear such evidence (if any) relevant to the issue as to whether such person stands mute of malice or by the visitation of God as may then and there be adduced before it, and

(a) if that Court is satisfied on such evidence that such person is mute by the visitation of God, all such consequences shall ensue as would have ensued if such person had been found to be so mute by a Judge sitting in the Central Criminal Court, and

(b) if that Court is not so satisfied or if no such evidence is adduced, that Court shall direct a plea of "not guilty" to be entered for that person.

(2) Whenever a person brought, before a Special Criminal Court for trial fails or refuses in any way, other than standing mute, to plead to the charge made against him when called upon to do so, that Court shall (without prejudice to its powers under the next following sub-section of this section) direct a plea of "not guilty" to be entered for such person.

(3) Whenever a person at any stage of his trial before a Special Criminal Court by any act or omission refuses to recognise the authority or jurisdiction of that Court, or does any act (other than lawfully objecting in due form of law to the jurisdiction of that Court to try him) which, in the opinion of that Court, is equivalent to a refusal to recognise that Court, or the authority or jurisdiction thereof, such person shall be guilty of contempt of that Court and may be punished by that Court accordingly.

52. Examination of detained persons

(1) Whenever a person is detained in custody under the provisions in that behalf contained in Part IV of this Act, any member of the Garda Síochána may demand of such person, at any time while he is so detained, a full account of such person's movements and actions during any specified period and all information in his possession in relation to the commission or intended commission by another person of any offence under any section or sub-section of this Act or any scheduled offence.

(2) If any person, of whom any such account or information as is mentioned in the foregoing sub-section of this section is demanded under that sub-section by a member of the Garda Síochána, fails or refuses to give to such member such account or any such information or gives to such member any account or information which is false or misleading, he shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding six months.

53. Immunities of members, etc, of Special Criminal Courts

(1) No action, prosecution, or other proceeding, civil or criminal, shall lie against any member of a Special Criminal Court in respect of any order made, conviction or sentence pronounced, or other thing done by that Court or in respect of anything done by such member in the course of the performance of his duties or the exercise of his powers as a member of that Court or otherwise in his capacity as a member of that Court, whether such thing was or was not necessary to the performance of such duties or the exercise of such powers.

(2) No action or other proceeding for defamation shall lie against any person in respect of anything written or said by him in giving evidence, whether written or oral, before a Special Criminal Court or for use in proceedings before a Special Criminal Court.

(3) No action, prosecution, or other proceeding, civil or criminal, shall lie against any registrar, clerk, or servant of a Special Criminal Court in respect of anything done by him in the performance of his duties as such registrar, clerk, or servant, whether such thing was or was not necessary to the performance of such duties.

Part VI
Powers of Internment

[…][1]

Amendments

1. Part VI repealed by s.2 of the Offences Against the State (Amendment) Act 1940.

OFFENCES AGAINST THE STATE (AMENDMENT) ACT 1940

Number 2 of 1940

Arrangement of Sections

An Act to repeal Part VI of the Offences Against the State Act 1939 and to make other provisions in relation to the detention of certain persons [9th February, 1940]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:-

Part I
Preliminary and General

1. Short title, construction, and collective citation

(1) This Act may be cited as the Offences Against the State (Amendment) Act, 1940.

(2) This Act shall be construed as one with the Offences Against the State Act, 1939 (No. 13 of 1939).

(3) The Offences Against the State Act, 1939, and this Act may be cited together as the Offences Against the State Acts, 1939 and 1940.

2. Repeal

Part VI of the Offences Against the State Act, 1939 (No. 13 of 1939), is hereby repealed.

3. Commencement and cesser of this Part of this Act

(1) This Part of this Act shall not come into or be in force save as and when and for so long as is provided by the subsequent sub-sections of this section.

(2) If and whenever and so often as the Government makes and publishes a proclamation declaring that the powers conferred by this Part of this Act are necessary to secure the preservation of public peace and order and that it is expedient that this Part of this Act should come into force immediately, this Part of this Act shall come into force forthwith.

(3) If at any time while this Part of this Act is in force the Government makes and publishes a proclamation declaring that this Part of this Act shall cease to be in force, this Part of this Act shall forthwith cease to be in force.

(4) Whenever the Government has made and published a proclamation under the second sub-section of this section, it shall be lawful for Dáil Eireann, at any time while this Part of this Act is in force by virtue of such proclamation, to pass a resolution annulling such proclamation, and thereupon such proclamation shall be annulled and this Part of this Act shall cease to be in force, but without prejudice to the validity of anything done under this Part of this Act after the making of such proclamation and before the passing of such resolution.

(5) A proclamation made by the Government under this section shall be published by publishing a copy thereof in the *Iris Oifigiúil* and may also be published in any other manner which the Government shall think proper.

4. Special powers of arrest and detention

(1) Whenever a Minister of State is of opinion that any particular person is engaged in activities which, in his opinion, are prejudicial to the preservation of public peace and order or to the security of the State, such Minister may by warrant under his hand and sealed with his official seal order the arrest and detention of such person under this section.

(2) Any member of the Gárda Síochána may arrest without warrant any person in respect of whom a warrant has been issued by a Minister of State under the foregoing sub-section of this section.

(3) Every person arrested under the next preceding sub-section of this section shall be detained in a prison or other place prescribed in that behalf by regulations made under this Part of this Act until this Part of this Act ceases to be in force or until he is released under the subsequent provisions of this Part of this Act, whichever first happens.

(4) Whenever a person is detained under this section, there shall be furnished to such person, as soon as may be after he arrives at a prison or other place of detention prescribed in that behalf by regulations made under this Part of this Act, a copy of the warrant issued under this section in relation to such person and of the provisions of *section 8* of this Act.

(5) Every warrant issued by a Minister of State under this section shall be in the form set out in the Schedule to this Act or in a form to the like effect.

5. Powers of search, etc., of detained persons

(1) It shall be lawful for any member of the Gárda Síochána to do all or any of the following things in respect of any person who is arrested and detained under this Part of this Act, that is to say—

(a) to demand of such person his name and address;

(b) to search such person or cause him to be searched;

(c) to photograph such person or cause him to be photographed;

(d) to take, or cause to be taken the fingerprints of such person.

(2) Every person who shall obstruct or impede the exercise in respect of him by a member of the Gárda Síochána of any of the powers conferred by the next preceding sub-section of this section or shall fail or refuse to give his name and address when demanded of him by a member of the Gárda Síochána under the said sub-section or shall give a name or an address which is false or misleading shall be guilty of a contravention of the regulations made under this Part of this Act in relation to the preservation of discipline and shall be dealt with accordingly.

6. Release of detained persons

A Minister of State may by writing under his hand, if and whenever he so thinks proper, order the release of any particular person who is for the time being detained under this Part of this Act, and thereupon such person shall forthwith be released from such detention.

7. Regulations in relation to places of detention

(1) A Minister of State may by order make regulations for all or any of the following purposes, that is to say—

(a) prescribing the prisons, internment camps, and other places in which persons may be detained under this Part of this Act;

(b) providing for the efficient management, sanitation, control, and guarding of such prisons, internment camps, and other places;

(c) providing for the enforcement and preservation of discipline amongst the persons detained in any such prison, internment camp, or other place as aforesaid;

(d) providing for the punishment of persons so detained who contravene the regulations;

(e) prescribing or providing for any other matter or thing incidental or ancillary to the efficient detention of persons detained under this Part of this Act.

(2) Every regulation made under this section shall be laid before each House of the Oireachtas as soon as may be after it is made, and if a resolution annulling such regulation is passed by either House of the Oireachtas within the next subsequent twenty-one days on which such House has sat after such regulation is laid before it, such regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done under such regulation.

8. Commission for inquiring into detentions

(1) As soon as conveniently may be after this Part of this Act comes into force, the Government shall set up a Commission (in this section referred to as the Commission) to perform the functions imposed upon the Commission by this section.

(2) The following provisions shall apply and have effect in relation to the Commission, that is to say—

(a) the members of the Commission shall be appointed and be removable by the Government;

(b) the Commission shall consist of three persons of whom one shall be a commissioned officer of the Defence Forces with not less than seven years' service and each of the others shall be a barrister or solicitor of not less than seven years' standing or be or have been a judge of the Supreme Court, [the Court of Appeal], the High Court, or the Circuit Court or a justice of the District Court;

(c) there may be paid out of moneys provided by the Oireachtas to any member of the Commission such (if any) fees or remuneration as the Minister for Finance shall determine.

(3) Any person who is detained under this Part of this Act may apply in writing to the Government to have the continuation of his said detention considered by the Commission, and upon such application being so made the following provisions shall have effect, that is to say—

(a) the Government shall, with all convenient speed, refer the matter of the continuation of such person's detention to the Commission;

(b) the Commission shall inquire into the grounds of such person's detention and shall, with all convenient speed, report thereon to the Government;

(c) the Minister for Justice shall furnish to the Commission such information and documents (relevant to the subject-matter of such inquiry) in the possession or procurement of the Government or of any Minister of State as shall be called for by the Commission;

(d) if the Commission reports that no reasonable grounds exist for the continued detention of such person, such person shall, with all convenient speed, be released.

Amendments

Subsection (2)(b) amended by inserting reference to the "Court of Appeal" by s. 37 of the Court of Appeal Act 2014 (No. 18 of 2014).

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9. Returns to be laid before each House of the Oireachtas

The Government shall once at least in every six months furnish to each House of the Oireachtas particulars of (*a*) persons detained under this Part of this Act, (*b*) persons in respect of whom the Commission has made a report to the Government, (*c*) persons in respect of whom the Commission has reported that no reasonable grounds exist for their continued detention, (*d*) persons who had been detained under this Part of this Act but who had been released on the report of the Commission, and (*e*) persons who had been detained under this Part of this Act but who had been released without a report of the Commission.

SCHEDULE
Form of Warrant under Section 4.

OFFENCES AGAINST THE STATE (AMENDMENT) ACT, 1940.
SECTION 4.

In exercise of the powers conferred on me by section 4 of the Offences Against the State (Amendment) Act, 1940 (No. 2 of 1940), I,_____, Minister for _____, being of opinion that _____ of _____ is engaged in activities which, in my opinion, are prejudicial to the preservation of public peace and order (or to the security of the State), do by this warrant order the arrest and detention of the said _____ under the said section 4.

Given under my Official Seal this _____ day of _____ 19 _____

Minister for_____

OFFENCES AGAINST THE STATE (AMENDMENT) ACT 1972

Number 26 of 1972

Arrangement of Sections

An Act to amend and extent the Offences Against the State Acts, 1939 and 1940 [3rd December, 1972]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:-

1. Definition

In this Act "the Act of 1939" means the Offences against the State Act, 1939.

2. Power to question found near place of commission of scheduled offence

Where a member of the Garda Síochána—

(a) has reasonable grounds for believing that an offence which is for the time being a scheduled offence for the purposes of Part V of the Act of 1939 is being or was committed at any place,

(b) has reasonable grounds for believing that any person whom he finds at or near the place at the time of the commission of the offence or soon afterwards knows, or knew at that time, of its commission, and

(c) informs the person of his belief as aforesaid,

the member may demand of the person his name and address and an account at his recent movements and, if the person fails or refuses to give the information or gives information that is false or misleading, he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding [€2,500] or, at the discretion of the court, to imprisonment for a term not exceeding twelve months or to both such fine and such, imprisonment.

3. Evidence of membership of unlawful organisation

(1)

(a) Any statement made orally, in writing or otherwise, or any conduct, by an accused person implying or leading to a reasonable inference that he was at a material time a member of an unlawful organisation shall, in proceedings under section 21 of the Act of 1939, be evidence that he was then such a member.

[(b) In paragraph (a) of this subsection "conduct" includes—

(i) movements, actions, activities or associations on the part of the accused person, and

(ii) omission by the accused person to deny published reports that he was a member of an unlawful organisation, but the fact of such denial shall not by itself be conclusive.][1]

(2) Where an officer of the Garda Síochána, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence under the said 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.

(3) Subsection (2) of this section shall be in force whenever and for so long only as Part V of the Act of 1939 is in force.

Amendments

1. Substituted by s.4 of the Offences Against the State (Amendment) Act 1998.

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4. Statements, meetings etc., constituting interference with the course of justice

(1)

(a) Any public statement made orally, in writing or otherwise, or any meeting, procession or demonstration in public, that constitutes an interference with the course of justice shall be unlawful.

(b) A statement, meeting, procession or demonstration shall be deemed to constitute an interference with the course of justice if it is intended, or is of such a character as to be likely, directly or indirectly to influence any court, person or authority concerned with the institution, conduct or defence of any civil or criminal proceedings (including a party or witness) as to whether or how the proceedings should be instituted, conducted, continued or defended, or as to what should be their outcome.

(2) A person who makes any statement, or who organises, holds or takes part in any meeting, procession or demonstration, that is unlawful under this section shall be guilty of an offence and shall be liable—

(a) on summary conviction, to a fine not exceeding €2,500 or, at the discretion of the court, to imprisonment for a term not exceeding twelve months or to both such fine and such imprisonment;

(b) on conviction on indictment, to a fine not exceeding €5,000 or to imprisonment for a term not exceeding five years or to both such fine and such imprisonment.

(3) Nothing in this section shall affect the law as to contempt of court.

5. Amendment to section 2 of 1939

The definition of "document" in section 2 of the Act of 1939 is hereby amended by the insertion after "advertisement" of the following:

"and also—

(a) any map, plan, graph or drawing,

(b) any photograph,

(c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom, and

(d) any film, microfilm, negative, tape or other device in which one or more visual images are embodied (whether with or without sounds or other data) so as to be capable (as aforesaid) of being reproduced therefrom and a reproduction or still reproduction of the image or images embodied therein whether enlarged or not and whether with or without sounds or other data".

6. Short title, construction and collective citation

(1) This Act may be cited as the Offences against the State Act, 1972.

(2) The Offences against the State Acts, 1939 and 1940, and this Act shall be construed as one and may be cited together as the Offences against the State Acts, 1939 to 1972.

OFFENCES AGAINST THE STATE (AMENDMENT) ACT 1985

Number 3 of 1985

Arrangement of Sections

An Act to amend and extend the Offences Against the State Acts, 1939 to 1972 [19th February, 1985]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:-

1. Definitions

(1) In this Act—

"bank" means the holder of a licence under the Central Bank Act, 1971 , and the persons specified in section 7 (4) of that Act and any other financial institution;

"the Minister" means the Minister for Justice;

"the Principal Act" means the Offences against the State Act, 1939 .

(2) References in this Act to moneys held by a bank include references to shares in a building society of a depositor in the society.

2. Payment of moneys of unlawful organisations into High Court[1]

(1) (a) On production to any bank of a document purporting to be signed by the Minister and bearing the seal of the Minister and stating—

(i) that, in the opinion of the Minister, moneys described in the document and held by the bank would, but for the operation of section 22 of the Principal Act,

be the property of an unlawful organisation and that those moneys stand forfeited to and vested in the Minister by virtue of the said section 22, and

(ii) that the Minister requires the bank to pay those moneys, or so much of them as are held by the bank at the time of the production to it of the document, into the High Court on a specified day or not later than a specified day and, in the meantime, to refrain from doing any act or making any omission inconsistent with that requirement and to notify as soon as may be thereafter the person or persons in whose name or names the moneys are held by the bank of their payment into that Court,

the bank shall comply with the requirement.

(b) Production of a document specified in paragraph (a) of this subsection to the chief officer or other person, by whatever name called, having charge of the management of a bank or to the manager, or an official of the bank acting as manager, of the branch of a bank into which the moneys concerned were, or are believed by the Minister to have been, paid shall be deemed for the purposes of that paragraph to be production of the document to the bank.

(c) […][2]

(2) (a) If proceedings are not brought, under section 3 of this Act or otherwise, in relation to moneys paid into the High Court under this section or in respect of or arising out of any such payment within 6 months of the day on which the moneys were paid into that Court or if all such proceedings brought are dismissed—

(i) the moneys shall not be paid out of the High Court otherwise than in accordance with subparagraph (ii) of this paragraph, and

(ii) the Minister may, after the expiration of the period aforesaid of 6 months, apply ex parte to the High Court for an order directing that the moneys be paid to the Minister or into such account at such bank as the Minister may specify, and,

without prejudice to the rights of any person under section 4 of this Act, the High Court shall make the order and the Minister shall cause a copy of the order to be sent to the bank by whom the moneys were paid into that Court.

(b) The reference in paragraph (a) of this subsection to the dismissal of proceedings includes a reference to the case where, following the decision of the Supreme Court in a case where there is an appeal in any such proceedings to that Court, the proceedings stand dismissed.

(c) Moneys paid pursuant to an order of the High Court under section 2 of this Act shall be paid into or disposed of for the benefit of the Exchequer in accordance with the directions of the Minister for Finance.

Amendments

1. Section 2 of the 1985 Act came into operation with the passing of the Criminal Justice (Terrorist Offences) Act 2005: see section 54(2) of the Criminal Justice (Terrorist Offences) Act 2005.
2. Repealed by s.54(1) of the Criminal Justice (Terrorist Offences) Act 2005.

3. Recovery by owner, in certain circumstances, of moneys paid into High Court under section 2

(1) A person claiming to be an owner of moneys paid into the High Court pursuant to section 2 of this Act may, within 6 months of the day on which the moneys were paid into that Court, apply to that Court for an order directing that the moneys, together with such amount in respect of interest thereon as that Court considers reasonable, be paid to him and, if that Court is satisfied that section 22 of the Principal Act has not had effect in relation to the moneys and that the person is the owner of the moneys, it shall make the order aforesaid.

(2) The Minister shall be given notice of, and be entitled to be heard in, any proceedings under subsection (1) of this section.

4. Compensation for owner, in certain circumstances, where moneys are paid into High Court under section 2

(1) Where moneys paid into the High Court pursuant to section 2 of this Act are ordered by that Court under section 3 of this Act to be paid to any person, that Court may, on application to it under this subsection award to the person, compensation payable by the Minister in respect of any loss incurred by him by reason of the payment of the moneys into and their retention in that Court under the said section 2 .

(2) Where, on application to the High Court under this subsection, a person shows to the satisfaction of that Court—

(a) that moneys paid to the Minister under section 2 of this Act are not moneys in relation to which section 22 of the Principal Act has had effect, and

(b) that the person is the owner of the moneys,

the High Court may—

(i) if it is of opinion that there are reasonable grounds for the failure of the person to make an application to that Court under section 3 of this Act in respect of the moneys within the time specified in that section, and

(ii) if the application under this subsection has been made within 6 years of the day on which the moneys were paid into that Court pursuant to section 2 of this Act,

award to the person compensation payable by the Minister in respect of any loss incurred by the person by reason of the payment of the moneys into and their retention in the High Court, and their payment to the Minister and retention by the State, under the said section 2 .

(3) The Minister shall be given notice of, and be entitled to be heard in, any proceedings under this section.

5. Evidence

(1) Production to a court in any proceedings of a document signed by the Minister and stating that moneys described in the document that were held on a specified day by a specified bank would, but for the operation of section 22 of the Principal Act, have been the property of an unlawful organisation on that day shall be evidence that the moneys so described would, but for the operation of the said section 22, have been the property of an unlawful organisation on the day so specified.

(2) A document purporting to be a document of the Minister under subsection (1) of this section and to be signed by the Minister shall be deemed for the purposes of this section to be such a document and to be so signed unless the contrary is shown.

(3) On the application of any party to proceedings, under section 3 of this Act or otherwise, in relation to moneys paid into the High Court under section 2 of this Act by a bank or in respect of or arising out of any such payment, the court may order the bank or a specified officer of the bank to produce and prove to the court all or specified documents or records in the bank's possession or within its procurement that are relevant to the payment of the moneys or part of them into or out of the bank or to the opening, maintenance, operation or closing of any account at the bank in respect of the moneys or part of them.

6. Immunity from proceedings

No action or proceedings of any kind shall lie against a bank in any court in respect of—

(a) acts done by the bank in compliance with a requirement in a document produced to it pursuant to section 2 of this Act, or

(b) the non-payment by the bank of the moneys, or part thereof, to which the document relates, or other moneys in lieu of them, to the person (or a person authorised by him to receive them) who, but for the operation of section 22 of the Principal Act, would be the owner of the moneys.

7. Offences

(1) A bank that fails or refuses to comply with a requirement in a document under section 2 of this Act shall be guilty of an offence and shall be liable, on conviction on indictment, to a fine not exceeding £100,000.

(2) Where an offence committed by a bank under subsection (1) of this section is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any person who, when the offence was committed, was a director, member of the committee of management or other controlling authority of the bank concerned, or the chief officer or other person, by whatever name called, having charge of the management of the bank, or the secretary or other officer of the bank (including the manager of, or other official of the bank at, a branch of the bank), that person shall also be deemed to have committed the offence and shall be liable—

(a) on summary conviction, to a fine not exceeding £1,000 or, at the discretion of the court, to imprisonment for a term not exceeding 12 months or to both the fine and the imprisonment, or

(b) on conviction on indictment, to a fine not exceeding £10,000 or, at the discretion of the court, to imprisonment for a term not exceeding 2 years or to both the fine and the imprisonment.

8. Meaning of "property of unlawful organisation" in this Act and sections 22 and 23 of Principal Act.

(1) For the removal of doubt, it is hereby declared that section 22 of the Principal Act applies and always applied to property of an unlawful organisation acquired by it at any time while a suppression order under section 19 of that Act in respect of it is or was in force as well as to the property of the organisation immediately upon the making of the suppression order.

(2) Moneys [or any other form of property][1] held by any person for the use or benefit of, or for use for the purposes of, an unlawful organisation in respect of which a suppression order under section 19 of the Principal Act, is in force shall be deemed, for the purposes of this Act and sections 22 and 23 of the Principal Act, to be the property of the organisation, and this Act and those sections shall apply and have effect accordingly.

Amendments

1. Inserted by s.55 of the Criminal Justice (Terrorist Offences) Act 2005.

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9. Short title and construction.

(1) This Act may be cited as the Offences against the State (Amendment) Act, 1985.

(2) The Offences against the State Acts, 1939 to 1972, and this Act shall be construed as one and may be cited together as the Offences against the State Acts, 1939 to 1985.

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OFFENCES AGAINST THE STATE (AMENDMENT) ACT 1998

Number 39 of 1998

Arrangement of Sections

An Act to amend and extent the Offences Against the State Acts, 1939 to 1985, and certain other enactments relating to criminal law and to provide for related matters. [3rd September, 1998]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:-

1. Interpretation

(1) In this Act—

"the Act of 1939" means the Offences against the State Act, 1939;

"the Acts" means the Offences against the State Acts, 1939 to 1998;

"explosive" means an explosive within the meaning of the Explosives Act, 1875, and any other substance or thing that is an explosive substance within the meaning of the Explosive Substances Act, 1883;

"firearm" has the same meaning as it has in the Firearms Acts, 1925 to 1990.

(2) A reference in this Act to a section is a reference to a section of this Act unless it is indicated that reference to some other enactment is intended.

(3) A reference in this Act to a subsection or paragraph is a reference to the subsection or paragraph of the provision in which the reference occurs unless it is indicated that reference to some other provision is intended.

(4) A reference in this Act to any other enactment shall, unless the context otherwise requires, be construed as a reference to that enactment as amended, extended or adapted by or under any subsequent enactment, including this Act.

2. Membership of an unlawful organisation: inferences that may be drawn

(1) Where in any proceedings against a person for an offence under section 21 of the Act of 1939 evidence is given that the accused at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, failed to answer any question material to the investigation of the offence, then the court [in determining whether a charge should be dismissed under Part IA of the Criminal Procedure Act 1967] or whether there is a case to answer and the court (or subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to the offence, but [a person shall not be convicted of the offence solely or mainly on an inference drawn from such a failure].[1]

[(2) Subsection (1) shall not have effect unless—

(a) the accused was told in ordinary language when being questioned what the effect of such a failure might be, and

[(b) the accused was afforded a reasonable opportunity to consult a solicitor before such a failure occurred.][2]

(3) Nothing in this section shall, in any proceedings—

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

(b) be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could be properly drawn apart from this section.

[(3A) The court (or, subject to the judge's directions, the jury) shall, for the purposes of drawing an inference under this section, have regard to whenever, if appropriate, an answer to the question concerned was first given by the accused.

(3B) This section shall not apply in relation to the questioning of a person by a member of the Garda Síochána unless it is recorded by electronic or similar means or the person consents in writing to it not being so recorded.

(3C) References in subsection (1) to evidence shall, in relation to the hearing of an application under Part IA of the Criminal Procedure Act 1967 for the dismissal of a charge, be taken to include a statement of the evidence to be given by a witness at the trial.][3]

(4) In this section—

(a) references to any question material to the investigation include references to any question requesting the accused to give a full account of his or her movements, actions, activities or associations during any specified period,

(b) references to a failure to answer include references to the giving of an answer that is false or misleading and references to the silence or other reaction of the accused shall be construed accordingly.

(5) This section shall not apply in relation to failure to answer a question if the failure occurred before the passing of this Act.

Amendments

1. Amended by s.31(1)(a) of the Criminal Justice Act 2007.
2. As substituted by s.31(1)(b) of the Criminal Justice Act 2007.
3. Inserted by s.31(1)(c) of the Criminal Justice Act 2007.

3. Notification of witnesses

(1) In proceedings for an offence under section 21 of the Act of 1939 the accused shall not without the leave of the court call any other person to give evidence on his or her behalf unless, before the end of the prescribed period, he or she gives notice of his or her intention to do so.

(2) Without prejudice to subsection (1), in any such proceedings the accused shall not without the leave of the court call any other person (in this section referred to as "the witness") to give such evidence unless—

(a) the notice under that subsection includes the name and address of the witness or, if the name or address is not known to the accused at the time he or she gives the notice, any information in his or her possession which might be of material assistance in finding the witness,

(b) if the name or the address is not included in that notice, the court is satisfied that the accused, before giving the notice, took and thereafter continued to take all reasonable steps to secure that the name or address would be ascertained,

(c) if the name or the address is not included in that notice, but the accused subsequently discovers the name or address or receives other information which might be of material assistance in finding the witness, he or she gives notice forthwith of the name, address or other information, as the case may be, and

(d) if the accused is notified by or on behalf of the prosecution that the witness has not been traced by the name or at the address given, he or she gives notice forthwith of any such information which is then in his or her possession or, on subsequently receiving any such information, gives notice of it forthwith.

(3) The court shall not refuse leave under this section if it appears to the court that the accused was not informed of the requirements of this section—

(a) by the District Court when he or she was sent forward for trial, or

(b) by the trial court when, on being sent forward by the District Court for sentence, he or she changed his or her plea to one of not guilty, or

(c) where he or she was brought before a Special Criminal Court for trial under section 47 of the Act of 1939, by the Court when it fixed the date of trial.

(4) Any notice purporting to be given under this section on behalf of the accused by his or her solicitor shall, unless the contrary is proved, be deemed to be given with the authority of the accused.

[(5) A notice under subsection (1) or under paragraph (c)or (d) of subsection (2) shall be given in writing to the solicitor for the prosecution.][1]

(6) A notice required by this section to be given to the solicitor for the prosecution may be given by delivering it to him or her or by leaving it at his or her office or by sending it to him or her by registered post at his or her office.

(7) In this section "the prescribed period" means—

[(a) the period of fourteen days after the date the accused is, in accordance with section 4B (1) of the Criminal Procedure Act, 1967, served with the documents mentioned in that section, or,][2]

[…][3]

[(c) where the accused, on being sent forward for sentence, changes his or her plea to not guilty, the period of fourteen days after the date the accused is, in accordance with section 13(4)(b) of the Criminal Procedure Act, 1967, served with the documents mentioned in section 4B (1) of that Act, or][4]

(8) This section shall not apply in respect of any person whom the accused intends to call to give evidence on his or her behalf solely in relation to the matter of sentence in the event that the accused is convicted of the offence concerned.

(9) This section shall not apply in relation to proceedings referred to in subsection (1) commenced before the passing of this Act and for the purposes of this subsection proceedings referred to in subsection (1) are commenced when the accused is first brought before a court charged with the offence concerned or, as the case may be, is charged before a court with the offence concerned.

Amendments

1. Inserted by s.24(a) of the Criminal Justice Act 1999.
2. Substituted by s.24(b) of the Criminal Justice Act 1999.
3. Deleted by s.24(b) of the Criminal Justice Act 1999.
4. Substituted by s.24(d) of the Criminal Justice Act 1999.

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4. Amendment of section 3 of Offences against the State (Amendment) Act, 1972

Section 3 of the Offences against the State (Amendment) Act, 1972 , is hereby amended by the substitution of the following paragraph for paragraph (b) of subsection (1):

"(b) In paragraph (a) of this subsection 'conduct' includes—

(i) movements, actions, activities or associations on the part of the accused person, and

(ii) omission by the accused person to deny published reports that he was a member of an unlawful organisation, but the fact of such denial shall not by itself be conclusive."

5. Inferences from failure of accused to mention particular facts

[…][1]

Amendments

1. Repealed by s.3(1) of the Criminal Justice Act 2007.

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6. [Directing an unlawful organisation

(1) In this section—

(a) "directs", in relation to activities, means—

(i) controls or supervises the activities, or

(ii) gives an order, instruction or guidance, or makes a request, with respect to the carrying on of the activities;

(b) "serious offence" means an offence for which a person may be punished by imprisonment for a term of 4 years or more;

(c) "unlawful organisation" means an organisation in respect of which a suppression order has been made under section 19 of the Act of 1939;

(d) references to activities include references to—

(i) activities carried on outside the State, and

(ii) activities that do not constitute an offence or offences.

(2) A person who directs, at any level of the organisation's structure, the activities of an unlawful organisation shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life or a lesser term of imprisonment.

(3) Any statement made orally, in writing or otherwise, or any conduct, by the defendant implying or leading to a reasonable inference that he or she was at a material time directing the activities of an unlawful organisation shall, in proceedings for an offence

under this section, be admissible as evidence that the defendant was doing such at that time.

(4) In proceedings under this section, the court or the jury, as the case may be, in determining whether an offence under this section has been committed, may, in addition to any other relevant evidence, also consider—

(a) any evidence of a pattern of behaviour on the part of the defendant consistent with his or her having directed the activities of the organisation concerned at the material time, and

(b) without limiting paragraph (a) or subsection (3)—

(i) whether the defendant has received any benefit from the organisation concerned, and

(ii) evidence as to the possession by the defendant of such articles or documents or other records as would give rise to a reasonable suspicion that such articles, documents or other records were in his or her possession or control for a purpose connected with directing the activities of the organisation concerned.

(5) Any document or other record emanating or purporting to emanate from the organisation concerned from which there can be inferred—

(a) either—

(i) the giving, at the time concerned, of an instruction, order or guidance by the defendant to any person involved in the organisation, or

(ii) the making, at that time, by the defendant of a request of a person so involved,

or

(b) the seeking, at that time, by a person so involved of assistance or guidance from the defendant, shall, in proceedings for an offence under this section, be admissible as evidence that the defendant was directing the activities of the organisation concerned at the material time.

(6) The expression "other record" in this section shall receive a like construction to that which is provided for by section 2 of the Act of 1939 with respect to the expression "document".][1]

Amendments

1. Substituted by s.25 of the Criminal Justice (Amendment) Act 2009.

7. Possession of articles for purposes connected with certain offences

(1) A person shall be guilty of an offence if he or she has any article in his or her possession or under his or her control in circumstances giving rise to a reasonable suspicion that the article is in his or her possession or under his or her control for a purpose connected with the commission, preparation or instigation of an offence under the Explosive Substances Act, 1883, or the Firearms Acts, 1925 to 1990, which is for the time being a scheduled offence for the purposes of Part V of the Act of 1939.

(2) It shall be a defence for a person charged with an offence under this section to prove that at the time of the alleged offence the article in question was not in his or her possession or under his or her control for any purpose specified in subsection (1).

(3) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

(4) The reference in subsection (1) to an offence under an enactment referred to therein shall be deemed to include a reference to an act or omission done or made outside the State that would be an offence under such an enactment if done or made in the State.

8. Unlawful collection of information

(1) It shall be an offence for a person to collect, record or possess information which is of such a nature that it is likely to be useful in the commission by members of any unlawful organisation of serious offences generally or any particular kind of serious offence.

(2) It shall be a defence for a person charged with an offence under this section to prove that at the time of the alleged offence the information in question was not being collected or recorded by him or her, or in his or her possession, for the purpose of its being used in such commission of any serious offence or offences.

(3) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

(4) In this section—

"members of any unlawful organisation" includes members of such an organisation whose identities are unknown to the Garda Síochána;
"serious offence" means an offence which satisfies both of the following conditions:

(a) it is an offence for which a person of full age and capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of 5 years or by a more severe penalty, and

(b) it is an offence that involves loss of human life, serious personal injury (other than injury that constitutes an offence of a sexual nature), false imprisonment or serious loss of or damage to property or a serious risk of any such loss, injury, imprisonment or damage,

and includes an act or omission done or made outside the State that would be a serious offence if done or made in the State.

9. Withholding information

(1) A person shall be guilty of an offence if he or she has information which he or she knows or believes might be of material assistance in—

(a) preventing the commission by any other person of a serious offence, or

(b) securing the apprehension, prosecution or conviction of any other person for a serious offence,

and fails without reasonable excuse to disclose that information as soon as it is practicable to a member of the Garda Síochána.

(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding five years or both.

[(3) In this section—

"child" means a person who has not attained 18 years of age;

"serious offence" has the same meaning as it has in section 8 but does not include—

(a) subject to subsection (4), an offence that is committed, or that it is anticipated will be committed, against a child, or

(b) the offence specified in paragraph 1 of Schedule 2 to the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 that is committed, or that it is anticipated will be committed, against a person other than a child.][1]

[(4) Nothing in subsection (3) shall prevent an offence from being a serious offence by reason only of the fact that it is committed, or it is anticipated that it will be committed, against more than one person in circumstances in which at least one of those persons is a child and at least one of them is not a child.][2]

Amendments

1. Amended by s.8 of the Criminal Justice (Withholding Information on Offences Against Children and Vulnerable Persons) Act 2012.
2. Amended by s.8 of the Criminal Justice (Withholding Information on Offences Against Children and Vulnerable Persons) Act 2012.

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10. Extension of period of detention under section 30 of Act of 1939

Section 30 of the Act of 1939 is hereby amended by the substitution of the following subsections for subsection (4):

> "(4) An officer of the Garda Síochána not below the rank of superintendent may apply to a judge of the District Court for a warrant authorising the detention of a person detained pursuant to a direction under subsection (3) of this section for a further period not exceeding 24 hours if he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned.
>
> (4A) On an application under subsection (4) of this section the judge concerned shall issue a warrant authorising the detention of the person to whom the application relates for a further period not exceeding 24 hours if, but only if, the judge is satisfied that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously.
>
> (4B) On an application under subsection (4) of this section the person to whom the application relates shall be produced before the judge concerned and the judge shall hear any submissions made and consider any evidence adduced by or on behalf of the person and the officer of the Garda Síochána making the application.
>
> (4C) A person detained under this section may, at any time during such detention, be charged before the District Court or a Special Criminal Court with an offence or be released by direction of an officer of the Garda Síochána and shall, if not so charged or released, be released at the expiration of the period of detention authorised by or under subsection (3) of this section or, as the case may be, that subsection and subsection (4A) of this section.".

11. Rearrest under section 30 of Act of 1939

The following section is hereby inserted after section 30 of the Act of 1939:

"30A. (1) Where a person arrested on suspicion of having committed an offence is detained pursuant to section 30 of this Act and is released without any charge having been made against him he shall not—

(a) be arrested again for the same offence, or

(b) be arrested for any other offence of which, at the time of the first arrest, the member of the Garda Síochána by whom he was arrested, suspected, or ought reasonably to have suspected, him of having committed,

except under the authority of a warrant issued by a judge of the District Court who is satisfied on information supplied on oath by an officer of the Garda Síochána not below the rank of superintendent that further information has come to the knowledge of the Garda Síochána since the person's release as to his suspected participation in the offence for which his arrest is sought.

(2) Section 30 of this Act, and, in particular, any powers conferred thereby, shall apply to or in respect of a person arrested in connection with an offence to which that section relates under a warrant issued pursuant to subsection (1) of this section as it applies to or in respect of a person to whom that section applies, with the following and any other necessary modifications:

(a) the substitution of the following subsection for subsection (3):

'(3) Whenever a person is arrested under a warrant issued pursuant to section 30A(1) of this Act, he may be removed to and detained in custody in a Garda Síochána station, a prison or some other convenient place for a period of 24 hours from the time of his arrest.',

(b) the deletion of subsections (4), (4A) and (4B), and

(c) the addition of the following at the end of subsection (4C):

'or, in case the detention follows an arrest under a warrant issued pursuant to section 30A of this Act, by subsection (3) of this section as substituted by the said section 30A.'.

(3) Notwithstanding subsection (1) of this section, a person to whom that subsection relates may be arrested for any offence for the purpose of charging him with that offence forthwith.".

12. Training persons in the making or use of firearms, etc

(1) A person who instructs or trains another or receives instruction or training in the making or use of firearms or explosives shall be guilty of an offence.

(2) It shall be a defence for a person charged with an offence under this section to prove that the giving or receiving of such instruction or training was done with lawful authority or that he or she had reasonable excuse for giving or receiving such instruction or training.

(3) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

(4) This section shall not apply to any assembly referred to in section 15(4) of the Act of 1939.

13. Provision in relation to section 52 of Act of 1939

Section 52 of the Act of 1939 shall not have effect in relation to a person referred to in subsection (1) thereof unless, immediately before a demand is made of him or her under that subsection, he or she is informed in ordinary language by a member of the Garda Síochána of

(a) the fact that the demand is being made under the said section 52, and

(b) the consequences provided by that section for a failure or refusal to comply with such a demand or for the giving of any account or information in purported compliance with such a demand which is false or misleading.

14. Offences under Act to be scheduled offences

(1) It is hereby declared that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to each offence under sections 6 to 9 and 12.

(2) Each offence under sections 6 to 9 and 12 shall be deemed to be a scheduled offence for the purposes of Part V of the Act of 1939 as if an order had been made under section 36 of that Act in relation to it and subsection (3) of that section and section 37 of that Act shall apply to such an offence accordingly.

(3) Nothing in subsection (1) or (2) shall be construed as affecting, or limiting in any particular case, the exercise—

(a) by the Government of any of its powers under any provision of section 35 or 36 of the Act of 1939,

(b) by the Director of Public Prosecutions of his or her power under section 45(2) of the said Act to direct that a person not be sent forward for trial by the Special Criminal Court on a particular charge, or

(c) by the Government or the Director of Public Prosecutions of any other of its or his or her powers under Part V of the said Act or by any other person of his or her powers under the said Part.

15. Penalties for certain offences

(1) Section 15 of the Firearms Act, 1925 , as amended by section 21 (4) of the Criminal Law (Jurisdiction) Act, 1976 , and section 14 of the Criminal Justice Act, 1984 (possessing firearm or ammunition with intent to endanger life or cause serious injury to property) is hereby amended by the substitution for "imprisonment for life" of "a fine or imprisonment for life or both".

(2) Section 27A(1) of the Firearms Act, 1964 , inserted by section 8 of the Criminal Law (Jurisdiction) Act, 1976 , and amended by section 14 of the Criminal Justice Act, 1984 (possession of firearm or ammunition in suspicious circumstances) is hereby amended by the substitution for "imprisonment for a term not exceeding ten years" of "a fine or imprisonment for a term not exceeding ten years or both".

[(3) Section 3 of the Explosive Substances Act, 1883 , inserted by section 4 of the Criminal Law (Jurisdiction) Act, 1976 , is hereby amended by the substitution for "imprisonment for life" of "a fine or imprisonment for life or both".][1]

(4) Section 4 of the Explosive Substances Act, 1883 , is hereby amended by the deletion in subsection (1) of all the words from "of felony" to the end of that subsection and the substitution of "of an offence and shall be liable, on conviction on indictment, to a fine or imprisonment for a term not exceeding 14 years or both, and the explosive substance shall be forfeited.".

Amendments

1. Inserted by s.36 of the Criminal Justice Act 1999.

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16. Amendment of Schedule to Bail Act, 1997

The Schedule to the Bail Act, 1997 , is hereby amended by the substitution for paragraph 25 of the following paragraph:

"25. Any offence under the Offences against the State Acts, 1939 to 1998.".

Amendments

1. See par. 25 of the Schedule to the Bail Act 1997.

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17. Forfeiture of property

Section 61 of the Criminal Justice Act, 1994 , is hereby amended—

[(a) by the insertion of the following subsection after subsection (1):

"(1A) Where—

(a) a person has been convicted of an offence under section 3 or 4 of the Explosive Substances Act, 1883 , section 15 of the Firearms Act, 1925 , or section 27A of the Firearms Act, 1964 , and

(b) a forfeiture order may be made in the case of that person by virtue of subsection (1) of this section in respect of property to which that subsection applies,

the court shall, subject to subsection (5) of this section, make the forfeiture order, unless, having regard to the matters mentioned in subsection (2) of this section and to the nature and degree of seriousness of the offence of which the person has been convicted, it is satisfied that there would be a serious risk of injustice if it made the order.",

and

(b) by the insertion of the following subsection after subsection (5):

"(5A) A court may, in making a forfeiture order, include such provisions in that order, or, as the case may require, may make an order supplemental to that order that contains such provisions, as appear to it to be necessary to protect any interest in the property, the subject of the forfeiture order, of a person other than the offender."][1]

Amendments

1. See the amended Act.

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18. Duration of certain sections

(1) Each of the following sections, namely sections 2 to 12 and 14 and 17 shall, subject to subsection (2), cease to be in operation on and from the 30th day of June, 2000, unless a resolution has been passed by each House of the Oireachtas resolving that that section should continue in operation.

[(2) A section referred to in subsection (1) may, by resolution of each House of the Oireachtas passed before the expiry of the section, be continued in operation from time to time for such period, not exceeding twelve months, as is specified in the resolutions.][1]

(3) Before a resolution under this section in relation to a section specified in subsection (1) is passed by either House of the Oireachtas, the Minister for Justice, Equality and Law Reform shall prepare a report, and shall cause a copy of it to be laid before that House, of the operation of the section during the period beginning on the passing of this Act or, as may be appropriate, the date of the latest previous report under this subsection in relation to that section and ending not later than 21 days before the date of the moving of the resolution in that House.

(4) For the avoidance of doubt, any enactment the amendment of which is effected by a section of this Act that ceases to be in operation on and from the day referred to in subsection (1) or, as the case may be, the expiry of the period for which it is continued in operation under subsection (2) ("the expiry") shall, an and from that day or, as the case may be, the expiry, apply and have effect as it applied and had effect immediately before the passing of this Act but subject to any amendments made by any other Act of the Oireachtas after such passing.

Amendments

1. Substituted by s.37 of the Criminal Justice Act 1999.

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19. Short title, construction and collective citation

(1) This Act may be cited as the Offences against the State (Amendment) Act, 1998.

(2) The Offences against the State Acts, 1939 to 1985, and this Act (other than sections 15 to 18) shall be construed together as one and may be cited together as the Offences against the State Acts, 1939 to 1998.

APPENDIX 3
RELEVANT EXTRACTS FROM CRIMINAL JUSTICE (TERRORIST OFFENCES) ACT 2005

CRIMINAL JUSTICE (TERRORIST OFFENCES) ACT 2005

Number 2 of 2005

(Consolidated 22 February 2023)

AN ACT TO ENABLE THE STATE TO MEET COMMITMENTS UNDERTAKEN AS PART OF THE INTERNATIONAL COMMUNITY, TO AMEND THE OFFENCES AGAINST THE STATE ACTS 1939 TO 1998 AND THE EUROPEAN ARREST WARRANT ACT 2003, AND TO MAKE PROVISION FOR RELATED MATTERS, INCLUDING THE RETENTION OF COMMUNICATIONS DATA. [8*th March*, 2005]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

PART 1
Preliminary Matters

Short title.
1.—This Act may be cited as the Criminal Justice (Terrorist Offences) Act 2005.

Commencement.
2.—Section 32 comes into operation 4 months after the passing of this Act.

Interpretation.
3.—(1) In this Act, except where the context otherwise requires—

"act" includes omission and a reference to the commission or doing of an act includes a reference to the making of an omission;

"Act of 1939" means the Offences against the State Act 1939;

"Act of 1965" means the Extradition Act 1965;

"Act of 1985" means the Offences against the State (Amendment) Act 1985;

"Act of 1994" means the Criminal Justice Act 1994;

"Act of 1996" means the Proceeds of Crime Act 1996;

"Act of 1998" means the Offences against the State (Amendment) Act 1998;

"Act of 2003" means the European Arrest Warrant Act 2003;

"Irish ship" has the same meaning as in section 9 of the Mercantile Marine Act 1955;

"Minister" means Minister for Justice, Equality and Law Reform;

"ship" includes any vessel used in navigation.

(2) In this Act a reference to a state includes a reference to the sub-sovereign entities of the state.

(3) A person who has his or her principal residence in the State for the 12 months immediately preceding the commission of an act referred to in section 6(2), 9(3), 10(4) or 13(6) is, for the purposes of this Act, considered—

(a) if he or she is a stateless person, to be habitually resident in the State on the date of the commission of that act, and

(b) in any other case, to be resident in the State on that date.

(4) In this Act—

(a) a reference to a section, Part or Schedule is to a section or Part of, or a Schedule to, this Act, unless it is indicated that a reference to some other enactment is intended,

(b) a reference to a subsection, paragraph or subparagraph is to the subsection, paragraph or subparagraph of the provision in which the reference occurs, unless it is indicated that reference to some other provision is intended, and

(c) a reference to any other enactment is to that enactment as amended by or under any other enactment, including this Act, unless the context otherwise requires.

Regulations
3A. (1) The Minister may by regulations provide for any matter referred to in this Act as prescribed or to be prescribed.

(2) Regulations under this Act may contain such incidental, supplementary and consequential provisions as appear to the Minister to be necessary or expedient for the purposes of the regulations.

(3) Every regulation under this Act shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either such House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

PART 2
Suppression of Terrorist Groups and Terrorist Offences

Definitions for Part 2.
4.—(1) In this Part—

"Framework Decision" means Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism2, the text of which is set out for convenience of reference in—

(a) Part 1 of Schedule 1, in the case of the Irish language text, and

(b) Part 2 of Schedule 1, in the case of the English language text,

as amended by Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism3, the English language text of which is set out for convenience of reference in Schedule 1A;

"Prevention of Terrorism Convention" means the Council of Europe Convention on the Prevention of Terrorism, done at Warsaw on 16 May 2005, the English language text of which is set out for convenience of reference in Schedule 1B;

"public provocation to commit a terrorist offence" shall be construed in accordance with section 4A;

"recruitment for terrorism" shall be construed in accordance with section 4B;

"terrorist activity" means an act that is committed in or outside the State and that—

(a) if committed in the State, would constitute an offence specified in Part 1 of Schedule 2, and

(b) is committed with the intention of—

(i) seriously intimidating a population,

(ii) unduly compelling a government or an international organisation to perform or abstain from performing an act, or

(iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a state or an international organisation;

"terrorist group" has the same meaning as in the Framework Decision;

"terrorist-linked activity", subject to subsections (2) and (3), means—

(a) an act that is committed in or outside the State and that—

(i) if committed in the State, would constitute an offence specified in Part 2 of Schedule 2, and

(ii) is committed with a view to engaging in a terrorist activity,

(b) an act that is committed in or outside the State and that—

(i) if committed in the State, would constitute an offence specified in Part 3 of Schedule 2, and

(ii) is committed with a view to engaging in a terrorist activity or with a view to committing an act that, if committed in the State, would constitute an offence under section 21 or 21A of the Act of 1939,

(c) public provocation to commit a terrorist offence,

(d) recruitment for terrorism, or

(e) training for terrorism;

"training for terrorism" shall be construed in accordance with section 4C.

(2) A terrorist-linked activity may be committed wholly or partially by electronic means.

(3) In determining whether an act is a terrorist-linked activity, it shall not be necessary for an offence under section 6(1)(a) insofar as that provision relates to a terrorist activity, to have actually been committed.

Public provocation to commit terrorist offence
4A. For the purposes of this Part, public provocation to commit a terrorist offence means the intentional distribution, or otherwise making available, by whatever means of communication by a person of a message to the public, with the intent of encouraging, directly or indirectly, the commission by a person of a terrorist activity.

Recruitment for terrorism
4B. For the purposes of this Part, recruitment for terrorism means—

(a) the intentional recruitment of another person—

(i) to commit, or participate in the commission of, a terrorist activity,

(ii) to commit an act in or outside the State that, if committed in the State, would constitute an offence under section 6 of the Act of 1998, or

(iii) to commit an act in or outside the State that, if committed in the State, would constitute an offence under section 21 or 21A of the Act of 1939,

or

(b) the intentional commission of an act in or outside the State that, if committed in the State, would constitute an offence under section 3 of the Criminal Law Act 1976.

Training for terrorism
4C. (1) For the purposes of this Part, training for terrorism means intentionally providing instruction or training in the skills of—

(a) making or using, for the purpose of committing, or contributing to the commission of, a terrorist activity—

(i) firearms or explosives,

(ii) nuclear material,

(iii) biological weapons, chemical weapons or prohibited weapons, or

(iv) such other weapons, or noxious or hazardous substances, that may be used in a terrorist activity as the Minister may prescribe,

or

(b) such other techniques or methods for the purpose of committing, or contributing to the commission of, a terrorist activity as the Minister may prescribe,

knowing that the skills provided are intended to be used by a person receiving the instruction or training for the purpose of committing, or contributing to the commission of, a terrorist activity.

(2) The Minister may, if he or she considers it appropriate to do so, make regulations for the purposes of subsection (1) and he or she shall—

(a) before making such regulations, consult with the Commissioner of the Garda Síochána, the Minister for Defence and such other Minister of the Government as the Minister considers appropriate having regard to the weapons, substances, techniques or methods concerned, and

(b) in making such regulations, have regard to the following:

(i) the capability of the weapon, substance, technique or method concerned to cause the death of or serious bodily injury to persons or substantial material damage to property;

(ii) the capacity of the weapon, substance, technique or method concerned to be used for the purposes of a terrorist activity and the likelihood of it being so used;

(iii) the extent to which instruction or training—

(I) in the making or use of the weapon or substance concerned, or

(II) in the use of the technique or method concerned,

is required for the making or use, as the case may be, of that weapon, substance, technique or method for the purpose of committing, or contributing to the commission of, a terrorist activity.

(3) In this section—

"biological weapon" and "prohibited weapon" have the same meanings as in the Biological Weapons Act 2011;

"chemical weapons" has the same meaning as in section 2 of the Chemical Weapons Act 1997;

"explosive" means an explosive within the meaning of the Explosives Act 1875 and any other substance or thing that is an explosive substance within the meaning of the Explosive Substances Act 1883;

"firearm" has the same meaning as in section 1 of the Firearms Act 1925;

"nuclear material" has the same meaning as in section 2 of the Radiological Protection Act 1991.

Terrorist groups.

5.—(1) A terrorist group that engages in, promotes, encourages or advocates the commission, in or outside the State, of a terrorist activity is an unlawful organisation within the meaning and for the purposes of the Offences against the State Acts 1939 to 1998 and section 3 of the Criminal Law Act 1976.

(2) For the purposes of this Act, the Offences against the State Acts 1939 to 1998 and section 3 of the Criminal Law Act 1976 apply with any necessary modifications and have effect in relation to a terrorist group referred to in subsection (1) as if that group were an organisation referred to in section 18 of the Act of 1939.

(3) Subsections (1) and (2) are not to be taken to be limited by any other provision of this Act that refers to provisions of the Offences against the State Acts 1939 to 1998 or that makes provisions of those Acts applicable in relation to offences under this Act.

(4) Subsections (1) and (2) apply whether the terrorist group is based in or outside the State.

Terrorist offences.

6.—(1) Subject to subsections (2) to (4), a person is guilty of an offence if the person—

(a) in or outside the State—

(i) engages in a terrorist activity or a terrorist-linked activity,

(ii) attempts to engage in a terrorist activity or a terrorist-linked activity, other than public provocation to commit a terrorist offence, or

(iii) makes a threat to engage in a terrorist activity,

or

(b) commits outside the State an act that, if committed in the State, would constitute—

(i) an offence under section 21 or 21A of the Act of 1939, or

(ii) an offence under section 6 of the Act of 1998.

(2) Subsection (1) applies to an act committed outside the State if the act—

(a) is committed on board an Irish ship,

(b) is committed on an aircraft registered in the State,

(c) is committed by a person who is a citizen of Ireland or is resident in the State,

(d) is committed for the benefit of a legal person established in the State,

(e) is directed against the State or an Irish citizen, or

(f) is directed against—

(i) an institution of the European Union that is based in the State, or

(ii) a body that is based in the State and is set up in accordance with the Treaty establishing the European Community or the Treaty on European Union.

(3) Subsection (1) applies also to an act committed outside the State in circumstances other than those referred to in subsection (2), but in that case the Director of Public Prosecutions may not take, or consent to the taking of, proceedings referred to in section 43(2) for an offence in respect of that act except as authorised by section 43(3).

(4) Subsection (1) does not apply in respect of—

(a) the activities of armed forces during an armed conflict insofar as those activities are governed by international humanitarian law, or

(b) the activities of the armed forces of a state in the exercise of their official duties insofar as those activities are governed by other rules of international law.

(5) To avoid doubt, the fact that a person engages in any protest, advocacy or dissent, or engages in any strike, lockout or other industrial action, is not of itself a sufficient basis for inferring that the person is carrying out an act with the intention specified in paragraph (b) of the definition of "terrorist activity" in section 4.

(6) Where a person is charged with an offence under subsection (1), which in the opinion of the Attorney General was committed in or outside the State with the intention of—

(a) unduly compelling the government of a state (other than a member state of the European Union) to perform or abstain from performing an act, or

(b) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of such a state,

then, notwithstanding anything in this Act, no further proceedings in the matter (other than any remand in custody or on bail) may be taken except with the consent of the Attorney General.

(7) Where in proceedings for the offence of engaging in or attempting to engage in a terrorist activity—

(a) it is proved that the accused person committed or attempted to commit an act—

(i) that constitutes an offence specified in Part 1 of Schedule 2, or

(ii) that, if committed in the State, would constitute an offence referred to in subparagraph (i),

and

(b) the court is satisfied, having regard to all the circumstances including those specified in subsection (8), that it is reasonable to assume that the act was committed, or the attempt was made, with the intention of—

(i) seriously intimidating a population,

(ii) unduly compelling a government or an international organisation to perform or abstain from performing an act, or

(iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a state or an international organisation,

the accused person shall be presumed, unless the court is satisfied to the contrary, to have committed or attempted to commit the act with that intention.

(8) The circumstances referred to in subsection (7), include—

(a) whether the act or attempt referred to in subsection (7)(a)—

(i) created or was likely to create a collective danger to the lives or physical integrity of persons,

(ii) caused or was likely to cause serious damage to a state or international organisation, or

(iii) caused or was likely to result in major economic loss,

and

(b) any other matters that the court considers relevant.

(9) Where the Director of Public Prosecutions considers that another Member State of the European Communities has jurisdiction to try a person for any act constituting an offence under this section, the Director—

(a) shall co-operate with the appropriate authority in that other Member State, and

(b) may have recourse to any body or mechanism established within the European Communities in order to facilitate co-operation between judicial authorities,

with a view to centralising the prosecution of the person in a single Member State where possible.

Penalties for terrorist offences.

7.—(1) A person guilty of an offence under section 6(1)(a) is liable on conviction to be punished according to the gravity of the offence as follows:

(a) to the sentence of imprisonment fixed by law, if the corresponding offence specified in Schedule 2 is one for which the sentence is fixed by law;

(b) to imprisonment for life, if the corresponding offence specified in Schedule 2 is one for which the maximum sentence is imprisonment for life;

(c) to imprisonment for a term not exceeding 2 years more than the maximum term of imprisonment for the corresponding offence specified in Schedule 2, if that corresponding offence is one for which a person of full capacity and not previously convicted may be sentenced to a maximum term of 10 or more years of imprisonment;

(d) to imprisonment for a term not exceeding 1 year more than the maximum term of imprisonment for the corresponding offence specified in Schedule 2, if that corresponding offence is one for which a person of full capacity and not previously convicted may be sentenced to a maximum term of less than 10 years of imprisonment,

(e) in the case of an offence that is a terrorist-linked activity referred to—

(i) in paragraph (c) of the definition in section 4 of "terrorist-linked activity"—

(I) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or

(II) on conviction on indictment, to a fine or imprisonment for a term not exceeding 10 years or both,

(ii) in paragraph (d) of that definition, on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both, and

(iii) in paragraph (e) of that definition, on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

(2) A person guilty of an offence under section 6(1)(b) is liable on conviction to the penalty to which he or she would have been liable had the act that constitutes the offence been done in the State.

(3) In this section, “corresponding offence”, in relation to a person convicted of an offence under section 6(1)(a), means the offence for which the person would have been liable to be convicted had the act constituting the offence under that section been committed in the State in

the absence of the intent referred to in paragraph (b) of the definition in section 4 of "terrorist activity".

PART 3
Suppression of Hostage-Taking, Terrorist Bombing and Crimes Against Internationally Protected Persons

Definitions for Part 3.
8.—In this Part—

> "Hostage Convention" means the International Convention against the Taking of Hostages adopted by resolution 34/146 of the General Assembly of the United Nations on 17 December 1979, the English language text of which is set out for convenience of reference in Schedule 3;
>
> "Internationally Protected Persons Convention" means the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by resolution 3166 of the General Assembly of the United Nations on 14 December 1973, the English language text of which is set out for convenience of reference in Schedule 4;
>
> "Terrorist Bombing Convention" means the International Convention for the Suppression of Terrorist Bombings adopted by resolution 52/164 of the General Assembly of the United Nations on 15 December 1997, the English language text of which is set out for convenience of reference in Schedule 5.

Offence of hostage-taking.
9.—(1) Subject to subsections (3) to (5), a person is guilty of the offence of hostage-taking if he or she, in or outside the State—

> (a) seizes or detains another person ("the hostage"), and
>
> (b) threatens to kill, injure or continue to detain the hostage,

in order to compel a state, an international intergovernmental organisation, a person or a group of persons to do, or abstain from doing, any act.

(2) Subject to subsections (3) to (5), a person who attempts to commit an offence under subsection (1) is guilty of an offence.

(3) Subsections (1) and (2) apply to an act committed outside the State if—

> (a) the act is committed on board an Irish ship,
>
> (b) the act is committed on an aircraft registered in the State,
>
> (c) the act is committed by a citizen of Ireland or by a stateless person habitually resident in the State,

(d) the act is committed in order to compel the State to do or abstain from doing an act, or

(e) the hostage is a citizen of Ireland.

(4) Subsections (1) and (2) apply also to an act committed outside the State in circumstances other than those referred to in subsection (3), but in that case the Director of Public Prosecutions may not take, or consent to the taking of, proceedings referred to in section 43(2) for an offence in respect of that act except as authorised by section 43(3).

(5) Subsections (1) and (2) do not apply in respect of any act of hostage-taking that constitutes an offence under section 3 of the Geneva Conventions Act 1962.

(6) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life.

Offence of terrorist bombing.

10.—(1) Subject to subsections (4) to (6), a person is guilty of an offence if he or she, in or outside the State, unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against—

(a) a place of public use,

(b) a state or government facility,

(c) a public transportation system, or

(d) an infrastructure facility,

with intent to cause death or serious bodily injury.

(2) Subject to subsections (4) to (6), a person is guilty of an offence if—

(a) he or she, in or outside the State, unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place, facility or system referred to in any paragraph of subsection (1) with intent to cause extensive destruction to that place, facility or system, and

(b) the destruction results in or is likely to result in major economic loss.

(3) Subject to subsections (4) to (6), a person who attempts to commit an offence under subsection (1) or (2) is guilty of an offence.

(4) Subsections (1) to (3) apply to an act committed outside the State if the act is committed—

(a) on board an Irish ship,

(b) on an aircraft registered in or operated by the State,

(c) by a citizen of Ireland or by a stateless person habitually resident in the State,

(d) against a citizen of Ireland,

(e) against a state or government facility of the State abroad, including an embassy or other diplomatic or consular premises of the State, or

(f) in order to compel the State to do or abstain from doing an act.

(5) Subsections (1) to (3) apply also in respect of an act committed outside the State in circumstances other than those referred to in subsection (4), but in that case the Director of Public Prosecutions may not take, or consent to the taking of, proceedings referred to in section 43(2) for an offence in respect of that act except as authorised by section 43(3).

(6) Subsections (1) to (3) do not apply in respect of—

(a) the activities of armed forces during an armed conflict insofar as those activities are governed by international humanitarian law, or

(b) the activities of military forces of a state in the exercise of their official duties insofar as those activities are governed by other rules of international law.

(7) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life.

(8) Subject to subsection (9), a word or expression that is used in this section has the same meaning as it has in the Terrorist Bombing Convention.

(9) In this section "explosive or other lethal device" means any of the following:

(a) an explosive weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage;

(b) an incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage;

(c) a weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of any of the following:

(i) a toxic chemical as defined in the Chemical Weapons Act 1997;

(ii) a microbial or other biological agent;

(iii) a toxin, whatever its origin or method of production;

(iv) a substance having an effect similar to the effect of anything referred to in any of subparagraphs (i) to (iii);

(v) ionising radiation or a radioactive substance, as defined in the Radiological Protection Act 1991.

Offences against internationally protected persons.

11.—(1) Subject to subsections (3) and (4), a person is guilty of an offence if he or she does outside the State—

(a) an act to, or in relation to, an internationally protected person that, if done in the State, would constitute an offence specified in Part 1 of Schedule 6, or

(b) an act in connection with an attack on the official premises, the private accommodation or any means of transportation of an internationally protected person that, if done in the State, would constitute an offence specified in Part 2 of Schedule 6.

(2) Subject to subsections (3) and (4), a person is guilty of an offence if he or she—

(a) attempts to commit an act that is an offence under subsection (1), or

(b) makes a threat to commit an act that is an offence under subsection (1) and intends the person to whom the threat is made to fear that it will be carried out.

(3) Subsections (1) and (2) apply to an act committed outside the State if the act is committed—

(a) on board an Irish ship,

(b) on an aircraft registered in the State,

(c) by a citizen of Ireland, or

(d) against a person who enjoys the status of an internationally protected person by virtue of functions exercised on behalf of the State.

(4) Subsections (1) and (2) apply also to an act committed outside the State in circumstances other than those referred to in subsection (3), but in that case the Director of Public Prosecutions may not take, or consent to the taking of, proceedings referred to in section 43(2) for an offence in respect of that act except as authorised by section 43(3).

(5) A person guilty of an offence under this section is liable on conviction to—

(a) in the case of an offence under subsection (1) or (2) (a), the penalty to which he or she would have been liable had the act that constitutes the offence been committed in the State, or

(b) in the case of an offence under subsection (2)(b), imprisonment for a term not exceeding 10 years.

(6) Subject to subsection (7), a word or expression that is used in this section has the same meaning as in the Internationally Protected Persons Convention.

(7) In this section "internationally protected person" means, in relation to an offence under subsection (1) or (2)—

(a) a person who, at the time of the commission of the offence—

(i) is a Head of State, a member of a body that performs the functions of a Head of State under the constitution of a state, a Head of Government or a Minister for Foreign Affairs, and

(ii) is outside the territory of the state in which he or she holds office,

(b) a person who does not fall within paragraph (a) and who, at the time of the commission of the offence—

(i) is a representative or official of a state or an official or agent of an international organisation of an intergovernmental character, and

(ii) is entitled under international law to protection from attack on his or her person, freedom or dignity,

or

(c) a person who, at the time of the commission of the offence—

(i) is a member of the family of a person mentioned in paragraph (a) and is accompanying him or her, or

(ii) is a member of the family and of the household of a person mentioned in paragraph (b).

PART 4
Suppression of Financing of Terrorism

Interpretation of Part 4.
12.—(1) In this Part, except where the context otherwise requires—

"disposal order" means an order under section 16;

"funds" means—

(a) assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and

(b) any legal document or instrument in any form, including electronic or digital, evidencing title to, or any interest in, any asset, including, but not limited to, a bank credit, traveller's cheque, bank cheque, money order, share, security, bond, draft and letter of credit;

"interim order" means an order under section 14;

"interlocutory order" means an order under section 15;

"member of the Garda Síochána" means a member of the Garda Síochána not below the rank of Chief Superintendent;

"respondent" means—

(a) a person in respect of whom an application for an interim order or an interlocutory order has been made, or

(b) a person in respect of whom an interim order or an interlocutory order has been made,

and includes a person who, but for this Act, would become entitled on the death of a person referred to in paragraph (a) or (b) to any funds to which such an order relates (being an order that is in force and is in respect of that person);

"Terrorist Financing Convention" means the International Convention for the Suppression of the Financing of Terrorism adopted by resolution 54/109 of the General Assembly of the United Nations on 9 December 1999, the English language text of which is set out for convenience of reference in Schedule 7.

(2) For the purposes of sections 14 to 20, a person is considered to be in possession or control of funds notwithstanding that all or part of them—

(a) are lawfully in the possession or control of a member of the Garda Síochána of any rank or any other person, having been lawfully seized or otherwise taken by any such member or person, or

(b) are subject to an interim order, an interlocutory order or any other order of a court that does either of the following or is to the like effect:

(i) prohibits any person from disposing of or otherwise dealing with the funds or diminishing their value;

(ii) contains any conditions or restrictions in that regard,

or

(c) are subject to a letting agreement, the subject of a trust or otherwise occupied by another person or are inaccessible.

(3) Subsection (2) is not to be construed to limit the generality of sections 11(2) and 13(2) of the Act of 1996 as made applicable by section 20 of this Act.

Offence of financing terrorism.

13.—(1) Subject to subsections (6) and (7), a person is guilty of an offence if, in or outside the State, the person by any means, directly or indirectly, unlawfully and wilfully provides, collects or receives funds intending that they be used or knowing that they will be used, in whole or in part in order to carry out—

(a) an act that constitutes an offence under the law of the State and within the scope of, and as defined in, any treaty that is listed in the annex to the Terrorist Financing Convention, or

(b) an act (other than one referred to in paragraph (a))—

(i) that is intended to cause death or serious bodily injury to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, and

(ii) the purpose of which is, by its nature or context, to intimidate a population or to compel a government or an international organisation to do or abstain from doing any act.

(2) Subject to subsections (6) and (7), a person who attempts to commit an offence under subsection (1) is guilty of an offence.

(3) A person is guilty of an offence if the person by any means, directly or indirectly, unlawfully and wilfully provides, collects or receives funds intending that they be used or knowing that they will be used, in whole or in part—

(a) for the benefit or purposes of a terrorist group as defined in section 4, or

(b) in order to carry out an act (other than one referred to in paragraph (a) or (b) of subsection (1)) that is an offence under section 6.

(4) A person who attempts to commit an offence under subsection (3) is guilty of an offence.

(5) An offence may be committed under subsection (1) or (3) whether or not the funds are used to carry out an act referred to in subsection (1) or (3)(b), as the case may be.

(6) Subsections (1) and (2) apply to an act committed outside the State if the act—

(a) is committed on board an Irish ship,

(b) is committed on an aircraft registered in or operated by the State,

(c) is committed by a citizen of Ireland or by a stateless person habitually resident in the State,

(d) is directed towards or results in the carrying out of an act referred to in subsection (1) in the State or against a citizen of Ireland,

(e) is directed towards or results in the carrying out of an act referred to in subsection (1) against a State or Government facility of the State abroad, including an embassy or other diplomatic or consular premises of the State, or

(f) is directed towards or results in the carrying out of an act referred to in subsection (1) in an attempt to compel the State to do or abstain from doing any act.

(7) Subsections (1) and (2) apply also to an act committed outside the State in circumstances other than those referred to in subsection (6), but in that case the Director of Public Prosecutions may not take, or consent to the taking of, proceedings referred to in section 43(2) for an offence in respect of that act except as authorised by section 43(3).

(8) A person guilty of an offence under this section is liable—

(a) on summary conviction, to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment, to a fine or imprisonment for a term not exceeding 20 years or both.

Interim order freezing certain funds.

14.—(1) If satisfied on application ex parte by a member of the Garda Síochána that a person is in possession or control of funds that are being used or may be intended for use in committing, or facilitating the commission of, an offence under section 6 or 13, the High Court may make an order prohibiting the person, any other specified person or any other person having notice of the order from—

(a) disposing of or otherwise dealing with all or, where appropriate, a specified part of the funds during such period, not exceeding 40 days, as may be specified by the Court, or

(b) diminishing the value of the funds during that period.

(2) An interim order—

(a) may contain such provisions, conditions and restrictions as the Court considers necessary or expedient, and

(b) shall provide for notice of the order to be given to the respondent and any other person who appears to be or is affected by it unless the Court is satisfied that it is not reasonably possible to ascertain their whereabouts.

(3) On application by the respondent or any other person claiming ownership of the funds specified in an interim order that is in force, the Court may discharge or, as may be appropriate, vary the order if satisfied that those funds or a part of them are not funds that are being used or may be intended for use in committing or facilitating the commission of an offence under section 6 or 13.

(4) On application by a member of the Garda Síochána or any other person, the Court may vary an interim order to such extent as may be necessary to permit—

(a) the enforcement of any order of a court for the payment by the respondent of any sum, including any sum in respect of costs,

(b) the recovery by a county registrar or sheriff of income tax due by the respondent pursuant to a certificate issued by the Collector-General under section 962 of the Taxes

Consolidation Act 1997, together with the fees and expenses provided for in that section, or

(c) the institution of proceedings for, or relating to, the recovery of any other sum owed by the respondent.

(5) Subsection (4) is not to be construed to limit the generality of section 6 of the Act of 1996 as made applicable by section 20 of this Act.

(6) On application at any time by a member of the Garda Síochána, the Court shall discharge an interim order.

(7) Subject to subsections (3), (6) and (11), an interim order continues in force until the end of the period specified by the Court and then lapses unless an application for an interlocutory order in respect of any of the funds concerned is brought during that period.

(8) If an application for an interlocutory order is brought within the period allowed under subsection (7), the interim order lapses on—

(a) the determination of the application,

(b) the expiry of the ordinary time for bringing an appeal against the determination, or

(c) if such appeal is brought, the determination or abandonment of the appeal or any further appeal or the expiry of the ordinary time for bringing any further appeal,

whichever is the latest.

(9) Notice of an application under subsection (3) for the discharge or variation of an interim order shall be given by the respondent or other person making the application to—

(a) the member of the Garda Síochána who applied for the interim order, and

(b) such other (if any) persons as the Court may direct.

(10) Notice of an application under subsection (4) for the variation, or under subsection (6) for the discharge, of an interim order shall be given by the applicant to—

(a) the respondent unless the Court is satisfied that it is not reasonably possible to ascertain the respondent's whereabouts, and

(b) such other (if any) persons as the Court may direct.

(11) Where a forfeiture order, or a confiscation order, under the Act of 1994 relates to any funds that are the subject of an interim order that is in force—

(a) the interim order is discharged, if it relates only to the funds that are the subject of the forfeiture order or the confiscation order, as the case may be, and

(b) the interim order is varied by the exclusion from it of the other funds, if it relates to other funds in addition to the funds that are the subject of the forfeiture order or the confiscation order, as the case may be.

Interlocutory order.

15.—(1) If, on application by a member of the Garda Síochána, it appears to the High Court on evidence tendered by the applicant that a person is in possession or control of funds that were being used or may be intended for use in committing or facilitating the commission of an offence under section 6 or 13, the Court shall, subject to subsection (2) of this section, make an order prohibiting the respondent, any other specified person or any other person having notice of the order from—

(a) disposing of or otherwise dealing with all or, where appropriate, a specified part of the funds, or

(b) diminishing the value of the funds,

unless the Court is satisfied, on evidence tendered by the respondent or any other person, that the funds are not being used or intended for use in committing or facilitating the commission of an offence under section 6 or 13.

(2) The Court shall not make an interlocutory order if it is satisfied that there would be a serious risk of injustice.

(3) Evidence tendered by the applicant for an interlocutory order may consist of or include evidence admissible by virtue of section 18.

(4) An interlocutory order—

(a) may contain such provisions, conditions and restrictions as the Court considers necessary or expedient, and

(b) shall provide for notice of the order to be given to the respondent and any other person who appears to be or is affected by it unless the Court is satisfied that it is not reasonably possible to ascertain their whereabouts.

(5) On application by the respondent or any other person claiming ownership of the funds concerned, the Court may discharge or, as may be appropriate, vary an order that is in force if satisfied that—

(a) the funds concerned, or a part of them, are not funds that are being used or may be intended for use in committing or facilitating the commission of an offence under section 6 or 13, or

(b) the order causes any other injustice.

(6) On application by a member of the Garda Síochána or any other person, the Court may vary an interlocutory order to such extent as may be necessary to permit—

(a) the enforcement of any order of a court for the payment by the respondent of any sum, including any sum in respect of costs,

(b) the recovery by a county registrar or sheriff of income tax due by the respondent pursuant to a certificate issued by the Collector-General under section 962 of the Taxes Consolidation Act 1997, together with the fees and expenses provided for in that section, or

(c) the institution of proceedings for, or relating to, the recovery of any other sum owed by the respondent.

(7) Subsection (6) is not to be construed to limit the generality of section 6 of the Act of 1996 as made applicable by section 20 of this Act.

(8) On application at any time by a member of the Garda Síochána, the Court shall discharge an interlocutory order.

(9) Subject to subsections (5), (6) and (12), an interlocutory order continues in force until—

(a) the determination of an application for a disposal order in relation to the funds concerned,

(b) the expiry of the ordinary time for bringing an appeal from that determination, or

(c) if such an appeal is brought, the determination or abandonment of the appeal or any further appeal or the expiry of the ordinary time for bringing any further appeal,

whichever is the latest.

(10) Notice of an application under subsection (1) for an interlocutory order or of an application under subsection (6) for the variation, or under subsection (8) for the discharge, of an interlocutory order shall be given by the applicant to—

(a) the respondent unless the Court is satisfied that it is not reasonably possible to ascertain the respondent's whereabouts, and

(b) any other person to whom the Court directs that notice be given.

(11) Notice of an application under subsection (5) to discharge or vary an interlocutory order shall be given by the respondent or other person making the application to—

(a) the member of the Garda Síochána who applied for the interlocutory order, and

(b) such other (if any) persons as the Court may direct.

(12) Where a forfeiture order, or a confiscation order, under the Act of 1994 relates to any funds that are the subject of an interlocutory order that is in force—

(a) the interlocutory order is discharged, if it relates only to the funds that are the subject of the forfeiture order or the confiscation order, as the case may be, and

(b) the interlocutory order is varied by the exclusion from it of the other funds, if it relates to other funds in addition to the funds that are the subject of the forfeiture order or the confiscation order, as the case may be.

Disposal order.

16.—(1) Subject to subsection (2), where an interlocutory order has been in force for not less than 7 years in relation to funds, the High Court may, on application by a member of the Garda Síochána, make an order directing that all or, if appropriate, a specified part of the funds be transferred, subject to such terms and conditions as the Court may specify, to the Minister for Finance or such other person as the Court may determine.

(2) Subject to subsections (6) and (8), the Court shall make a disposal order in relation to any funds that are the subject of an application under subsection (1) unless it is satisfied that the funds are not funds that had been used or were intended for use in committing or facilitating the commission of an offence under section 6 or 13.

(3) The applicant shall give notice of an application under this section to—

(a) the respondent unless the Court is satisfied that it is not reasonably possible to ascertain the respondent's whereabouts, and

(b) such other (if any) persons as the Court may direct.

(4) A disposal order operates to deprive the respondent of any rights to the funds to which the order relates and on the making of the order the funds are transferred to the Minister for Finance or other person determined by the Court.

(5) The Minister for Finance may dispose of any funds transferred to him or her under this section and any proceeds of the disposition and any money transferred to that Minister under this section shall be paid into and disposed of by him or her for the benefit of the Exchequer.

(6) In proceedings under subsection (1), before deciding whether to make a disposal order, the Court shall give any person claiming ownership of the funds an opportunity to be heard by the Court and to show cause why the order should not be made.

(7) On application by the respondent or, if the respondent's whereabouts cannot be ascertained, on the Court's own initiative, the Court may, if it considers it appropriate to do so in the interests of justice, adjourn the hearing of an application under subsection (1) for such period not exceeding 2 years as it considers reasonable.

(8) The Court shall not make a disposal order if it is satisfied that there would be a serious risk of injustice.

Ancillary orders and provision in relation to certain profits or gains, etc.

17.—(1) At any time while an interim or interlocutory order is in force, the High Court may, on application by a member of the Garda Síochána, make such orders as it considers necessary or expedient to enable the interim order or interlocutory order to have full effect.

(2) The applicant shall give notice of an application under this section to—

(a) the respondent unless the Court is satisfied that it is not reasonably possible to ascertain the respondent's whereabouts, and

(b) such other (if any) persons as the Court may direct.

(3) An interim order, an interlocutory order or a disposal order may be expressed to apply to—

(a) any profit, gain or interest,

(b) any dividend or other payment, or

(c) any other funds,

payable or arising, after the making of the order, in connection with any other funds to which the order relates.

Evidence and proceedings relating to interim and other orders.
18.—(1) A statement made by a member of the Garda Síochána—

(a) in proceedings under section 14, on affidavit or, if the High Court so directs, in oral evidence, or

(b) in proceedings under section 15, in oral evidence,

that he or she believes that the respondent is in possession or control of funds that are being used, or may be intended for use, in committing or facilitating the commission of an offence under section 6 or 13 is evidence of the matter if the Court is satisfied that there are reasonable grounds for that belief.

(2) The standard of proof applicable in civil proceedings is the standard required to determine any question arising under section 14, 15, 16, 17, 19 or 20.

(3) Proceedings under section 14 in relation to an interim order shall be heard otherwise than in public and any proceedings under section 15, 16, 17 or 19 may, if the respondent or any other party to the proceedings (other than the applicant) so requests and the Court considers it proper, be heard otherwise than in public.

(4) The Court may, if it considers it appropriate to do so, prohibit the publication of such information as it may determine in relation to proceedings under section 14, 15, 16, 17 or 19, including information relating to—

(a) applications for, the making or refusal of and the contents of orders under any of those sections, and

(b) the persons to whom those orders relate.

Compensation.
19.—(1) An application to the High Court for an order under this section may be made where—

(a) an interim order is discharged or lapses and an interlocutory order in relation to the matter is not made or, if made, is discharged (otherwise than pursuant to section 14(11)),

(b) an interlocutory order is discharged (otherwise than pursuant to section 15(12)) or lapses and a disposal order in relation to the matter is not made or, if made, is discharged, or

(c) an interim order or an interlocutory order is varied (otherwise than pursuant to section 14(11) or 15(12)) or a disposal order is varied on appeal.

(2) On application under subsection (1) by a person who satisfies the Court that—

(a) the person is the owner of funds to which—

(i) an interim order referred to in subsection (1)(a) related,

(ii) an interlocutory order referred to in subsection (1)(b) related,

(iii) an order referred to in subsection (1)(c) had related, but by reason of it being varied by a court, has ceased to relate,

and

(b) the funds are not being used or intended for use in committing or facilitating the commission of an offence under section 6 or 13,

the Court may award to the person such (if any) compensation payable by the Minister for Finance as it considers just in the circumstances in respect of any loss incurred by the person by reason of the order concerned.

(3) The Minister for Finance shall be given notice of, and be entitled to be heard in, any proceedings under this section.

Application of certain provisions of Act of 1996.
20.—For the purposes of this Part, sections 6, 7 and 9 to 15 of the Act of 1996 apply with the following modifications and any other necessary modifications as if an interim order, an interlocutory or a disposal order made under this Part, or an application for such an order, had been made under the Act of 1996:

(a) a reference in any of the applicable provisions of the Act of 1996 to applicant shall be construed as referring to the member of the Garda Síochána who applied to the High Court for the interim order, interlocutory order or disposal order;

(b) a reference in any of the applicable provisions of the Act of 1996 to respondent shall be construed as defined in section 12 of this Act;

(c) a reference in any of the applicable provisions of the Act of 1996 to property shall be construed as referring to funds.

Section 21 *et seq.* omitted.

PART 5
Miscellaneous Matters

Proceedings relating to offences committed outside the State.

43.—(1) Proceedings for an offence under section 6, 9, 10, 11 or 13(1) or (2) in relation to an act committed outside the State may be taken in any place in the State and the offence may for all incidental purposes be treated as having been committed in that place.

(2) Where a person is charged with an offence referred to in subsection (1), no further proceedings in the matter (other than any remand in custody or on bail) may be taken except by or with the consent of the Director of Public Prosecutions.

(3) The Director of Public Prosecutions may take, or consent to the taking of, further proceedings against a person for an offence in respect of an act to which section 6(1), 9(1) or (2), 10(1), (2) or (3), 11(1) or (2) or 13(1) or (2) applies and that is committed outside the State in the circumstances referred to in section 6(3), 9(4), 10(5), 11(4) or 13(7) respectively if satisfied—

(a) that—

(i) a request for that person's surrender for the purpose of trying him or her for an offence in respect of that act has been made under Part II of the Extradition Act 1965 by—

(I) in the case of an offence in respect of an act to which section 6(1) applies, any state, and

(II) in the case of an offence in respect of an act to which section 9(1) or (2), 10(1), (2) or (3), 11(1) or (2) or 13(1) or (2) applies, a state party to the applicable instrument and exercising jurisdiction in accordance with its relevant provision,

and

(ii) the request has been finally refused (whether as a result of a decision of the court or otherwise),

or

(b) that—

(i) a relevant arrest warrant has been received from an issuing state for the purpose of bringing proceedings against the person for an offence in respect of that act,

(ii) except in the case of an act to which section 6(1) applies, jurisdiction is being exercised in accordance with the relevant provision of the applicable instrument, and

(iii) a final determination has been made that the F11[relevant arrest warrant] should not be endorsed for execution in the State under the European Arrest Warrant Act 2003 or that the person should not be surrendered to the issuing state concerned,

or

(c) that, because of special circumstances (including, but not limited to, the likelihood of a refusal referred to in paragraph (a)(ii) or a determination referred to in paragraph (b)(iii)), it is expedient that proceedings be taken against the person for an offence under the law of the State in respect of the act.

(4) In subsection (3)—

"applicable instrument" means—

(a) in relation to an act to which section 9(1) or (2) applies, the Hostage Convention as defined in section 8,

(b) in relation to an act to which section 10(1), (2) or (3) applies, the Terrorist Bombing Convention as defined in section 8,

(c) in relation to an act to which section 11(1) or (2) applies, the Internationally Protected Persons Convention as defined in section 8, and

(d) in relation to an act to which section 13(1) or (2) applies, the Terrorist Financing Convention as defined in section 12;

"relevant arrest warrant" and "issuing state" have the meanings given by section 2 of the European Arrest Warrant Act 2003;

"relevant provision" means—

(a) in relation to the Hostage Convention, Article 5(1),

(b) in relation to the Terrorist Bombing Convention, Article 6(1) or (2),

(c) in relation to the Internationally Protected Persons Convention, Article 3(1), and

(d) in relation to the Terrorist Financing Convention, Article 7(1) or (2).

Evidence in proceedings under the Act.
44.—(1) Where in any proceedings relating to an offence under this Act a question arises as to whether—

(a) a person is an internationally protected person,

(b) a facility is a State or Government facility of the State abroad, or

(c) an organisation is an international organisation or an international organisation of an intergovernmental character,

a certificate that is signed by the Minister for Foreign Affairs, or by a person authorised by that Minister, and that states any fact relating to that question is evidence of the fact unless the contrary is shown.

(2) In any proceedings relating to an offence under this Act—

(a) in relation to an act committed outside the State—

(i) a certificate that is signed by an officer of the Minister for Foreign Affairs and Trade and states that a passport was issued by that Minister of the Government to a person on a specified date, and

(ii) a certificate that is signed by an officer of the Minister and states that, to the best of the officer's knowledge and belief, the person has not ceased to be an Irish citizen,

is evidence that the person was an Irish citizen on the date on which the offence concerned is alleged to have been committed, unless the contrary is shown,

(b) a certificate that is signed by the Attorney General, or by a person authorised by him or her, as to his or her opinion in relation to a matter mentioned in section 6(6) is evidence of that opinion, unless the contrary is shown, and

(c) a certificate that is signed by the Director of Public Prosecutions or by a person authorised by that Director and that states any of the matters specified in paragraph (a), (b) or (c) of section 43(3) is evidence of the facts stated in the certificate, unless the contrary is shown.

(3) A document purporting to be a certificate under subsection (1) or (2) is deemed, unless the contrary is shown—

(a) to be such a certificate,

(b) to have been signed by the person purporting to have signed it, and

(c) in the case of certificate signed with the authority of the Minister for Foreign Affairs, the Attorney General or the Director of Public Prosecutions, to have been signed in accordance with the authorisation.

Liability for offences by bodies corporate.

45.—(1) Where a body corporate commits an offence under this Act and the offence is proved to have been committed with the consent or connivance of, or to be attributable to, any neglect on the part of a person who, when the offence was committed—

(a) was a director, manager, secretary or other officer of that body, or

(b) purported to act in any such capacity,

that person, as well as the body corporate, is guilty of an offence and is liable to be proceeded against and punished accordingly.

(2) A person may be proceeded against for an offence referred to in subsection (1) whether or not the body corporate has been proceeded against or convicted of the offence committed by that body.

(3) Where the affairs of a body corporate are managed by its members, subsections (1) and (2) apply in relation to the acts and defaults of a member in connection with the member's management functions as if the member were a director or manager of the body corporate.

Double jeopardy.
46.—A person who has been acquitted or convicted of an offence outside the State shall not be proceeded against for an offence under this Act consisting of the acts that constituted the offence of which that person was so acquitted or convicted.

Expenses.
47.—The expenses incurred in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of money provided by the Oireachtas.

Section 48 *et seq.* omitted.

APPENDIX 4
RELEVANT EXTRACTS FROM CRIMINAL JUSTICE ACT 2006

CRIMINAL JUSTICE ACT 2006

Number 26 of 2006

(Consolidated 22 February 2023)

AN ACT TO AMEND AND EXTEND THE POWERS OF THE GARDA SÍOCHÁNA IN RELATION TO THE INVESTIGATION OF OFFENCES; TO AMEND CRIMINAL LAW AND PROCEDURE IN OTHER RESPECTS, INCLUDING PROVISION FOR THE ADMISSIBILITY IN EVIDENCE OF CERTAIN WITNESS STATEMENTS, AN EXTENSION OF THE CIRCUMSTANCES IN WHICH THE ATTORNEY GENERAL IN ANY CASE OR, IF HE OR SHE IS THE PROSECUTING AUTHORITY IN A TRIAL, THE DIRECTOR OF PUBLIC PROSECUTIONS MAY REFER A QUESTION OF LAW TO THE SUPREME COURT FOR DETERMINATION OR TAKE AN APPEAL IN CRIMINAL PROCEEDINGS, PROVISION FOR OFFENCES RELATING TO ORGANISED CRIME, AMENDMENTS TO THE MISUSE OF DRUGS ACT 1977, AN OBLIGATION, IN THE INTERESTS OF THE COMMON GOOD, ON PERSONS CONVICTED ON INDICTMENT OF CERTAIN DRUG TRAFFICKING OFFENCES TO NOTIFY CERTAIN INFORMATION TO THE GARDA SÍOCHÁNA, PROVISIONS IN RELATION TO SENTENCING, A RESTRICTION OF THE OFFENCES TO WHICH SECTION 10(4) OF THE PETTY SESSIONS (IRELAND) ACT 1851 APPLIES, AN AMENDMENT OF THE JURISDICTION OF THE DISTRICT COURT AND THE CIRCUIT COURT IN CRIMINAL MATTERS, THE IMPOSITION OF FIXED CHARGES IN RESPECT OF CERTAIN OFFENCES UNDER THE CRIMINAL JUSTICE (PUBLIC ORDER) ACT 1994 AND AN AMENDMENT OF THE PETTY SESSIONS (IRELAND) ACT 1851 RELATING TO THE ISSUE AND EXECUTION OF CERTAIN WARRANTS; TO AMEND THE FIREARMS ACTS 1925 TO 2000 AND THE EXPLOSIVES ACT 1875; TO MAKE PROVISION IN RELATION TO ANTI-SOCIAL BEHAVIOUR BY ADULTS AND CHILDREN; TO AMEND THE CHILDREN ACT 2001; TO PROVIDE FOR THE ESTABLISHMENT OF A BODY TO BE KNOWN AS AN COISTE COMHAIRLEACH UM CHÓDÚ AN DLÍ CHOIRIÚIL OR, IN THE ENGLISH LANGUAGE AS, THE CRIMINAL LAW CODIFICATION ADVISORY COMMITTEE AND TO PROVIDE FOR RELATED MATTERS. [*16th July, 2006*]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Section 1 *et seq.* omitted.

PART 7
Organised Crime

Interpretation (Part 7).

70.— (1) In this Part—

"act" includes omission and a reference to the commission or doing of an act includes a reference to the making of an omission;

"criminal organisation" means a structured group, however organised, that has as its main purpose or activity the commission or facilitation of a serious offence;

"Irish ship" has the meaning it has in section 9 of the Mercantile Marine Act 1955;

"serious offence" means an offence for which a person may be punished by imprisonment for a term of 4 years or more;

"structured group" means a group of 3 or more persons, which is not randomly formed for the immediate commission of a single offence, and the involvement in which by 2 or more of those persons is with a view to their acting in concert; for the avoidance of doubt, a structured group may exist notwithstanding the absence of all or any of the following:

(a) formal rules or formal membership, or any formal roles for those involved in the group;

(b) any hierarchical or leadership structure;

(c) continuity of involvement by persons in the group.

(2) For the purposes of this section facilitation of an offence does not require knowledge of a particular offence the commission of which is facilitated, or that an offence actually be committed.

(3) For the purposes of the references in sections 71(2)(d) and 74(1)(b)(i) to a person's being ordinarily resident in the State, a person shall be taken to be so resident, on the date of the commission of the offence to which section 71(1) or 74(1), as the case may be, applies, if, for the 12 months immediately preceding that date, the person has his or her principal place of residence in the State.

Offence of conspiracy.

71.— (1) Subject to subsections (2) and (3) , a person who conspires, whether in the State or elsewhere, with one or more persons to do an act—

(a) in the State that constitutes a serious offence, or

(b) in a place outside the State that constitutes a serious offence under the law of that place and which would, if done in the State, constitute a serious offence,

is guilty of an offence irrespective of whether such act actually takes place or not.

(2) Subsection (1) applies to a conspiracy committed outside the State if—

(a) the offence, the subject of the conspiracy, was committed, or was intended to be committed, in the State or against a citizen of Ireland,

(b) the conspiracy is committed on board an Irish ship,

(c) the conspiracy is committed on an aircraft registered in the State, or

(d) the conspiracy is committed by an Irish citizen or a person ordinarily resident in the State.

(3) Subsection (1) shall also apply to a conspiracy committed outside the State in circumstances other than those referred to in subsection (2) , but in that case the Director of Public Prosecutions may not take, or consent to the taking of, proceedings for an offence under subsection (1) except in accordance with section 74 (3) .

(4) A person charged with an offence under this section is liable to be indicted, tried and punished as a principal offender.

Offence of directing a criminal organisation.
71A.— (1) In this section—

(a) 'directs', in relation to activities, means—

(i) controls or supervises the activities, or

(ii) gives an order, instruction or guidance, or makes a request, with respect to the carrying on of the activities;

(b) references to activities include references to—

(i) activities carried on outside the State, and

(ii) activities that do not constitute an offence or offences.

(2) 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.

(3) Any statement made orally, in writing or otherwise, or any conduct, by the defendant implying or leading to a reasonable inference that he or she was at a material time directing the activities of a criminal organisation shall, in proceedings for an offence under this section, be admissible as evidence that the defendant was doing such at that time.

(4) In proceedings under this section, the court or the jury, as the case may be, in determining whether an offence under this section has been committed, may, in addition to any other relevant evidence, also consider—

(a) any evidence of a pattern of behaviour on the part of the defendant consistent with his or her having directed the activities of the organisation concerned at the material time, and

(b) without limiting paragraph (a) or subsection (3)—

(i) whether the defendant has received any benefit from the organisation concerned, and

(ii) evidence as to the possession by the defendant of such articles or documents or other records as would give rise to a reasonable suspicion that such articles, documents or other records were in his or her possession or control for a purpose connected with directing the activities of the organisation concerned.

(5) Any document or other record emanating or purporting to emanate from the organisation concerned from which there can be inferred—

(a) either—

(i) the giving, at the time concerned, of an instruction, order or guidance by the defendant to any person involved in the organisation, or

(ii) the making, at that time, by the defendant of a request of a person so involved,

or

(b) the seeking, at that time, by a person so involved of assistance or guidance from the defendant,

shall, in proceedings for an offence under this section, be admissible as evidence that the defendant was directing the activities of the organisation concerned at the material time.

(6) In this section 'document or other record' has the same meaning as it has in section 71B.

Provisions with respect to proof of criminal organisation's existence.
71B.— (1) In proceedings under this Part the opinion of—

(a) any member of the Garda Síochána, or

(b) any former member of the Garda Síochána,

who appears to the Court to possess the appropriate expertise (in this section referred to as the 'appropriate expert') shall, subject to section 74B, be admissible in evidence in relation to the issue as to the existence of a particular criminal organisation.

(2) In subsection (1) 'expertise' means experience, specialised knowledge or qualifications.

(3) Without limiting the matters that can properly be taken into account, in the formation of such opinion, by the appropriate expert, it shall be permissible for that expert, in forming the opinion referred to in subsection (1), to take into account any previous convictions for arrestable offences of persons believed by that expert to be part of the organisation to which the opinion relates.

(4) Without prejudice to subsection (1), in proceedings under this Part the following shall be admissible as evidence that a particular group constitutes a criminal organisation—

(a) any document or other record emanating or purporting to emanate from the group or created or purporting to be created by the defendant—

(i) from which the group's existence as a criminal organisation can be inferred;

(ii) from which the commission or facilitation by the group of a serious offence or its engaging in any activity in relation thereto can be inferred; or

(iii) that uses or makes reference to a name, word, symbol or other representation that identifies the group as a criminal organisation or from which name, word, symbol or other representation it can be inferred that it is such an organisation,

(b) the provision by a group of 3 or more persons of a material benefit to the defendant (or a promise by such a group to provide a material benefit to the defendant), which provision or promise is not made in return for a lawful act performed or to be performed by the defendant.

(5) In subsection (4) 'document or other record' includes, in addition to a document or other record in writing—

(a) a disc, tape, sound-track or other device in which information, sounds or signals are embodied so as to be capable (with or without the aid of some other instrument) of being reproduced in legible or audible form,

(b) a film, tape or other device in which visual images are embodied so as to be capable (with or without the aid of some other instrument) of being reproduced in visual form, and

(c) a photograph.

Offence to participate in, or contribute to, certain activities.

72.— (1) A person is guilty of an offence if, with knowledge of the existence of the organisation referred to in this subsection, the person participates in or contributes to any activity (whether constituting an offence or not)—

(a) intending either to—

(i) enhance the ability of a criminal organisation or any of its members to commit, or

(ii) facilitate the commission by a criminal organisation or any of its members of,

a serious offence, or

(b) being reckless as to whether such participation or contribution could either—

(i) enhance the ability of a criminal organisation or any of its members to commit, or

(ii) facilitate the commission by a criminal organisation or any of its members of,

a serious offence.

(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 15 years or both.

(3) The reference in subsection (1) to the commission of a serious offence includes a reference to the doing of an act in a place outside the State that constitutes a serious offence under the law of that place and which act would, if done in the State, constitute a serious offence.

(4) In proceedings for an offence under this section it shall not be necessary for the prosecution to prove—

(a) that the criminal organisation concerned or any of its members actually committed, as the case may be—

(i) a serious offence in the State, or

(ii) a serious offence under the law of a place outside the State where the act constituting the offence would, if done in the State, constitute a serious offence,

(b) that the participation or contribution of the defendant actually—

(i) enhanced the ability of the criminal organisation concerned or any of its members to commit, or

(ii) facilitated the commission by it or any of its members of,

a serious offence, or

(c) knowledge on the part of the defendant of the specific nature of any offence referred to in subsection (1)(a) or (b).

(5) In determining whether a person participates in or contributes to an activity referred to in subsection (1), the court may consider, inter alia, whether the person—

(a) uses a name, word, symbol or other representation that identifies, or is associated with, the criminal organisation concerned, or

(b) receives any benefit from the criminal organisation concerned.

(6) In proceedings for an offence under this section, it shall be presumed, until the contrary is shown, that the participation or contribution (the ‘ relevant act ’) of the defendant referred to in subsection (1) was engaged in or made with the state of mind on the defendant’s part referred

to in paragraph (a) or (b) of that subsection if the circumstances under which the relevant act was committed—

(a) involved either—

(i) the possession by the defendant, whilst in the presence of one or more other persons, of any article or item referred to in the Table to this section, or

(ii) there being present in (or, in the case of a false registration plate referred to in paragraph 8 of that Table, present in or affixed to) any vehicle—

(I) the use of which appears connected with the relevant act, and

(II) of which the defendant and one or more other persons were occupants on or about the date of commission of the relevant act,

any such article or item,

and

(b) those circumstances are such as give rise to a reasonable suspicion that the defendant's state of mind was as aforesaid at the time of the relevant act's commission.

Table

1. Any balaclava, boiler suit or other means of disguise or impersonation, including any article of Garda uniform or any equipment supplied to a member of the Garda Síochána or imitation thereof.

2. Any firearm (within the meaning of section 1 of the Firearms Act 1925), ammunition for a firearm or device that appears to the ordinary observer so realistic as to make it indistinguishable from a firearm.

3. Any knife to which section 9(1) of the Firearms and Offensive Weapons Act 1990 applies, weapon of offence within the meaning of section 10(2) of that Act or weapon to which section 12 of that Act applies.

4. Any implement for burglary or other article or item for gaining access to any premises or other structure without the permission of the owner or occupier thereof, including any key or card that has been stolen or any access code unlawfully procured.

5. Any plan of any premises or other structure unrelated to any lawful activity, trade or purpose being pursued or engaged in by one or more of the persons referred to in subsection (6)(a).

6. Any controlled drug (within the meaning of the Misuse of Drugs Act 1977).

7. Any substantial amounts, in cash, of any currency unrelated to any lawful activity, trade, transaction or purpose being pursued or engaged in by one or more of the persons referred to in subsection (6)(a).

8. Any false vehicle registration plate, that is to say, any plate purporting to be a plate for a mechanically propelled vehicle registered under section 131 of the Finance Act 1992 and displaying an identification mark other than that duly assigned by the Revenue Commissioners under Chapter IV of Part II of that Act and regulations thereunder.

9. Any article or item for making a counterfeit of any currency note or coin or making a counterfeit or otherwise for making a forgery of any credit or debit card.

10. Any article or item for making copies of any work, being an article or item of a design enabling, and held in circumstances indicating that it would likely be used for, the making, on a substantial scale, of infringing copies (within the meaning of Part II of the Copyright and Related Rights Act 2000) of the work without the copyright owner's consent.

11. Any other article or item prescribed for the purposes of subsection (6).

Offences under this Part: inferences that may be drawn.
72A.— (1) Where in any proceedings against a person for an offence under this Part evidence is given that the defendant at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, failed to answer any question material to the investigation of the offence, then the court in determining whether a charge should be dismissed under Part IA of the Criminal Procedure Act 1967 or whether there is a case to answer and the court (or subject to the judge's directions, the jury) in determining whether the defendant is guilty of the offence may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to the offence, but a person shall not be convicted of the offence solely or mainly on an inference drawn from such a failure.

(2) Subsection (1) shall not have effect unless—

(a) the defendant was told in ordinary language when being questioned what the effect of such a failure might be, and

(b) the defendant was afforded a reasonable opportunity to consult a solicitor before such a failure occurred.

(3) Nothing in this section shall, in any proceedings—

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

(b) be taken to preclude the drawing of any inference from the silence or other reaction of the defendant which could be properly drawn apart from this section.

(4) The court (or, subject to the judge's directions, the jury) shall, for the purposes of drawing an inference under this section, have regard to whenever, if appropriate, an answer to the question concerned was first given by the defendant.

(5) This section shall not apply in relation to the questioning of a person by a member of the Garda Síochána unless it is recorded by electronic or similar means or the person consents in writing to it not being so recorded.

(6) References in subsection (1) to evidence shall, in relation to the hearing of an application under Part IA of the Criminal Procedure Act 1967 for the dismissal of a charge, be taken to include a statement of the evidence to be given by a witness at the trial.

(7) In this section ‘ any question material to the investigation of the offence’ means:

(a) a question requesting that the defendant give a full account of his or her movements, actions, activities or associations during any specified period relevant to the offence being investigated; and

(b) whichever one, or more than one, of the following is relevant to the offence being investigated—

(i) a question relating to any statement or conduct of the type referred to in section 71A(3);

(ii) a question relating to any benefit of the type referred to in section 71A(4)(b)(i) or 71B(4)(b) which the member of the Garda Síochána concerned reasonably believes was received by the defendant or on his or her behalf;

(iii) a question relating to articles, or documents or other records, of the type referred to in section 71A(4)(b)(ii) or (5)(a);

(iv) a question relating to any document or other record of the type referred to in section 71B(4)(a)—

(I) created or purporting to be created by the defendant, or

(II) found in the possession of the defendant on or about the time of his or her arrest or found on foot of a lawful search of any premises or vehicle occupied by the defendant;

(v) a question relating to the suspected use by the defendant in a document of, or the suspected reference by him or her in a document to, a name, word, symbol or other representation of the type referred to in section 71B(4)(a)(iii);

(vi) a question relating to—

(I) the possession by the defendant, or

(II) the presence in a vehicle referred to in section 72(6)(a)(ii) and in the circumstances involving the defendant referred to in that provision,

of any article or item referred to in the Table to section 72:

provided that no question shall be regarded as being material to the investigation of the offence unless the member of the Garda Síochána concerned reasonably believed that the question related to the participation of the defendant in the commission of the offence.

(8) In this section references to a failure to answer include references to the giving of an answer that is false or misleading and references to the silence or other reaction of the defendant shall be construed accordingly.

(9) This section shall not apply in relation to a failure to answer a question if the failure occurred before the commencement of section 9 of the Criminal Justice (Amendment) Act 2009.

Commission of offence for criminal organisation.

73.— (1) A person who commits a serious offence for the benefit of, at the direction of, or in association with, a criminal organisation is guilty of an offence.

(2) In proceedings for an offence under subsection (1), it shall not be necessary for the prosecution to prove that the person concerned knew any of the persons who constitute the criminal organisation concerned.

(3) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 15 years or both.

Proceedings relating to offences committed outside State.

74.— (1) A person who does any act in a place outside the State that would, if done in the State, be an offence under section 71A or 72 and either—

(a) the act in question is done on board an Irish ship or on an aircraft registered in the State, or

(b) the person is—

(i) an individual who is an Irish citizen or ordinarily resident in the State, or

(ii) a body corporate established under the law of the State or a company within the meaning of the Companies Acts,

then the person is guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of an offence under section 71A or 72, as the case may be.

(2) Where a person is charged with an offence referred to in subsection (1) , no further proceedings in the matter (other than any remand in custody or on bail) may be taken except by or with the consent of the Director of Public Prosecutions.

(2A) Proceedings for—

(a) an offence under section 71 in relation to an act committed outside the State, or

(b) an offence under subsection (1),

may be taken in any place in the State and the offence may for all incidental purposes be treated as having been committed in that place.

(3) The Director of Public Prosecutions may take, or consent to the taking of, further proceedings against a person for an offence in respect of an act to which subsection (1) of section 71 applies and that is committed outside the State in the circumstances referred to in subsection (3) of that section if satisfied—

(a) that—

(i) a request for a person's surrender for the purpose of trying him or her for an offence in respect of that act has been made under Part II of the Extradition Act 1965 by any country, and

(ii) the request has been finally refused (whether as a result of a decision of the court or otherwise),

or

(b) that—

(i) a F17[relevant arrest warrant] has been received from an issuing state for the purpose of bringing proceedings against the person for an offence in respect of that act, and

(ii) a final determination has been made that the F17[relevant arrest warrant] should not be endorsed for execution in the State under the European Arrest Warrant Act 2003 or that the person should not be surrendered to the issuing state concerned,

or

(c) that, because of the special circumstances (including, but not limited to, the likelihood of a refusal referred to in paragraph (a) (ii) or a determination referred to in paragraph (b) (ii)), it is expedient that proceedings be taken against the person for an offence under the law of the State in respect of the act.

(4) In this section "relevant arrest warrant" and "issuing state" have the meanings they have in section 2(1) of the European Arrest Warrant Act 2003.

Aggravating factor: serious offence committed as part of, or in furtherance of, activities of criminal organisation.

74A.— (1) Where a court is determining the sentence to be imposed on a person for a serious offence, the fact that the offence was committed as part of, or in furtherance of, the activities of a criminal organisation shall be treated for the purpose of determining the sentence as an aggravating factor.

(2) Accordingly, the court shall (except where the sentence for the serious offence is one of imprisonment for life or where the court considers that there are exceptional circumstances

justifying its not doing so) impose a sentence that is greater than that which would have been imposed in the absence of such a factor.

(3) The sentence imposed shall not be greater than the maximum sentence permissible for the serious offence.

Exclusion of evidence in certain circumstances.
74B.— Nothing in this Part prevents a court, in proceedings thereunder, from excluding evidence that would otherwise be admissible if, in its opinion, the prejudicial effect of the evidence outweighs its probative value.

Evidence in proceedings under this Part.
75.— (1) In any proceedings for an offence under section 71 —

(a) a certificate that is signed by an officer of the Department of Foreign Affairs and states that—

(i) a passport was issued by that Department of State to a person on a specified date, and

(ii) to the best of the officer's knowledge and belief, the person has not ceased to be an Irish citizen,

is evidence that the person was an Irish citizen on the date on which the offence concerned is alleged to have been committed, unless the contrary is shown, and

(b) a certificate that is signed by the Director of Public Prosecutions or by a person authorised by him or her and that states that any of the matters specified in paragraph (a) , (b) or (c) of section 74 (3) is evidence of the facts stated in the certificate, unless the contrary is shown.

(2) A document purporting to be a certificate under subsection (1) is deemed, unless the contrary is shown—

(a) to be such a certificate,

(b) to have been signed by the person purporting to have signed it, and

(c) in the case of a certificate signed with the authority of the Minister for Foreign Affairs or the Director of Public Prosecutions, to have been signed in accordance with the authorisation.

Liability for offences by bodies corporate.
76.— (1) Where an offence under this Part is committed by a body corporate and is proved to have been committed with the consent, connivance or approval of, or to have been attributable to any wilful neglect on the part of, any person, being a director, manager, secretary or any other officer of the body corporate or a person who was purporting to act in any such capacity, that person, as well as the body corporate, shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) shall apply in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director or manager of the body corporate.

Double jeopardy.
77.— A person who is acquitted or convicted of an offence in a place outside the State shall not be proceeded against for an offence under—

(a) section 71 consisting of the act, or the conspiracy to do an act, that constituted the offence, or

(b) section 72 consisting of the act that constituted the offence,

of which the person was so acquitted or convicted.

Amendment of Act of 1967.
78.— The Act of 1967 is amended—

(a) in section 13(1), by the insertion of "or an offence under section 71 , 72 or 73 of the Criminal Justice Act 2006" after "the offence of murder under section 6 or 11 of the Criminal Justice (Terrorist Offences) Act 2005 or an attempt to commit such offence", and

(b) in section 29(1), by the insertion of the following paragraph after paragraph (k):

"(l) an offence under section 71 , 72 or 73 of the Criminal Justice Act 2006.".

Amendment of Schedule to Bail Act 1997.
79.— The Schedule to the Bail Act 1997 is amended by the insertion of the following after paragraph 28:

"Organised Crime.

28A.— An offence under section 71 , 72 or 73 of the Criminal Justice Act 2006.".

Section 80 *et seq*. omitted.