Submission to the Offences Against the State Acts Independent Review Group

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The following submission focuses on six features of the Offences Against the State legislation which require attention. They are as follows:

1. The *de facto* permanency of the Special Criminal Court
2. The dual role of the Special Criminal Court in the context of belief evidence
3. Corroboration of belief evidence
4. The role of the DPP in directing cases towards the Special Criminal Court
5. Other options to a non-jury trial
6. Certain offences created by the OASA Legislation
7. Re-arrest of persons for membership offences

This does not represent an exhaustive list of the issues that fall to be considered when reviewing the relevant legislation and I have expressed my views in respect of various matters in my other written material on the subject.[1] I am open to discussion on any of the issues raised herein or elsewhere.

1. The *De Facto* Permanency of the Special Criminal Court

1.1 The continued operation of Part V of the 1939 Act, which provides for the existence and operation of the Special Criminal Courts can no longer be described as either an emergency or temporary measure. The Court, the current instantiation of which was established in 1972 by Government Proclamation, has now been in operation continuously for almost 50 years. During this time, the nature of the trials heard have expanded beyond those relating to subversive activity, to include – increasingly – offences which relate to organised crime. The volume of cases heard by the Special Criminal Court has been such that, in 2016, the Special Criminal Court No. 2 came into operation to deal with the caseload.

1.2 Further evidence of this expansion can be seen in the coming into force of section 8 of the Criminal Justice Act 2009, which scheduled four offences created by Part VII of the Criminal Justice Act 2006. These offences, which include, for example, participating in or contributing to the activities of criminal organisation, are aimed at targeting organised crime, and their presumptive direction for trial in the Special Criminal Court may be seen as a clear indication of the Court's extending reach.

1.3 While these recent developments show the Special Criminal Court's embeddedness and *de-facto* permanency in our criminal justice system, the move from exceptional to accepted has been remarked upon for some time. Writing in 1989, Hogan and Walker noted the lack of political pressure to have the Special Criminal Court disbanded and

[1] Harrison, *The Special Criminal Court* (Bloomsbury, 2019)*;* Harrison, 'Disclosure and Privilege: The Dual Role of the Special Criminal Court' in Coen (ed), *The Offences Against the State Act 1939 at 80* (Hart Publishing, 2021).

wrote that this also provided *'disquieting evidence of the "seepage" of emergency legislation into the ordinary law of the State. What was once seen as a radical (and purely temporary) departure from standard norms has now become an accepted feature of the criminal justice system'*.[2]

1.4 With regard to the Act itself, it is submitted that section 35 of the 1939 Act neither envisages nor provides for the permanence which characterises the Court today. The intention of the section was considered by Barrington J. in *Kavanagh v. The Government of Ireland,*[3] wherein it was stated;

> *Part V of the Act, by contrast, was in the nature of temporary emergency legislation and dealt with the adequacy of the ordinary Courts to secure the effective administration of justice and a preservation of public peace and order either generally or in relation to a specific kind of crime.*[4]

1.5 I would submit that the fact that the Special Criminal Court now has *de facto* permanency which was not contemplated by the Oireachtas in enacting the 1939 legislation. In essence, a situation has now arisen where emergency powers have become normalised. Where this is so, even greater care must be taken to ensure that the Court's expansion is not to the detriment of accused persons' rights.

<u>*Review by the Oireachtas*</u>

1.6 The importance of review by the Oireachtas needs to be seen in the context of what amounts to the unintended but *de-facto* permanence of the Special Criminal Court, as discussed above.

1.7 The Oireachtas has not implemented procedures for the regular review of the proclamation and thereby the activation and operation of Part V of the 1939 Act. Other legislative provisions relevant to the Special Criminal Court, such as several of those contained within the 1998 Act, require annual renewal by the Houses of the Oireachtas.[5] A similar requirement exists in respect of section 8 of the Criminal Justice (Amendment) Act 2009, which inserted offences relating to organised crime into the schedule of the 1939 Act.[6]

1.8 In 1996, in *Kavanagh v. Ireland,*[7] the Supreme Court upheld the constitutionality of the regime under Part V of the 1939 Act, but indicated the necessity that the Special Criminal Court be kept under constant review.[8] Barrington J. considered the adequacy or otherwise of the ordinary courts to secure the effective administration of justice and the preservation of public peace and order as primarily a political question to be left to the legislature and executive.[9] This political control was further underlined by the fact

[2] Hogan and Walker, *Political Violence and the Law in Ireland* (Manchester University Press, 1989) 239.
[3] *Kavanagh v. Ireland* [1996] 1 IR 321.
[4] *Kavanagh v. Ireland* [1996] 1 IR 321, 357.
[5] These include sections 2–4, 6–12, 14 and 17 of the 1998 Act.
[6] These offences are created by virtue of Part VII of the Criminal Justice Act 2006.
[7] *Kavanagh v. Ireland* [1996] 1 IR 321.
[8] *Kavanagh v. Ireland* [1996] 1 IR 321.
[9] *Kavanagh v. Ireland* [1996] 1 IR 321, 354.

that it is lawful for Dáil Éireann, at any time where Part V of the Act is in force, to pass a resolution annulling the proclamation.[10]

1.9 It has been said by Hogan and Morgan in *JM Kelly: The Irish Constitution* that the jurisprudence leading up to and including *Kavanagh*[11] has rendered it almost impossible to challenge a decision by the Government to establish the Special Criminal Court or maintain its existence, as long as the situation is kept under review by the Government.[12] Accordingly, it is submitted that where there is insufficient review, the constitutionality of the Court's continued existence is less concrete.

1.10 As part of its obligations under the Good Friday Agreement, the Irish Government established the Committee to Review the Offences Against the State Acts 1939 to 1998 under the chairmanship of Hederman J, in May 1999. The Committee published its report and recommendations in 2002. The current review, established by the Minister for Justice in February 2021, is therefore the second of its kind. It is submitted that two reviews of the provisions of the statute, one occurring between 1999 and 2002 and one occurring in 2021 cannot be considered to amount to regular review. Moreover, the recommendations that the Committee to Review the Offences Against the State Acts made in 2002 have not been implemented.

1.11 ***It is accordingly submitted that, to date, the reviews of the functioning of the Special Criminal Court have not been of sufficient frequency nor given sufficient effect to validate the de-facto permanence which the Court has come to enjoy. It is submitted that a regular review of the 1972 Proclamation which re-commenced Part V of the 1939 Act – and subsequently the current Special Criminal Court – be undertaken on an annual basis by the Houses of the Oireachtas. A review of this nature is required so as to direct the Government's attention not just to the functioning of certain sections of the legislation, but to the adequacy or otherwise of the ordinary courts, and the necessity of the continued operation of Part V of the 1939 Act.***

2. The Dual Role of the Special Criminal Court in the Context of Belief Evidence

2.1 The situation which arises in the Special Criminal Court – wherein the same tribunal which hears a *voir dire* also determines the facts – has long been a cause for concern amongst lawyers. The accused faces the difficulty that the same court is ruling on the issue of admissibility or privilege and later deciding the ultimate issue of guilt or innocence, notwithstanding they have heard the impugned evidence. Indeed, the very notion of a *voir dire* before the Special Criminal Court seems artificial because, in practice, where evidence is called for the purposes of a *voir dire*, the prosecution will ask the court to treat the evidence as having been heard for the purpose of the substantive trial.

[10] *Kavanagh v. Ireland* [1996] 1 IR 321, 354.
[11] *Kavanagh v Ireland* [1996] 1 IR 321; *Savage & McOwen v DPP* [1982] ILRM 385*; O'Reilly & Judge v DPP* [1984] ILRM 224; *Foley v DPP* (25 September 1989) Irish Times Law Reports.
[12] Hogan, Whyte, Kenny, Walsh, *JM Kelly: The Irish Constitution*, (5th edn, Bloomsbury Professional, 2018), 1056.

2.2 The issue is particularly stark in membership prosecutions under section 21 of the 1939 Act, where the belief evidence of a chief superintendent is relied by virtue of section 3(2) of the 1972 Act in order to prove the offence. Experience shows that in recent times, the State has often asserted a blanket claim of privilege over all of the materials relating to the basis for the Chief Superintendent's belief evidence. It is worthy of note that the Special Criminal Court has recently granted a certificate of miscarriage of justice in the case of *Connolly v. DPP,*[13] a case which demonstrates the dangers of blanket claims of privilege where belief evidence is given.

2.3 While the prosecution is entitled to assert privilege, the extent of any such claim will have implications for an accused. Although the Defence may be assured by investigating and prosecuting authorities that adequate disclosure has been made, there are cases – such as those where a blanket claim of privilege is made – where the defence is so hampered in its cross-examination that the accused has to consider asking the court to inspect the Chief Superintendent's file.[14] For most accused, exposing the court to unknown and possibly prejudicial material is not a risk worth taking.

2.4 Should a court in fact be asked to review privileged documentation, it is obliged to embark on the exercise of removing any such prejudicial material from its mind prior to deciding on the ultimate issue in the case. Even if the court succeeds in doing so, the perception could be that it has not.

2.5 It is notable for the purposes of discussion that this issue received consideration by the ECtHR in *Donohoe v. Ireland,*[15] where the European court took the view that review by the trial court of documents underpinning belief evidence was a safeguard, as opposed to a further risk, to an accused. Despite this view, the risk of exposing the ultimate arbiter to prejudicial information has served to deter the majority of accused persons in this jurisdiction from seeking review by the trial court. In addition, it is submitted that the ECtHR did not address the central issue in *Donohoe* – the court's dual role as arbiter of law and fact – and focused primarily on the safeguards available to the accused.[16]

Possible Options for Reform

2.6 The Special Criminal Court is a creature of statute and, consequently, it is for the legislature to provide a solution to the issue.

Oversight from a Differently Constituted Court

2.7 The most viable option appears to be the inspection of materials by a differently constituted court in advance of a trial in the Special Criminal Court. This is all the more viable since the establishment of the second Special Criminal Court in 2016, meaning that the infrastructure for providing a differently constituted court is already in place. This system would allow disputes over disclosure and privilege to be dealt with in advance of the trial, permitting the trial to proceed without delay, and would have the

[13] *Connolly v. DPP* (12 April 2021, SCDP09/2014) Coffey J.
[14] See, for eg, *Connolly v. DPP* (12 April 2021, SCDP09/2014).
[15] *Donohoe v. Ireland* [2013] ECHR 1363.
[16] Harrison, 'Disclosure and Privilege: The Dual Role of the Special Criminal Court' in Coen (ed), *The Offences Against the State Act 1939 at 80* (Hart Publishing, 2021), at p.116.

benefit of eradicating the risk of highly prejudicial information being put before the eyes of the trial judges to the disadvantage of the accused.

2.8 A similar system operates in the UK Courts, where a 'public interest immunity application' must be made by the prosecution where they intend to withhold evidence on the grounds that it would be damaging to the public interest to disclose same to the defence.[17] The application can be made on an *ex-parte* basis, or on notice to the defence, in which latter case the accused is entitled to make submissions. The system is not without issue, particularly where the application is made *ex-parte*, and neither the court nor the prosecution have the requisite knowledge of the accused's defence to determine if a certain piece of evidence is of significance to it. A further issue arises when one considers the continuing obligation of disclosure throughout trial, as well as the duty of the trial judge to keep the matter under review as the trial proceeds. For this reason, it is submitted that a pre-trial hearing before a differently constituted court should operate in tandem with a recognition of the obligation on the prosecution counsel, discussed below.

2.9 A comparable system of pre-trial hearings has already been adopted in this jurisdiction with the recent enactment of the Criminal Procedure Act 2021. This Act, which has yet to be commenced, aims to minimise the length of *voir-dires* taking place during jury trials, and provides for pre-trial hearings in respect of certain offences. While the purpose of that legislation is distinct from the issue of public interest privilege discussed above, it is submitted that the system – which will operate in the ordinary of courts – would be of benefit in resolving the significant problems arising from privilege and disclosure in the Special Criminal Courts.

Obligation of the Prosecution Counsel to Review Material

2.10 It has been explicitly stated by the courts that prosecution counsel – who have an overall responsibility to assist in ensuring a fair trial – have a 'critical' role in relation to documents over which privilege is claimed.[18] In *DPP v. Special Criminal Court & Ward*[19] it was held that:

> *[C]ounsel for the prosecution must have a role in disclosing all relevant material to the defence but counsel must also be in a position to take a stance on the matter of informer privilege which, in turn, is subject to the 'innocence at stake' exception. It is the position, to adopt McLachlin J's phrase, speaking for the Supreme Court of Canada in R v Leipert, that 'the right to disclosure is not to trump privilege'. They must both be accommodated and prosecution counsel has a key role in this concord. However, when it comes to a stage where there is any doubt on the matter, it will be essential to get the ruling of the trial judge.*

2.11 A similar stance was outlined by Charleton J in his judgment – which differed from the majority judgment – in *Redmond v. Ireland*:

[17] Harrison, 'Disclosure and Privilege: The Dual Role of the Special Criminal Court' in Coen (ed), *The Offences Against the State Act 1939 at 80* (Hart Publishing, 2021), at p.116, 119.
[18] *DPP v. Special Criminal Court & Ward* [1999] 1 IR 60, pp. 87-88.
[19] *DPP v. Special Criminal Court & Ward* [1999] 1 IR 60, pp. 87-88.

[D]ocuments would not be given to the accused in the event of their pointing to the innocence of the accused. Rather, prosecution counsel would, in the role which O'Flaherty J characterises as being that of 'ministers of justice', scrutinise the documents as to the innocence at stake exception and report their findings to the defence…[20]

2.12 These pronouncements may be contrasted to the position of the Court of Appeal in *People (DPP) v. Palmer*,[21] in which that Court found that there was no basis in section 3(2) of the 1972 Act for the consideration of the material on which the garda's evidence is based either by the DPP or any other agency.[22] One possible distinction between the cases is that the Court in *Palmer* considered whether the prosecution is under an obligation to look at the file in order make a qualitative assessment of the basis for the Chief Superintendent's belief, whereas Charleton J in *Redmond* appears to have focused on the prosecution's obligation to assess claims of privilege and ensure adequate disclosure has been made.

2.13 It is submitted that the review of the contents of the file of privileged documents by the prosecution counsel would be beneficial for several reasons, as outlined by the courts in *Ward* and *Redmond*. The first is that a review of documents over which privilege is claimed should be carried out by persons with legal experience in order to determine whether privilege is being correctly claimed, and whether any of the documents could fall within the "innocence at stake" exception. If the DPP and prosecution counsel do not consider the file, then it is for the investigating authorities to assess relevance of the information therein, and also to monitor the question of relevance as the trial goes on. Members of An Garda Síochána are not trained lawyers nor are they keeping a close eye on proceedings as the trial progresses and it becomes clear what the defence is. There does not appear to be a system in place whereby the investigating authorities re-address the question of relevance as a trial progresses. For example, is there a system of constant communication between prosecution and Gardaí as to what the case is so they can assess the test of relevance? It should be noted that the Special Criminal Court recently granted a certificate that there was a miscarriage of justice in the case of *Connolly v. DPP,*[23] in circumstances where the manner in which the Assistant Commissioner reviewed his file and formed his belief gave rise to an issue of 'double counting'. Where the investigating authorities alone have sight of these documents, and have no legal training, there is a clear risk that documents of importance may be overlooked.

2.14 Second, it is submitted that the prosecution counsel's duty to the court and their position as 'ministers of justice' (as per Charleton J. in *Redmond* above*),* would provide a safeguard for the accused throughout the trial, and assist in ensuring that "all available legal proof of the facts be presented".[24] Similarly, the DPP's independence from An Garda Síochána operates as a further procedural safeguard, and one which is already established within the current system. Accordingly, where the prosecution lawyers see the material upon which the chief superintendent's evidence is based, not only can they bring a legal perspective, but also, and crucially, they bring a duty independent of the

[20] *Redmond v. Ireland* [2015] 4 IR 84, 108-109.
[21] *People (DPP) v. Palmer* [2015] IECA 153.
[22] *People (DPP) v. Palmer* [2015] IECA 153, at paras 43-44.
[23] *Connolly v. DPP* (12 April 2021, SCDP09/2014) Coffey J.
[24] *R v. Boucher* [1954] SCR 16.

investigating authorities to ensure that the relevant evidence is put before the court. This is particularly important where the prosecution counsel are present throughout the entirety of the case, and therefore so too is the protection afforded by their obligation to the court. It is this continuous aspect that is so important, and is the reason why it is submitted that the review obligation of prosecution counsel be operated in tandem with the system of pre-trial review by a differently constituted court, as outlined above.

2.15 The issue of the obligation of prosecution counsel to review material is the subject of appeal in *People (DPP) v. K and M*,[25] and it is hoped that the judgment from the Court of Appeal may provide further clarification of the court's position on this important issue.

Inspection of Material by a 'Special Advocate'

2.16 An alternative solution to the options discussed above is the use in Special Criminal Court trials of 'Special Advocates' to represent the interests the accused. The system whereby Special Advocates are used to assist the disclosure process has received favourable treatment by the ECtHR and has been used in the UK to good effect[26] – albeit only in exceptional circumstances[27] – and their use generally arises in immigration cases. The Irish Courts have not rejected the idea, but have stated on several occasions that such a matter is for the legislature.[28] Once again, the use of Special Advocates has the benefit of not placing the accused in the position of seeking inspection by the court, but there are other practical considerations which make this option less attractive. In particular, Special Counsel would not be instructed by the accused and would not be privy to the defence. In addition, in order to be fully effective in their role, the Special Counsel would be required to sit in on the trial so as to be able to raise any issues that became apparent as the trial and the defence evolved.

2.16. It is accordingly submitted that, along with the use of pre-trial hearings by a differently constituted Special Criminal Court to determine questions of privilege, the Prosecution Counsel's ongoing obligation to review documents ought to act as an additional safeguard throughout the course of the trial. While it is not submitted that these approaches would eliminate the issue entirely, it is hoped that the systems might work in tandem to ameliorate the situation, and significantly mitigate the risk for the accused in trials where belief evidence is adduced.

3. Corroboration of Belief Evidence

3.1 In the seminal case of *Redmond v. Ireland*,[29] the Supreme Court confirmed that a person may not be convicted on the basis of belief evidence alone. Although the accused failed in his application to the Supreme Court to obtain a declaration that section 3(2) of the 1972 Act was unconstitutional or contrary to the European Convention on Human Rights, the Supreme Court held, for the first time, that the belief evidence of a chief

[25] *People (DPP) v. K and M* (Bill No 0012/2017/ 5 December 2019).
[26] *R v. Botmeh* [2002] 1 WLR 531; *Secretary of State for the Home Department v. Rehman* [2003] 1 AC.
[27] The House of Lords in *R v. H and C* [2004] 2 AC 134, at 150-151 commented that "*an appointment [of a Special Advocate] will always be exceptional, never automatic; a course of last and never first resort".*
[28] *People (DPP) v. Binéad and Donohue* [2007] 1 IR 374, 396; *Redmond v. Ireland* [2015] 4 IR 84, 95.
[29] *Redmond v Ireland* [2015] 4 IR 84.

superintendent must be supported by some other evidence that implicates the accused in the offence charged.[30]

3.2 ***It is submitted that the decision of the Supreme Court in Redmond, and the protection which it affords to an accused in a membership trial, ought to be reflected within section 3(2) of the 1972 Act.***

3.3 It is further submitted that, where belief evidence is adduced in a membership trial, the requirement for corroborative evidence ought not to be satisfied by inference evidence adduced under section 2 of the 1998 Act. The inference provision in the 1998 Act represents an incursion of an accused person's right to silence by departing from the general rule that references ought not be made to an accused person's failure to answer questions during interview.[31] Whilst the use of this provision itself is sufficiently safeguarded, it is submitted that 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.

3.4 ***It is submitted that inference evidence allowed under section 2 of the 1998 Act should not be the sole piece of evidence used to corroborate the belief of a chief superintendent in a trial for the offence of membership.***

4. The role of the DPP in directing cases towards the Special Criminal Court

4.1 Sections 45 to 47 of the 1939 Act set out the procedures whereby an accused person may be returned for trial before the Special Criminal Court. Irrespective of the offence alleged to have been committed, the decision as to the venue of trial lies ultimately within the discretion of the DPP. If the Special Criminal Court is to remain in being, it is submitted that it would be preferable that the decision regarding the form and venue of trial lie with the courts, rather than the DPP or the legislature.[32]

(i) Scheduled offences

4.2 Where an offence has been scheduled under section 36 of the 1939 Act, that offence will be presumptively directed for trial in the Special Criminal Court. This is a distinctive feature of the OASA legislation and requires particular scrutiny where the effect of such a presumption has serious consequences for an accused person's right to a jury trial. It is submitted that, given the issues outlined below, the scheduling of offences is not a justifiable or appropriate method for determining whether trials be heard in the Special Criminal Court.

4.3 The effect of the scheduling of broad classes of offences is to capture a very wide range of situations. The Supreme Court in *Cox v. Ireland*[33] noted this, remarking that the 1939 Act captured "offences of widely varying seriousness", and pointing to several

[30] *Redmond v Ireland* [2015] 4 IR 84, 97, *per* Hardiman J.
[31] *People (DPP) v. Finnerty* [1999] 4 IR 364.
[32] As suggested by Campbell (Campbell, 'The Prosecution of Organised Crime: Removing the Jury' (2014) 18(2) IJEP 83, 100).
[33] *Cox v Ireland* [1992] 2 IR 503.

examples of minor matters, including the failure to renew a license on a sporting gun (an offence under the Firearms Acts 1925 – 1971), being situated alongside much more serious offences – such as maintaining an armed force.[34]

4.4 Presumably, the offences scheduled by the Government were originally chosen because, by their nature, there was a possibility that they might involve a subversive element. However, where a subversive element is by no means necessary for proving many of the offences, the broad approach brought about by the schedule seems an arbitrary one.

4.5 Where the effect of the schedule has such an overt impact on an accused person's right to a jury trial – a right described by O'Donnell J in *DPP v. Murphy*[35] as "not just a fundamental right of the citizen, [but a] vital constitutional obligation of the State"[36] – it must not be permitted to operate in an arbitrary fashion.

4.6 It is therefore submitted that the scheduling of offences under section 36 of the 1939 Act for the purposes of determining the venue of the trial should be substituted for a system whereby each case should be considered on an individual basis.

4.7 In Northern Ireland, the Justice and Security (Northern Ireland) Act 2007 permits non-jury trial where the DPP for Northern Ireland issues a certificate for that mode of trial.[37] Offences are presumptively tried by jury trial – although this is not expressly stated[38] – but the DPP can certify trial by judge alone where there is a link to a proscribed organisation or where there is political or religious hostility and if the DPP is of the view that there is a risk to the administration of justice if the trial were to be conducted with a jury.[39]

(ii) <u>*Non Scheduled Offences*</u>

4.8 Section 46 of the 1939 Act gives the DPP authority to certify any non-scheduled offence for trial in the Special Criminal Court if she is of the opinion that the ordinary courts are "inadequate to secure the effective administration of justice and the preservation of public peace".[40] Following the decision in *Murphy v. Ireland,*[41] the DPP must give

[34] *Cox v Ireland* [1992] 2 IR 503, 523.
[35] *Murphy v. Ireland* [2014] 1 IR 198.
[36] *Murphy v. Ireland* [2014] 1 IR 198*,* 215.
[37] The provisions of the Act are temporary and *must* be extended by order approved by both Houses of Parliament for a period of two years.
[38] Walker, Blackstone's Guide to the Anti-Terrorism Legislation (Oxford University Press, 2014), 318.
[39] The Justice and Security (Northern Ireland) Act 2007, s 1, as amended. The DPP can issue a certificate for a non-jury trial only if he suspects that one or more of four statutory conditions, which are laid out in s 1 of the 2007 Act, are met. Condition one is that the defendant is, 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 when it was, at that time, a proscribed organisation whose activities are (or were) connected with the affairs of Northern Ireland. Condition two is that the offence was committed on behalf of such a proscribed organisation, or such a proscribed organisation was otherwise involved. Condition three is that an attempt has been made by, or involving, a proscribed organisation, whose activities are (or were) connected with Northern Ireland, to prejudice the investigation or prosecution. Condition four is that the offence was committed as a result of, or in connection with, religious or political hostility. Furthermore, the DPP must be satisfied that, in view of one or more of these conditions being met, there is a risk that the administration of justice might be impaired if a jury trial were to be held.
[40] Offences Against the State Act 1939, s 46(1).
[41] *Murphy v. Ireland* [2014] 1 IR 198.

reasons for their certification of a matter for trial in the Special Criminal Court, but these reasons are often limited due to security concerns, and cannot be reviewed save in the limited circumstances of improper motive or *mala fides.*

4.9 It is submitted that by abolishing the Schedule of Offences for the purposes of sending an accused forward for trial, and extending the certification process to all persons being tried before the Special Criminal Court, a minimum standard of safeguards would be applied evenly to all persons tried before the special courts. However, in circumstances where the ability to review the DPP's reasons for certification is so constrained, it is submitted that judicial oversight of the DPP's decisions is also required.

4.10 It is submitted that the decision to try a matter in the Special Criminal Court should be made by the Courts following an application from the DPP. If this suggested system of pre-trial application were to apply to cases being directed towards the Special Criminal Court in Ireland, it would serve to alleviate concerns of arbitrariness brought about by the schedule of offences, as well as concerns about the lack of review and procedural fairness where the DPP alone decides to certify a non-scheduled offence for trial.

4.11 The functioning of such a system requires detailed consideration, but it is submitted that given the sensitive nature of the alleged offences, the DPP ought to make an *in camera, ex-parte* application to a judge of the Superior Courts seeking leave to send a matter forward for trial in the Special Criminal Court. It is submitted that while *in camera, ex-parte* applications are generally unsatisfactory from the point of view of the defence, the situation would be somewhat ameliorated by the annual publication of a report stating how many such leave applications were brought by the DPP, if any applications were refused and, if so, the reasons for their refusal. It is submitted that a report from the deciding judge in the manner described would provide some scrutiny of the process such that it could not appear to merely be a 'rubber-stamping' exercise.

4.12 Should the above described approach not find favour, it is submitted that a different form of review could be implemented. In this respect, regard may be had to the review mechanism currently in operation pursuant to section 12 of the Criminal Justice (Surveillance) Act 2009. This mechanism provides that a judge of the Superior Court reviews the functioning of the Act, and furnishes a report to the Taoiseach on an annual basis highlighting any concerns that they have about the functioning of the Act. In a similar fashion, a judge of the Superior Court could review the decisions forming the basis for the DPP's certification in each case directed to the Special Criminal Court, and accordingly furnish a report annually about the approach being taken by the DPP, along with any related concerns.

4.13 ***Accordingly, it is submitted that alongside the abolition of the schedule of offences for the purposes of sending matters forward to trial in the Special Criminal Court, leave should be sought by the DPP from a Superior Court judge in respect of each matter being directed towards the Special Criminal Court. It is further submitted that an annual report should be furnished by the deciding judge summarising the outcome of any such ex-parte applications, and the reasons (if any) for refusing same.***

5. Other options to non-jury trial

5.1 It is disappointing that the debate and dialogue in Ireland surrounding the Special Criminal Court has primarily revolved around two poles; jury or non-jury trial. There has been little political discussion of intermediate alternatives for protecting jurors, which, in modern times, might include the use of technological solutions to some of the problems posed by potential jury intimidation. It is perhaps interesting to note that a concept put forward in 1929 has never been explored in any depth in Ireland. The now expired Juries Act 1929 provided for special protections for juries, but the Act was never commenced and the concept of trial by a 'protected jury' was cast aside in favour of non-jury trials.[42] One possibility would be to allow the jury to observe proceedings from a remote location, though it must be acknowledged that such protective measures may have a prejudicial effect and may invite the jury to draw negative connotations about the culpability of the accused. Options such as transporting the jury to their homes or taking steps to anonymise the jury[43] may not be as feasible in Ireland given the small size of the country and would again involve the risk of prejudice towards the accused where the jury members are aware of the protective measures taken. A more realistic option to prevent juror intimidation would be to limit the right to inspect the panel from which the jury is drawn, as has been done in Northern Ireland.[44]

6. Certain offences created by the OASA Legislation

Withholding information – Section 9(1) of the 1998 Act

6.1 The offence of withholding information under section 9(1) of the 1998 Act is unusual in that it places an obligation on individuals to provide information relating to the criminal activities of other persons to An Garda Síochána, and allows a person who fails to do so to be detained for questioning, pursuant to section 30 of the 1939 Act, for up to 72 hours. The section is undoubtedly broad and captures a range of different situations and persons, with a number of difficulties arising in relation to its interpretation. Where the Oireachtas has legislated for other incursions into the right to silence, such as with the adverse inference provisions under section 2 of the 1998 Act, safeguards are generally put in place, i.e., that a person may not be convicted solely on the basis of such adverse inferences,[45] that they must be warned of the consequences of

[42] The Act was extended by the Juries (Protection) Act 1931 but expired on 30 September 1933. It was ultimately repealed by the Statute Law Revision Act 2016.

[43] These steps include referring to them by number only, housing them in a secret location and monitoring their calls, as occurred in *United States v. Gotti* 777 F Supp 224 (EDNY 1991). See Campbell, *Organised Crime and the Law: A Comparative Analysis* (Hart Publishing, 2013) 118.

[44] Juries (Northern Ireland) Order 1996 (SI 1996/1141 (NI 6)), Art 26A, as inserted by the Northern Ireland Act 2007, s 10. This was found not to breach the Art 6 right to a fair trial in *Re McParland* [2008] NIQB 1. See Campbell, 'The Prosecution of Organised Crime: Removing the Jury', (2014) 18(2) IJEP 83, 97. See also, the recent recommendations of Seymour CB in relation to non-jury trials in Northern Ireland: Seymour CB, *Report of the Independent Reviewer Justice and Security (Northern Ireland) Act 2007*, Tenth Report 1 August 2016 – 31 July 2017 (Her Majesty's Stationery Office, April 2018), at para 23.2.

[45] See, for e.g., Offences Against the State (Amendment) Act 1998, s 2(1), as amended, Criminal Justice Act 1984, sections 18(2), 19(2) and 19A(2), as amended, and Criminal Justice Act 2006, s 72A(1), as amended.

failure to provide information[46] and that they must be informed of their right to obtain legal advice.[47]

6.2 Contrary to this, section 9 of the 1998 Act is an offence in its own right with a distinct lack of such statutory protections. In addition, the precise behaviour which will lead to criminal liability is unclear and this would seem to fly in the face of the constitutional requirement for legal certainty of offences.[48] The offence created by section 9 has been utilised as an investigative tool, where acquaintances or relations of a suspect are arrested, in order to put pressure on a suspect or obtain information. Experience shows that persons arrested under the section are generally released immediately only to subsequently give a voluntary statement. Section 9(1)(b) was challenged in *Sweeney v. Ireland*,[49] wherein Baker J. in the High Court determined that the section was unconstitutional. In that case, the offence was said to have been committed in the course of police questioning and the accused was not told that his silence could lead to a charge being levied under section 9(1)(b) of the 1998 Act. The Court also found that where a person would likely not understand what silence was their right, and what made them liable for an offence, the provision was also impermissibly vague. Ms Justice Baker commented that an adequate warning may have served to save the provision, but none was provided for.

6.3 While this decision was overturned in the Supreme Court, it is submitted that the reasoning of Baker J. is valuable, and the Court's observation about the lack of warning remains astute, where the section still provides no such safeguard.

6.4 ***Accordingly, it is submitted that although the constitutionality of section has been confirmed, an additional safeguard that an adequate warning to persons at risk of falling foul of the section be placed on a statutory footing.***

Failure to answer questions – Section 52 of the 1939 Act

6.5 Section 52 of the 1939 Act makes it an offence for a person detained under the Act to fail to answer certain questions relating to his movements, and to the commission or intended commission by another person of an offence. This section represents the most significant infringement of a suspects right to silence and while it has been found to be constitutional by the Irish Courts, it has – on two occasions[50] – been found to be incompatible with an individual's fair trial rights under Article 6 of the ECHR.

6.6 It is also of note that any statements obtained under section 52 would likely be inadmissible having regard to the decision in *Re National Irish Bank Limited (No. 1)*,[51] where it was held that to admit any such evidence would likely violate Article 38.1 of

[46]See, for e.g., Offences Against the State (Amendment) Act 1998, s 2(2), Criminal Justice Act 1984, s 18(3)(a), 19(3)(a) and 19A(3)(a), as amended, and Criminal Justice Act 2006, s 72A(2)(a), as amended.
[47]The Criminal Justice Act 2007, Pt 4 amends various adverse inference provisions such that they shall not have effect unless the suspect was 'afforded a reasonable opportunity to consult a solicitor' before the failure to answer questions occurred. See, for example, Criminal Justice Act 1984, ss 18(3)(b), 19(3)(b) and 19A(3)(b), as amended and Criminal Justice Act 2006, s 72A(2)(b), as amended.
[48]See *King v AG* [1981] IR 233, 264 and *People (DPP) v Cagney* [2008] 2 IR 111, 120–122.
[49] *Sweeney v. Ireland* [2017] IEHC 702; *Sweeney v. Ireland* [2019] IESC 39.
[50] *Heaney v. Ireland and Quinn v. Ireland* (2001) 33 EHRR 264.
[51] *Re National Irish Bank Limited (No. 1)* [1999] 3 IR 145.

the Constitution.[52] The section is not frequently invoked, but it remains on the Statute Books.

6.7 ***It is accordingly submitted that section 52 of the 1939 Act represents an undue and disproportionate interference with a person's right to silence and should be repealed.***

Conduct Evidence in Trials for the Offence of Membership

6.8 The introduction of conduct evidence in the 1972 was intended to help overcome the recognised evidential difficulties in proving the offence of membership under section 21 of the 1939 Act. The 1972 Act 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 s.21 of [the 1939 Act], be evidence that he was then such a member".[53] Conduct goes on to be defined as including "associations" on behalf of an accused person, as well as an omission on the part of an accused person to deny published reports that he was such a member.

Association Evidence

6.9 While association evidence has not been defined in the Act, it has come to mean the association of an accused person with another person or persons who have been found guilty of offences before the Special Criminal Court. Accordingly, the requirement exists whereby the prosecution must prove that other person's conviction in order to adduce association evidence.

6.10 It is submitted however that there are several other factors which go towards the weight that should be given to association evidence beyond the mere fact of a person's conviction before the Special Criminal Court. These include matters such as the nature of the relationship between the accused person and their associate, as well as the time that the relationship was evidenced. For example, if a person is charged with an offence under section 21, evidence of past or loose associations should be given little weight.

6.11 ***It is accordingly submitted that in respect of association evidence, 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 the evidence. Consideration should be given as to whether any amendment to the legislation is required in this regard.***

Failure to deny published reports

6.12 The Committee to Review the Offences Against the State Acts 1939–1998 has recommended that the failure to deny published reports should not be regarded as evidence from which an inference of membership can be made.[54]

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[52] *Re National Irish Bank Limited (No. 1)* [1999] 3 IR 145.
[53] The Offences Against the State (Amendment) Act 1972, section 3(1)(a).
[54] *Hederman et al, Report of the Committee to Review the Offences Against the State Acts 1939–1998 (2002),* at para 6.83.

6.13 ***I would echo this sentiment, and submit that failure to deny such reports should be removed from the definition of conduct provided in section 3(1) of the 1972 Act.***

7. Re-arrest of persons for membership offences

7.1 An issue arises where a person is arrested for membership of an unlawful organisation, and then, at some later point, is re-arrested for the same offence. This is in contravention of 30A of the 1939 Act which provides that re-arrest for the same offence is unlawful, save for where a warrant has been obtained from a District Court Judge.

7.2 Membership of an unlawful organisation, described by the O'Donnell J. in *People (DPP) v. Donnelly, McGarrigle and Murphy* as a continuing offence,[55] is not generally categorised by a single activity, but rather "a continuing state of affairs"[56] which can theoretically extend over decades. The issue therefore arises as to whether a person can ever be lawfully re-arrested for an offence of membership. The matter has been dealt with by the Special Criminal Court on a number of occasions,[57] and the courts have approached the matter generally on a case by case basis. A warrant for re-arrest is not required where the subsequent offence can be distinguished from the former offence, perhaps due to factors such as a lapse of time, fresh evidence, political developments or a new set of circumstances. Such factors will lend weight to the argument that the later offence is a separate and distinct offence for which a warrant is not required. For example, a period of 24 years was considered sufficient to distinguish between membership offences for the purpose of a re-arrest,[58] while three months was not.[59]

7.3 Section 21 of the 1939 Act does not set out specific criteria for the offence, and nor it is likely that direct evidence of an accused person's formal membership of an organisation (such as evidence of the swearing of an oath or a production of membership records) will ever be obtained. Clarity within the legislation would be welcomed, where, given the inherent difficulties in defining the offence, a certain degree of discretion must be afforded to the Gardaí in the performance of their duties.

7.4 Where the re-arrest of a person should, ideally, be affected by virtue of a warrant obtained under section 30A, it is submitted that the section should also provide for circumstances where this is not the case.

7.5 ***Accordingly, it is submitted that that section 30A of the 1939 Act be amended to provide that where a person is re-arrested in respect of the offence of membership, that person should be arrested pursuant to a warrant issued by a District Court Judge under section 30A(1), save where the arresting Garda – having regard to the circumstances – has a reasonable belief that the alleged offence for which they were previously arrested is distinct from the current alleged offence.***

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[55] *People (DPP) v. Donnelly, McGarrigle and Murphy* [2012] IECCA 78 at para 26.
[56] *People (DPP) v. Donnelly, McGarrigle and Murphy* [2012] IECCA 78 at para 26.
[57] *People (DPP) v. Banks* (Bill No SCDP18/2012, 19 March 2014) Special Criminal Court; *People (DPP) v. AB* [2015] IECA 139.
[58] *People (DPP) v. AB* [2015] IECA 139.
[59] *People (DPP) v. Banks* (Bill No SCDP18/2012, 19 March 2014) Special Criminal Court.