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SUBMISSION OF THE COUNCIL OF THE BAR OF IRELAND

Submission to Offences Against the State Acts Independent Review Group

JULY 2021

Introduction

The Council of the Bar of Ireland ("the Council") is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,150 practising barristers. The Council has prepared the following submission to the Offences Against the State Acts Independent Review Group in response to the public consultation on the relevant acts.

The submission has been sub-divided to address what the Council regard as the seven most important issues that arise from consideration of the Offences Against the State Acts ("OASA") legislation. They are as follows;

1. The continuing justification for the use of the Special Criminal Courts
2. The decision to try certain matters in the Special Criminal Court
3. Powers of Arrest and Detention under the OASA
4. The right to silence and offences relating to a failure to provide information
5. The use of belief evidence in membership trials
6. Other evidence of membership
7. Other offences against the State

1. The continuing justification for the use of the Special Criminal Courts

The creation and continuation of the Special Criminal Court is perhaps the most significant aspect of the OASA legislation. While its existence is specifically provided for by Article 38(3) of the Constitution of Ireland 1937, it remains an exceptional measure, the justification for which requires analysis on a continuing basis.

Centre to the issue is whether it can be determined that the ordinary courts – and accordingly jury trials – are adequate to secure the effective administration of justice and the preservation of public peace and order in the State. It is submitted by the Council that given the continuing threat of paramilitary organisations and the threat of organised crime, that the retention of the Special Criminal Court continues to be justified. This is so where, given the comparatively small nature of Irish Society and its close communities, the risk of jury tampering continues to remain.

It is also submitted however, that the situation ought to remain under review, and it is not contended that the current system would not benefit from improvement. Many aspects of the Special Criminal Court's existence, while justified in essence, in practice require continual scrutiny. It is on these areas that the rest of the submission will focus**.**

Summary*: It is submitted by the Council that in order to deal with offences of a subversive nature, as well as those which relate to organised crime, the continuation of the Special Criminal Courts continues, on balance, to be justified.*

2. The decision to try certain matters in the Special Criminal Court

Scheduled Offences

The scheduling of offences under section 36(1) of the 1939 Act is a distinctive feature of the OASA legislation. It provides that, as well as being subject to the specific powers of arrest and detention under section 30 of the 1939 Act, scheduled offences will be presumptively directed to the Special Criminal Court for trial. Should the DPP determine that a non-scheduled offence ought to be tried in the Special Criminal Court, she must provide certification to this effect under section 46(1) of the 1939 Act. The process was explained by O'Donnell J. in *Murphy v. Ireland*[1] as follows;

> *The structure of the Act is clear. Before a person is tried in the Special Criminal Court it is necessary first that the Government must declare that the ordinary courts are inadequate to secure the administration of justice. Thereafter, the legislation distinguishes between scheduled offences and non-scheduled offences in providing a different default position. Scheduled offences are presumptively directed towards trial in the Special Criminal Court whereas non-scheduled offences will only be tried after positive certification to that effect. But in each case, the relevant officer must direct his mind to the question of the adequacy of the ordinary courts to secure the administration of justice in the particular case. In the case of scheduled offences, the Director must direct or request a trial in the Special Criminal Court. In the case of non-scheduled offences, he or she must certify that the ordinary courts are, in his or her opinion, inadequate to secure the administration of justice and the preservation of public peace and order "in relation to the trial of such person on such charge".*[2]

The current Schedule contains a wide variety of offences, many of which do not necessarily contain a subversive element. A sample of such offences include;

- Section 2 of the Explosive Substances Act 1883 (Causing an explosion likely to endanger life or property)
- Section 2 of the Firearms Act 1925 (Possession, use and carriage of firearms or ammunition)
- Section 26 of the Firearms Act 1964 (Possession of a firearm while taking a vehicle without lawful authority)
- Sections 7(1) and 8 of the Firearms and Offensive Weapons Act 1990 (Possession of a silencer and reckless discharge of weapons)

Unlike certain scheduled offences, such as section 21 of the 1939 Act (membership of an unlawful organisation), the above sample do not necessarily require any subversive element in order to prove their commission. It therefore appears an element of arbitrariness exists in the distinction between scheduled and non-scheduled offences. This arbitrariness serves to undermine the "presumption" applied to scheduled offences, and it is therefore submitted that the schedule should be abolished for

[1] *Murphy v. Ireland* [2014] 1 IR 198
[2] *Murphy v. Ireland* [2014] 1 IR 198, 211

the purposes of sending matters forward for trial to the Special Criminal Court.

Aside from arbitrariness, a further consideration is the underlying importance of a jury trial, which was described in *Murphy* as "not just a fundamental right of the citizen, [but a] vital constitutional obligation of the State".[3] While the current framework implicitly requires this right to be considered by the DPP in respect of scheduled offences, the consideration is not required to be evidenced in a meaningful way to the accused.

This can be contrasted with the position whereby the DPP elects to send a non-scheduled offence for trial in the Special Criminal Court. Where the DPP's decision in that regard is subject only to a very limited form of review, such as in instances of *mala fides* or improper motive,[4] fair procedures require that the accused be furnished with the reasons for the DPP's decision.[5] The major caveat from the point of view of the accused is that the reasons given by the DPP can themselves be limited for security reasons. However, it is submitted by the Council that specific certification provides an important procedural check on the State's power, and there is no justification for not extending this protection to those accused of scheduled offences.

A comparable system exists in Northern Ireland, where the Justice and Security (Northern Ireland) Act 2007 provides that that the presumption for a jury trial can be displaced by a certificate from the DPP where there is a political or religious element, *and* where the DPP is of the view that there is a risk to the administration of justice were the trial to proceed before a jury. This system removes the potential for arbitrariness which exists in this jurisdiction where scheduled offences are presumptively tried in the Special Criminal Court.

It is therefore submitted, that removing the distinction between scheduled and non-scheduled offences, and requiring a reasoned certification from the DPP where any accused person is sent forward to trial in the Special Criminal Court would be in the interests of justice. It is further submitted that where the DPP is not obliged to give information that would threaten national security,[6] the State would not be disadvantaged by the extension of this existing requirement.

***Summary**: The Council submits that the distinction between scheduled and non-scheduled offences be abolished in respect of sending an accused forward for trial in the Special Criminal Court. It is submitted that for the purposes of sending an accused forward for trial, that the DPP must certify in each case that the ordinary courts would be an unsuitable venue.*

Oversight of the DPP's power

The Council is aware of proposals having been made for there to be some form of oversight of the DPP's power to direct trial in the Special Criminal Court instead of in the ordinary courts. Such, for example, was the majority view of those engaged in the Hederman Report. Should the Review Group form the view that such an external review is required to safeguard the rights of accused persons and

[3] *Murphy v. Ireland* [2014] 1 IR 198, 215
[4] *State (McCormack) v. Curran* [1987] ILRM 225; *Kavanagh v. Ireland* [1996] 1 IR 321
[5] *Murphy v. Ireland* [2014] 1 IR 198, 234
[6] *Murphy v. Ireland* [2014] 1 IR 198, 233 and *Mallak v. Minister for Justice* [2012] 3 IR 297

to reassure generally that the power is exercised in an appropriate manner, the Council submits that regard should be had to oversight of the process by a judge of the Superior Courts.

In this respect, regard is had to the review function within section 12 of the Criminal Justice (Surveillance) Act 2009. In that section, provision is made for a judge of the High Court to review the operation of the act, and furnish a report to An Taoiseach on a yearly basis relating any matters of concern. While this Act operates in a manner distinct from the OASA, it nonetheless serves as an example of where sensitive intelligence information is reviewed by a member of the judiciary for the purpose of safeguarding rights.

It is submitted that a similar approach could be taken to oversee the DPP's power in relation to trials before the Special Criminal Court. Similar to the system employed by the 2009 Act, a judge of the Superior Courts would review the decisions of the DPP to direct trial in the Special Criminal Court.

Such a system would provide a robust safeguard against the infringement of an accused person's right to jury trial except where necessary. Similar options were put forward by the majority in the Hederman Report, and such suggestions continue to have merit.[7]

***Summary**: The Council submits that, should the Review Group consider it necessary, a mechanism be established whereby the decision of the DPP to direct trial in the Special Criminal Court be subject to oversight by a judge of the Superior Courts and that such a mechanism would include the publication of a report on an annual basis.*

3. Powers of Arrest and Detention under the OASA

Section 30 of the 1939 Act grants the Gardaí significant powers in respect of arrest and detention, and it is submitted by the Council that there is an abiding need for vigilance in respect of the use of these powers.

Length of Detention

The maximum period of detention under the OASA legislation is 72 hours. Section 30(3) of the 1939 Act provides that the first 24 hours of detention may be legally grounded on the reasonable suspicion of the arresting officer, while the direction of a member not below the rank of chief superintendent is required to extend that detention to 48 hours.

It is notable that there is no requirement for that chief superintendent to be independent of the investigation, and the Council notes the decision of *DPP v Howard*[8] in that regard. The Court of Appeal, in dismissing the appellant, pointed to the other safeguards which were available to a person who's right to liberty was imperilled. The statute is also silent on what, if any, belief must be held by the superintendent before they may lawfully direct an extension of time. In this respect, the Court in

[7] Hederman et al, *Report of the Committee to Review the Offences Against the State Acts 1939 – 1998* (2002), at paras 9.71 – 9.77 (See options 3 & 4)
[8] *People (DPP) v. Howard* [2016] IECA 219

People (DPP) v Eccles, McPhillips & McShane[9] made clear that the requirement of reasonable suspicion must also apply.

Section 30(4) provides that the detention may be extended by a further 24 hours on successful application to a District Court Judge for a warrant authorising same. Section 30(4B) provides for the production of the person at this time and affords an opportunity for that person to be heard. While 72 hours is by any count an extensive period of detention, it is submitted that the safeguards provided by the section, as well as the safeguards afforded to all persons in custody[10] are sufficient to protect the interests of the detained person.

One additional safeguard to protect persons in detention would be the inclusion in section 30 of the guarantee that appears in section 4(4) of the Criminal Justice Act 1984, that if during detention, there are no longer reasonable grounds to suspect the person of committing an offence to which the section applies, that person is to be immediately released.[11]

A corollary of the above, and a further safeguard which ought to be recognised in section 30 of the 1939 Act, is that a suspect should be charged as soon as there is sufficient evidence to bring that suspect before the court. These positions are already recognised by the law, but their specific inclusion within the OASA legislation would serve to insure that no person is detained longer than is necessary.

Summary: *It is submitted by the Council that the provisions of section 30 of the 1939 Act be amended so as to include the specific requirements that, first, a suspect be immediately released if there are no longer reasonable grounds to suspect them of committing the offence to which the section applies, and second, that a suspect be charged with the relevant offence as soon as there is enough evidence to bring that person before the court.*

Powers of re-arrest under section 30A of the 1939 Act

Section 30A of the 1939 Act provides that no person shall be re-arrested for the same offence without a warrant of a District Court judge. This raises an interesting problem when a member of An Garda Siochana re-arrests a person for membership of an unlawful organisation which has been described by the O'Donnell J. in *People (DPP) v. Donnelly, McGarrigle and Murphy* as constituting a "continuing offence".[12] Where this occurs, and a person is arrested for a second time in respect of membership, the statute offers no clarity as to what factors should be considered to render such an arrest lawful or unlawful.

The courts have provided some guidance, where in *People (DPP) v. Banks,*[13]a period of four months between arrests rendered the second arrest unlawful, but in *People (DPP) v. AB*[14]*,* a period of 24 years

[9] *People (DPP) v. Eccles, McPhillips & McShane* (1986) 3 Frewen 36
[10] *The People v. Quilligan (No. 3)* 1993 2 IR 305
[11] Hederman et al, *Report of the Committee to Review the Offences Against the State Acts 1939 – 1998* (2002), at para 7.19.
[12] *People (DPP) v. Donnelly, McGarrigle & Murphy* [2012] IECCA 78, at paras 16-17
[13] *People (DPP) v. Banks* (Bill No SCDP18/2012, 19 March 2014) SCC, as cited in Harrison, *The Special Criminal Court* (1st Ed., Bloomsbury, 2019) at 435 (n.169)
[14] *People (DPP) v. AB* [2015] IECA 139

was sufficient to provide a distinction between charges. Other factors such as the political landscape and/or the occurrence of certain events may also serve to distinguish between membership offences. It is submitted that section 30A of the 1939 Act is vague in this regard, and clarity would be welcomed.

However, the difficulties inherent in proving the offence of membership must be recognised. The challenge of defining membership is evidenced by the fact that the section 21of 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. In these circumstances, it is submitted that a certain discretion should be afforded to members of An Garda Siochana to re-arrest persons for membership, when factors which give rise to a reasonable presumption that the alleged offences are distinct from each other.

It may also be noted that where there does exist uncertainty as to whether a second arrest in respect of a continuing offence may be unlawful, certainty may be sought by making an application for an arrest warrant pursuant to the second part of section 30A(1).

***Summary**: It is submitted by the Council that section 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 an offence under section 21 of the 1939 Act, that person should be arrested pursuant to warrant issued under section 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.*

4. The right to silence and offences relating to a failure to provide Information

Some of the most notable and contentious issues arising from the OASA are undoubtedly the incursions on the right to silence which the statutes provide for. The sections discussed below have received significant judicial treatment.

Section 52 of the 1939 Act

Section 52 of the 1939 Act as amended makes it an offence to fail to answer certain questions when detained under the Act. It provides that where a person is so detained "any member of the Garda Siochana may demand of such a 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 [the Act]". The scope of the provision is notably broad, and has been recognised as representing the most significant incursion under OASA legislation into an accused person's right to silence.[15]

Section 52 has been upheld in the Irish Courts as being a constitutional and proportionate interreference with a person's right to silence[16], on the grounds that such is provided for by the 'public order exception' enshrined in Article 40 of the Constitution (wherein the right to silence has been

[15] Harrison, *The Special Criminal Court* (1st Ed., Bloomsbury, 2019) at [4.58 – 4.64]
[16] *Heaney v. Ireland [1996] 1 IR 580*

treated as a corollary to the right to freedom of expression). However, since that decision, the statute has fallen foul of international standards where the European Court of Human Rights ("ECtHR") has found on two occasions that the statute is incompatible with a person's fair trial rights under Article 6 of the ECHR.[17] The reasoning of the ECtHR was that the degree of compulsion brought to bear by the section "destroyed the very essence of [the accused's] privilege against self-incrimination and his right to remain silent.[18]

The section's viability should also be viewed in context of decision in *National Irish Bank Limited (No. 1),*[19] wherein it was stated that admissions given as a result of a statutory demand would not be admissible in any following trial, as to do so would violate Article 38.1 of the Constitution.[20] Accordingly, the sole purpose of the Act from a prosecutorial perspective is simply to strip a person of their right to silence during questioning in respect of a scheduled offence.

While it appears that the section is not frequently invoked, it still remains open to use. It is submitted that the section should be removed in its entirety.

Summary: *With regard to the decisions of the ECtHR in Heaney and Quinn, it is submitted that section 52 of the 1939 Act represents an undue and disproportionate interference with an individual's right to silence and should be removed from the Statute Books.*

Section 2 of the 1998 Act

Section 2 of the 1998 Act is an inference provision which provides that an accused person's failure to answer material questions may be regarded as corroboration evidence in a trial for membership under section 21 of the 1939 Act. The section states that the court may only draw from the failure "such inferences as seem proper".

It is submitted that the section does represent an incursion on an accused person's right to silence by departing from the general rule that no reference should be made during the course of a criminal trial to the fact that the defendant refused to answer questions during the course of his detention.[21] However, it is submitted that the inference provision is sufficiently safeguarded so as to protect from a risk of unfairness to the accused.

The ECtHR, in its decision in *Murray v. United Kingdom,*[22] confirmed that inference provisions do not, when sufficiently safe-guarded, fall foul of fair procedure rights prescribed by Article 6 of the ECHR.

The relevant section in operation in this jurisdiction includes various safeguards so as to ensure that the detained person is aware of the effect of any failure to answer such as questions as might be put to them. The inferences which arise may only, by virtue of section 2(1) be treated as corroborative,

[17] *Heaney v. Ireland and Quinn v Ireland* (2001) 33 EHRR 264
[18] *Quinn v. Ireland* (2001) 33 EHRR 264
[19] *RE National Irish Bank Limited (No. 1)* [1999] 3 IR 145
[20] *RE National Irish Bank Limited (No. 1)* [1999] 3 IR 145
[21] *People (DPP) v. Finnerty* [1999] 4 IR 364
[22] *Murray v. United Kingdom* (1996) 22 EHRR 29

and they are still subject to the proviso that they may only be drawn when "appears proper". It is submitted that, in general, these safeguards are adequate to protect the rights of the accused. However, it should be noted that the additional protection afforded to detained persons by virtue of section 10 of the Criminal Justice Act 2011, which requires that a detained person be informed of their right to consult with a solicitor before any such failure to answer a relevant question occurs, has yet to be commenced.

***Summary**: The Council supports the continuing use of the inference provision in membership trials. It is recommended however that section 10 of the Criminal Justice Act 2011 be commenced so as to guarantee the right of legal advice to detained persons coming within the ambit of section 2 of the 1998 Act.*

Section 9(1) of the 1998 Act

Section 9(1)(b) of the 1998 Act relates the offence of withholding information in respect of any serious crime.

The constitutionality of section 9(1)(b) was recently approved by the Supreme Court after having being previously struck down by the High Court for infringing the right to silence and being impermissibly vague.[23] The challenge arose when the defendant was questioned (but never charged) in relation to a murder. However, his silence during the course of his interview, in which he was suspected of a serious crime, was used to ground the prosecution for an offence under section 9(1)(b) of the Act.

Without prejudice to the constitutionality of section 9(1)(b) which now stands beyond doubt, it is submitted that the section still represents a significant incursion into a person's right to silence. Accordingly, it is submitted that the section would benefit from amendment to ensure that such incursion contains adequate safeguards to goes no further than is necessary and proportionate in respect of the interests of justice and the common good.

During the High Court challenge to the section, attention was drawn to the lack of any requirement for a warning that a person's silence may trigger an offence under section 9(1).[24] It is submitted that such a warning would serve as welcome safeguard to a section that does in effect criminalise a person's silence in interview.

***Summary**: The Council submits that section 9(1) of the 1998 Act be amended to include that, where the offence is alleged to arise from a person's failure to disclose information during the course of an interview, that the person be warned that their silence may lead to a charge being brought under section (9)(1).*

Aside from the concerns outlined above in respect of a person's right to silence in interview, section 9(1) is also of note where the provision is of such broad application.

[23] *Sweeney v. Ireland & Ors* [2019] IESC 39
[24] Unlike the warning provided within the Criminal Justice Act 2007

Section 9(1) is one of many mandatory reporting provisions. The Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 as well as section 19 of the Criminal Justice Act 2011 – which relates to mandatory reporting in respect of white collar crime – clearly specify the nature of the offence which a person has an obligation to report. The specific nature of those acts, and the clear purpose of the reporting obligations contained therein appear to minimise the infringement of the right to silence in so far as possible.

However, where, as appears in section 9 of the 1998 Act, the obligation extends to such a broad array of possible offences, the proportionality of the curtailment on a person's right to silence is called into question. Going further, the concern might be raised about the use that such a broad provision could be put to, wherein if it were to be mis-used, it could be used to criminalise those persons who surround someone suspected of a serious offence.

***Summary**: Having regard to the specific nature of other mandatory reporting provisions, as well as the parent Act, section 9(1) of the 1998 Act should be amended to relate specifically to serious offences with an organised crime or subversive element.*

5. The use of belief evidence in membership trials

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

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.

The use of "belief evidence"

The Council is cognisant of the difficulties is in obtaining direct evidence in membership prosecutions where the risk to informants can be regarded as near certain.

Amongst the factors cited in favour of the use belief evidence is the reliability of the chief superintendent, where, as was stated by Ryan P in *People (DPP) v. Palmer,* "that belief is, of course, grounded in information that the Officer has obtained from a variety of sources and he will be expected to have brought his experience, training and judgment to bear on the evaluation of material that he has had available to him."[25] This needs to be balanced against the risks of belief evidence which were set out in *People (DPP) v. Kelly*[26] and *Redmond v. Ireland,*[27] where it was acknowledged that while the evidence is honestly given, it is still subject to the risks posed by inaccurate sources, or by mistaken or malicious informers.

The Council submits that belief evidence is necessary in the prosecution of membership offences, and

[25] *People (DPP) v. Palmer* [2015] IECA 153, at para 40; see also *People (DPP) v. Cull* (1980) 2 Frewen 36, 41
[26] *People (DPP) v. Kelly* [2006] 3 IR 115
[27] *Redmond v. Ireland* [2015] 3 IR 115

while the constitutionality of section 3(2) of the 1972 Act has been upheld on numerous occasions by the Superior Courts,[28] it is submitted that the legislation would benefit from additional safeguards.

Corroboration of belief evidence

The decision by the Supreme Court in *Redmond v. Ireland*[29] provides that, in order to pass constitutional muster, belief evidence must be corroborated by other evidence in order to secure a conviction. The corroboration evidence must be seen by the court as being credible in itself and independent of the witness who gave the belief evidence.[30]

The council submits that this is a welcome development which operates as a necessary safeguard to the rights of the accused, and as a minimum it's effect should be put on a statutory footing.

Another issue arises where the corroboratory evidence takes the form of inferences drawn from an accused person's failure to answer questions during their detention, as allowed by section 2 of the 1998 Act. It is submitted that the corroboration of belief evidence (which itself is an exceptional measure) with an additional form of exceptional evidence casts a shadow on an accused's procedural rights.

***Summary**: The Council submits that section 3(2) of the 1972 Act be amended so that the requirement that belief evidence be corroborated, as set out in Redmond v Ireland [2015] 3 IR 115, be placed on a statutory footing.*

It is further submitted that such corroborative evidence, as required pursuant to the judgment in Redmond, should not be of the kind prescribed for by section 2 of the 1998 Act.

Belief evidence and privilege

Where the Defence seeks to challenge the chief superintendent's claim of privilege, they may only do so to a limited extent where the claim of privilege will often prevent them from obtaining sufficient information to effectively cross-examine on the issue. If the Defence asks the court to determine a claim of privilege and review the file, they face the obvious risks associated with exposing the arbiter of fact to information that might be highly prejudicial, and which they themselves are unable to challenge. As a result of this dilemma, this latter option is rarely used in practise.

Other mechanisms for reviewing privilege

It is submitted that an alternative method is required whereby the question of privilege over belief evidence can be resolved without application to the court hearing the matter.

One possibility which the Council submit should be explored further is the use of 'Special Advocates',

[28] *O'Leary v. AG* [1993] 1 IR 102, *People (DPP) v. Kelly* [2006] 3 IR 115, *Redmond v. Ireland* [2015] 3 IR 115
[29] *Redmond v. Ireland* [2015] 3 IR 115
[30] *Redmond v. Ireland* [2015] 3 IR 115

or 'Special Counsel'– an approach which has found favour in other jurisdictions.[31] The use of Special Advocates generally entails an independent lawyer being appointed to represent the interests of the accused. Although the Special Advocate is not instructed by the accused person, they would examine the privileged materials, and make representations to the court on the person's behalf.[32]

The approach has been favourably considered by the ECtHR,[33] and while courts in the Irish jurisdiction have by no means dismissed the notion, they have repeatedly underlined the fact that any innovation on this front would be a matter for the legislature.[34] Special Advocates are used in a limited fashion – generally in immigration matters – in the UK Courts, although the House of Lords has expressed the view that such appointments should only be made in exceptional circumstances.[35]

It is submitted by the Council that a system whereby Special Advocates are appointed for the purpose of reviewing privileged documents should be investigated as a possible solution to the privilege dilemma faced by accused persons in membership trials. The appointment of such counsel, and the exact scope of their role are factors which require greater consideration, given the possible implications to those so appointed. To that end, the Council recommends further consideration in respect of the feasibility and potential functioning of Special Advocates, and is open to discussion on this point with the OASA Review Group should same be of assistance.

Other mechanisms include having recourse to a differently constituted panel of the Special Criminal Court prior to the trial of the matter. This approach has found favour in the English courts but has heretofore been resisted in Ireland.[36] Another possible resolution to the dilemma would be to place the obligation with the prosecution. This would expose the privileged documents to legal scrutiny independent of the investigating authorities, and again would not place the accused in the position of having to request a review of the documents from the panel of judges hearing the matter.

***Summary**: It is submitted that section 3(2) of the 1972 Act be amended so as to provide for a system of the review of privileged documents in cases where belief evidence is challenged. To this end, the Council recommends that particular consideration be given to the introduction of a system of 'Special Advocates' to review the privileged documents on behalf of the accused, and invites further discussion on same.*

6. Other evidence of membership

Aside from belief evidence and inference evidence discussed above, there are certain other methods of evidencing the membership in an unlawful organisation that are worthy of note and comment. The Council accepts that given the nature of the crime, certain "evidential shortcuts" may be permitted,

[31] For example, in the UK, Canada, New Zealand and Hong Kong
[32] 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)
[33] *Rowe and Davis v. United Kingdom* (2000) 30 Essex Human Rights Review 1; *Jasper v. United Kingdom* (2000) 30 Essex Human Rights Review 30
[34] *People (DPP) v. Binéad and Donohue* [2007] 1 IR 374, 396; *Redmond v. Ireland* [2015] 4 IR 84, 95
[35] *R v. H and C* [2004] 2 AC 134, 150 - 151
[36] The notion was rejected by Carney J in *DPP v Special Criminal Court & Ward* [1999] 1 IR 60, although no reasons were given.

as long as they do not infringe on the fair trial procedures of the accused.[37]

Section 24 of the 1939 Act - Incriminating Documents

Section 24 of the 1939 Act provides that possession of an incriminating document shall stand as evidence of membership until the contrary is proven.

This section has been subject of review in *O'Leary v. Attorney General*[38] on the grounds that it effectively reversed the onus of proof on the accused. It was found by both the High Court and the Supreme Court not to be in contravention of the right to a fair trial rights where it was still open to the court to evaluate and asses the significance of the evidence and dismiss in the event of it having any reasonable doubt, even in the absence of exculpatory evidence.

However, the issue was raised by the Hederman Report as to whether there is a "sufficiently rational link"[39] between possession of a broadly defined 'incriminating document' and membership in an unlawful organisation. While the Council agrees that a requirement of a rational link is necessary for the prosecution on the basis of section 24 evidence, it is submitted that the requirement is met where the courts are required to assess the facts of each case.

Summary: *While having due regard to the decision in O'Leary, it is submitted by the Council 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.*

Section 3(1)(a) of the 1972 Act – Conduct Evidence

A further acknowledgment of the evidential difficulties in membership cases can be seen through the introduction of conduct evidence in the 1972 Act, which 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.21of [the 1939 Act], be evidence that he was then such a member".* Conduct is then 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. Both of these forms of conduct evidence require consideration.

Section 3(1)(b)(i) of the 1972 Act - Association Evidence

There is no definition in the Act to what exactly counts as an association for the purposes of the section. It has come to mean association with persons previously convicted by the Special Criminal Court, and as a result it is necessary to prove the conviction of those "associates" before the court in

[37] To adopt the terminology in Hogan and Walker, *Political Violence and the Law in Ireland* (Manchester, 1989) at p. 248.
[38] *O'Leary v. Attorney General* [1995] IR 254
[39] Hederman et al, *Report of the Committee to Review the Offences Against the State Acts 1939 – 1998* (2002), at para 6.8

order for the evidence to be adduced. However, it is submitted that other factors which go to the strength of the association, and the nature of the relationship between such persons also need to be taken into account. These are matters for the court to judge on a case by case basis, and may include, for example, where a great deal of time has passed between an instance of association and the arrest of a person for a membership offence. In this regard the degree of temporal proximity between the two occasions is an important factor to be taken into account.

***Summary**: Without prejudice to the admissibility of association evidence, it is recommended that matters such as the nature of the relationship and the frequency or temporal proximity of association be considered in determining the weight of such evidence.*

Section 3(1)(b)(ii) of the 1972 Act (as amended) – Denial of Published Reports

It is submitted that failure to deny a published report of membership should not be considered as evidence in a prosecution for membership under section 21 of the 1939 Act. As the section currently stands, the very fact of a report being published appears to import a truth value to its claims, which it then falls on the accused to discharge. Furthermore, where a panoply of reasons exist to cause a person to not deny a published report, it would seem that on a whole the value of the section is more prejudicial than probative.

***Summary**: It is submitted by the Council that failure to deny published reports of membership should be removed from the definition of conduct provided in section 3(1) of the 1972 Act.*

7. Other offences against the State

Section 6 of the 1998 Act - Directing an Unlawful Organisation

Section 6 of The Offences Against the State Act 1998 provides that;

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.

The above legislation prescribes that a person can be guilty of committing this offence "at any level of the organisation's structure". Where the intended purpose of the legislation is to snare those who are issuing directions in a leadership context,[40] the question must be asked as to whether the inclusion of "at any level of the organisation's structure" is too broad a net given the severity of the potential punishment of life imprisonment if found guilty.

However, given the practise of the DPP in this regard, and the history of how the offence has been prosecuted in reality, it does not seem that this provision is used for anything other than in

[40] *R v. Mellon* [2015] NICC 14

circumstances where high-level leadership is alleged.[41] Nor has the provision ever been used in a flagrant or widespread manner against those who are not believed to be in the upper-echelons of the organisation.

Only two persons have ever been tried for the offence of directing an unlawful organisation.[42] It is submitted by the council that it's infrequent use is not a reason against its continuing existence on the statute books, where its purpose is to prosecute crimes which occur only in rare circumstances. It is submitted that to retain or remove offences on the basis of the frequency of their use would be to severely hinder the future prosecution of very serious conduct in situations where specific circumstances arise. It is therefore submitted that the section remains unchanged.

Summary: *The Council submits that the section is satisfactory as drafted.*

NOTE: There are a number of other offences similar in certain respects to the above. These are as follows;

- Offences created by Part II of the 1939 Act (Sections 6 – 17)
- Section 12 of the 1998 Act (Training of persons in the making or use of firearms)
- Section 21A of the 1939 Act (Assisting an unlawful organisation)
- Section 7 of the 1998 Act (Possession of articles connected with certain offences)

The Council is of the view that similar reasoning applies to these offences as applies in respect of the offence of Directing an Unlawful Organisation considered above.

Section 8 of the 1998 Act - Unlawful Collection of Information

Section 8 of the 1998 Act provides as follows;

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.

It is submitted that the above section is too broad and purports to criminalise activities and behaviour that is *prima facie* lawful.[43] 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

[41] *People (DPP) v. McKevitt* [2005] IECCA 139, *People (DPP) v. McGrane* (Bill No SCDP4A/2015, 31 October 2017) SCC
[42] *People (DPP) v. McKevitt* [2005] IECCA 139, *People (DPP) v. McGrane* (Bill No SCDP4A/2015, 31 October 2017) SCC
[43] Hederman et al, *Report of the Committee to Review the Offences Against the State Acts 1939 – 1998* (2002), at para 6.168

circumstances. While the defence at section 8(2) provides for situations where the information was not possessed "for the purpose of being used in such commission of a serious offence" – it still has the effect of placing the burden on the accused for behaviour that was *prima facie* lawful in the first instance. Where the core issue is not the gathering of information, but rather the nefarious purpose which that information might be put to, it is submitted that an the elements of the offence should be amended to include an element of intent on the part of the accused.

***Summary**: It is submitted that this section should be repealed. If not repealed, it should be amended so as to contain a requirement for intent.*