ICCL Submission to the Offences Against the State Acts Review Group

July 2021

Irish Council for Civil Liberties

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Contents

Executive Summary

This submission examines the practice and procedure of the Special Criminal Court in Ireland from a human rights perspective and with particular regard to the constitutional rights of accused persons. The current Special Criminal Court was established in 1972 as a temporary, emergency measure to respond to the threat from paramilitary organisations, mainly operating in Northern Ireland. Nearly fifty years later this emergency Court remains part of the Irish criminal justice system, despite the government's declaration that the relevant emergency period was over in 1995.

ICCL considers, in line with international human rights bodies, that it is entirely inconsistent for a country which prides itself on the rule of law, a robust justice system and strong protections for individual rights to continue to use an emergency court that deviates from fair trials norms. Despite ongoing criticism and calls for the abolition of the Court for nearly 20 years, no movement towards abolition has ever been made by Government. Rather, Government has expanded the remit of the Special Criminal Court to have jurisdiction over organised crime.

This submission argues for the immediate abolition of the Special Criminal Court given its incompatibility with Ireland's international and constitutional human rights obligations. We also address particular failings in the procedure and practice of the Court and make recommendations for improving the protection of fair trial rights until such time as the Court is abolished.

We focus on six areas of particular concern: the right to be tried by a jury; the dual role of the Court as trier of fact and law; the extensive powers of the

Director of Public Prosecutions (DPP); claims of privilege; the use of belief evidence; and inferences.

The right to a trial by jury is an essential component of an adversarial common law system. We consider that juries should be introduced for all trials of serious crimes and if there is a real risk of intimidation, provision should be made for the protection of juries.

The fact that the same judges are triers of fact and law in the SCC is highly problematic, in particular in relation to decisions on admissibility of evidence. The interplay between claims of privilege and issues of disclosure in the SCC risks, at the very least, perceptions of bias and impartiality on the part of judges.

The power of the DPP to send matters forward to the SCC is too broad and immensely difficult to challenge. We argue that reasons should be required for decisions by the DPP to send cases to the SCC and fair challenges to those decisions should be facilitated.

We address the impact of the use of belief evidence and the drawing of inferences on the right to prepare a defence, with particular reference to article 6 of the European Convention on Human Rights. Both of these practices significantly impinge on the right to a fair trial and should be ended or, in the alternative, significantly narrowed.

In light of the cumulative infringements on the right to a fair trial and fair procedures, we consider the ongoing use of the Special Criminal Court must end and, until then, its practices and procedures must be significantly altered.

Introduction[1]

This submission addresses the question of whether the continuing use of the Special Criminal Court (SCC) in Ireland is compliant with Ireland's human rights obligations under the Constitution, the European Convention on Human Rights and the international treaties Ireland has ratified, in particular the International Covenant on Civil and Political Rights. ICCL has long opposed the ongoing use of the Special Criminal Court beyond a proclaimed emergency period as unnecessary and highly problematic from a rights perspective. We consider that the significant dilution of the right to a fair trial in the Special Criminal Court is incompatible with Ireland's constitutional and human rights obligations.

ICCL therefore calls for the Special Criminal Court to be abolished. The original justification for its establishment and use has expired because there is no longer a state of emergency in Ireland. The Court and its underlying legislation do a disservice to our criminal justice system and our otherwise strong international reputation.

Until such time as the Court is abolished, fair trial rights within the Court must be strengthened as a matter of urgency. In light of this, we recommend alternatives to the current procedural rules within the Special Criminal Court so as to strengthen the fair trial rights of those who appear before the Court.

This submission will address the following issues:

Part 1: Justification for the Special Criminal Court

Part 2: International criticism

Part 3: The right to trial by jury

[1] This submission was written by Gemma McLoughlin-Burke BL.

Part 1: Justification for the Special Criminal Court

The Special Criminal Court finds its legal foundation in Article 38.3 of the Constitution which states:

> *"3.1° special 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.*
>
> *2° the constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law."*
>
> *In accordance with Article 38.3.2, the Offences Against the State Act 1939 was enacted to regulate the manner in which the Special Criminal Court operates. Section 35(2) of the Act mirrors the language of Article 38.3.1, allowing for the establishment of special criminal courts where Government is satisfied that "the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order".*

The provisions of the Offences Against the State Act ("OASA") and the Special Criminal Court itself have been activated three times since their inception. In 1939 until around 1942, for a brief period between 1961 and 1962, and, finally, in 1972 – the Special Criminal Court has remained in existence since this time having been renewed by Government annually. A second Special Criminal Court has been in operation since 2015.

The justification for the Special Criminal Court has always been the existence of paramilitary threat, primarily from the IRA. On the 8th February 1939, then Minister for Justice, Patrick Ruttledge introduced the Offences Against the State Bill 1939 to the Dáil. He stated that the purpose of the Bill was to tackle threats to the State by regulating and controlling "*unlawful associations and organisations*" and went on to directly reference a proclamation by the IRA in which they sought to effectively overthrow the government. He stated: "*That is a position which the Government is not going to tolerate and that matter will be dealt with, amongst others, under this Bill.*" Similarly, at the second stage of the Bill, Minister Ruttledge stated: "*I should say, I think, at the outset, that the sole object of this Bill is the* ***prevention of the display, the use, or the advocacy of force as a method to achieve political or social aims."***

Importantly, during the course of this debate, the Minister emphasised the extraordinary nature of these powers, that they would only be invoked where an "*emergency existed*" and assured members of the Dáil that they "*at any time, can annul, by resolution here, that proclamation, and this emergency provision will cease to have effect.* ***That, I suggest, is a safeguard against any abuses that Deputies might fear…"***

When the Special Criminal Court was re-established in 1972, it was not subject to intense debate or discussion in the Dáil. In fact, it is stated that the move was one which took many by surprise. Fergal Davis states "*The idea of a special criminal court was mooted in the Dáil only two days before the Court was re-established*". Again, the reason given for the re-establishment of the Court was the real and ongoing threat of paramilitary activity, with Taoiseach Jack Lynch stating on 3rd June 1972:

> *"We want to make sure that we can continue to control any subversive activity here…But these activities were of course* ***related to the situation in the North of Ireland and as soon as that situation will have eased…then there wouldn't seem to be any need for the continuation of the special courts*** *and therefore we would have to look at the situation again."*

From this brief synopsis of the history of the Court, two important matters emerge. First, the Special Criminal Court was established as an emergency measure. It was never intended to become a permanent feature of our Courts system. The fact that it must be renewed annually is indicative of the extraordinary nature of the Court. Second, the existence of the IRA alone was not enough to invoke these special powers in the past. It was the activities of the IRA at specified times and the heightened threat caused by paramilitary activity which grounded the activation of the Court on the three occasions referenced above. In periods between the invocation of the Special Criminal Court, the IRA still existed, they still posed a threat to the State, however, this threat was not so extreme and pervasive as to require the "emergency powers" in the OASA.

Unfortunately, the annual renewal of the Special Criminal Court now occurs as a matter of course, justified by the threat of (i) continued paramilitary activity, (ii) possible international terrorism and (iii) organised crime and criminal gangs. Time and again it is claimed (without any evidence) that these crimes give rise to a serious possibility of jury tampering and that the only way to protect against this is to try such matters in the Special Criminal Court. There is no real engagement with the fact that these are emergency measures. Nor is there any discussion in relation to potential alternatives to these provisions which would protect against these fears without significantly depriving accused persons of their rights.

As noted above, the Constitution requires that special courts can only be set up where the ordinary courts are deemed inadequate to secure the effective administration of justice, and the preservation of public peace and order. Maintaining the Special Criminal Court can therefore be read as effectively a vote of no confidence in our ordinary courts. ICCL considers that this lack of confidence in our ordinary courts is misplaced and ill judged. Our ordinary judicial system, while not perfect, is highly regarded at home and abroad for its independence, fairness and ability to deliver justice.

Finally, there seems to be no recognition of the fact that terrorism and organised crime will most likely always be a threat to this, and every, State. It is submitted that our criminal justice system is not so frail as to be incapable of handling the same issues which every country around the world faces on a daily basis. If it is the case that flaws exist within this system, then the solution to this is to review and strengthen that system, not to continue to use a set of extraordinary powers designed for State emergencies.

The Special Criminal Court has become so politicised that there continues to be a lack of reasoned engagement with the very real impact that these provisions have on accused persons in Ireland and the legal issues which flow therefrom. In a country which otherwise provides for very strong protections to the rights of accused persons, the continued use of the Special Criminal Court is a black mark on the tapestry of human rights and constitutional protections which have been carefully crafted by decades of case law and legislation.

A comparative analysis published by the Irish Times[2] of the conviction rates in the Special Criminal Court with conviction rates in the Circuit Court and Central Criminal Court paints a stark picture:

Year	Special Criminal Court	Circuit Court	Central Criminal Court
2018	94%	38%	62%
2017	79%	50%	54%
2016	95%	57%	47%
2015	20%	57%	70%
2014	85%	51%	69%

Ours is not a legal system which believes in conviction at all costs. We are a democratic, adversarial, constitutional Republic in which the rule of law is valued, respected and protected. The above statistics should be a cause for deep concern and can be read as in and of themselves to indicate that the Special Criminal Court, in practice, must be inherently flawed.

[2] Conor Gallagher, Ruling may change way IRA cases are tried, The Irish Times, 9 December 2019

Part 2: International criticism

Ireland's continued invocation of emergency powers to deal with "subversive crime", as well as the expansion of those powers over time, have received continuous criticism internationally. The United Nations Human Rights Committee ("HRC") has been highly critical of Ireland's use of the Special Criminal Court since 1993, when, in a report on Ireland's implementation of the International Covenant on Civil and Political Rights, it stated:

> *"The Committee also expresses its concern with respect to the Special Court established under the Offences Against the State Act of 1939. It does not consider that the continued existence of that Court is justified in the present circumstances…* ***The need for the Emergency Powers Act and the Special Criminal Court should also be examined and all practices in that regard should conform to the obligations of the State party under the Covenant…***
>
> *19. The Committee* ***strongly recommends that the State party critically examine the need for the existing state of emergency*** *and see that the provisions of article 4 of the Covenant are being strictly observed.* ***The need for the Emergency Powers Act and the Special Criminal Court should also be examined*** *and all practices in that regard should conform to the obligations of the State party under the Covenant."*[3]

Article 4 of the International Covenant on Civil and Political Rights as referenced above by the HRC provides as follows:

> *"Article 4*

[3] UN Human Rights Committee, Report on Ireland, CCPR/C/79/Add.21, August 1993

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

In the HRC's report of 2000, it again highlighted issues with the Special Criminal Court, including the wide discretion afforded to the DPP. It concluded that "***Steps should be taken to end the jurisdiction of the Special Criminal Court."***[4]

In 2008, the HRC called once again for the abolition of the Court and also highlighted concerns with the untrammelled power of the Director to send cases forward to the Special Criminal Court, with a focus on the duty to give reasons:

"The Committee reiterates its concerns about the continuing operation of the Special Criminal Court and the establishment of additional special courts. (arts. 4, 9, 14, 26) The State party should carefully monitor, on an ongoing basis,

[4] Concluding Observations of the Human Rights Committee, Ireland, UN Doc A/55/40 2000.

> ***whether the exigencies of the situation in Ireland continue to justify the continuation of a Special Criminal Court with a view to abolishing it.*** *In particular, it should ensure that, for each case that is certified by the Director of Public Prosecutions for Ireland as requiring a nonjury trial, objective and reasonable grounds are provided and that there is a right to challenge these grounds."*[5]

In 2013, the UN Human Rights Council's Special Rapporteur on the situation of human rights defenders supported the recommendation of the Human Rights Committee that Ireland should *"monitor the need for the Special Criminal Court carefully with a view to its abolition."*

Finally, in its fourth periodic review of Ireland, published in 2014, the UN Human Rights Committee again stated:

> *"Counter-terrorism measures*
>
> *The Committee reiterates its concern at the lack of a definition of terrorism under domestic legislation and the continuing operation of the Special Criminal Court. It expresses further concern at the expansion of the remit of the Court to include organized crime (arts. 14 and 26).*
>
> *The State party should introduce a definition of "terrorist acts" in its domestic legislation, limited to offences which can justifiably be equated with terrorism and its serious consequences. It should also consider abolishing the Special Criminal Court."*[6]

[5] UN Human Rights Committee, Concluding Observations, Ireland UN Doc CCPR/C/IRL/CO/3,2008
[6] UN HRC, Concluding Observations, Ireland, UN Doc, CCPR/C/IRL/CO/4

In spite of these continued criticisms, over the past two decades there have been no attempts to curb the development of the Court or to take steps towards abolition, instead the Court's remit has been expanded to include organised crime and other offences which were never envisaged to be tried in the Special Criminal Court.

ICCL recommends:

(1) That Government implement the persistent and unwavering call of the UN Human Rights Committee to abolish the Special Criminal Court given there is no longer a relevant state of emergency in Ireland.

Part 2: The right to a trial by jury

The right to trial by jury is linked to the fundamental right of every accused person to a fair trial as guaranteed by Article 38.1 of the Constitution. With the exception of those tried in the Special Criminal Court, all persons tried on indictment (ie, tried for serious crimes) are entitled to be tried by a jury of their peers. As noted above, Article 38.3 deviates from this norm and allows for the establishment of "special courts" which operate without a jury. The absence of a jury is the single biggest issue within the Special Criminal Court and one which is the root of many of the other issues discussed in this submission, such as the dual role of the Court, issues with privilege and disclosure and the duty of the Director to give reasons for sending an accused forward to the Special Criminal Court.

The right to a trial by jury originated from the Magna Carta as far back as 1215 and is the foundation of the common law system. The importance to trial by jury in a common law system has been emphasised time and again as an essential prerequisite to a fair trial and as the most effective shield an accused person has against the power of the State. Alexis de Toquerville referred to juries entrusting *"the actual control of society into the hands of the ruled, or some of them, rather than into those of the rulers."*

Lord Devlin also famously proclaimed:

> *"The first object of any tyrant in Whitehall would be to make parliament utterly subservient to his will; and the next to overthrow or diminish the right to trial*

> *by jury, for no tyrant could afford to leave a subject's freedom in the hands of 12 of his countrymen.* ***So that trial by jury is more than an instrument of justice and more than one wheel of the Constitution: it is the lamp that shows that freedom lives."***

Similar observations were made by Kingsmill Moore J in Melling v O'Mathghamhna , wherein he stated:

> *"Rightly or not, trial by jury had for centuries been regarded popularly* ***as a most important safeguard for the individual,*** *a protection alike against the zeal of an enthusiastic executive or the rigidity of an ultra-conservative judiciary."*

In The People v O'Shea , Henchy J discussed the importance of a jury trial in the Irish context, particularly given the abuse of power which has historically been prevalent in the Courts. He stated:

> *"The bitter Irish race-memory of politically appointed and Executive-oriented judges, of the suspension of jury trial in times of popular revolt, of the substitution therefor of summary trial or detention without trial, of cat-and-mouse releases from such detention, of packed juries and sometimes corrupt judges and prosecutors, had long implanted in the consciousness of the people and, therefore, in the minds of their political representatives,* ***the conviction that the best way of preventing an individual from suffering a wrong conviction for an offence was to allow him to "put himself upon his country", that is to say, to allow him to be tried for that offence by a fair, impartial and representative jury, sitting in a court presided over by an impartial and independent judge appointed under the Constitution, who would see that all the requirements for a fair and proper jury trial would be observed."***

In the 2002 minority report of the Committee to Review the Offences Against the State Acts 1939-1998 ("the 2002 Review Committee"), Hederman J, Professor Walsh and Professor Binchy stated:

> *"Trial by jury is a cornerstone of the criminal law system. It ensures that the innocence or guilt of a person charged with an offence is determined by twelve randomly chosen members of the community, each of whom brings to the process the benefit of his or her life-experience and individual perspective. Lord Devlin used somewhat colourful language when he observed that trial by jury is "the lamp which shows that freedom lives". His insight is, however, important in emphasising the liberal democratic basis of jury trial…If convenience were the predominant test, trial by jury for any offence would be abolished. Jury trial is valuable, in spite of its inconvenience, because of deeper values relating to a liberal democracy."*

The minority went on to note at para 9.93:

> *"9.93 In measuring the weight of this concern, it is worth noting that no other common law jurisdiction has come to the conclusion that the risk of jury intimidation warrants non-jury trial in a special criminal court…While Ireland unfortunately has experienced the growth of organised crime in recent years, it is not plausible to suggest that, in contrast to other common law jurisdictions such as the United States of America, England and Australia, Irish social conditions are so perilous as to warrant dispensing with jury trial. Few would suggest that had the 1939 Act not come into being in the context of concerns for subversion, legislation would have been enacted in recent years to dispense with jury trial for those suspected of organised crime.*

> *9.94 With any system of jury trial, there will be the possibility of jury intimidation. That risk will be greater in some cases than others, but there is no evidence, from any jurisdiction, that the risk is of such proportions as to warrant dispensing with trial by jury. Other common law jurisdictions have not taken such a suggestion seriously."*

In more recent times, the Supreme Court has referred to the right to trial by jury as "*not just a fundamental right of the citizen, it is a vital constitutional obligation on the State.*"

ICCL strongly endorses the above jurisprudence and the findings of the minority of the 2002 Review Committee. The right to trial by jury is fundamental to the common law system and is a strong protection for any accused person. Moreover, no evidence has ever been proffered supporting the contention that the risk of jury tampering for certain offences is such as to justify the imposition of juryless courts. ICCL recommends that the position of the Special Criminal Court as a juryless court should be reconsidered. It is submitted that appropriate safeguards could be implemented which would allow for juries to be introduced without the risk of "jury tampering".

In fact, previous governments have sought to do just that. The Juries (Protection) Act 1929 was drafted with the stated purpose of making *"further and better provision for the protection of jurors and witnesses concerned in the trial of criminal issues*". The Act was never commenced. However, the provisions are indicative of the alternatives open to the Courts in dealing with potential jury tampering. The provisions of the Act include:

i. The introduction of secret jury panels;
ii. The exclusion of the public from jury empanelment;

iii. Prohibition on the publication of the names of jurors;

iv. The return of a verdict by nine members;

v. The creation of offences and penalties for those found guilty of jury intimidation.

The introduction of a similar, modernised Jury Protection Act, ensuring that juries were protected, would dispense with a key justification for the existence of the Special Criminal Court. Advances in technology also provide a solution to potential jury intimidation. The availability of videolink and platforms such as Pexip (the remote platform used to conduct virtual court hearings) mean that a jury need not even be required to sit in a physical court to adjudicate upon cases. Juries could operate from confidential locations assigned by the Courts service, with remote platforms allowing for communications to be made to the Court where required.

However, the physical presence of juries will always be preferable and the introduction of juries in this manner should only be utilised where there is evidence offered by the DPP of a significant danger of potential witness intimidation.

In Northern Ireland, the use of juryless courts is reserved for exceptional cases. Part 7 of the Criminal Justice Act 2003 provides for trials on indictment without a jury. Section 44 of the Act allows for the DPP to apply to a judge of the Crown Court for a trial without a jury where the following conditions are satisfied:

"(4)The first condition is that there is evidence of a real and present danger that jury tampering would take place.
(5)The second condition is that, notwithstanding any steps (including the provision of police protection) 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.

(6)The following are examples of cases where there may be evidence of a real and present danger that jury tampering would take place—

(a)a case where the trial is a retrial and the jury in the previous trial was discharged because jury tampering had taken place,

(b)a case where jury tampering has taken place in previous criminal proceedings involving the defendant or any of the defendants,

(c)a case where there has been intimidation, or attempted intimidation, of any person who is likely to be a witness in the trial."

The provisions require more than a mere assertion that, on account of the parties involved in the case, that jury tampering is likely to occur. Instead, it is required that an application grounded on evidence is made to the Court showing that jury tampering would likely take place AND it must be shown that there are no alternative steps which could be taken to alleviate concerns in relation to potential jury tampering. ICCL considers that these provisions are significantly more protective of the position of the accused than the provisions of the OASA. It is worth noting that these provisions operate in Northern Ireland. The foundational premise of the Special Criminal Court in Ireland is that the threat of violence emanating mainly from groups based in Northern Ireland is such as to justify the use of these emergency provisions. It is entirely unjust that the legislation providing for trials without jury in Northern Ireland offers more protection to an accused person than the OASA.

The right to a trial by jury is fundamental in an adversarial, constitutional, common law jurisdiction. At present, there is no evidence that the risk of jury tampering in cases before the Special Criminal Court is such as to warrant the use of a juryless court. There are appropriate alternatives to a juryless court which would balance both the rights of the accused and the public interest and administrative of justice, such as protected juries. Finally, the DPP should not be able to assert without evidence that

there is a risk of jury tampering to justify the use of a protected jury. Instead, an application grounded on evidence should be made to the Court. Where appropriate, these applications could be made in camera or information could be furnished to the Court for assessment in a similar manner as a Court would assess privileged information.

ICCL Recommends:

1) The introduction of protected juries into the Ordinary Courts;
2) Until such time as it is abolished, the introduction of protected juries to the Special Criminal Court; and
3) Where the DPP wishes to have a matter heard by a protected jury, an application grounded on evidence should be made to the Court seeking to empanel a protected jury. This application can be held in camera where it is found to be in the interests of justice to do so.

Part 3: The dual role of the Special Criminal Court

As discussed in Part 2 of this submission, the Special Criminal Court operates with three judges in the absence of a jury. The judges are therefore triers of both fact and law. This is a significant departure from standard practice in the ordinary courts and gives rise to its own distinct set of problems. First, the judiciary must decide all matters of admissibility. This means that the judges will assess potentially prejudicial information and decide whether or not this information should be admitted at trial. In all other courts in which serious offences are tried, the judge will decide matters of admissibility in the absence of the jury, so as not to prejudice or bias the jury. Although it is accepted that the judiciary are presumed to be impartial and unbiased, the manner in which the Special Criminal Court operates seriously risks the perception of bias from the perspective of accused persons and is greatly damaging to the rule of law. As explored further below, a fundamental rule of law principle is that justice must both be done and be seen to be done.

A second issue arising from the dual role of the Court is that the judges are often asked to decide matters of privilege. This means that judges may assess prejudicial material over which privilege is claimed and that they may uphold this claim of privilege ***without*** disclosing this material to the accused. This gives rise once again to the apprehension of bias. It also significantly impacts a fundamental fair trial right of accused persons to see the evidence against them so they can challenge it. Ultimately, it feeds a perception of and actual inequality of arms between the State and accused persons.

a) Independence and impartiality of the judiciary

The right to a fair trial is inextricably linked to the concept of an independent, impartial tribunal. The right to have criminal matters heard by an impartial tribunal is enshrined in both Irish law and in international instruments, including Article 38.1 of the Irish Constitution, Article 6 of the European Convention on Human Rights (ECHR) which makes reference to an "impartial and independent tribunal", Article 47 of the Charter of Fundamental Rights and Article 14(1) of the International Covenant on Civil and Political Rights.

Guideline IX of the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism stipulates that "[a] person accused of terrorist activities has the right to a…hearing…by an independent, impartial tribunal established by law ".[7] The HRC has also stated that the right to be tried by an independent and impartial tribunal "is an absolute right that may suffer no exception".[8]

It is not just "actual" impartiality which should be maintained, but also the "appearance of impartiality". In *Incal v Turkey*, the ECtHR considered the perception of bias of the judiciary by accused persons, stating:

> *"In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused… In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the*

[7] Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, adopted by the Committee of Ministers on 11 July 2002 at the 804th Session of the Council of Europe Ministers' Deputies.
[8] Communication No. 263/1987, M. Gonzalez del Río v Peru (Views adopted on 28 October 1992), UN document CCPR/C/46/D/263/1987 (Jurisprudence), [5.2].

accused is important without being decisive. What is decisive is whether his [or her] doubts can be held to be objectively justified."[9]

An accused person is entitled to both an impartial tribunal, and a tribunal which has the appearance of impartiality. This is essential to maintaining trust in the Courts system and the rule of law. ICCL submits that the current Special Criminal Court fails to meet these standards because of the dual role of the Court.

b) *The parameters of the "dual role" of the Court*

The dual role of the Court as triers of both fact and law was first substantially challenged in the case of *DPP v Special Criminal Court*[10]. The case involved the murder of journalist Veronica Guerin in broad daylight while driving her car on the Naas dual carriageway. The accused in *DPP v Special Criminal Court* was charged with murder. During the trial, the accused's legal advisers sought the disclosure of key witnesses statements, however the Director claimed that the statements were privileged and refused to make disclosure. An application was ultimately made to the trial Court who ruled that defence counsel should view the documents but could not disclose their contents to the accused without further application to the Court. On judicial review, this decision was quashed by Carney J who held that the Court should review the documents and decide whether to uphold the claim of privilege. This decision was affirmed by the Supreme Court on appeal.

The Supreme Court gave two reasons for its ruling. First, the Supreme Court held that allowing counsel to view material which they could not share with their client would be a breach of client-counsel trust.[11] Second, the Court held that judges frequently

[9] *Incal v Tukey* (2000) 29 EHRR 449, [71].
[10] [1999] 1 IR 60.
[11] This is similar to the finding by Carney J in the High Court that there would be a "fundamental change" to the client-counsel relationship if legal counsel could view material which the accused was not privy to.

viewed documents and made rulings on claims of privilege so there was no risk of unfairness in allowing the Court to consider such material. O'Flaherty J stated that "*No doubt, judges allow claims of privilege in routine cases day in and day out without ever examining any documents. Other cases - this may be one - will be more complicated and then the judge or judges (as in the case of the Special Criminal Court) will examine the documents*". This would come to be an oft-repeated extract in future cases seeking to challenge the review of privileged material by the Court. In subsequent jurisprudence, this statement has been held to confirm the "jurisdiction" of the Special Criminal Court to view privileged documents without disclosing them to the defence.

Before considering the rights implications of this judgment, it is worth considering the reasoning of the Court in further detail. The Supreme Court in *DPP v Special Criminal Court* considered the claim of privilege through the lens of civil jurisprudence.[12] In civil cases, where a dispute as to privilege arises, courts are frequently furnished with the disputed documentation and they decide whether a claim of privilege should be upheld. O'Flaherty J concludes: "*Ever since the decision in Murphy v. Corporation of Dublin… this solution has worked well on the civil side.*"[13]

ICCL submits that the procedure for reviewing documents over which privilege is claimed in the civil courts is not an appropriate procedure to adopt into the criminal courts, certainly not for some of the most serious offences on the statute book. Criminal proceedings have the potential to interfere with the constitutional right to liberty of an accused person. For this reason, human rights law, our Constitution, our legislature and our courts have crafted very specific rules and protections to shield accused

[12] Citing cases such as *Burke v Central Independent Television plc* [1994] 2 IR 61, *Murphy v Corporation of Dublin* [1972] IR 215, *Director of Consumer Affairs v Sugar Distributors Ltd* [1991] 1 IR 225 and *Ambiorix Ltd v Minister for the Environment (No.1)* [1992] 1 IR 277.
[13] *Ibid*, 88.

persons from an unfair deprivation of liberty. The criminal standard of proof, being beyond a reasonable doubt, is far higher than the civil standard of proof, being on the balance of probabilities. Civil proceedings do not involve the level of power imbalance which exists in the criminal Courts in which an accused person faces the full might of the State with a significant impingement on their Constitutional rights and the potential imposition of a custodial sentence. We note that the general practice of many civil courts is for one judge to hear and determine interlocutory matters – such as issues of discovery and privilege – with a different judge assigned to hear the substantive matter. This process is undoubtedly adopted to prevent the potential inference of bias.

The Supreme Court has, on other occasions, refused to align the two procedures and has held that to do so would be inappropriate. For example, in *DPP v McKevitt*[14], the Court was concerned with a claim that the DPP had made inadequate disclosure and that this had prejudiced the rights of the accused. In considering whether the initial trial of the applicant was unfair on account of the alleged lack of disclosure, Geoghegan J stated:

> *"The distinction is especially relevant to the procedural issues of whether there should have been a schedule identifying all documents "in its power, possession or procurement" and to use the wording of the written submissions of the appellant, "potentially relevant to assisting the applicant's defence or to undermining the prosecution case". **The appellants are effectively suggesting that there should be a system on the criminal side identical to discovery on the civil side. In two different decisions, this court has already made clear, not only that the rules of civil discovery do not apply to criminal cases but that there are good reasons why that should be so, a primary one being that unlike in a***

[14] [2009] 1 IR 525.

> *civil case where the issues are known to both parties having regard to the pleadings which normally must be closed before discovery, in a criminal case the prosecution does not know in advance (subject to a few statutory exceptions) the defence issues."*[15]

ICCL submits that the adoption of the civil procedure for claims of privilege into the Special Criminal Court was incorrect in law and is inappropriate in a context where a person's liberty is at stake.

Further, in *DPP v Special Criminal Court*, both the High Court[16] and the Supreme Court[17] placed a great deal of emphasis on the importance of trust between client and counsel. However this factor is, in our view, given too much weight and seems to have potentially distorted the other factors which must be taken into consideration to ensure that the right to a fair trial is maintained, such as trust in the rule of law and the legal system, the right to cross-examine and the right of equality of arms between the accused and the State.

It is essential to the maintenance of the rule of law that accused persons trust the system trying them[18]. As stated above, an accused person not only has the right to be tried by an impartial tribunal, they must also have confidence in this tribunal. The appearance of bias from an objective standpoint is relevant to whether or not a trial can be said to be "fair".[19] In trials before the Special Criminal Court, accused persons are asked to maintain trust in a system which allows the tribunal who will ultimately

[15] Ibid, [10].
[16] *Ibid*, 75 where Carney J refers to a "fundamental change" to the client-counsel relationship which would result if the approach advocated for by the trial Court was allowed.
[17] *Ibid*, 84 – 86.
[18] See *Goode Concrete v CRH Plc* [2015] 3 IR 493 and *Re the Solicitors Act and Sir James O'Connor* [1930] IR 623.
[19] See above *Incal v Turkey*, *ibid.*

decide their guilt or innocence to review potentially prejudicial material which the accused and their legal team may not even be furnished with.

As stated by Geoghegan J in *McKevitt*[20], in criminal proceedings in an adversarial system, counsel for the defence is the only party fully instructed as to the accused's defence. They are, therefore, the only person who can properly assess what material may be relevant to that defence. At the disclosure stage, the defence may not have decided what witnesses will be called or whether the accused will give evidence. These decisions will be made after full disclosure is reviewed and discussed with the client for their instructions. For the most part, the defence being put forward will not become clear to those outside the defence team until the prosecution case has concluded. The ruling in *DPP v Special Criminal Court*, and the dual role of the Court itself, therefore undermine a central tenet of the rule of law and impinge on an accused person's right to be tried by an impartial tribunal. The Supreme Court should review this decision in light of the right to a fair trial at the earliest opportunity.

c) Further expansion of the "Dual Role"

The dual role of the Special Criminal Court was further expanded in *DPP v Binéad & Donohue*[21]. In *Binéad & Donohue*, the two accused were charged with unlawful membership of an illegal organisation. The most essential piece of evidence before the Court was belief evidence given by a Chief Superintendent. The Chief Superintendent stated that it was his belief that the accused were members of the IRA, both before and after the incident leading to their arrest. This belief was grounded on written and oral information obtained from confidential sources. Both accused persons

[20] *Ibid.*
[21] [2007] 1 IR 374.

challenged this belief evidence. However, privilege was claimed over the sources of the information.

Against the wishes of one co-accused, the Court viewed the material in dispute, upholding the claim of privilege and refusing to disclose the information to the accused.[22] The Court of Criminal Appeal held that the trial judge was entitled to view the material due to "*the very full discretion vested in it according to the decision in Director of Public Prosecutions v. Special Criminal Court*".[23] The Court went on to find:

> "*…judges sitting without a jury, such as in the Special Criminal Court, have long experience in removing from their consideration material or evidence which may have been admitted in error, or opened to them, even inadvertently, or which has otherwise come to their attention. A typical example exists every time a trial court, and not just the Special Criminal Court, conducts a voir dire...*"[24]

For serious offences, *voir dires* in ordinary courts are conducted in the absence of the jury, the triers of fact who make determinations of guilt. This is to be differentiated from the Special Criminal Court, where judges hear all evidence and make a decision in relation to the guilt of the accused. This analysis is absent from the consideration of the Court in *Binéad & Donohue*. The Court also did not take into the consideration the right of accused persons to an impartial tribunal and the importance of the appearance of impartiality to the rule of law.

[22] Ibid, 397.
[23] Ibid, 396.
[24] Ibid, 397.

The Court also referred to the ability of accused persons to appeal decisions where it believes that the Court has been prejudiced by such material. This puts the burden on an accused person to ensure that the tribunal trying them is impartial. Not only is this unsatisfactory from a rights perspective, but it is also an almost insuperable hurdle from a legal perspective. In *Binéad & Donohue*, although the Court acknowledged that an appeal exists, it went on to find that the appeal in that case was not made out. It stated that the accused had not established that the judges were affected by such material as "*a statement to the contrary was explicitly made by the trial court*".[25] This effectively means that, once a trial Court explicitly states in their judgment that they have not been prejudiced by privileged material, this will be sufficient to insulate that decision from appeal.

(d) Consideration of the dual role by the ECtHR

The decision in *Binéad & Donohue* was ultimately appealed to the ECtHR by the second accused, Kenneth Donohoe, in a case which became known as *Donohue v Ireland*[26]. The *Donohue* case was legally complex, in that it involved a variety of what were termed "strands" of evidence; belief evidence, inferences from conduct and inferences from silence. Nonetheless, the main issue before the Court was whether the review by the Court of privileged material which was not disclosed to defence counsel amounted to a breach of his right to a fair trial in circumstances where he could not effectively challenge this material. At para 56 of the judgment of the main Court, the issue before the Court was summarised as follows:

> *"The applicant complained under Article 6 that the non-disclosure of the Chief Superintendent's source material seriously restricted his defence rights and that it should have been counterbalanced by commensurate safeguards. He*

[25] Ibid, 398.
[26] *Donohoe v Ireland*, App No 19165/08 (ECtHR, 12 December 2013).

further complained that the trial court's review of the materials was inadequate and that no effective safeguards were made available to him."[27]

The Court proceeded to consider the admissibility of evidence more generally from an EU law perspective and then stated that the issues it needed to address were:

"(i) whether it was necessary to uphold the claim of privilege asserted by Chief Superintendent PK as regards the source of his belief;
(ii) if so, whether Chief Superintendent PK's evidence was the sole or decisive basis for the applicant's conviction; and,
(iii) if it was, whether there were sufficient counterbalancing factors, including the existence of strong procedural safeguards, in place to ensure that the proceedings, when judged in their entirety, were fair within the meaning of Article 6 of the Convention."[28]

Unfortunately, these issues, though related, do not tackle head on the issue that arose in *Binéad*, being: was it a violation of the accused's rights under Article 38.1 of the Irish Constitution and Article 6 of the ECHR for the Court to review material which the accused could not effectively challenge. The main judgment of the Court does not consider this issue. On the contrary, the Court found that the review of the privileged material by the trial Court was a "safeguard" and that, if the accused disagreed with the outcome of this review, they could and should have sought to have this material reviewed by the Court of Criminal Appeal. This fails to get at the crux of the issue, being whether it is fair for a tribunal of fact and law to have information relating to the accused which the accused themselves have not reviewed and are therefore not in a position to challenge.

[27] *Ibid*, [56].
[28] *Ibid*, [79].

A minority judgment was issued by Lemmens J who concurred with the outcome of the main judgment but stated "*To my regret, however, I find it difficult to follow the reasoning adopted by the majority. In the first place, in my opinion the majority fail to address the applicant's core complaint.*"[29] He outlined the issue before the Court as follows:

> "*The complaint: not about the admissibility of belief evidence or the non-disclosure of underlying material, but about the role of the trial court with respect to the privileged material.*
>
> *2. The applicant explicitly stated that he did not object to the admissibility of the belief evidence (written observations of 17 July 2012, § 1). Nor did he object to the non-disclosure as such of the privileged material submitted by the Superintendent to the Special Criminal Court (SCC).*

*What he objected to was "**the unfairness which is inherent in the fact that the court of trial, which in this case was the trier of fact, reviewed the material upon which the belief was based, formed a view as to its reliability and convicted the (applicant) on the basis of it while denying the (applicant) any meaningful way of challenging that evidence**" (written observations, § 2; emphasis added). He concluded his submissions in the following words: "The applicant does argue that the procedure adopted in his case was unfair because a trial court which had to determine the question of guilt or innocence had knowledge of material which it concluded was reliable evidence persuasive of guilt but which the applicant was unable to challenge in any meaningful way."*[30]

Lemmens J considered the dual role of the Special Criminal Court, the non-disclosure of the material to the accused and whether this complied with the requirement "to

[29] Ibid, dissenting judgment of Lemmens J, [1].
[30] Ibid, [2].

provide adversarial proceedings". Although he engages with the issue before the Court, there is no real analysis of the importance of a division of roles and equality of arms in adversarial criminal proceedings[31]. Overall, the decision in *Donohue* does not get to the heart of the issues which arise from the dual role of the Special Criminal Court in the Irish context, where constitutional protections are strong, common law principles have been developed over decades of case law, and the adversarial system with a trial by jury are paramount to a fair trial.

ICCL considers that the issue of the dual role of the Court and the potential impact that this has on the right to a fair trial have not been satisfactorily addressed by the former Court of Criminal Appeal, the Supreme Court or the ECtHR. Further, ICCL considers that the practice is now so deeply entrenched in the operation of the Court that an amendment of the legislation underpinning these practices (as recommended below) is required in order to bring clarity to the area, and to ensure the protection of accused persons.

d) Potential solutions to the issue of the dual role

There are a number of solutions to the difficulties presented by the dual role of the Court. The most effective solution to the issue is of course to abolish the Court and allow all accused persons the full spectrum of rights protected by the Constitution and human rights law. Until such time as the Court is abolished we consider the next most effective way to address this issue would be to introduce juries in one form or another into the Special Criminal Court. This would result in the operation of the Court being aligned more closely with the ordinary courts in that the triers of fact would not be exposed to potentially prejudicial material.

[31] As alluded to by Carney J in *Special Criminal Court*, *ibid.*

A second option would be the introduction of something akin to the special advocates procedure in the UK.[32] In other jurisdictions, third-party counsel represent the interests of an accused where there is a disclosure dispute in which matters of national security or the protection of intelligence sources arise. Special advocates are viewed as a means by which the rights of the accused can be protected alongside the public interest.[33] A barrister entirely independent of the proceedings could represent the interests of the accused where a disclosure issue arose. This barrister would be fully instructed as to the defence of the accused and could then assess privileged material in accordance with those instructions. Ultimately, any application made to the Court disputing privilege would have to be made by the advocate in the absence of the accused and *in camera*. This would not be ideal but would be an improvement on the current procedure.

A third possibility is to utilise a pre-trial procedure. Preliminary trial hearings ("PTHs") are shortly to be introduced via the Criminal Procedure Bill, 2021. One of the functions of a Court during a PTH will be to deal with issues of disclosure which arise in advance of trial. An amendment to the OASA which includes a provision that a separate panel of the Special Criminal Court must deal with any disclosure and privilege issues in advance of the trial would be a step towards strengthened protection for the accused. Again, this solution would not be ideal, in that disclosure issues could arise throughout the trial which would require to be ruled upon by the Court, however, if strict case management was introduced which placed pressure on the DPP to ensure that all disclosure was made in advance of any PTH, this could prove to be a relatively effective solution to the dual role problem.

e) Recommendations

[32] Harrison, The Special Criminal Court: Practice and Procedure (Bloomsbury, 2019), 578-581.
[33] Jackson, '*The Role of Special Advocates: Advocacy, Due Process and the Adversarial Tradition*' (2016) 20(4) IJEP 343.

ICCL considers that the dual role of the Special Criminal Court breaches the right of the accused to a fair trial by an impartial tribunal.

Until such time as the Special Criminal Court is abolished, ICCL Recommends:

(1) The introduction of a jury into the Special Criminal Court;

(2) In the alternative, ICCL recommends the introduction of a special advocates procedure to deal with issues of privilege and disclosure;

(3) In the alternative or in addition to special advocates, ICCL recommends the introduction of a pre-trial hearing system which will ensure that issues of privilege and disclosure are fully aired before a separate panel of the Special Criminal Court prior to the trial of the accused.

Part 4: Power of the Director of Public Prosecutions

As discussed above, the right to a trial by jury is a fundamental right in a common law, adversarial system such as exists in Ireland. This right is impinged upon as a result of the very creation of the Special Criminal Court but even more so in the manner in which offences come to be tried before that Court. Sections 45-47 of the OASA 1939 together with s3 of the Prosecution of Offences Act, 1974, vests the sole discretion to send matters forward to the Special Criminal Court in the Director of Public Prosecutions ("DPP" or "the Director"). The Director may send forward both scheduled and non-scheduled offences for trial in the Special Criminal Court. There is no requirement that the Director give reasons for deciding to send a matter forward. There is also no provision allowing an accused person to review this decision or have a matter remitted back to another Court. ICCL considers that the discretion vested in the Director is too wide-ranging and does not effectively safeguard the rights of accused persons.

(a) No requirement to give reasons

It is a general requirement of procedural fairness that public bodies, be they courts, tribunals or statutory authorities, should give reasons for their decisions. This obligation is described by De Blacam as flowing from "*the democratic nature of the State recognised in article 5 of the Constitution*". [34] He states: *"Whereas a tyrant may not be expected to have to explain his decisions, the same cannot be said of a public decision-maker in this State."*[35]

[34] De Blacam, *Judicial Review, 3rd Ed* (Dublin: Bloomsbury, 2017), [17.02]
[35] Ibid.

The duty to give reasons has been the subject of substantial case law and was considered by the Supreme Court in the recent decision of *Mallak v Minister for Justice*[36]. In *Mallak*, the appellant sought to challenge a decision of the Minister refusing his application for a certificate of naturalisation. In quashing the decision and upholding the appeal, Fennelly J stated:

"…The particular issue for decision on this appeal is the extent to which decision makers are obliged to disclose the reasons for which they are made. This question is, of its nature, closely related to other features of the rules of natural justice compendiously covered by the broad principle of audi alteram partem, which may include the giving of prior notice of impending decisions, the matters which the decision maker will take into account and, in appropriate cases, the disclosure of information and even, in some cases, the holding of a hearing…"[37]

…

"[45] It cannot be correct to say that the ***"absolute discretion" conferred on the Minister necessarily implies or implies at all that he is not obliged to have a reason. That would be the very definition of an arbitrary power****. Leaving aside entirely the question of the disclosure of reasons to an affected person,* ***it seems to me axiomatic that the rule of law requires all decision makers to act fairly and rationally, meaning that they must not make decisions without reasons.****"*[38]

When sending matters forward for trial in the Special Criminal Court, the Director must issue a certificate under s47(2) of the OASA, certifying that the ordinary courts are inadequate to secure the effective administration of justice. However, the Director is not required to give reasons for this belief. As noted above in the section on

[36] [2012] 3 IR 297.
[37] Ibid, 300.
[38] Ibid, 312.

"International Criticism", the UN HRC has been immensely critical of the lack of reasons given by the Director. ICCL submits that the level of discretion afforded to the Director has been interpreted too broadly by the Courts and amounts to the kind of "arbitrary power" which Fennelly J warned against in *Mallak*.

In *State (Littlejohn) v Governor of Mountjoy Prison*[39] for example, the accused had pleaded guilty to robbery but was nonetheless sent forward by the Director to the Special Criminal Court for sentence. There would clearly be no risk of jury intimidation where a person is simply being sentenced by the Court, however, the Supreme Court upheld the decision, stating: *" We are not entitled to speculate as to the grounds on which the Attorney General formed the opinion that the ordinary courts were inadequate to secure the effective administration of justice to sentencing the prisoner."*[40]

In *Savage v Director of Public Prosecutions*[41], the accused sought to challenge s46(2) and the power of the Director to send matters forward. Finlay P stated that it was "*peculiarly and exclusively a matter for the Attorney General*"[42] (or the DPP) to certify the inadequacy of the ordinary courts which was not reviewable by the courts. Finlay P considered that compelling the Director to give reasons for her decision would be impractical as the Director would have to provide evidence of a sensitive nature to the Court. Finlay P went on to find: *"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..."*[43]

[39] *State (Littlejohn) v Governor of Mountjoy Prison* (18 March 1976). It should be noted that this decision was made in the early stages of the introduction of the Prosecution of Offences Act, 1974, which vested the powers of the Attorney General in criminal matters in the newly established DPP. All references to the Attorney General in this case law can be read as referring to the DPP.
[40] Ibid, [11].
[41] [1982] ILRM 385.
[42] Ibid, 388.
[43] Ibid, 389.

The duty to give reasons was also considered by the Supreme Court in *Murphy v Ireland*[44]. There, the accused was charged with a number of revenue offences and unusually, was sent forward for trial in the Special Criminal Court. In challenging the decision of the Director, the accused relied on the lack of reasons given to justify sending him forward. However, O'Donnell J, delivering judgment on behalf of the Court, dismissed the appeal and found that the duty of the Director to give reasons was severely limited. The following extracts from the judgment of O'Donnell J are instructive:

> *"[42] It also follows from the decision of the Government and the certificate of the Director that it is* ***highly likely*** *that the reason why the Director considered that the ordinary courts are not adequate to secure the administration of justice in the particular case* ***must relate to the connections of the individual with organisations which are prepared to interfere with the administration of justice…*** *[43] Where the Director is making a decision that is subject to only limited review by a court and has the result that a trial which would otherwise take place before a jury would be heard without a jury, then the Director is under a duty to give reasons for that decision which extends to why he or she considers that the ordinary courts are not suitable for a trial of this accused. As indicated in Mallak v. Minister for Justice [2012] IESC 59, [2012] 3 I.R. 297,* ***in an appropriate case, it may be sufficient to state that no reason can be given, without impairing national security****."*[45]

Although the decision in *Murphy* appears to be authority for the proposition that the Director must give reasons for sending a matter forward under s46(2), in reality the decision allows the Director to choose to refuse to give reasons on the very broad

[44] [2014] 1 IR 198.
[45] Ibid, 233.

ground of "national security". ICCL considers that this makes it near impossible for an accused person to seek reasons for the decision of the Director.

(b) No real power to challenge the decision of the Director

Linked to the above submission on the lack of duty to give reasons is the more general difficulty that an accused person sent forward under s46(2) has in challenging the decision by way of judicial review. The importance of the ability to judicially review public decisions was emphasised by Fennelly J in *Mallak*, where he stated: *"Where fairness can be shown to be lacking, the law provides a remedy. The right of access to the courts is an* ***indispensable cornerstone*** *of a State governed by the rule of law."*[46]

In *Byrne and Dempsey v Ireland*,[47] the Supreme Court upheld the refusal by the High Court to grant leave for judicial review of the decision of the Director to send the accused forward for trial in the Special Criminal Court. It was submitted that s. 46(2) deprived the appellants of their constitutional rights to trial by jury and, therefore the decisions of the Director should be subject to judicial review. However, the Court rejected this submission, stating:

> *"While the court in [Kavanagh v. Ireland [1996] 1 I.R. 321] was concerned with issues broader than the issues involved in the instant case, the judgments delivered therein, with which all the members of the court agreed, clearly established that the question of whether the ordinary courts are or are not adequate to secure the effective administration of justice and the preservation of public peace and order* ***is primarily a political question,*** *and, for that reason, it is left to the legislature and the executive and that normally, the certificates or directions of the Director of Public Prosecutions under either ss. 46 or 47 of the*

[46] Ibid, 300.
[47] (Unreported, Supreme Court, 11th March 1999).

> *Offences Against the State Act 1939* ***will not be subject to judicial review in the absence of mala fides or improper motives****."*[48]

In *Murphy*, discussed above, O'Donnell J stated:

> *"The question, in any case, is whether the Director was entitled to consider that the ordinary courts were inadequate to secure the administration of justice in a particular case. Review of such a decision* ***should be the exception*** *and never the routine, and only when an accused person can put forward* ***a substantial case*** *that the decision making process has miscarried."*[49]

Effectively, the Supreme Court in *Murphy* found that a decision of the Director to send a matter forward under s46(2) was reviewable if it could be demonstrated that there was some kind of *mala fides* on the part of the Director or that the decision was influenced by improper motive or improper policy, or in some other exceptional circumstances. However, as discussed above, there is no duty on the Director to give reasons for their decision, they can simply refuse to give a reason for the decision on the basis of the public interest. This leaves an accused person in the impossible position where they must prove that the reasoning of the Director is flawed or lacks *bona fides* without being furnished with those reasons.

As the above jurisprudence indicates, the ability of an accused person to challenge a decision of the Director to send them forward for trial under s46(2) is severely restricted to exceptional circumstances. ICCL considers that this threshold is too high and interferes with the right of the accused to challenge decisions by a public body which materially impacts on their rights. We note that in these decisions, the Courts did not fully ventilate their obligations under Article 6 of the ECHR. Further, the

[48] Ibid, 19 & 20.
[49] Ibid, 234.

decisions may demonstrate an excessive level of deference to the Director which we suggest is inconsistent with the role of the Courts to protect individual rights, including the right to fair trial, and is inconsistent with the general approach taken by the Courts to require fair procedures where decisions of public bodies are challenged.

(c) Alternatives and possible safeguards

As discussed above, in Northern Ireland the Director must make an application to the Court seeking to have matters sent forward to a juryless court. Such applications must be grounded in evidence that jury tampering will occur and must also show that no other steps can be taken to dissipate those concerns.

In much of the jurisprudence discussed above, the Courts have focused on the "sensitive" nature of the material which decisions of the Director may be based upon. Where the DPP claims that they cannot disclose the reasons for sending someone forward to the Special Criminal Court for security reasons, Pye has suggested that the Courts could review this material privately, presumably in a similar manner to how privileged material is reviewed, and then decide whether such a decision is warranted.[50] This would allow the accused to have effective judicial review while still protecting the public interest.

(d) Conclusion and Recommendations

ICCL considers that the absence of a duty to give reasons and the inability in most cases to judicially review decisions of the Director amounts to a breach of the rights of the accused and fly in the face of the general rules of procedural fairness which all decisions by public bodies should adhere to. There are no checks and balances in

[50] Pye, '*Judicial Review of Discretionary Powers under Part V of the Offences against the State Act, 1939*', [1983] I.L.T. 65, 71.

place to limit the discretion held by the Director and there are insufficient safeguards for the protection of the accused.

ICCL recommends:

(1) That where the Director seeks to send matters forward to the Special Criminal Court, she should be required to make an application to the Court evidencing the reasons for her view that there is a sufficient risk of jury tampering on affidavit.

(2) Where the Director claims that, for reasons of national security, the material grounding her decision to send the matter forward should not be discussed in open Court, the Director can make an application to have such an application held *in camera* and / or can request that the Court review the material grounding their application in private.

Part 5: Claims of Privilege

Privilege can be claimed over a wide range of written documents and non-written information such as information verbally provided by witnesses.[51] There is no formal procedure for setting out claims of privilege in the Special Criminal Court and the Supreme Court has rejected the proposition that such a procedure should be introduced.[52] ICCL submits that claims of privilege in the Special Criminal Court interfere unduly with the right of an accused person to fair procedures.[53]

The EU Directive on the right to information in criminal proceedings provides that where the disclosure of evidence may lead to a serious threat to the life or fundamental rights of another person, any restriction on disclosure must be weighed against the rights of the accused.[54] In *Rowe and Davis v the United Kingdom*[55], the ECtHR stated that the right to equality of arms was encompassed in the right to a fair trial in accordance with Article 6 of the ECHR. The Court linked the concept of equality of arms with full disclosure being made to the accused. The Court accepted that in some cases it may necessary to withhold information from the defence, however it qualified this statement as follows:

> *"..only such measures restricting the rights of the defence which **are strictly necessary** are permissible under Article 6 § 1 ... Moreover, in order to ensure*

[51] Harrison, 'Practice and Procedure in the Special Criminal Court' (Bloomsbury Professional, 2019) [8.32]
[52] *People (DPP) v McKevitt* [2009] 1 IR 525, 531.
[53] The right to "fundamental fairness" in criminal proceedings was emphasised in *People (Director of Public Prosecutions) v Breathnach* (1981) 2 Frewen 43. See also *DPP v Gilligan* [2006] 1 IR 107 where Denham J stated at 137: "*The right of the accused to due process is a clear mandate of the Constitution. Unlike other articles it is short and pithy, but that does not detract from its importance. Rather it means that there are no qualifying phrases to this important right.*"
[54] EU Directive 2012/13/EU.
[55] Case no. 28901/95, ECHR 2000-II.

> *that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights* ***must be sufficiently counterbalanced*** *by the procedures followed by the judicial authorities."*[56]

The types of privilege which will be considered in this submission are: (a) Public interest privilege and (b) Informer privilege.

(a) Public interest privilege

Public interest privilege is often claimed in the Special Criminal Court, usually to justify (i) the protection of Garda methodology or "tradecraft" or (ii) the safety of protected witnesses in the Witness Security Programme. It can also be claimed over information which relates to national security or information which it is believed could cause a risk to life.

(i) Protection of "tradecraft"

Privilege is often claimed over information which the Director claims is indicative of Garda methodology or "tradecraft". In effect, this relates to how the Gardaí carry out their investigations, including the surveillance of certain persons or places, the manner in which the Gardaí obtain evidence, communications between different departments in An Garda Síochána, and other working documents or reports which may be on file in Garda Headquarters. Where such a claim of privilege arises, it is difficult for this to be substantively challenged. As discussed in Part 3 of this submission, often the Court will intervene and review material over which privilege is claimed. The difficulties associated with this approach have been discussed more fully above.

(ii) Privilege in the context of protected witnesses

[56] Ibid, [61].

Evidence in the Special Criminal Court is frequently given by protected witnesses who have been placed in the Witness Security Programme. Information associated with the placement of the witness into the programme (being how they came to be placed in the programme), the conditions of their participation in the programme, and whether or not the witness will receive immunity, is often not disclosed to the accused on the grounds of privilege. It is difficult for the accused to effectively cross-examine a witness or call into question their credibility when the aforementioned information has not been disclosed. Privilege could be maintained over any information which would tend to identify the location of the witness in question while other matters which are relevant to the defence could be disclosed. Further, uncorroborated evidence of a protected witness – who may have an interest in the conviction of an accused – can ground a conviction without any further information. ICCL submits that this position gives rise to unfairness for the accused and is a breach of an accused's right to due process and a fair trial under Article 38.1 of the Constitution.

The lack of accountability and transparency in the Witness Security Programme and the non-disclosure of related information to the accused was challenged in *DPP v Gilligan*[57]. Although the Supreme Court in *Gilligan* accepted that uncorroborated evidence of a person in receipt of a benefit from the State "*should be viewed with caution*" and that it was akin to evidence from an accomplice, the Court did not accept that such evidence needed to be corroborated or that the admission of such evidence was inherently unfair to the accused. This was based on the premise that Witness Security Programmes are designed to protect witnesses and that sufficient safeguards could be put in place to ensure that such evidence was reliable, such as requiring that a Court approach such evidence with caution and consider the weight to be attached to such evidence where no corroboration exists.

[57] *DPP v Gilligan* [2006] 1 IR 107.

(b) Informer privilege

Informer privilege can be claimed over information which leads to procedural steps being taken by the Gardaí, such as search, arrest and detention, and can also be claimed over information which forms part of the prosecution case[58]. There is a limited ability of an accused person to challenge these claims[59]. ICCL considers that this interferes with the right to a fair trial.

Information from informers frequently forms the basis of "belief evidence" given by the Gardaí, usually as to whether an accused is a member of an illegal organisation. Given that informer privilege is usually invoked in this context, this will be considered in Part 6 of this submission.

(c) Solutions to the issues raised by claims of privilege

The issue of how claims of privilege are assessed by the Special Criminal Court has already been assessed in some depth in Part 3 of this submission. ICCL considers that the introduction of a jury into the Special Criminal Court would allow for the proper assessment of material over which privilege is claimed by the Court without giving rise to the perception of bias or unfairness. In the alternative, the special advocates procedure, discussed in Part 3 of this submission, could be invoked to assess material over which privilege is claimed.

ICCL submits that additional safeguards are required where the evidence of a protected witness is sought to be relied upon. First, any evidence from a protected witness should be corroborated. This provides an additional safeguard to an accused

[58] *People (DPP) v Kavanagh* [2011] IECCA 102.
[59] *People (DPP) v Eccles, McPhillips & McShane* (1986) 3 Frewen 36.

person whose conviction would otherwise be solely based on evidence of a witness who may derive a benefit from the conviction of the accused. Second, the benefits accruing to the witness – such as immunity from prosecution and any financial benefits – should be disclosed to the accused prior to trial. This information can form the basis of cross-examination which will allow an accused to more effectively challenge the evidence of protected witnesses.

(d) Conclusion and Recommendations

The manner in which privilege is invoked in the Special Criminal Court makes it difficult for an accused person to effectively challenge such claims. It also gives rise to issues in relation to the trial Court viewing privileged material (as discussed in Part 3 of this submission) and a lack of reliability where protected witnesses are concerned. Cumulatively, ICCL submits that the admission of such evidence which cannot be effectively challenged is a breach of fair procedures and the right to a fair trial pursuant to Article 38.1 of the Constitution. Denying access to the evidence against an accused is also a clear interference with article 6(3) of the ECHR, which protects the right of an accused to have adequate time and facilities to prepare a defence and to examine witnesses and confines restrictions to this right to those which are "strictly necessary".

ICCL recommends:

(1) Until such time as the Special Criminal Court is abolished, juries should be introduced into the Special Criminal Court, this will allow the Court to assess claims of privilege without giving rise to any perception of bias or impartiality;
(2) In the alternative, evidence over which privilege is claimed should be assessed through the special advocates procedure;
(3) Where evidence is given by a protected witness, this evidence should not ground a conviction unless corroborated by another form of evidence;

(4) Where evidence is proposed to be given by a protected witness, the Director should disclose any benefits accruing to this witness to the accused in advance of the proceedings.

Part 6: Belief evidence

Section 3 of the 1972 Act allows a member of An Garda Síochána to give what is known as "belief evidence" that an accused person is a member of an unlawful organisation. Section 3(2) states:

"3(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.."*

Belief evidence from An Garda Síochána under section 3 is one of the most controversial aspects of the Special Criminal Court. Membership of an illegal organisation is an offence under the OASA; admitting belief evidence that an accused person is a member of such an organisation severely dilutes the function of the Court to decide on whether or not the accused is guilty of the commission of this offence. Further, the entire premise of belief evidence poses a number of legal issues.

First, it is often based on hearsay and other evidence which would otherwise be inadmissible in criminal proceedings. Second, given that belief evidence is usually based on information from unknown third parties, the ability of the accused to cross-examine is severely limited and undermined. Finally, belief evidence can be corroborated by circumstantial evidence, such as inferences, severely diluting the standard of proof required in serious criminal proceedings.

(a) The basis of belief evidence

Belief evidence is usually based on information provided by informants. There are no standards attaching to the type of information that can ground this belief, it is entirely a matter for the discretion of the relevant Garda. In *DPP v Connolly*[60], the belief evidence given in the trial was based on "*material or documentation which …had come into [The Chief Superintendents] possession following the retirement of a colleague*". In that case the Superintendent was permitted to give belief evidence in relation to information informants had provided to someone else. This means that there is no requirement on the Garda giving belief evidence to question and assess the direct sources of information grounding their belief. There is also no requirement for the Chief Superintendent to have direct knowledge of the witnesses or information on which their belief is based. This is a stark and concerning situation from the perspective of the accused.

Further, challenges to the evidential basis of belief evidence have been unsuccessful, with the Courts differentiating between the "source" of the belief and the belief itself. In *Donnelly*, O'Donnell J stated at para 51:

> *"For present purposes, it is important however, that it is the belief of the Chief Superintendent which is evidence, and not the material upon which that belief is based. Thus, the section does not involve the giving of hearsay evidence where the relevant evidence is that of a person who is not available in court for cross-examination. Nor is it akin to the giving of evidence by an anonymous witness."*[61]

[60] [2018] IECA 201.
[61] Ibid, [51].

ICCL considers that this distinction is tenuous at best. The basis of the belief evidence of the relevant Garda is inextricably linked to that belief. The distinction drawn between the belief and the source of the belief creates a fallacy of protection for the accused. If belief evidence is based on hearsay, it is of little relevance that the Garda is persuaded by that hearsay. The accused should be given an opportunity to meaningfully engage with this evidence and should not be convicted on the basis of evidence that would of itself be inadmissible in criminal proceedings. There is too much discretion afforded to the Gardaí to decide what evidence can form the basis of their "belief" for the purposes of section 3.

(b) The right to cross-examine

The right to cross-examine is derived from Art 38.1 of the Constitution and was confirmed by O'Dálaigh CJ in *Re Haughey*[62], where he stated "*an accused person has a right to cross-examine every witness for the prosecution, subject, in respect of any question asked, to the court's power of disallowance on the ground of irrelevancy.*"[63] Similarly, in *Donnelly v Ireland*[64], Costello P stated "*The constitutional right to fair procedures includes the right to cross-examine witnesses in a criminal trial.*"[65] This right is also protected by Article 6(3) of the ECHR which states:

"(3) Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which she understands and in detail, of the nature and cause of the accusation against her.
(b) to have adequate time and facilities for the preparation of her defence.

[62] [1971] IR 217.
[63] Ibid, 261.
[64] [1998] 1 IR 321.
[65] Ibid, 337.

(d) to examine or have examined witnesses against her and to obtain the attendance and examination of witnesses on her behalf under the same conditions as witnesses against her."

Despite multiple challenges to the limitations that belief evidence poses to effective cross-examination, section 3 has been upheld as constitutional by the Irish Courts.[66]

In *DPP v Donnelly & Ors*[67], the accused challenged his conviction for membership of an unlawful organisation where the evidence before the Court amounted to belief evidence based on information over which informant privilege was claimed, and inferences from silence, pursuant to s2 of the OASA 1939. The belief evidence of the Chief Superintendent was based on information provided to him by informants. The accused held that a conviction based on these two strands of evidence amounted to a breach of his fair trial rights pursuant to Article 6 of the ECHR.

The Court considered jurisprudence from the ECHR insofar as it relates to witnesses who are absent from proceedings and are therefore not available for cross-examination. In cases such as *Doorson v The Netherlands*[68] and *Al-Khawaja and Tahery v The United Kingdom*[69], the ECHR had come to formulate the "sole and decisive" test. In essence, the evidence of witnesses who are not available for cross-examination could be admissible in criminal trials as long as this was not the sole and decisive evidence against the accused.

In a somewhat disappointing passage in *Donnelly*, O'Donnell J stated:

[66] See *O'Leary v Attorney General* [1993] 1 I.R. 102 and *DPP v Martin Kelly* [2006] 3 I.R. 115.
[67] [2012] IECCA 78.
[68] (Case 20524/92) (1996) 22 E.H.R.R. 330.
[69] (Case 26766/05) (2011) 54 E.H.R.R. 23.

> *"This Court accepts that the statutory provisions in issue* ***are significant alterations to the common law*** *and together with the privilege which normally attaches to the identity of informers and indeed to methods of information gathering,* ***make more difficult the task of defending persons accused with the offence of membership of an unlawful organisation in particular****. However, a* ***fair trial whether pursuant to Article 38 of the Constitution or Article 6 of the Convention is not necessarily to be understood as a trial in which a defence is facilitated****. The question at all times is whether a trial under such conditions is fair."*[70]

The right to a fair trial is so fundamental to a democratic, adversarial, constitutional, common law system that a finding by the Supreme Court that this right does not encompass a right to facilitate a defence is of some concern. ICCL submits that this approach does not adequately protect the rights of the accused and does not meet the obligations of the State under Article 38.1 of the Constitution or Article 6 of the ECHR.

(c) The standard of proof

Although in *Binéad & Donohue*[71] the Court stated that it would not in practice convict on the basis of uncorroborated belief evidence alone, there remains the possibility that it could. There is no provision in the OASA which states that a conviction could not be secured on the basis of uncorroborated belief evidence. This was expressly recognised by the Court in *Kelly* and in *Donnelly*.[72] This seriously undermines the standard of proof in criminal proceedings and interferes with the right to a fair trial, in particular article 6(3) of the ECHR which protects the right of an accused to have

[70] Ibid, [37].
[71] Ibid.
[72] See comments of O'Donnell J in *Donnelly*, [45].

adequate time and facilities to prepare a defence and to examine witnesses against him or her.

Second, ICCL submits that this assurance does not go far enough to protect the rights of the accused where the evidence corroborating the belief evidence is circumstantial or based on inferences.[73] In *Donnelly*[74], referenced above, the accused was convicted on the basis of belief evidence and inferences from silence. In *Binéad & Donohue*[75], the accused were convicted on the basis of belief evidence, inferences from silence and inferences from conduct. In *Connolly*[76], the accused was convicted on the basis of belief evidence, inferences drawn from silence and circumstantial evidence (in that another man he had been in the company of that day had later been found with explosives in his possession). These cases evidence the low threshold which is required to be met to convict persons of very serious offences with very serious consequences for the individual.

(d) Conclusion and Recommendations

ICCL considers that the admission of belief evidence in the Special Criminal Court amounts to a severe breach of the right to a fair trial, both in terms of the inability to effectively cross-examine and the inequality of arms created. ICCL further considers that the lack of regulation regarding the type of information which can ground belief evidence, the wide discretion afforded to the Gardaí and the complete lack of judicial oversight leave the use of belief evidence open to potential abuse.

ICCL recommends:

[73] *DPP v Binéad & Donohue* [2007] 1 IR 374.
[74] I*bid.*
[75] *Ibid.*
[76] *Ibid.*

(1) Belief evidence should no longer be admissible as evidence of membership of an unlawful organisation;

(2) In the alternative, appropriate guidance and regulation – including a requirement that the Garda in question directly speak with the informants providing them with information – should be put in place to guide the manner in which this evidence is gathered;

(3) In the alternative, this evidence should be reviewed by an independent third party, which could be the judiciary if a jury is introduced to the Court or by way of the special advocates procedure.

Part 7: Inferences

There are a number of provisions in the OASA which allow for inferences to be drawn from silence or from a failure to account for certain circumstances. Inferences can be drawn from silence for the purposes of conviction of an offence of membership of an illegal organisation, as provided for by section 2 of the OAS(A)A 1998. Section 21 of the OASA 1939 allows adverse inferences to be drawn where an accused person fails to answer material questions which relate to the investigation of an offence under the Act. Section 72A of the Criminal Justice Act 2006 allows adverse inferences to be drawn where an accused person fails to answer material questions which relate to the investigation of an offence under Part 7 of the Criminal Justice Act 2006. Sections 18 and 19 of the Criminal Justice Act 1984 allow for adverse inferences to be drawn where an accused person fails to account for objects, substances or marks on their person or clothing or fails to account for their presence at a particular place.

The right to silence, or privilege against self-incrimination, is a constitutional right, first recognised by the Supreme Court as forming part of Article 38.1 in *Heaney v Ireland*[77]. It has also been recognised by the ECtHR as forming part of the right to a fair trial under Article 6 of the ECHR.[78] As recognised by McGuinness J in Gilligan v CAB[79], the exercise of the right to silence by an accused should not be read as indicative of guilt, "*There have been sufficient miscarriages of justice in the history of crime in this and other jurisdictions to indicate that a belief that 'the innocent have nothing to hide' is not necessarily the whole answer.*"[80]

[77] [1996] 1 IR 580.
[78] *Murray v United Kingdom* (1996) 22 EHRR 29.
[79] [1998] 3 IR 185.
[80] Ibid, 230.

Unfortunately, as noted in Part 6 above, the SCC has been more than willing to draw inferences and to use these inferences alongside other circumstantial evidence to convict accused persons. This willingness to draw inferences, with often strong approval from the Court, is concerning. In *Binéad & Donohue*, the Court referred to the "*complete and utter failure*"[81] of the accused to answer material questions and stated that this failure meant that inferences were correctly drawn. This seems to imply that where an accused person cooperates in some manner with the Gardaí that perhaps inferences will not be drawn from a failure to answer other questions. ICCL submits that this is an unfair and inappropriate incursion into the right to silence.

Further, the Courts have justified the drawing of inferences on the basis that the inferences must logically flow from the silence of the accused. For example, in *Donnelly* O'Donnell J stated:

> *"An inference of guilt is not an inevitable consequence of a failure to answer. In some cases one inference may be that the accused did not understand either the import of the question or the consequences of a failure. In another situation, a refusal to answer questions may be indicative of a desire to avoid disclosing matters shameful and reprehensible, though perhaps not illegal. In still other cases, one inference might be that it is a desire to avoid disclosing a matter which is illegal, albeit not the illegality with which the person is being taxed. A further possible inference is that a suspect has already given a comprehensive account and does not see any merit in repetition."*[82]

The difficulty with this reasoning is that it makes it difficult for the accused to establish that the above examples are the appropriate inferences to draw without the accused

[81] Ibid, 395.
[82] Ibid, [70].

having to give evidence (with the exception of the final example). An accused person should not be compelled to give evidence in order to disprove an inference being drawn by the Court. This also shifts the burden of proof from the prosecution onto the accused, so that she must *disprove* the inference being drawn. This is contrary to both fair procedures and the right to a fair trial.

It is also unclear that this approach – of assessing all potential inferences from silence – is taken by the Court. In *DPP v Nolan*[83], the accused had answered all questions during the course of his interviews with Gardaí and had given an account for his movements as requested. However, during subsequent interviews, the Gardaí invoked s.2 and the accused chose not to repeat the answers previously given, he remained silent and the Court found that it was entitled to draw the inference that he was a member of a legal organisation as a result. There was no consideration by the Court in *Nolan* that the accused may have been of the view that he had already given an account and therefore did not see any "merit" in giving any further explanation. The Court was willing to draw adverse inferences rather than give the benefit of the doubt to the accused.

Finally, as noted above, inferences can be used to corroborate belief evidence.[84] Although in cases such as *Donnelly*[85], the Court stated that this was a safeguard which meant that a person could not be convicted on the basis of inferences alone, ICCL submits that the use of belief evidence as corroboration of inferences severely dilutes the standard of proof required in criminal trials. Far from being a safeguard, ICCL submits that these two "strands" of evidence amount to little more than circumstantial evidence which should be viewed as too weak to ground a conviction.

[83] [2015] IECA 165.
[84] *DPP v Binéad & Donohue* [2007] 1 IR 374.
[85] Ibid.

Although it is acknowledged that there are some safeguards in place which protect an accused when inference provisions are invoked,[86] ICCL submits that the inference provisions which can be invoked against an accused person are too wide-ranging and interfere with the accused's constitutional right to silence and right to a fair trial.

ICCL recommends:

(1) The abolition of inference drawing provisions from the OASA;
(2) In the alternative, that inferences should no longer be used as "corroboration" of other circumstantial evidence;
(3) And that where inferences are to be drawn, they should not be capable of grounding a conviction without the presence of "real evidence".

[86] Such as the necessity under the legislation to warn the accused that inferences can be drawn from their silence or the requirement that the accused have access to legal advice (*DPP v Fitzpatrick* [2013] 3 IR 656).

Conclusion

Many of the legal issues identified in this submission are, in and of themselves, sufficient to severely impinge upon the rights of accused persons. Taken cumulatively however, the practice and procedure in the Special Criminal Court, grounded on the provisions of the OASA, amount to an egregious violation of the rights of the accused and an affront to the democratic common law system which has otherwise sought to protect the rights of the accused since the foundation of the State. What were once emergency courts invoked in response to a State in turmoil are now used as a matter of course. As discussed in this submission, the Special Criminal Court is, and has, been used for everything from sentencing to the prosecution of tax offences. The conviction rate in the Court is disproportionately higher than other Courts. This is simply not how a democratic State with respect for the rule of law should operate.

ICCL recognises the difficult balance to be struck between protecting the rights of the accused and protecting the public from serious crime. We do not wish to underplay the seriousness of these offences, nor the experiences of the victims of these crimes. ICCL also recognises the intensely political nature of the debate surrounding the OASA and the Special Criminal Court. ICCL would express concern that the Special Criminal Court may be used as a political tool at the expense, and to the detriment, of accused persons. Our ordinary criminal courts are robust and more than capable of dealing with serious crime. This State has always placed a high value on the vindication of the rights of all citizens. This review is an opportunity for Government to close a controversial chapter in our State's history and to demonstrate its dedication to the protection of the rights of accused persons. ICCL strongly urges that this opportunity is not wasted.

Recommendations

ICCL recommends:

(1) That Government abolish the Special Criminal Court;

(2) In the alternative, the introduction of protected juries into the Special Criminal Court;

(3) Where the DPP wishes to have a matter heard by a protected jury, an application grounded on evidence should be made to the Court seeking to empanel a protected jury. This application can be held in camera where it is found to be in the interests of justice to do so;

(4) In the alternative to the introduction of juries into the Court, the introduction of a special advocates procedure to deal with issues of privilege and disclosure;

(5) In the alternative, the introduction of a pre-trial hearing system which will ensure that issues of privilege and disclosure are fully aired before a separate panel of the Special Criminal Court prior to the trial of the accused;

(6) That where the Director seeks to send matters forward to the Special Criminal Court, she should be required to make an application to the Court evidencing the reasons for her view that there is a sufficient risk of jury tampering on affidavit;

(7) Where the Director claims that, for reasons of national security, the material grounding her decision to send the matter forward should not be discussed in open Court, the Director can make an application to have such an application held in camera and / or can request that the Court review the material grounding their application in private;

(8) Where evidence is given by a protected witness, this evidence should not ground a conviction unless corroborated by another form of evidence;

(9) Where evidence is proposed to be given by a protected witness, the Director should disclose any benefits accruing to this witness to the accused in advance of the proceedings;

(10) Belief evidence should not be admissible as evidence of membership of an unlawful organisation;

(11) In the alternative, appropriate guidance and regulation – including a requirement that the Garda in question directly speak with the informants providing them information – should be put in place to guide the manner in which this evidence is gathered;

(12) In the alternative, this evidence should be reviewed by an independent third party, being the judiciary if a jury is introduced into the Court or by way of the special advocates procedure;

(13) The abolition of inference drawing provisions from the OASA;

(14) In the alternative, that inferences should no longer be used as "corroboration" of other circumstantial evidence; and

(15) That where inferences are to be drawn, they should not be capable of grounding a conviction without the presence of "real evidence".

About ICCL

The Irish Council for Civil Liberties (ICCL) is Ireland's oldest independent human rights body. It has been at the forefront of every major rights advance in Irish society for over 40 years. ICCL helped legalise homosexuality, divorce, and contraception. We drove police reform, defending suspects' rights during dark times. In recent years, we led successful campaigns for marriage equality and reproductive rights.

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Civil Liberties