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

17 May 2021

Submission to:
Independent Review Group to Examine the Offences Against the State Acts –
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https://www.oasareview.ie/public-consultation/

1. This submission is primarily based on a chapter entitled 'The Proscription of Organisations in the Republic of Ireland', co-written by Jamie McLoughlin, a PhD student at UCD Sutherland School of Law who researches in the areas of comparative and international human rights law and Irish constitutional law, and Professor Emeritus Clive Walker of the University of Leeds (see below). For the full text see
    - Mark Coen (ed) *The Offences Against the State Act 1939 at 80: A Model Counter-Terrorism Act?* (Hart, Oxford, 2021).

2. In the background to the chapter is the research of Professor Emeritus Clive Walker which has focused for many decades on terrorism and counter-terrorism, as well as broader issues in criminal justice, miscarriages of justice, and human rights. Professor Walker holds the title of Professor Emeritus at the University of Leeds. His appointments also include the role of Senior Special Advisor to the Independent Reviewer of Terrorism Legislation in the United Kingdom. Key texts:
    - Walker, C.P., *The Anti-Terrorism Legislation* (Third edition, Oxford University Press, Oxford, 2014)
    - Lennon, G. and Walker, C. (eds.), *Routledge Handbook of Law and Terrorism* (Routledge, Abingdon, 2015) chapter 28 (with Fergal Davis) 'Manifestations of extremism'
    - Walker, C., '"They haven't gone away you know." The Persistence of Proscription and the problems of deproscription' (2018) 30 *Terrorism & Political Violence* 236-258
    - Almutawa, A. and Walker, C., 'Proscription by proxy: the banning of foreign groups' [2021] *Public Law* 377-398

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Key Recommendations for Reform of the Offences Against the State Acts

1 The mode of proscription by definition under section 18 lacks in legal certainty compared to proscription by declaration under section 19. Proscription by definition carries with it the potential for a chilling effect on the activities of protest groups. Proscription by explicit suppression order ensures greater certainty and can be the occasion for triggering necessary oversight mechanisms. It does not create any dangerous gaps whereby a suppressed organisation could simply 'reinvent' itself, since this risk is much reduced by the doctrine in *DPP v Campbell*. However, if further confidence is required, it could be supplied by the addition of a simple extra power for the executive to make 'name change' orders, as occurs under the (UK) Terrorism Act 2006, section 22.

2 If proscription by definition is retained, then some aspects of this pathway to proscription are disproportionate. Thus, under paragraph (f), advocacy in favour of the non-payment of taxes could attach to legitimate social and political movements, such as protests against budgetary austerity. The Committee to Review the Offences Against the State Acts 1939 – 1998 (the 'Hederman Report') also expressed disquiet about the suppression of legitimate political expression and trade union activity. The Committee recommended the abolition of paragraph (f) and also the replacement of paragraphs (d) and (e) with a new paragraph requiring that the purpose of the impugned activity be designed to undermine the authority of the state by way of promoting, encouraging or advocating any criminal offence or the obstruction of, or interference with, the administration or enforcement of the law. These recommendations should be implemented but only to the extent that it can be proven that the group relies upon, or advocates, violent crimes or substantial obstruction of, or interference with, the administration or enforcement of the law.

3 As for proscription involving direct declaration via a suppression order under section 19, the Hederman Committee considered that the section 19 power should rest with the executive (but subject to appeal to the High Court) since the government is best placed to make the necessary security and intelligence assessments. In our view, the least safeguard should be an appeal (on merits) to a court. However, given the limited number of orders combined with their long-lasting effects, a better option would be to allow the executive to issue a provisional suppression order which must then be confirmed on the merits by a court within a set period (say, six months). Such a model has been adopted for more modern executive-based counter-terrorism orders, such as under the (UK) Terrorism

Prevention and Investigation Act 2011. This mechanism of automatic referral would replace the 'declaration of legality' (the appeal mechanism against suppression orders afforded by section 20) which is inadequate and unfair, especially because of its short time-frame, and the burden and standard of proof.

4 Proscription under either pathway should be subject to regular review. The periodic review process should be both executive-based and judicial. Thus, both branches should keep orders under review at regular intervals with the onus being against renewal. We also encourage the legislature to play a part in this process by reviewing draft renewal orders. This model of review exists in Australia Criminal Code 1995 (Division 102) and Canada (Criminal Code, section 83.05), though the period set is two years which may be insufficient to evidence a cessation of violence or decommissioning of weapons. Therefore, it is suggested that once every three years would be a suitable time-frame.

5 Moving to the consequences of proscription, when a person is prosecuted for membership of an unlawful organisation, the provision under section 19(4) that a suppression order is 'conclusive evidence' of unlawfulness should be modified. It should be made clear, contrary to the decision in in *Sloan v Special Criminal Court*, that the impugned activities of that defendant were not of a harmful nature.

6 Another reform required to the offence of membership of an unlawful organisation is to define more extensively what is meant by 'membership'. The emphasis should be on active rather than passive modes of engagement, and the active engagement should relate to violent crimes or preparations, logistics or action in pursuit of campaigns against law enforcement and so on.

7 Next, the 'key provision' which enables many prosecutions for membership is section 3(2) of the Offences Against the State (Amendment) Act 1972, by which a Garda Síochána officer not below the rank of Chief Superintendent can offer opinion evidence of membership. This measure insufficiently complies with the principles of open justice or due process, since not all the data on which the opinion is based will be disclosed in court. Therefore, if section 3(2) is to be retained, it should be required that before an opinion is introduced, the relevant officer should be required to disclose all the data on which the opinion is based to the trial judge and to a special advocate who can make representations to the judge based on the interests of the defendant.

8 The offence in section 8 of the Offences Against the State (Amendment) Act 1998, involving the unlawful collection or possession of information which is of such a nature that it is likely to be useful in the commission by members of an unlawful organisation of

serious offences, is too widely formulated. Though the Hederman Committee called for repeal, there is no evidence of overuse and so it would be sufficient to reformulate the offence to the knowing collection for that purpose of information likely to be useful to the commission by members of any unlawful organisation of serious offences generally or any particular kind of serious offence.

9 As for non-criminal legal consequences, section 22, which provides for the forfeiture to the Minister for Justice of all property of the suppressed organisation, lacks the procedures for challenge under the Criminal Justice (Terrorist Offences) Act 2005. It seems fair to abolish section 22, as suggested by the Hederman Committee.

10 Another non-criminal sanction is section 25 of the 1939 Act, as amended by section 4 of the Criminal Law Act 1976, a Garda Chief Superintendent may order the closure of a building for 12 months (extendable to three years in total) if satisfied of its use, directly or indirectly, for the purposes of an unlawful organisation. The invocation of this power is very rare, with just one recorded case, and the Hederman Committee favoured its repeal. That remains the best option.

11 Aside from this technical list, the gap between ‘a perpetual state of emergency’ and sharply directed, fully accountable counter terrorism laws is too broad and should not be allowed to persist for another 80 years.

Commentary

1 Introduction

1.1 The power to proscribe 'tumultuous', 'dangerous', 'unlawful', or 'terrorist' (in contemporary parlance) organisations has existed almost continuously in Ireland since the mid-eighteenth century. Today, the Offences Against the State Acts (OASA) (as amended) are the principal legal instruments behind the proscription (or 'suppression' in the language of Part III of the 1939 Act) of 'unlawful organisations' in the Republic of Ireland. However, the 1939 Act has been supplemented by the Criminal Justice (Terrorist Offences) Act 2005 (as amended), Part II of which tackles the suppression of 'terrorist groups'. This duality reflects the terminologies and attitudes of different eras. While the chief concern of the 1939 Act was domestic subversion carried out by the IRA, a group steeped in Irish history which became viewed as deviant but towards which a 'policy of patience' was applied decade after decade, the 2005 Act, by contrast, adopted after the 9/11 attacks, responded to international groups, like Al-Qaida, which are depicted as responsible for alien and 'barbarous acts of terrorism'. The two sources incorporate different modes of empowerment and selection, which will now be examined.

2 Proscription by Definition

2.1 Part III of the 1939 Act addresses 'Unlawful Organisations' by a definitional approach. Under section 2, 'the word "organisation" includes associations, societies, and other organisations or combinations of persons of whatsoever nature or kind, whether known or not known by a distinctive name'. This formula ensures breadth of coverage by avoiding explicit reference to particular formats (such as associations) or to particular causes (whether political, religious or cultural). But a 'lone wolf' or even a coincidence of fellow travellers are ruled out. 'In order to regulate and control in the public interest the exercise of the constitutional right of citizens to form associations', an organisation can be condemned as 'unlawful' under section 18 whenever it:

> '(a) engages in, promotes, encourages, or advocates the commission of treason or any activity of a treasonable nature, or
>
> (b) advocates, encourages, or attempts the procuring by force, violence, or other unconstitutional means of an alteration of the Constitution, or
>
> (c) raises or maintains or attempts to raise or maintain a military or armed force in contravention of the Constitution or without constitutional authority, or

(d) engages in, promotes, encourages, or advocates the commission of any criminal offence or the obstruction of or interference with the administration of justice or the enforcement of the law, or

(e) engages in, promotes, encourages, or advocates the attainment of any particular object, lawful or unlawful, by violent, criminal, or other unlawful means, or

(f) promotes, encourages, or advocates the non-payment of moneys payable to the Central Fund or any other public fund or the non-payment of local taxation.'

2.2 It should be emphasised here that the offence of membership of an unlawful organisation under section 21 (described later) can apply to membership of terrorism organisations which meet any of the foregoing statutory criteria. It is not necessary for the further step of the issuance of a suppression order under section 19 (the second means of proscription which is considered in detail below under the heading of 'proscription by declaration'). This bifurcated approach to proscription contrasts with the position prior to 1939, whereby proscription by declaration was always necessary to trigger the membership offence.

2.3 Returning to the proscription by definition approach, is the extensive list in section 18, consistent with Article 40.6.1(iii) of the Constitution which guarantees liberty for the right to form associations? Presaging Article 11 of the European Convention on Human Rights, Article 40.6.1(iii) recognises that freedom of association is not absolute but is subject to 'public order and morality'. It has been argued that the prefatory language of section 18 'echoes, and thus claims authority from, Article 40.6.1º.(iii), and is the foundation on which much of the law against subversion rests …'. Bolstering further the constitutionality of section 18 is the dictum of Walsh J in *Aughey v Ireland* [1989] ILRM 87, whereby considerations of 'public order and morality', could justify a total ban on an organisation, though one might ask whether a total ban would be proportionate if only a minor amount of organisational effort is devoted to section 18 objectives. Nonetheless, some aspects are arguably excessive. Thus, under paragraph (f), advocacy in favour of the non-payment of taxes could attach to various social and political movements which emerged during budgetary austerity in Ireland (2008 – 2015) and which called for a boycott of the payment of water charges and local property taxes. The Committee to Review the Offences Against the State Acts 1939 – 1998 (the 'Hederman Report') also expressed disquiet about the suppression of legitimate political expression and trade union activity. The Committee recommended the

abolition of paragraph (f) and also the replacement of paragraphs (d) and (e) with a new paragraph requiring that the purpose of the impugned activity be designed to undermine the authority of the state by way of promoting, encouraging or advocating any criminal offence or the obstruction of, or interference with, the administration or enforcement of the law. These recommendations remain unimplemented.

2.4 Another criticism of the Hederman Report went in the opposite direction. The Committee feared that foreign terrorist organisations (such as Al-Qaida) would not fall within the domestically oriented milieu of section 18 since they have no interest in localised constitutional upheaval, and so a new power to proscribe should be added. This idea was powerfully reinforced by the EU's Framework Decision on Combating Terrorism which required Member States to ensure that a range of 'terrorist offences' are available in domestic law. In response, Part II of the Criminal Justice (Terrorist Offences) Act 2005 deals with the suppression of terrorist groups and terrorist offences, thereby amending the 1939 Act. Pursuant to section 5, the concept of 'unlawful organisation' in section 18 is extended so as to encompass 'terrorist groups':

> (1) A terrorist group that engages in, promotes, encourages or advocates the commission, in or outside the State, of a terrorist activity is an unlawful organisation within the meaning and for the purposes of the Offences against the State Acts 1939 to 1998 and section 3 of the Criminal Law Act 1976. 46
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> (2) For the purposes of this Act, the Offences against the State Acts 1939 to 1998 and section 3 of the Criminal Law Act 1976 apply with any necessary modifications and have effect in relation to a terrorist group referred to in subsection (1) as if that group were an organisation referred to in section 18 of the Act of 1939.

2.5 The 2005 Act embraces the definition of 'terrorist group' contained in the EU's Framework Decision which is replicated in Schedule 1 to the Act. Thus, a terrorist group is defined as:

> '… a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. 'Structured group' shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defi ned roles for its members, continuity of its membership or a developed structure.'

2.6 Furthermore, section 5(4) establishes that a terrorist group will be an 'unlawful organisation' provided it meets the definition in section 5(1), irrespective of whether it is based within Ireland. In effect, the 2005 Act thereby accords extraterritorial reach to the 1939 Act. 48 This is followed up by related extraterritorial offences in section 6, including membership of an unlawful organisation, as described below.

2.7 The 'proscription by definition' approach embodies flexibility and so is arguably more efficient than the 'proscription by order' approach (discussed next). The point might be illustrated by the pending prosecution of Lisa Smith. Smith, an Irish citizen and former member of the Irish Defence Forces, is alleged to have travelled from Ireland to Syria in order to join the Islamic State ('ISIS') and was repatriated with governmental aid in 2019. She is now awaiting trial for the offence of membership of an unlawful organisation contrary to section 21 of the 1939 Act as applied by the 2005 Act. 'ISIS' is treated as an 'unlawful organisation' by definition, without the need for any specific suppression order (under section 19 of the 1939 Act). This flexibility can be helpful in the context of the range of armed groups in Iraq and Syria which have operated, with considerable fluidity in membership and formations. To pin down allegiance to one group has drawbacks, though it might be argued that ISIS has been the leading non-state armed actor and the UN Security Council has displayed no compunction in singling it out for international and state attention.

3 Proscription By Declaration

3.1 The second pathway to proscription involves direct declaration via a suppression order under section 19 of the 1939 Act. Section 19(1) empowers the government, by order, to declare unlawful any organisation based on its 'opinion' of unlawfulness and 'the public interest'. Section 19(2) allows the government to revoke or amend a suppression order whenever 'they so think proper'. Extensive subjectively formulated discretion is thus placed in the hands of the executive. A suppression order renders an organisation unlawful without proof before a court of any activities listed in section 18. Under section 19(4), a suppression order is 'conclusive evidence' that the organisation is unlawful. The order results in its property being forfeit to the state under section 22. In addition, under section 21, proof of membership of a section 19 unlawful organisation is short-circuited; evidence is not required that the organisation is unlawful by design or activity, only that an order has been made and has been published in Iris Oifigiúil (Official Gazette) under section 19(4). However, a

suppression order against an organisation is not necessary to prosecute for the offence of membership (described below). This point has not been judicially confirmed but was 'clear' to the Hederman Committee. Furthermore, in debates on the Criminal Law Act 1976, the then Minister for Justice stated that a suppression order was unnecessary for conviction under section 18; in the absence of a suppression order, the question of whether or not an organisation was unlawful within the meaning of section 18 was to be established through prosecution evidence. The Hederman Committee considered that the section 19 power should rest with the executive (but subject to appeal to the High Court) since the government is best placed to make the necessary security and intelligence assessments.

3.2 Just two suppression orders have been made under section 19. One was made in 1939 against the 'Irish Republican Army'; the other was made in 1983 against the 'Irish National Liberation Army'. There has also been no instance of de-proscription. The dearth of suppression orders under section 19 reflects several factors. One is the fact that a suppression order is not a necessary pre-requisite for prosecution for the offence of membership and that the alternative pathway of proscription by definition can be followed. Thus, a stark contrast can be drawn with the position under the UK's Terrorism Act 2000, Part II, whereby 14 organisations have been subject to proscription orders in Northern Ireland (in place since the commencement of the legislation) in addition to 75 international terrorist organisations (plus four such groups now de-proscribed). Crucially, UK law does not allow for proscription by definition. A second reason is that international terrorism has largely bypassed the Irish Republic which, according to police assessments, is 'not in the same league' as the UK, France or Belgium. The same point even applies, though with much less force, to Loyalist terrorist groups which have sporadically been active south of the border. Consequently, it is untrue that 'a wide variety of subversive organisations on both sides of the Northern Ireland conflict have been the subject of suppression orders' as was claimed by a former DPP in Ireland. A third reason is that the Irish courts have adopted an interpretation whereby the 'IRA' and its various mutations, dissident or otherwise, are treated as being the same organisation and therefore within the scope of the 1939 suppression order. This approach was challenged in *DPP v Campbell* [2005] IECCA 27. The accused had been convicted of membership based on involvement in the 'Real IRA', a Republican faction which rejected the ongoing 'Peace Process'. The 'Real IRA' was founded in 1997 and so could not have been in the mind of the Minister at the time of the suppression order made in 1939. However, McGuiness J, in the Court of Criminal Appeal, held that subsequently added labels like

'Real', 'Continuity', 'Official' and 'Provisional' did not necessarily exclude successor organisations from the ambit of the original suppression order so long as those various off-shoots were 'on all-fours' in terms of philosophy and aims with the organisation identified by the 1939 Order. A similar interpretation has been adopted by the UK courts (also in relation to the Real IRA), though misgivings exist in Northern Ireland about whether the group, Arm na Poblachta, whose targets include other Republican factions ought to be explicitly and separately proscribed.

3.3 Overall, these three factors (the ability to prosecute the membership offence without prior suppression, the relative absence of international terrorism in Ireland, and apparent judicial willingness to apply existing suppression orders to off-shoot organisations) make it unlikely that suppression orders will proliferate. However, two possibilities might alter the situation. One would be the shock of attacks from international sources, though returning foreign terrorist fighters from Iraq and Syria have not yet perpetrated any major outrage in Ireland. Second would be a decisive change of political policy at home whereby it became important to signal for symbolic purposes Irish society's terminal disdain for paramilitarism, perhaps associated with the need for political assurance in a new arrangement. However, the policy in Northern Ireland in those circumstances since 1998, as shown by the absence of proscription or de-proscription orders after 2001, has been slanted towards 'letting sleeping dogs lie' in the sense that there has been no changes to the proscription list since 1998, even though most listed groups have solemnly renounced violence.

3.4 A 'declaration of legality' is the appeal mechanism against suppression orders afforded by section 20(1) of the 1939 Act:

> 'Any person (in this section referred to as the applicant) who claims to be a member of an organisation in respect of which a suppression order has been made may, at any time within thirty days after the publication of such order in the Iris Oifigiúil, apply to the High Court in a summary manner on notice to the [Director of Public Prosecutions] for a declaration (in this Act referred to as a declaration of legality) that such organisation is not an unlawful organisation.'

If, under section 20(2), evidence presented by the applicant or the state leaves the High Court 'satisfied' that the organisation is not an unlawful organisation, then 'it shall be lawful for the High Court to make a declaration of legality'. If issued, the suppression order is rendered null

and void under section 20(4). Amongst the consequences, section 23 requires the release from custody of persons detained on a charge of membership of a previously unlawful organisation and provides for the return of forfeited property.

3.5 The odds are stacked against the applicant seeking a declaration of legality. Some discouragement is applied by section 20(3) which prevents the High Court from making a declaration of legality unless the applicant gives evidence in support of the application and submits to cross-examination by counsel for the state. Thus, someone must have considerable courage (and financial wherewithal) to become the public champion of an unlawful organisation, albeit that subsection (6) prohibits the use of evidence tendered by an applicant for a declaration of legality in any subsequent criminal proceedings relating to the offence of membership. Relatedly, section 21(4) prevents persons from being brought to trial in respect of a charge of membership while they have an unresolved application for a declaration of legality in relation to the same organisation. However, they may still be detained while this appeal process plays out, and criminal proceedings relating to non-membership offences may still draw on tendered evidence.

3.6 This appeal mechanism is a solitary device, since, unlike in the UK, there is no form of regular independent review under the 1939 Act. As for its fairness and effectiveness, no application for a declaration of legality has ever been reported. Of course, only two narrow opportunities to challenge have ever arisen, namely, within 30 days of the publication of either suppression order made to date in 1939 or 1983. The fleeting timeframe and meagre oversight mechanisms have been criticised by Hogan and Walker:

> 'It is important that there should be regular, objective and public determination that the organisation has been involved in subversive crime. While the proscription of organisations such as the IRA and the INLA is entirely justified in view of the commitment of such organisations to paramilitary crime, similar powers have been abused in the past. Section 20, by vesting the High Court with power to review suppression orders, does provide some safeguards, but it is regrettable that s 20(1) puts a time limit of thirty days for the making of such an application from the date of publication in Iris Oifigiúil. This time limit precludes judicial review in circumstances where the nature of the organisation has changed and has lost its paramilitary character, but where the original suppression order has not been revoked.'

3.7 The short window of opportunity might even be unconstitutional, the view taken about a two-month time limit to appeal a planning decision in *Brady v Donegal County Council* HC, 6 November 1987. Other procedural shortcomings identified by the Hederman Committee relate to the absence of any advance notice of a suppression order or chance to make representation before it is issued, though the Committee ultimately concluded that it would be inappropriate, given the nature of the organisations involved, to require the state to give advance notice. Instead, it concluded that due process concerns could be addressed by an amendment to section 20 which stipulated that a suppression order would not take effect until the impugned organisation had had a chance to appeal.

3.8 Another problem with section 20 is the burden and standard of proof. According to the Hederman Committee, 'the onus remains on the applicant to establish the legality of the organisation' and the grounds for overturning an order are confined 'to the judicial review grounds of reasonableness, irrationality or error of law' rather than a full appeal on the facts. The latter assertion may be disputed; Hogan and Walker argue that when a court is given a statutory power of appeal, it must be presumed to have a wider jurisdiction than when exercising its inherent jurisdiction of judicial review and that therefore the section would seem to allow for an appeal on the merits. The safeguards for freedom of association could be further augmented by shifting the onus of proof under section 20, perhaps after the issue has been raised, from the applicant onto the government to establish that the organisation subject to the suppression order under challenge is unlawful. At the very least, 'intense and detailed scrutiny' should be applied to the demand to suppress. The judges and legislators should also assert that regular review is required by administrative law and fairness.

3.9 As for more general arguments of fairness, the constitutionality of section 19(4) of the OASA was tested in *Sloan v Special Criminal Court* [1993] 3 IR 528. The accused, who had been charged with membership of an unlawful organisation, argued that, by providing under section 19(4) that a suppression order is 'conclusive evidence' of unlawfulness, the Oireachtas had invaded the judicial domain under Article 34 of the Constitution and improperly removed a justiciable controversy from the purview of the courts. Costello J disagreed:

> 'It seems to me that the Oireachtas, by the Act of 1939, established procedures by which an organisation could be declared an illegal organisation. Instead of declaring that membership of named organisations would be illegal, the Oireachtas provided that

membership of an illegal organisation which had been designated by the Government would be illegal. This provision of the Act is not, in my judgment, an impermissible infringement of the judicial power. If an order is made under the section, then the justiciable dispute which may be before the court is whether an accused is a member of an illegal organisation and not whether the organisation itself is illegal.'

3.10 This decision has been questioned by the Hederman Committee and by leading constitutional commentators. Their argument is that it is at odds with the judgment of the Supreme Court in *Maher v Attorney General* [1973] IR 140 wherein section 49(1) of the Road Traffic Act 1961, which stipulated that a certain certificate should be 'conclusive' evidence of the blood-alcohol level of a person for the purposes of prosecution for the offence of drink-driving, was found to be unconstitutional. The *Sloan* interpretation precludes arguments that the activities of the defendant were not of a harmful nature and perhaps also that the organisation concerned cannot realistically be characterised as unlawful. As such, objections might arise not only under Article 34 of the Constitution but also under Article 6 of the European Convention on Human Rights (not considered at all in *Sloan*) since section 19 imposes an absolute finding rather than an evidential burden. In this way, the suppression order should be treated as proffering no more than '*prima facie*' evidence of unlawfulness, but this more balanced approach was rejected in debates on the 1939 Act.

3.11 Despite shortcomings within the section 19 pathway of proscription by declaration, this mode offers better legal certainty compared to proscription by definition. A declaration is a public act which can be observed and disputed in equal measure. By contrast, proscription by definition carries with it the potential for a chilling effect, on the activities of protest groups such as the opponents of economic austerity (as discussed previously in relation to section 18(f)) and Extinction Rebellion (whose UK adherents have been depicted as extremists who could be candidates for terrorism preventive responses). Nevertheless, a condemnatory declaration must be fair, which means it must be carefully scrutinised at the time of issuance, and its continuance should be periodically reviewed on the basis of a presumption in favour of expiration, regardless of whether any challenger steps forward. Those features are currently lacking.

4 Consequences of Proscription

4.1 A litany of 'Offences against the State' abounds in Part II of the 1939 Act. The 'usurpation of functions of government' (section 6), the possession of 'treasonable, seditious, or incriminating documents' (section 12), unauthorised military exercises (section 15), the formation of secret societies (section 16) and unlawful oaths (section 17) could readily form part of the activities of an unlawful organisation, though the offences are general in nature and are not confined to that context. Therefore, for reasons of space, this chapter focuses on the offence of membership of an unlawful organisation and closely related offences, as well as other sanctions within Part III of the 1939 Act.

4.2 The most prolific criminal offences relevant to proscription are those relating to membership of, and/or assisting, and/or directing, an unlawful organisation. The Hederman Committee considered it 'imprudent' to confine the offence of membership by making it consequent upon a suppression order; in its opinion, a dangerous 'lacuna' might arise whereby a suppressed organisation could simply 'reinvent' itself, thus making subsequent prosecutions for membership impossible without a *de novo* suppression order. However, this risk is much reduced by the doctrine in *DPP v Campbell* [2005] IECCA 27.

4.3 Most prominent of the offences in the 1939 Act is section 21(1) which creates the offence of 'membership': 'It shall not be lawful for any person to be a member of an unlawful organisation.' What constitutes 'membership' is not defined, but prosecution is aided by several evidential devices. One is that, under section 24, if a person is found in possession, or has on their property, an 'incriminating document', then this shall be evidence until the contrary is proved that such person is a member of the unlawful organisation to which the document relates. Second, the Offences Against the State (Amendment) Act 1972, section 3(1) (as amended by section 4 of the Offences Against the State (Amendment) Act 1998), allows for statements or conduct (which might include an omission to issue denials) 'implying or leading to a reasonable inference' of membership to be admissible in evidence. Third, even more controversial but still a frequently invoked 'key provision', by section 3(2), a Garda Síochána officer not below the rank of Chief Superintendent can offer opinion evidence of membership. Fourth, adverse inferences may be drawn from silence in response to police questioning in the circumstances specified by section 2 of the Offences Against the State (Amendment) Act 1998. By contrast, section 21(3) affords a defence for a person to show that either they did not know the organisation in question was an unlawful organisation, or that as soon as reasonably possible after they became aware of the true nature or after the

making of a suppression order, they ceased their membership of, and dissociated from attachment. Given the venerable and prominent nature of the two suppression orders against the IRA and INLA, section 21(3) will realistically most relate to international groups proscribed by definition, save that the operation of the interpretation in *DPP v Campbell* might catch out some Dissident Republicans.

4.4 The core membership offence in section 21 is directly complemented by four further offences. First, recruiting, inciting, or inviting another person to join, or to take part in, support or assist an unlawful organisation is an offence under section 3 of the Criminal Law Act 1976. Second, directing at any level the activities of an organisation which is subject to a suppression order under section 19 is an offence under section 6 of the Offences Against the State (Amendment) Act 1998. It is noteworthy that, unlike the membership offence under section, a suppression order is a condition precedent for this offence. This qualification reflects the aetiology of the directing offence. Thus, the offence was aimed against the 'Godfathers' of the Republican paramilitary groups, such as the prime suspects of the Omagh bombing which had prompted the legislation, namely, the Real IRA, which already conveniently fell within the terms of the IRA 1939 suppression order. Reflecting the high-ranking targets, section 6 carries the penalty of imprisonment for life compared to up to eight years' imprisonment (raised in 1976) from just two years to seven years, and then raised again by section 48 of the 2005 Act) for section 21.

4.5 Third, also under the 1998 Act, section 8 creates the offence of the unlawful collection or possession of information which is of such a nature that it is likely to be useful in the commission by members of an unlawful organisation of serious offences. This formula bears some resemblance to the UK Terrorism Act 2000, section 58, but that offence is wider since it is not confined to the work of organisations nor to serious offences of terrorism. Despite these limits, a majority of the Hederman Committee called for repeal. By comparison, the Hederman Committee was content with section 7, an offence which is confined to the possession or control of articles connected with the preparation of explosives or firearms offences; it was said to be 'relatively limited' and is much narrower than the UK Terrorism Act 2000, section 57.

4.6 Fourth, under section 21A (imported by the 2005 Act), it is an offence knowingly to render assistance (including financial assistance) to an unlawful organisation, whether

directly or indirectly, in the performance or furtherance of an unlawful object. This supplement reflects a recommendation made by the Hederman Committee which had argued that active assistance to an unlawful organisation might be easier to prove than passive membership. Alongside section 21A, the 2005 Act also implemented the general offence of financing terrorism (in section 13) so as to ensure domestic implementation of the United Nations Convention for the Suppression of the Financing of Terrorism 1999.

4.7 Extra-territorial effect for membership-type offences in certain circumstances is accorded by section 6 of the 2005 Act which mainly has the effect of establishing a further terrorism offence which is chiefly related to activity but, contrary to the ethos of the Framework Directive, also extends the offences based on group affiliation. Section 6(1)(a) states that a person is guilty of an offence if, in or outside the state, they engage in a 'terrorist activity' or 'terrorist-linked activity' or, under section 6(1)(b), commit outside the state an act that, if committed in the state, would constitute: (i) an offence under section 21 or 21A of the Act of 1939; or (ii) an offence under section 6 of the Act of 1998. Section 6(2) sets out the circumstances in which acts committed outside the state will be offences for the purpose of subsection (1). Furthermore, where a section 6 offence is committed outside the state and a request for extradition or a European Arrest Warrant is received and refused, section 43(3) of the 2005 Act affords jurisdiction to try the case in Ireland.

4.8 These membership offences have not been constitutionally challenged *per se*, unlike their evidential appurtenances. The principal section 21 membership offence has been regularly prosecuted as a key tool to suppress domestic terrorist and subversive activity. The offences have often provided the most frequent charges in the Special Criminal Court; there were 72 convictions from 2002 –17.

4.9 Moving from criminal offences, other legal consequences are specified by sections 22 and 25. First, section 22 of the 1939 Act provides for the forfeiture to the Minister for Justice of all property of the suppressed organisation; the Minister can then dispose of the property in consultation with the Minister for Finance. This mechanism was extended by section 2 of the Offences Against the State (Amendment) Act 1985. The Minister for Justice may direct a bank to lodge in the High Court, funds which stand in a bank account and which are in the opinion of the Minister liable to forfeiture under section 22, without having to provide notice to those affected. A further extension is made by the Criminal Justice (Terrorist Offences)

Act 2005, section 51, which imports sections 22A to 22I into the 1939 Act. They concern a further procedure for the recovery of the property of unlawful organisations, other than moneys held in a bank, which should be forfeited to the Minister by virtue of section 22. The constitutionality of the financial pre-emptive strike allowed by the 1985 Act was challenged in *Clancy v Ireland* [1988] IR 326. The plaintiffs argued that the Minister's exercise of this power amounted to a confiscation of property in violation of the right to the peaceful enjoyment of property under Articles 40.3 and 43 of the Constitution. Barrington J rejected their arguments, holding that section 2 of the 1985 Act did not effect a confiscation of funds, but rather constituted a temporary freezing of funds, which the plaintiff was entitled to challenge in the High Court (under section 3) and to receive compensation if in error (under section 4). As a result, Barrington J concluded that the provision represented a permissible delimitation of private property rights in the interests of the common good. This reasoning was endorsed by the Supreme Court in *Murphy v GM* [2001] 4 IR 113 in relation to the Proceeds of Crime Act 1996, and the freezing and confiscation of illicit assets has become a mainstream feature within the anti-money laundering regimes. However, the Hederman Committee noted that the safeguards of challenge under the 1985 Act are not present in section 22 which it also found to be 'ineffective' and 'unworkable' and so worthy of abolition. The broader consideration of whether these quasi-criminal approaches are fair goes beyond the confines of this chapter.

4.10 The final non-criminal sanction is that, under section 25 of the 1939 Act as amended by section 4 of the Criminal Law Act 1976, a Garda Chief Superintendent may order the closure of a building for 12 months (extendable to three years in total) if satisfied of its use, directly or indirectly, for the purposes of an unlawful organisation. The invocation of this power is very rare, with just one recorded case, and the Hederman Committee favoured its repeal.

5 Conclusion

5.1 Proscription has retained vitality in Ireland. Its functions go beyond the presentational or symbolic purposes which are often achieved by proscription, and it seeks to deliver more transactional outcomes in terms of deterrence and prosecutions. Several reasons may invest this energy. One is that its focus remains domestic and so involves relatively organised groups compared to the decentred and heterarchical groups common in international (foreign)

terrorism, where central organisation and discipline is relatively weak and so any organisational ban seems futile. Second, the Irish legal system has been prepared to invest an extraordinary level of trust in senior police officers who are allowed to present untrammelled opinion evidence, which is regularly the key to conviction for proscription crimes. Leaving aside ongoing doubts about whether the device is fair, experiences of miscarriages of justice in terrorism cases in other jurisdictions, especially the UK, seem to rule out such heavy evidential reliance on police opinion. Third, alternatives to proscription and membership offences are limited. By comparison, the UK Terrorism Act 2000, sections 57 and 58 (discussed above), plus the Terrorism Act 2006, sections 1, 2 (terrorist messages online) and (above all) section 5 (the offence of preparation of terrorism) have left membership offences as marginal and less attractive options.

5.2 This depiction of vitality might be contrasted with the position said earlier to prevail in Northern Ireland – 'let sleeping dogs lie'. However, while prosecution convictions are being racked up south of the Border, the Republic's proscription structure does evince similar traits of somnolence. The need for reform in regard to powers and review represents unfinished business at least from the time of the Hederman Committee over two decades ago, with many recommendations ignored. The shelving of radical reform is testament to the emotions and divisions roused by proscription. For now, Ireland persists with its apprehensions about subversive organisations (arguably more acute than its fear of 'terrorism') and maintains in full working order its 80-year-old superstructure, including proscription. Yet, the gap between 'a perpetual state of emergency' and sharply directed, fully accountable counter terrorism laws is broad and should not be allowed to persist for another 80 years.