Sinn Féin Submission to the Review of Offences Against the State Legislation

Section 1: Context and Introduction

Organised crime and impact on communities

There can be no doubt that there is a significant problem with organised crime in Ireland. Over the past 20 years gangland feuds and other organised criminal activity has been the scourge of urban communities. Indeed, as we write this submission, the HSE has been the subject of a sophisticated cyber attack that has been unprecedented in the state.

There can be no doubt that the nature of these crimes has had a huge impact on communities and on the national consciousness. There is, understandably, growing fear in communities and an increasing need to ensure that the criminal justice system is adequately resourced and effective in order to eliminate organised crime.

Good Friday Agreement commitments

The Good Friday Agreement was passed by referenda north and south in 1998. It is an International Agreement which underpins the Irish Peace Process.

A significant section of the Good Friday Agreement deals with the transition to a normal and peaceful society.

This specifically referenced the use of emergency legislation. The responsibility on the Irish Government is very clear.

"The Irish Government will initiate a wide-ranging review of the Offences Against the State Act 1939-85 with a view to both reform and dispensing with those elements no longer required as circumstances permit."

Nobody can argue with any substance that the circumstances that gave rise to the introduction of this emergency legislation pertain today.

That has been the success of the Peace Process. This needs to be reflected as the Good Friday Agreement demanded in the reform and dispensing of emergency powers.

As we have earlier acknowledged the State is faced with a significant problem with global organized criminal gangs. This is not the same 'emergency' which gave rise to these powers and requires a different modern 21st Century Criminal Justice and Policing response.

23 years on from the signing of the Good Friday Agreement emergency legislation put in place during the conflict should not need to be in existence.

It should be noted that there have been recent signals that the north is moving to eliminate the emergency legislation currently in operation there and bring the criminal justice system in line with other jurisdictions. This is discussed in more detail in the submission.

Failure of Government

It should be noted that a number of the recommendations in relation to the operation of the Offences Against the State Act, both from the Hederman Review and the Law Reform Commission on Jury Service have not been implemented by the Irish Government.

Furthermore, the government has failed to implement a modern, fit for purpose legislative framework that will provide legal certainty to communities and ensure that jurors are adequately protected and that the criminal justice system operates within established human rights norms.

There has also been a lack of investment in resources to tackle modern organised crime and, in fact, there has been significant cuts to policing services over the past number of years.

Structure of paper

This submission is broken into 5 further sections:

Section 2 outlines the fundamental principles and key rights that must be considered in the context of legislative reform in this area

Section 3 outlines the criticisms of the system in operation to date – specifically the special criminal court

Section 4 outlines the recommendations that have been put forward by academic commentators and legal experts in the field of criminal justice

Section 5 outlines the key policy and resourcing issues that should be considered

Section 6 outlines our conclusion and recommendations

Section 2: Fundamental Principles and Key Rights

Right to be safe in your home and community:

The right of the public to live a life in a society safe from the threat of violence, or intimidation and the right to a safe community. In the context of an appointment to a

jury, the jurors right to be safe while partaking in a trial on which they have been asked to adjudicate.[1]

Right to a Trial 'in due course of law' (article 38.1 of the Constitution:

Right to fair procedures

The courts, and all other bodies or persons making decisions that affect you, must treat you fairly. There are two essential rules of fair procedure.

- The person making the decision that affects you should not be biased or appear to be biased.
- You must be given an adequate opportunity to present your case. You must be informed of the matter and you must be given a chance to comment on the material put forward by the other side.

Innocent Until Proven Guilty

The prosecution must prove the defendant is guilty beyond reasonable doubt.

The right to a trial 'in due course of law', in article 38.1 of the constitution has been generally interpreted as incorporating the presumption of innocence

Right to equality before the law

All citizens in Ireland shall be held equal before the law. This means that the State cannot unjustly, unreasonably or arbitrarily discriminate between citizens. You cannot be treated as inferior or superior to any other person in society simply because of your human attributes or your ethnic, racial, social or religious background etc. (9 grounds of discrimination – Equal Status Act 2000)

In relation to the above, the right to fair procedure, innocence until proven guilty, and equality before the law are contained in the International Covenant on Civil and Political Rights.

In addition, Article 8 of the ECHR provides a right to respect for one's private and family life, home and correspondence. And Article 6 of the ECHR, provides a detailed right to a fair trial, including the right to a public hearing, before an independent and impartial tribunal within reasonable time, the presumption of innocence and other minimum rights for those charged with a criminal offence.

[1] "However, the evidence of the existence of jury-tampering is largely anecdotal." – Fíona Donson, Centre for Criminal Justice & Human Rights Blog - https://www.ucc.ie/law/blogs/ccjhr/2009/07/trial-by-jury-to-be-removed-for.html+

Section 3: Criticisms of the operation of the Special Criminal Court

The use of the Special Criminal Court was criticised by the United Nations Human Rights Committee in 2001, which found that the state was in breach of the right to equal treatment, espoused by art 26 of the United Nations International Covenant on Civil and Political Rights 1967, given the power of the DPP to certify trial in the Special Criminal Court.

Critical to the conclusion was the failure of Ireland to demonstrate that the decision of the DPP to certify that the applicant be tried by the Special Criminal Court was based on "reasonable and objective" grounds and the fact that the DPP was under no obligation to provide reasons and that the scope for judicial review of decision was extremely limited.

In 2014 the United Nations Human Rights Committee highlighted its continued concern at the operation of the Special Criminal Court and called on the Government to consider the abolition of the Special Criminal Court completely.

In November 2018 the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism states that there has been "consistent and trenchant concerns about the use of the Special Criminal Courts and Offences Against the State Act as a "work around" the ordinary protection of the law."

Section 4: Summary of relevant proposals put forward by others

End of Emergency legislation

Article 15 of the European Convention on Human Rights provides that:

> ***1*** In time of ***war or other public emergency threatening the life of the nation*** any High Contracting Party may take measures derogating from its obligations under this Convention under this Convention ***to the extent strictly required by the exigencies of the situation***, ***provided that at such measures are not inconsistent with its other obligations under international law.***

The Offences Against the State Act 1939 has been in operation for over 80 years and the use of the legislation has moved significantly from its original intention. While fully recognising the need to have robust legislation in place to adequately address organised crime, Ireland is unique in common law jurisdictions in relying on the use of emergency legislation in this regard.

Harrison, in her book on Practice and Procedures in the Special Criminal Court points out that "most of the recommendations made by the majority of the Committee to Review the Offences Against the State Acts 1939 – 1998 intended to align the

legislative provisions with human rights norms have not been implemented and have largely been ignored by the State."[2]

Taking into account the above, it is difficult to justify the existence of "emergency" legislation and there is an increasing argument for the need for a modern legal framework that provides certainty and is specifically designed to address the challenges facing communities and the state in relation to organised crime.

This is further reflected in the fact that in the 13th Annual Report of the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007, the independent reviewer stated that similar provisions are "remnants of emergency powers which were introduced during the troubles." A working group has now been established in that jurisdiction to examine the potential reform of the legislative framework in the North.

The fact that emergency legislation is, by its very nature, subject to ongoing review, and must be renewed by the Oireachtas on an annual basis and that there is growing opposition to its existence suggests that the need to put an appropriate framework in place to effectively protect communities into the future is becoming increasingly urgent.

Protection of Jurors

There has been little political discussion of the intermediate alternatives for protecting jurors, which in modern times, might include the use of technological solutions to some of the problems posed by potential jury intimidation. A concept put forward in the Juries Act 1929 providing for special protections for juries was never commenced and the concept of trial by a "protected jury" was cast aside in favour of non-jury trials.

In 2013 the Law Reform Commission published a Report on Jury Service which includes a Chapter on Jury Tampering.

It included a number of recommendations which have not been implemented including:

- ***Par. 7.49 the creation of a single offence of jury tampering***

Currently, as pointed out by the Law Reform Commission the law in relation to jury tampering is a mixture of common law and statutory offences. The current statutory provision (section 41 of the Criminal Justice Act 1999) is based on the comparable offence of intimidation of a witness. The Law Reform Commission suggests that a single offence of juror interference, covering conduct ranging from persuasive to menacing, may be required.

The penalties for the existing statutory offence of intimidating certain persons connected with the administration of justice, including jurors and potential jurors

[2] Harrison, Alice (2019) 'The Special Criminal Court: Practice and Procedure'. Bloomsbury Professional

contained in section 41 of the Criminal Justice Act 1999 are: a Class C fine (i.e. not exceeding €2,500) and imprisonment for a term up to 12 months, or both on summary conviction or an unlimited fine and imprisonment for a term up to 15 years or both on indictment.

In reforming the statutory provisions in this area in line with the above recommendation, scope to enhance penalties for the offence of jury intimidation or tampering as a deterrent should be considered.

- ***Par. 7.51 new restrictions on access to jury lists***

Under section (16) Juries Act 1976 every person is entitled to inspect a panel of jurors free of charge while a party to any proceedings is entitled to a copy free of charge.

In Australia and New Zealand there has been a trend towards restricting the length of time allowed to access jury lists before trial and some have moved towards the anonymity of jurors. For example in New South Wales this access was withdrawn and names are only made available for the purposes of challenge and jurors are called in court by number.

In New Zealand access to the jury panel is provided no earlier than 7 days in advance of trial. Counsel may only show a defendant a copy of the list but must not leave a copy in their possession and must take all reasonable steps to ensure that the defendant does not copy the document.

The Law Reform Commission suggests that access to jury lists should only be available to the parties' legal advisors (or the defendant when representing themselves) for a period of 4 days before the trial. Access to the jury list would not be provided once the jury is sworn, except for exceptional reason and only with the sanction of the court.

- ***Par. 7.52 abolish the daily roll-call of jurors.***

Currently there is a daily roll call of the jury carried out in open court, therefore revealing the names of the 12 jurors on a daily basis. The Law Reform Commission believes this an unnecessary process and should be abolished. It further recommends that legislation in relation to juries include a provision that prospective jurors be required to bring a valid form of ID as this would help eliminate the necessity for calling names in Court on a repeated basis.

It is ironic, given the fact that the threat of jury tampering and intimidation has been used as the justification for the continued operation of the Offences Against the State Act, that none of these recommendations have been implemented.

The use of video equipment and remote links for juries should also be considered. One of the outcomes of the O'Malley Report was greater use of video links for vulnerable victims, provided for in the Civil Law and Criminal Law (Miscellaneous Provisions) Bill 2020. Sinn Féin believes this could be explored also in instances where juries may similarly be vulnerable to intimidation or risk in a court room

setting. This should be provided for in primary legislation to ensure constitutional compliance.

Likewise, consideration should also be given to greater use of measures such as relocating trials to a different location or selecting jurors from outside the district where the case is heard as appropriate.

Use of non-jury courts – exceptional cases and safeguards to be put in place

Role of DPP

If a non-jury Court is to remain in being to be used in exceptional circumstances, the decision regarding form of trial should lie with the courts rather than the DPP or the legislature.

This was the view of Hederman J and Professor Dermot Walsh in Review of the Special Criminal Court in 2002:

"Even if non jury Trials were considered appropriate in certain circumstances, the Special Criminal Court is unacceptable to us on the basis that the decision whether an individual forfeits his or her right to jury trial is made by the Director of Public Prosecutions on his own discretion, and with no reasons given – a position which is in practice unreviewable in most cases."

The majority of the Hederman Committee recommended that any decision of the DPP should be subject to a positive review mechanism in order to comply with Ireland's obligations under the International Covenant on Civil and Political Rights.

It should be noted that under the system in operation in Britain, Section 44 of the Criminal Justice Act 2003, the prosecution may apply to a judge of the Court for the trial to be conducted without a jury. If an application is made and the judge is satisfied that the two conditions are fulfilled, s/he must make an order that the trial is to be conducted without a jury.

The two conditions are as follows:

- There is evidence of "a real and present danger that jury tampering would take place"
- Notwithstanding any steps (including the provision of police protection) which might 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.

Importantly, section 45 of the Criminal Justice Act 2003 provides that where there it is considered that a non-jury trial on indictment is necessary to prevent jury tampering, the parties will attend a preparatory hearing prior to the decision to hold a non-jury trial and are given an opportunity to make representations with regard to the decision.

Scheduled Offences

Instead of using a system of scheduling a vast number of offences which are currently presumptively tried before the Special Criminal Court, in future each case should be considered on an individual basis.

It is suggested by academic and legal commentators that the decision regarding the form of trial should lie with the courts on a case by case basis, as occurs in England, rather than the prosecution or legislature. It has been pointed out by Campbell in 2014 out that "dispensing with the jury automatically for certain offences is an unprincipled reaction to an issue that may not be a threat in every case of suspected organised crime."[3]

The Hederman Committee points out that there is a potential argument that the current scheduling of specific offences to be tried in the Special Criminal Court may fall foul of article 38.3 of the Constitution. The Committee points out that this article could be interpreted as the constitutional jurisdiction to try a case in a non-jury court rests on an assessment of that individual case on its merits.

The Law Reform Commission in 2013 considered that there was a strong argument in favour of the examination of the use of the scheduling of offences in light of the State's international legal obligations and noted the approach of the Criminal Justice Act 2003 above.

Section 5 : Garda resourcing and Policy Considerations

In addition to the legislative recommendations above, Sinn Féin believes any new criminal justice legislation does not operate in a vacuum, and that a number of initiatives are required to ensure the safety and security of communities.

These include the following:

Better resourcing of the Justice system

Covid-19 has led to a shortfall in garda strength, with the numbers recruited to the force in 2020 not surpassing retirements, leaving the force 700 shy of its targeted 15,000 strength, and further short of the 16,000 force target Sinn Fein supports. Targeted civilian recruitment numbers also fell short, meaning the number of redeployed sworn Gardai in 2020 was only 144 instead of the targeted 456. These shortfalls must be fully recovered, and the numbers grown to record levels.

Under-resourcing of the Prison Service mean some prisons are functioning as recruitment grounds for organised gangs, building bonds of loyalty among vulnerable populations and pulling low level offenders deeper into criminal structures. The recent revelations by whistle-blowers about resistance to reforms are telling, and provision of education, the ending of isolation in accordance with health guidelines and proper identification of the risk level of prisoners all must be implemented.

Tackle the finance and technology of criminal gangs

[3] Campbell, 'The Prosecution of Organised Crime: Removing the Jury' (2014) 18 (2) IJEP 83, 100

The pandemic has meant fewer opportunities for “in person” offences to be committed and has also seen a rise in crimes that require a higher level of sophistication. Disrupting these gangs and their operations will require the pursuit of their finances through CAB, and the recruitment of forensic accountants and other experts and specialists as required.

The Commission on the Future of Policing made a number of recommendations related to cybercrime and cybersecurity, with more resources and the fast tracking of recruitment recommended. These recommendations must be implemented and the vacancies and staff turnover within the National Cyber Security Centre (NCSC) should be addressed also

Proper threat assessments that deal with the risk posed by organised crime must be carried out and prioritised as trials of major criminal figures in these gangs represent a major security risk.

White collar crime must also be taken far more seriously. Recently, the government ran the risk of referrals of Ireland to the ECJ due to delays in transposing legislation to prevent white collar crime, including measures related to money laundering. This is not acceptable and we must become a leader in this area in the future, in order to root out those complicit in laundering the profits of criminal gangs.

Winning the Trust of Communities.
Criminal gangs have developed parasitical relationships within vulnerable communities and restoring trust that the Gardai will be able to protect people in these communities is crucial. The creation of a fit for purpose youth justice agency, in combination with forthcoming legislation on the inducement of minors to commit crimes would do much to solve this as an issue.

Adopting a community safety approach to policing, as the forthcoming Policing, Security and Community Safety Bill does, is welcome. Sinn Féin have reservations about certain aspects of the bill, especially those that reduce the powers of the Policing Authority, but the creation of Local Community Safety Partnerships is a positive step.

At a senior leadership and local level Gardaí must sustain a comprehensive programme of engagement with community, sporting, business and residents’ groups to develop working relationships and to problem solve jointly on key issues etc. These engagements are crucial to developing confidence and building trust. In the final analysis the Gardaí must respond to the issues raised by the local community, if they fall within their remit, in a timely and adequate manner.

Section 6: Conclusion and recommendations

There is a need to provide legal certainty and adequate resources to ensure the justice system is in a position to robustly deal with organised crime. Emergency

legislation, which is subject to ongoing review and subject to annual renewal in the Oireachtas does not provide this certainty into the future.

The current emergency legislative provisions in operation have been subject to consistent criticism, both from internal commentators and interested parties as well as International Human Rights Watchdogs.

Ireland is unique among common law jurisdictions in relying on emergency legislation to address organised crime. There are signs that the North may soon reform the legislative framework in place.

Other jurisdictions, facing similar challenges, have reformed their legislative frameworks in order to provide protection for jurors and balance the key principle of a fair trial.

Recommendations

- The use of emergency legislation should come to an end and a modern and appropriate legal framework should be put in place to effectively address organised crime and to adequately protect jurors.
- The recommendations of the Law Reform Commission in relation to the protection of jurors should be implemented and the practices of other jurisdictions be thoroughly examined, with a view to adopting best practice in line with international standards.
- Gardaí and security agencies must be adequately resourced to protect communities from organised crime. Garda numbers must be increased to record levels and specialist recruitment to tackle modern organised crime must be prioritised.
- Should the review conclude that non – jury trials remain necessary in exceptional circumstances, at a minimum the following safeguards should be put in place: the decision regarding form of trial should lie with the courts rather than the DPP or the legislature, each case to be decided on its merits and that reasonable and objective grounds be given for the decision to hold a non-jury trial in order to comply with human rights standards.