

**Submission to the Independent Review Group on
the Offences Against the State Acts**

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Biographical Information

[Dr Mark Coen](#) is a Lecturer in Law at University College Dublin. His doctoral thesis, submitted for examination in 2012, analysed the approach of the appellate courts in Ireland and England to allegations of jury-related irregularities. He has published many articles on various issues relating to jury trial, including juror comprehension,¹ the jury as a shaper of the rules of Evidence,² apprehended juror bias,³ jury interference,⁴ the publicly-unreasoned nature of jury verdicts,⁵ the jurisprudence on juries of the European Court of Human Rights,⁶ the power of a trial judge to comment adversely on defence evidence in a jury trial,⁷ the largely-forgotten practice of juries appending riders to their verdicts⁸ and the intimidation of jurors by members of Cumann na mBan in the 1920s and 1930s.⁹ Dr Coen is the editor of *The Offences Against the State Act at 80: A Model Counter-Terrorism Act?*, published by Hart in March 2021.

[Dr Niamh Howlin](#) is an Associate Professor of Law at University College Dublin. Her expertise in relation to jurors stems primarily from her 2008 doctoral thesis. In 2017 she published a book examining aspects of Irish juries in the nineteenth century.¹⁰ She has published a number of peer-reviewed articles on aspects of jury trial, addressing such issues as the active role of jurors at trial,¹¹ jurors' experiences,¹² the

¹ M Coen and L Heffernan, 'Juror Comprehension of Expert Evidence: A Reform Agenda' (2010) *Criminal Law Review* 195

² M Coen, 'Hearsay, Bad Character and Trust in the Jury: Irish and English Contrasts' (2013) 17(3) *International Journal of Evidence and Proof* 250-271

³ M Coen, 'Apprehended Bias: The Case of Jurors' (2010) 32 *Dublin University Law Journal* 121-135

⁴ M Coen, 'Interference with Jurors and its Potential Legal Consequences' (2011) *Criminal Law and Procedure Review* 142.

⁵ M Coen and J Doak, 'Embedding Explained Jury Verdicts in the English Criminal Trial' (2017) 37(4) *Legal Studies* 786-806

⁶ M Coen, "With Cat-Like Tread": Jury Trial and the European Convention on Human Rights' (2014) 14(1) *Human Rights Law Review* 1-25

⁷ M Coen, 'Judicial Comment on the Evidence After Rattigan' (2018) 60 *The Irish Jurist* 90-111

⁸ M Coen and N Howlin, 'The Jury Speaks: Jury Riders in the Nineteenth and Twentieth Centuries' (2018) 58(4) *American Journal of Legal History* 505-534

⁹ M Coen, "The work of some irresponsible women": Jurors, Ghosts and Embracery in the Irish Free State' (2020) 38(4) *Law and History Review* 777.

¹⁰ N Howlin, *Juries in Ireland: Laypersons and Law in the Long Nineteenth Century* (Four Courts Press, 2017)

¹¹ N Howlin 'Irish Jurors: Passive Observers or Active Participants?' (2014) 35(2) *Journal of Legal History* 143-171.

¹² N Howlin, "The Terror of Their Lives": Irish Jurors' Experiences' (2011) 29(3) *Law and History Review* 703-761.

impact of politics on jury trials,¹³ jury riders,¹⁴ jury composition,¹⁵ and the inclusion of persons of different nationalities on juries.¹⁶ She has also published book chapters on special juries¹⁷ and the peculiarity of Irish jury laws.¹⁸ As well as historical works, Dr Howlin has written about contemporary aspects of jury trial in Ireland, including multiculturalism and representation,¹⁹ and the use of expert juries in complex civil actions.²⁰

Drs Howlin and Coen have collaborated on a number of research projects and have received research funding from several sources and presented their work on juries at international conferences and events. Together they teach a module entitled *Jury Trials* at UCD.

Drs Howlin and Coen are the lead investigators on the *Judge-Jury Relations Project*, on which they collaborate with Dr Colette Barry of Sheffield Hallam University and John Lynch of University College Dublin. To date a report and an article have been published on the data from the project.²¹

¹³ N Howlin, 'The Politics of Jury Trial in Ireland' (2015) 3(2) *Comparative Legal History* 271-291

¹⁴ See Coen and Howlin, 'The Jury Speaks', above.

¹⁵ N Howlin, 'Controlling Jury Composition in Nineteenth-Century Ireland' (2009) 30(3) *The Journal of Legal History* 227-261.

¹⁶ N Howlin, 'Fenians, Foreigners and Jury Trials in Ireland 1865-69' (2010) 45 *Irish Jurist* 51-81.

¹⁷ N Howlin, 'Merchants and Esquires: Special Juries in Dublin 1725-1833' in O'Kane and Sullivan (eds), *Georgian Dublin* (Dublin, Four Courts Press, 2008).

¹⁸ N Howlin 'English and Irish Jury Laws: the Growing Divergence 1825-1833' in Brown and Donlan (eds) *The Laws and Other Legalities of Ireland, 1689-1850* (Ashgate Publications, 2011).

¹⁹ N Howlin, 'Multiculturalism, Representation and Integration: Citizenship Requirements for Jury Service' (2012) 35 *Dublin University Law Journal* 148.

²⁰ N Howlin, 'White-Collar Crimes and Expert Juries: Precedents, Alternatives and Implications' (2012) 22(2) *Irish Criminal Law Journal* 40 (and see also N. Howlin, 'Notion of Expert Juries for Particular Cases Raises Complex Issues', *The Irish Times*, 21 November 2011).

²¹ M Coen, N Howlin, C Barry and J Lynch, *Judges and Juries in Ireland: An Empirical Study* (UCD, Dublin 2020); M Coen, N Howlin, C Barry and J Lynch, 'Respect, Reform and Research: An Empirical Insight into Judge-Jury Relations' (2020/2) *Irish Judicial Studies Journal* 116.

1. Introduction

We welcome the establishment of the Independent Review Group and the opportunity to make a written submission on its work. As experts on the jury system our submission is mostly concerned with the impact of the Offences Against the State Acts on jury trial.

Before outlining our views on some of the relevant issues, we would like to make three general points. First, we feel it is important that the Review Group engages thoroughly with the recommendations of the Hederman Committee as expressed in its 2002 report. It is regrettable that the Committee's many well-reasoned recommendations have been ignored by successive governments and the Review Group should consider and evaluate them thoroughly in its own reports. Second, the question of whether constitutional change is necessary should be considered with reference to the recommendations of the Constitution Review Group's report of 1996. Finally, we urge the Review Group to publish all submissions received on its website in response to the consultation, in the interests of facilitating a transparent public discussion of this contentious area of law.²²

2. Specific issues

This submission is premised on the expectation that the Special Criminal Court will remain in existence, as the State has ignored the critiques of international human rights organisations in relation to its existence and operation for several decades.²³ We thus focus on identifying legislative and practical reforms that would recognise that non-jury trial represents a departure from the norm in our jurisdiction and that such a departure should be accompanied by more robust safeguards than exist at

²² Responses to parliamentary consultations in the United Kingdom are routinely published. See generally

<https://www.parliament.uk/mps-lords-and-offices/offices/commons/scrutinyunit/written-submissions/>.

For a specific example of published submissions see <https://bills.parliament.uk/bills/1343/stages/>.

²³ See further M Coen, 'International Human Rights Law: A Flavour of its Impact on the Irish Criminal Justice System' in S Egan (ed), *International Human Rights: Perspectives from Ireland* (Bloomsbury, 2015) 333, 350-353; Y M Daly, 'The Offences Against the State Acts and International Human Rights' in M Coen (ed) *The Offences Against the State Act at 80: A Model Counter-Terrorism Act?* (Oxford: Hart, 2021) 185.

present. In our view, the existing legislative provisions in relation to judge-only trial are imbalanced in favour of the prosecution and insufficiently protective of the constitutional requirement for trial by jury for non-minor offences. We are also conscious that the Hederman Committee made many relatively modest recommendations of this nature which the political establishment has ignored for the past twenty years.

2.a. A case-by-case approach to trial venue

The legal presumption that certain types of offences ('scheduled offences') are triable before the Special Criminal Court should be replaced by a case-by-case determination of whether a derogation from the norm of jury trial should be permitted in an individual case. In this regard, it is worth recalling that the Hederman Committee suggested that the concept of scheduled offences may amount to an unconstitutional usurpation of the role of parliament by the executive.²⁴ More generally, blanket presumptions run the risk of having unwarranted and unjust results in individual cases. In its 2013 report *Jury Service*, the Law Reform Commission also queried the appropriateness of scheduled offences and appeared to favour 'a more individualised case-by-case approach.'²⁵ We echo Professor Liz Campbell's support for such a system, 'grounded on objectively justifiable and articulated reasons, rather than a class-based presumptive model.'²⁶

2.b. The role of the DPP in determining trial venue

In addition to the abolition of scheduled offences, the law should be amended so that the opinion of the Director of Public Prosecutions should not be conclusive in determining whether a non-minor offence should be tried with or without a jury. The position of the defence and the prosecution should be equalised in this regard, with

²⁴ *Report of the Committee to Review the Offences Against the State Acts 1939-1998* (Dublin, Government Publications, 2002), hereinafter Hederman Committee, para 7.25.

²⁵ Law Reform Commission, *Jury Service* (LRC 107-2013) 102.

²⁶ L Campbell, 'The Prosecution of Organised Crime: Removing the Jury' (2014) 18 *International Journal of Evidence and Proof* 83, 99.

the decision as to the appropriate trial venue being determined by a judge. The Hederman Committee recommended that a decision of the Director of Public Prosecutions to send an accused for trial in a non-jury court should be subject to review by a serving Supreme Court judge.²⁷ Another option would be for the case in which the DPP is seeking a non-jury trial to go before a judge of the Circuit Criminal Court or the Central Criminal Court (depending on which court the offence(s) involved would ordinarily be tried), with the judge hearing arguments from prosecution and defence and deciding if a non-jury trial should be ordered. Such a decision could be appealed to the Court of Appeal.

2.c. Criteria for determining trial venue

Statutory criteria should be formulated to determine whether a derogation from the norm of jury trial should be permitted in an individual case. There should be a presumption in favour of jury trial which the prosecution would have to rebut. In England and Wales, the prosecution must demonstrate that two factors are present in order to succeed in being granted a judge-only trial in a particular case. The first requirement is that there must be 'evidence of a real and present danger that jury tampering would take place.'²⁸ Examples are provided in the legislation of instances when this condition could be said to be present, namely where the trial is a retrial and the jury in the earlier trial was discharged because of jury tampering; where jurors have been interfered with in previous cases involving the accused and where witnesses in the case have been intimidated.²⁹ While these examples are non-exhaustive they indicate that there must be some basis for the prosecution contention that there is a real risk of jury tampering, and that there must be relevant evidence to support it. The second requirement is that:

...notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that

²⁷ Hederman Committee, para 9.76.

²⁸ Criminal Justice Act 2003, s 44(4).

²⁹ Criminal Justice Act 2003, s 44(6).

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.³⁰

This approach requires that alternatives to judge-only trial must be considered first, with a derogation from the norm of jury trial only permitted when it is strictly necessary in an individual case. Alternatives such as police protection, anonymous juries and the presence of the jury in a different location are among some of the alternatives that should be considered in this context,³¹ and it would be prudent for a statutory provision to list examples of the sort of alternatives to judge-only trial that the court would have to consider when deciding on mode of trial.

2.d. Jury intimidation: law

The potential for jury intimidation is the dominant rationale for the continued existence of the Special Criminal Court. However, the Oireachtas has failed to take basic measures to make jury intimidation more difficult. The Law Reform Commission recommended in 2013 that the right of inspection of the jury panel,³² which may facilitate persons who wish to contact or identify jurors, should be restricted.³³ It also recommended the abolition of the daily roll call of serving jurors in open court. Neither of these recommendations have been implemented. In empirical research we conducted with judges, one judge recounted how a jury in a specific trial had requested that the roll call be discontinued.³⁴ However, according to their own account the judge refused to do this, notwithstanding their belief that the jurors involved 'were worried and concerned about their safety.'³⁵ This is clearly unsatisfactory and needs to be addressed as a matter of urgency.

³⁰ Criminal Justice Act 2003, s 44(5).

³¹ Campbell (above note 26) 97-98.

³² Juries Act 1976, s 16(1).

³³ Law Reform Commission, *Jury Service* (LRC 107-2013) 104.

³⁴ M Coen, N Howlin, C Barry and J Lynch, *Judges and Juries in Ireland: An Empirical Study* (UCD, Dublin 2020) 114.

³⁵ *Ibid*, 115.

We would urge the Review Group to call for the immediate implementation of the Law Reform Commission's recommendations in relation to the right of inspection and the daily roll call. These recommendations have been endorsed by academics on a number of occasions.³⁶ A committee should also be established with representation from relevant stakeholders (including, for example, jury minders, Gardaí and Courts Service staff with a knowledge of court buildings) to examine the issue of jury intimidation from a practical perspective.

2.e. Jury intimidation: statistics

It has been stated elsewhere that jury intimidation is 'a matter on which it is virtually impossible to obtain firm evidence, or to know in what proportion of cases it may occur.'³⁷ In Ireland this is particularly true because up-to-date figures are not maintained regarding prosecutions for jury intimidation. Figures released in 2011 did not differentiate between witness and jury intimidation.³⁸ In May 2019 the Minister for Justice indicated in answer to a parliamentary question that no figures on prosecutions for jury intimidation were available.³⁹ We would urge the Review Group to recommend that this situation be remedied, as at present there is no evidence base to support assertions about the prevalence of jury intimidation.

2.f. Consolidation of the law

³⁶ Ibid, 116; L Campbell, 'The Offences Against the State Acts and Non-Subversive Offences' in M Coen, *The Offences Against the State Act at 80: A Model Counter-Terrorism Act?* (Hart Oxford 2021) 129, 141-142.

³⁷ New Zealand Law Commission, *Juries in Criminal Trials* (Report 69/2001) para 416. Available at: <http://www.nzlii.org/nz/other/nzlc/report/R69/R69.pdf>.

³⁸ The figures related to prosecutions under s 41 of the Criminal Justice Act 1999, which provides for an offence of intimidation in respect of jurors and witnesses and their families: Dáil Debates, 23 June 2011, Vol 736. A number of common law offences may also be used to prosecute people who seek to influence jurors, including by persuasion or bribery rather than by intimidation. See M Coen, 'Interference with Jurors and its Potential Legal Consequences' (2011) 1 Criminal Law and Procedure Review 130, 134-141.

³⁹ See <https://www.oireachtas.ie/en/debates/question/2019-05-29/89/#pq-answers-89>.

In addition to recommending amendments to the substantive law in this area, the Review Group should recommend consolidation of the law relating to offences against the State, which is currently located in a number of statutes. This renders the law inaccessible and raises questions about whether it accords with the principle of legality.

2.g. Publication of the judgments of the Special Criminal Court

The current practice, whereby judgments of the Special Criminal Court are not published on Courts.ie, should be abandoned in favour of publication of all judgments of the Court. Publication would assist in improving public confidence in the Court and in countering the impression that it operates in secret and in a manner different to other courts that produce written judgments. The names of the judges hearing particular cases could be omitted, if this is deemed necessary on security grounds. However, it should be noted that the names of judges, particularly the judge presiding over the Court, is often referred to in media reporting.

3. Conclusion

In our submission, we have identified several specific areas of concern which relate to the non-jury aspects of the Special Criminal Court: the use of scheduled offences; decision-making about the use of the Special Criminal Court and issues around jury intimidation. We recommend an evidence-based approach to these issues which also takes into account international norms and comparative legal practice. We welcome the establishment of the Review Group and we strongly emphasise the importance of engaging with existing publications by the Hederman Committee, the Law Reform Commission and the Constitution Review Group.