Offences Against the State Acts

Independent Review Group

Report of the Minority

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To Examine the Offences Against the State Acts

REPORT OF THE MINORITY

May 2023

Introduction

It would probably be expecting a lot to anticipate unanimity from a review group of six people – all with diverse backgrounds and professional affiliations – on a topic as controversial and multi-faceted as the Offences Against the State Acts 1939 to 1998 and the existence and operation of the Special Criminal Court. It should therefore come as no great surprise that two of us have opted to write a minority report. We do so because we have a genuine difference of perspective – particularly when it comes to human rights and the rule of law – to that of our colleagues who form the majority of four in the Review Group.

We wish to provide a counterpoint to that which we believe to be an example of becoming *"overly habituated to the abnormal"*.[1] In so doing we agree to differ with respect and without rancour. It is, however, noteworthy that the Review Group of which we are members is unanimous in recommending repeal of the Offences Against the State Acts. We support this recommendation – which was also made in 2002 by the Hederman Review Committee[2] – without reservation. The clear recommendation to repeal the OASAs opens up a number of possibilities and the options presented by repeal should be the basis upon which further deliberation proceeds.

This minority report affords us the possibility of setting out our views on issues other than repeal with clarity and, we hope, coherence. It should be taken as a sign of the discursively dynamic approach adopted by the Review Group since it was appointed by the Minister for Justice in February 2021.

Our core difference with the majority stems from a reluctance to recommend the establishment of a permanent or *"standing"* non-jury court where the prosecution (DPP) will still decide on trial venue with no unequivocal recommendation grounding concrete measures to ensure a reduction in the use of non-jury courts. Furthermore, we believe that establishing a permanent non-jury court by ordinary legislation is constitutionally inappropriate based on an originalist understanding of the relevant provisions of Bunreacht ha hÉireann 1937 and for other reasons. Just because something can be done does not mean it should be done – we differ from our colleagues in the majority in our approach to decisions of the Irish Supreme Court regarding the existence and use of the Special Criminal Court and its operations. We view these decisions as *"deferential"*, something which we discuss in greater detail later. We disagree with our colleagues in the majority in not treating that which is *permitted* by the Supreme Court and, indeed, the Constitution, as if it were *prescribed*. In keeping with this approach we also differ from the majority on the admissibility of belief or opinion evidence and favour the approach taken in Northern Ireland and the UK. We also take a different approach to our colleagues on the issue of proscription. We do not believe that the recommendations contained in the Majority Report are supported by adequate empirical evidence or sufficiently extensive comparative analysis.

Our Minority Report references the version of the Majority Report that we received on 16th March 2023. We are grateful to the majority for setting out legislative and jurisprudential developments that have occurred in the 20 year period since the Report of the Hederman

[1] This phrase is borrowed from the foreword by O'Malley J. of the Supreme Court to Harrison, *The Special Criminal Court Practice and Procedure* (Bloomsbury Professional, 2019).

[2] *Report Of the Committee to Review the Offences Against the State Acts, 1939-1998* (Dublin, Government Publications, 2002) (The Hederman Report) at para 4.46.

Review Committee was published in 2002 in detail and with great care. We also appreciate their summaries of submissions received by this Review Group.

Principles and Fundamental Issues

We are gratified to note that a set of *"guiding principles"* based on a draft set of principles which were tendered by us on 4th August 2022 appear to have been adopted by the majority since we signalled our intention to write a minority report in early-November 2022. For ease of understanding we restate them (in slightly modified form) as the principles which inform our position in this minority report:

1. Any legislation to replace the OASAs must maintain the legislative basis for an effective State capacity to deal with terrorism and organised crime on an ongoing basis while also achieving human rights and rule of law compliance;

2. While the Irish Constitution 1937 is enabling in relation to the establishment and use of exceptional courts, there are also important international standards applicable to this State which must, in contemporary circumstances, inform the existence, continued use and operations of such courts;

3. Jury trial for indictable offences is *"the gold standard"* under the Irish constitutional system and throughout the common law world. Therefore, any deviation from that standard must be based on truly exceptional circumstances with appropriate legislative safeguards to address any compromise on fair trial or other rights;

4. The various methods of protecting juries in circumstances of perceived or demonstrable risk – whether of nullification or tampering – must be addressed in the context of progressing other previously made proposals for reform of juries yet to be implemented;

5. The principle of proportionality should apply to any limitations on individual rights arising from the use of exceptional courts[3];

6. As all policy and law reform should be evidence-led, the need for adequate data, open to rigorous scrutiny through independent and democratic oversight, is especially important in a context in which exceptional courts are being constituted and operate;

7. Given the degree to which the executive is significantly empowered by Irish constitutional provisions and statutory arrangements for the use of exceptional courts it follows that the level of accountability for the exercise of such powers is robust and likely to secure public confidence.

[3] We are conscious of the statement by the Chief Justice in *Dowdall & Hutch* in relation to the principle of proportionality and the individual right to trial by jury but our view on the applicability of the proportionality principle is made independently of any constitutional imperative and grounded, as a normative proposition, on well-established rules of Public Law and Human Rights. Proportionality has always been a disputed concept. For example, in *Heaney* the Irish Supreme Court rejected the argument that s. 52 of the Offences Against the State Act 1939, which criminalised the assertion of the right to silence by a person arrested under s. 30 in respect of giving an account of their movements, was a disproportionate restriction on the presumption of innocence. When the matter came to be considered by the European Court of Human Rights it took the view that Article 6 of the Convention had been violated as s. 52 had denied the very essence of the right to silence.

Exceptional Courts and Choice of Trial Venue

According to Professor Fionnuala Ní Aoláin, UN Special Rapporteur for Counter-Terrorism and Human Rights: *"…Special Courts promise states the possibility of greater control over the legal process, a highly attractive proposition when faced with violent challengers, sustained internal violence or substantial opposition to the political or constitutional order."*[4] We therefore approach the proposal of the majority to establish a permanent or *"standing"* non-jury court to try any serious offences in the circumstances set out for the use of *"special courts"* by Article 38 of the Constitution with significant apprehension. Our concerns are compounded by the majority proposal that the DPP will continue to decide on trial venue albeit with some vague form of retrospective oversight by a judge.

Jury trial is, to borrow a phrase used by the Irish Human Rights and Equality Commission (IHREC) and the UK Independent Reviewer of Counter-Terrorism Legislation, Jonathan Hall K.C. in their engagement with the Review Group, *"the gold standard"* when it comes to the expectations of the criminal process in Ireland.[5] It is the established constitutional ideal under Bunreacht na hÉireann 1937[6] and is the applicable norm in most common law systems. The right to trial by jury is not, however, an absolute right[7] and the Constitution sets out the circumstances in which non-jury trials can take place, *i.e.* for minor or summary offences and where the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. It should also be acknowledged that trial by jury is not a requirement of international human rights law although the right to equality before the law and other aspects of the right to a fair trial are internationally protected.

The Special Criminal Court, an exceptional court, is a creature of statute contemplated by the Constitution. When the Government proclaims the ordinary courts inadequate to secure the effective administration of justice and the preservation of public peace and order, or if it terminates such a proclamation by proclaiming their adequacy, or if a proclamation of inadequacy is nullified by the Oireachtas, the Government or Oireachtas acts pursuant to a statutory power contained in Part V of the Offences Against the State Act 1939.[8] As such it is an exceptional court and should only exist as part of the architecture of the court system without necessarily becoming part of the furniture. The decision to proclaim the ordinary courts inadequate to secure the effective administration of justice and the preservation of public peace and order, thus triggering the exceptional arrangements provided for under the Offences Against the State Acts, is a political decision of the Government subject to a very limited degree of oversight by the Oireachtas.

[4] Ní Aoláin, "The Special Criminal Court: A Conveyor Belt of Exceptionality" in Coen (ed.), *The Offences Against the State Act 1939 at 80: A Model Counter-Terrorism Act?* (Hart Publishing, 2021) at p. 59.

[5] For the full written submission of IHREC see: https://www.ihrec.ie/documents/submission-to-the-independent-review-group-on-the-offences-against-the-state-acts/

[6] Bunreacht na hÉireann 1937, Article 38.5. The fundamental and essential characteristic of the right to trial by jury is evident from a long line of authoritative cases, including: *Melling v Ó Mathghamhna* [1962] I.R. 1; *The People (DPP) v. O'Shea* [1982] I.R. 384; *O'Callaghan v. Attorney General* [1992] 1 I.R. 538; *People v. Davis* [1993] 2 I.R. 1.

[7] In *Murphy v. Ireland* [2014] IESC 19, [2014] 1 I.R. 198 the Supreme Court, in a case that acknowledged the constitutional nature of the exception to the right to trial by jury, stressed at p. 215: *"…trial by jury is not just a fundamental right of the citizen, it is a vital constitutional obligation on the State"*. Later, however, in *Dowdall and Hutch v. DPP* [2022] IESC 36, (Unreported, Supreme Court, 29th July 2022), O'Donnell C.J. noted at paras. 40 and 41: *"…since, however, the creation of special courts is contemplated by the Constitution, it would not be correct to approach that question [as to the adequacy of the ordinary courts] as if a trial in the ordinary courts is a constitutional right, interference with which requires justification or the application of a proportionality test"*.

[8] Described accurately by Ní Aoláin as *"the strong executive model contained in the constitutional ordering"*, in Coen (n. 4) at p. 61.

As we understand it, our purpose, as set out in the Terms of Reference, is to advise the Government on this political question. Any advice we offer must, of course, be informed by legal realities, if for no reason other than the fact that the political question upon which we advise is a justiciable matter.[9] That means we cannot ignore the consistent body of authoritative case law that is deferential to the executive on the exercise of its legitimate political power to proclaim the ordinary courts inadequate to secure the effective administration of justice and the preservation of public peace and order.[10] This is discussed in greater detail below.

It does not mean, however, that our advice is determined or dictated by these authoritative judicial statements which, although based on the relevant provisions of the Constitution, apply to the Offences Against the State Acts in their current form. We differ from the majority on this, especially in circumstances where a legislative alternative to the OASAs is being proposed. We see our role as one in which we advise the Government on what *should* be done and not merely what *can* be done.

Rather than becoming a normalised or permanent fixture of the court system we believe that non-jury courts, whether constituted by statute or established by constitutional amendment, should be used only in circumstances where there is a real and present danger of jury intimidation or tampering.

Proposing a permanent or *"standing"* non-jury court to deal potentially with any serious offence in circumstances where the ordinary courts are deemed to be inadequate by the DPP (subject to light touch review) by reference to a non-exhaustive list of criteria creates a context of *"function creep"* for a new non-jury court that could, foreseeably, lead to trials that would now be dealt with by juries being tried by a non-jury court on the basis of, for example, evidential complexity or litigation efficiency. It could also, depending on the legislative arrangements made to bring such a permanent or 'standing' non-jury court into existence and on the statutory criteria to guide the DPP, stretch the constitutional standard of *"adequacy"* or inadequacy beyond what is acceptable, even on a strict reading of the rather permissive provisions of Article 38 of the Constitution. It might be possible to manage this risk through the statutory criteria proposed by the majority to guide the DPP in the exercise of their power to determine trial venue but we believe that this is too great a change to recommend and, if it was to cover situations other than those involving jury tampering, is certainly not based on any testimony or evidence heard by the Review Group. In fact, the proposal of the majority to create a permanent or *"standing"* non-jury court coupled with the recommendation that the DPP continue to decide on trial venue in future circumstances that could go well beyond the contexts of terrorism and organised crime is, arguably, straying beyond the terms of reference for this Review Group.

[9] *Per* O'Donnell C.J. and Hogan J. in *Dowdall and Hutch v. DPP* [2022] IESC 36, (Unreported, Supreme Court, 29th July 2022). It is worth noting, in this connection, that the Supreme Court emphasised that while the role of the executive in respect of proclaiming the inadequacy or adequacy of the ordinary courts was justiciable, the role of Oireachtas in nullifying any such proclamation was non-justiciable.

[10] The most recent example being the decision of the Supreme Court in *Dowdall and Hutch v. DPP* [2022] IESC 36, (Unreported, Supreme Court, 29th July 2022).

Jury Tampering or Intimidation

Allowing for non-jury trials where there is a real and present danger of jury tampering would be consistent with the approach now adopted in Northern Ireland, a much smaller jurisdiction with obvious community tensions, as well as other comparable jurisdictions like England and Wales. In saying this we are strongly conscious of the need to pre-empt jury intimidation or tampering where it is probable and we are not merely proposing remedies *ex post facto* for when jury intimidation actually occurs.

This risk of a *"perverse verdict"* or *"jury nullification"* did not feature heavily, if at all, in the evidence received by the Review Group. Rather, the primary form of jury tampering we received evidence about centred on the risk of jury intimidation. It can, therefore, be concluded that any need for a non-jury court which we have considered is based primarily upon the possibility and extent of juror intimidation giving rise to a situation of inadequacy in respect of the ordinary courts, whether assessed as a probability pre-trial or as an actuality in the course of a trial.

This problem of jury intimidation is potentially one that is not limited solely to *"seditious"* or terrorist organisations. Consequently, the use of the Special Criminal Court has been extended over time to deal with prosecutions arising from *"organised crime"*. In so doing, the State has extended the use of an exceptional court to an area of criminal activity that cannot be considered to be exceptional or temporary. It is worth noting that this extension has not been accompanied by a commensurate increase in legislative safeguards expected by a recalibration towards normalcy.

The only evidence that the Review Group has considered in relation to jury intimidation were statistics published in July 2021, shortly after the Group commenced its work, that *"a total of 343 cases have been brought since 2011 under Section 41 of the Criminal Justice Act 1999"* for jury or witness intimidation. This was reported in several media sources as evidence for the necessity of the Special Criminal Court.[11] However, these statistics clearly conflate jury intimidation and witness intimidation.

When the Review Group requested statistics specifically on jury intimidation from An Garda Síochána we were told that these were not available. The difference between juror and witness intimidation is of fundamental importance. It is clear how a non-jury trial can cure the risk of jury intimidation. It is not, however, at all clear how a non-jury trial might somehow rectify witness intimidation. Witnesses are still required to testify before the Special Criminal Court. To conflate witness intimidation with jury intimidation therefore is not only groundless, it is potentially misleading as to the extent of jury intimidation and, by extension, of the necessity for a non-jury court. As a result, we simply have no idea of the extent of jury intimidation in Ireland and so we cannot say that a Special Criminal Court to cure this risk of jury intimidation is necessary. Of course, the argument can be made that the use of the Special Criminal Court (combined with the automatic trial of scheduled offences before that court) eliminated the risk or probability of jury intimidation but that argument is more convenient than compelling in the absence of specific or plausible evidence of jury intimidation.

The majority take the view that, despite this, trust must be placed in An Garda Síochána as to the continued necessity of the Special Criminal Court, albeit in the guise of a newly-

[11] Conor Gallagher, *"Just 27% of witness or jury intimidation cases result in conviction"*, *The Irish Times* (6th July 2021), accessible at https://www.irishtimes.com/news/crime-and-law/just-27-of-witness-or-jury-intimidation-cases-result-in-conviction-1.4612182.

established, permanent non-jury court, based on an unquantifiable but probable risk of jury intimidation. The majority therefore defer to the views of An Garda Síochána in the absence of compelling evidence to the contrary on one of the most fundamental questions at the heart of this review: is the Special Criminal Court (in whatever guise) necessary?

Indeed, this is the case not just for the majority of this Review Group but also for every other decision-maker in the weak oversight process currently operating under the OASAs. From the DPP, to the judiciary, to the Department of Justice, to the Oireachtas, no meaningful scrutiny of the assessment by An Garda Síochána and other security actors as to the inadequacy of the ordinary courts to secure the effective administration of justice and the preservation of peace and public order has been forthcoming. It is not forthcoming because no such scrutiny is possible.

This is not to say that An Garda Síochána and others are incorrect in their assessment. The point is, we do not know.

Deference and justification

There is certainly a place for what is known as *"deference"* in a constitutional democracy that respects human rights and the rule of law. Deference occurs when a review is being carried out of a decision and respect is accorded to the original decision-maker's assessment of the situation owing to their superior expertise or democratic mandate. The latter is not relevant to An Garda Síochána as an unelected body; however, the former is applicable based on the superior but non-monopolistic expertise of An Garda Síochána in respect of national or state security. But deference does not mean complete abdication of responsibility to review and scrutinise a decision. Deference should promote a *"culture of justification"* where deference is not automatic but earned by decision-makers giving reasons for their decisions so far as it is possible to do so. In relation to the OASAs deference operates to frustrate any culture of justification.

Were we, as the minority, to recommend the continued need for the Special Criminal Court (or an equivalent), we would, in effect, be endorsing, legitimising, and contributing to this weak oversight and accountability framework. We would ourselves be frustrating the very principles of the rule of law, oversight, and accountability against which we purport to evaluate the provisions of the Offences Against the State Acts. This is not something we are willing to do based on what we have heard and considered in the course of this review.

However, given the undeniable possibility of jury tampering, whether as an outworking of community intimidation or on some other basis, even if it is a possibility that is difficult to gauge abstractly or a remote possibility, it follows that we accept that, in such very limited circumstances, judge-only or juryless courts may be used. Those circumstances should be limited to situations where there is evidence of a real and present danger of jury intimidation or tampering where reasonable preventative steps to avoid this probability would be ineffective or impracticable thus warranting recourse to a juryless court in the interests of justice.

Accepting this as a matter of principle does not mean that we acquiesce in the specific proposal made by the majority to establish on a permanent or *"standing"* basis a non-jury special court based on the deliberations of this particular Review Group.

Those protections or reasonable preventative steps would include using:

- Remote juries; and/or
- Anonymised jury lists (as recommended by the Law Reform Commission in 2013); and/or
- Transfer of jury trials to a different location.

With regard to remote juries the Review Group had a most useful interaction with a representative from the criminal side of the Scottish Faculty of Advocates (equivalent of the Irish Bar). He outlined the lengths to which the Bar in Scotland had gone during the period of the COVID pandemic to protect jury trials by using state-of-the-art technology to enable the use of remote juries sitting in venues such as unused cinemas. In his meeting with the Review Group he outlined in some detail how successful this project had been and mentioned that the throughput of criminal cases tried by jury actually increased during this period. We see no insuperable obstacle to the use of remote juries in this jurisdiction in dedicated and not temporary venues in circumstances where it might be done to mitigate or eliminate the risk of juror intimidation.

If we have learned anything from the COVID pandemic it is how to optimise technology to do things differently. The use of remote juries would entail additional costs and would require some adjustment on the part of judges and criminal practitioners but neither of these are insuperable obstacles. It would also represent a more proportionate compromise on the right to trial by jury, in the traditional sense, than dispensing with jury trial altogether.

The Review Group also considered the Report of the Law Reform Commission published in 2013[12] which, in Chapter 7, dealt with the issue of Jury Tampering. It identified access to jury lists as a potential risk of jury tampering and recommended a system of anonymised lists and a series of other reforms designed to strengthen and improve matters relating to jury service in the modern era. The Commission also published a bill with its report with provisions implementing its recommendations.

A number of submissions received by the Review Group referred to the Law Reform Commission recommendations with approval. It is noteworthy, in connection with the issue of anonymised jury lists, that the Justice and Security (Northern Ireland) Act 2007 places restriction on disclosure of juror information and a challenge to this on the basis that it breached Article 6 of the Convention was unsuccessful.[13]

We note that it was reported in 2019 that the Department of Justice disbanded an inter-departmental Working Group established in 2018 to consider the full set of recommendations made by the Law Reform Commission due to other work being prioritised at that time.[14] This was subsequently clarified in a response to Parliamentary Questions in which the relevant Minister of State stated:

[12] The full report can be accessed here: https://www.lawreform.ie/_fileupload/Reports/r107.pdf. It should be acknowledged by way of declaration of interest that one member of the minority, Professor O'Connell, was a member of the Law Reform Commission in 2013.

[13] *In re McParland* [2008] N.I.Q.B. 1.

[14] See further: https://www.irishlegal.com/articles/jury-service-reforms-effectively-shelved-after-working-group-disbanded.

> *"While the working group met on a number of occasions up to April 2019, unfortunately other priorities then overtook the work of that group. Its work is now being taken forward through my Department's Statement of Strategy 2021-2023 and its priority objective to modernise the courts system. The overall operation of the jury system will be further reviewed in that context, including the work already carried out by the Working Group and any subsequent developments, in particular over the course of the pandemic. This review will be among the priorities set for my Department in 2022. Any reforms would of course require primary legislation and would build on other important reforms to jury service that have already been introduced in recent years."*[15]

It goes without saying that if the proposals with regard to non-jury trials of either the majority or minority of this Review Group are to be advanced it would make abundant good sense to re-engage with the proposals made by the Law Reform Commission ten years ago as a priority. Where a credible and authoritative blueprint for the enhancement of jury service exists, and where implementation of recommendations designed to strengthen jury trials has not taken place, it would be an oddly dissonant approach – given the centrality of the right to trial by jury under the Constitution – to prioritise legislating for non-jury trials before implementing the pre-existing proposals for reform, especially in circumstances where the ostensible motivation for having non-jury trials is to deal with jury tampering, a matter considered in some detail by the Law Reform Commission when making its recommendations.

Of course, given the provision under the OASAs for scheduled offences automatically triable before the Special Criminal Court, something which has been upheld constitutionally, and other provisions, such as s. 8 of the Criminal Justice (Amendment) Act 2009 declaring ordinary courts automatically inadequate in respect of certain offences, it may well be the case that jury tampering or nullification has always been a secondary consideration in making provision for non-jury trials.[16] We welcome and support the proposal by the majority of this Review Group to cease the scheduling of offences in any new legislation to replace the OASAs.

Choice of Trial Venue – Who Decides?

In the event that a permanent or *"standing"* non-jury court were to be established in the manner proposed by the majority we disagree profoundly with their proposal that the choice of trial venue should remain a matter solely for the DPP even if that choice were to be fettered by criteria grounded in statutory guidelines. Without prejudice to our concerns about such a court we believe that the choice of trial venue should be made by a judge on an *ex parte* or *inter partes* basis as a preliminary matter and not by one party to the proceedings, the DPP. The criteria upon which such a decision should be made should be set out clearly in legislation and should not be so open-ended as to allow for casual or routine recourse to non-jury trial. The aforementioned risk of function creep must be avoided at all costs. The kind of safeguards proposed by the majority for the exercise of such a power by the DPP – such as considering a range of jury protections – should also apply to a judge deciding on trial venue.

[15] See further: Jury Service – Wednesday, 30 Jun 2021 – Parliamentary Questions (33rd Dáil) – Houses of the Oireachtas, accessible at: https://www.oireachtas.ie/en/debates/question/2021-06-30/176/

[16] In para. 7.50 of its *Report on Jury Service the Law Reform Commission stated: "…there is a strong argument…in favour of a re-examination of whether the use of scheduling of offences for the purposes of the Offences Against the State Act 1939 complies with the State's obligations under international law and whether a more individualised case-by-case approach may be justified."*

In considering the option of a judge deciding on venue, an option which raises no constitutional impediments, the majority note the following practical difficulties (at para 4.59):

> *"…questions arise as to the point at which the decision is made; the procedure to be followed; the role (if any) of the accused in the process; the manner in which evidence is adduced; how claims of privilege are to be dealt with; and the possibility of appeal or review of the decision."*

None of these difficulties are insurmountable and are more than counter-balanced by the clear advantage of having a decision as to venue (and thereby dispensing with the right to trial by jury) being taken by an independent party who, in that pre-trial process, also exercises a form of oversight in respect of the DPP.

Ideally, the decision should be taken at the pre-trial stage on notice to the defence but, exceptionally, on an *ex parte* basis with a right of appeal. We believe it would be preferable to have this decision taken out of the hands of the DPP than to have some kind of *ex post facto* review by a judge of decisions already taken by the DPP. In fact, it is not at all clear how this form of oversight by a judge (but not judicial review) proposed by the majority would work or how it would amount to anything other than a veneer of pointless oversight. Is the proposal grounded on some idea that the DPP will exercise her/his power to certify more carefully when based on a set of *"open-ended"* criteria but also knowing that there's a judge at their shoulder, albeit a judge that can say nothing until long after a case has been dispensed with by a permanent non-jury court? The proposal of the majority adds a layer of complexity to the role of the DPP that would be avoided entirely by putting the decision on venue into the hands of a judge.

We deal later with the issue of privilege judges and special advocates in our section on belief evidence but for the purpose of deciding on trial venue as a preliminary matter the judge so deciding would, as a matter of practical necessity, act as a privilege judge. We do not see the possibility of appeal or review of a decision by a judge to certify a case as suitable for trial by a non-jury court as a disadvantage. In fact, we see it as a further protection of the right to trial by jury that takes the constitutional imperative of trial by jury seriously and is likely to address any concerns, however fanciful, that the majority may have that putting the decision into the hands of a judge may not in fact lead to a reduction in non-jury trials.

Why a Permanent Non-Jury Court is Constitutionally Inappropriate

While the Constitution does provide for non-jury trials, the manner in which this is done is entangled in the Constitution's emergency powers framework. Moreover, although the Special Criminal Court is now *de facto* permanent,[17] this does not mean, as a normative proposition, that it *should* be. This entanglement with the Constitution's emergency powers undermines the legitimacy of the Special Criminal Court.

Currently, non-jury trials for serious offences can only be provided for under Article 38.3.1°:

[17] There was no Special Criminal Court (or non-jury criminal court) between the coming into effect of the Irish Constitution 1937 and the enactment of the Offences Against the State Act 1939 and the making of a Proclamation under Part V thereof and in the period from 1962 to 1972. At all other times there has been a Proclamation to the effect that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order.

> *"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".*

Article 38.3.1° was clearly designed to be used in temporary emergency situations. It emerged from the recommendations of the 1934 Constitution Review Committee which was established to deal with the difficulties surrounding, amongst other things, the highly controversial Special Courts established under Article 2A of the Irish Free State Constitution 1922. The Constitution Review Committee suggested a two-pronged approach to emergency powers: Scheme A which would allow for the enactment of special courts; and Scheme B which would provide for the declaration of a state of emergency for more serious crises. When Eamon de Valera decided to pursue the drafting of a wholly new constitution rather than amending the Free State Constitution, Scheme A thus became the aforementioned Article 38.3.1° and Scheme B became the more extensive emergency powers contained in Article 38.3.3°.

This close link between Article 38.3.1° and its origins as a constitutional emergency provision should not be lost as it is enmeshed in its fabric. Firstly, like most emergency power provisions, Article 38.3.1° sets out a test for conditions that must exist for these special courts to come into effect: *"when the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order"*. Ideally, these clauses are designed to ensure that these exceptional powers are quarantined to exceptional situations.[18] The exceptional nature of Article 38.3.1° is further demonstrated by the wide scope it gives the Oireachtas in how it designs special courts; this is further emphasised by Article 38.3.6° of the Constitution which states that:

> *"The provisions of Articles 34 and 35 of this Constitution shall not apply to any court or tribunal set up under section 3 or section 4 of this Article".*

Article 34 and 35 include important protections such as: judicial independence, security of tenure, and security of remuneration. The breadth of what was permissible under Article 38.3.1° is illustrated by previous iterations of the Special Criminal Court composed entirely of military officers and the fact that when challenged this was held to be constitutional.[19]

The current iteration of the Special Criminal Court consists of a bench composed entirely of serving judges. Moreover, with Ireland's ratification of the European Convention on Human Rights (ECHR) in 1953[20] and the International Covenant on Civil and Political Rights (ICCPR) in 1989, Ireland has obligations under international human rights law to ensure that anybody charged with a criminal offence receive a fair trial with adequate protections to ensure this. Consequently, the types of special court that are now possible under Article 38.3.1° are limited by international human rights law, notwithstanding the Constitution's more generously enabling provisions.

However, such positive developments from a human rights perspective are often delimited by a hyper-deferential approach taken by Irish courts to questions of national security. The most notable of these judgments focus on the role of the superior courts in scrutinising whether special courts are necessary. Despite the ostensibly strong language in Article 38.3.1° that

[18] Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing, 2018) at p. 61.

[19] *Re MacCurtain* [1941] I.R. 83.

[20] Given further effect in domestic law by the European Convention on Human Rights Act 2003.

special courts can only be established when the ordinary courts are *"inadequate to secure the effective administration of justice, and the preservation of public peace and order"*, the Supreme Court has effectively held that this is a *"political question"*, albeit a technically justiciable one. In *Kavanagh v. Ireland,* Barrington J. held that the Government was under no duty to provide reasons as to why the executive considers that the ordinary courts are inadequate – save for the question-begging declaration that the ordinary courts are inadequate – and the courts have no function to review these reasons provided that this power has been exercised in a *bona fide* manner. The difficulty, however, is that without reasons, it becomes impossible to assess whether the decision to establish special courts is *bona fide* or not. This issue was acknowledged by the UN Human Rights Committee which found that the State had failed to demonstrate that the decision to try Mr. Kavanagh before the SCC was based on reasonable and objective grounds.

Recently in *Dowdall and Hutch v. DPP*, the Supreme Court has clarified this, finding that a court established under Article 38.3.1° does not have to be temporary.[21] The Supreme Court also found that that the Government must also be satisfied that the ordinary courts *are* adequate to secure the effective administration of justice, and the preservation of public peace and order in order to exercise its power under s. 35(2) OASA 1939 and terminate the continued use of the Special Criminal Court. However, this should not be interpreted as negating the obligation of the Government to review the Special Criminal Court's continued necessity.[22] Indeed, the Supreme Court further stated that:

> *"…the Government, once forming the opinion on the adequacy of the ordinary courts, would not be entitled to maintain Part V in force for reasons of convenience or efficiency or public popularity, no matter how compelling those considerations might be in any particular case."*[23]

It follows, therefore, that *"the Government is obliged to keep the situation under review to permit it, if necessary to make the relevant determination"*.[24] That said, the degree to which the courts will be able to inquire into the merits of such a determination is almost certainly quite curtailed.

While the Constitution does not *expressly* provide that special courts established under Article 38.3.1° be temporary, temporariness is fundamental to the objective legitimacy and justification of any emergency-type power. Emergency powers are, by definition, temporary measures taken in response to an exceptional threat. Such measures are exempt from ordinary constitutional or human rights protections. This is justified solely on the basis that they are temporary with legitimacy dependent upon the fact that they are needed to respond to some crisis or threat. Once a crisis is resolved or threat defeated or averted, the emergency power is no longer needed and is therefore repealed or allowed to expire. The recent experience of emergency measures arising from the COVID pandemic are instructive in this regard.

Emergency powers therefore should negate the necessity for their own existence. In finding that special courts established under Article 38.3.1° do not have to be temporary, the Supreme Court has effectively undermined any quarantining effect of Article 38.3.1° limiting special courts only to when *"the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order"*.

[21] [2022] IESC 36, (Unreported, Supreme Court, 29th July 2022).

[22] *Ibid* at para. 37.

[23] *Ibid* at para. 38 (O'Donnell C.J.).

[24] *Ibid* at para. 29.

It is understandable why the Supreme Court has taken a deferential and accommodating approach to the possibility of a permanent special court under Article 38.3.1° as that provision of the Constitution is the only basis upon which any interference with the right to a trial by jury for serious offences is possible. But in attempting to fit a square peg in a round hole, they have interpreted a constitutional provision in a manner in which it was not designed to operate.

It is clear, therefore, that the weak oversight of national security powers available through the processes of political accountability is also mirrored in available mechanisms of judicial oversight. That is not to be excessively critical of the judiciary. The deferential approach adopted by the courts must be understood in terms of the separation of powers under the Constitution and the degree to which courts defer to democratic branches (the executive and legislature) on issues such as national security where courts lack the democratic legitimacy or expertise to second-guess the democratic branches.

However, these constitutional concerns that, perhaps correctly, inhibit the judiciary in any effort to robustly review decisions pertaining directly to national security do not necessarily apply to other, non-judicial bodies tasked with review and oversight of national security and related matters. Indeed, where judicial oversight is necessarily or excessively deferential, it is incumbent upon other review bodies, such as this Review Group or, in the future, the Independent Examiner of Security Legislation, to provide a balancing level of uninhibited scrutiny.

It follows that, while aforementioned court judgments enable the status quo pertaining to the Special Criminal Court to endure, that is not to say that the *status quo should* endure or that there is no scope for considerable improvement. Court judgments should operate as a floor and not a ceiling for rights protection. Therefore, if Article 38.3.1° is to remain the basis upon which non-jury courts are provided for under the Constitution—and, indeed, it has to be the basis unless a constitutional amendment is proposed and approved by a majority of the eligible voters in a referendum—the Oireachtas has considerable scope to improve and enhance such a court's protections for human rights and the rule of law.

Our colleagues in the majority no doubt believe that their proposal to establish a permanent or *"standing"* non-jury criminal court is an improvement on the *status quo* whereby a temporary court brought about by Government proclamation has, over time, become permanent. The difficulty with what they are proposing, based as it is on Article 38 of the Constitution, is that they are calling on the Oireachtas to legislate on the basis of a measure of the capacity of the ordinary courts to secure the effective administration of justice and the preservation of public peace and order that is permanently inadequate. This idea needs to be engaged with. For all sorts of reasons criminal trials collapse and retrials are ordered without the conclusion being reached that the ordinary courts are inadequate to secure the effective administration of justice. The system is imperfect but robust. If we were to make provision for exceptional non-jury courts on a permanent or *"standing"* basis by means of legislation instead of Government proclamation, as proposed by the majority, we could be going well beyond the original intent of the Constitution.

Evidential Provisions

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

> *"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 [membership of an unlawful organisation], the statement shall be evidence that he was then such a member".*

We do not propose to replicate here the detailed and extensive 11-page synopsis of the relevant case law on belief evidence and related matters of disclosure and privilege contained in the majority report.[25] This careful overview of the case law details a concerted effort by the courts over time to add additional safeguards and to narrow the scope of s. 3(2). This can be seen by, *inter alia*: the requirement that a conviction cannot solely be secured on the basis of belief evidence,[26] the rule against double-counting,[27] and that the invocation of privilege over the sources upon which belief is based may affect the weight given to the belief evidence by the court.[28]

However, the case law also shows courts consistently upholding the constitutionality of the admissibility of belief evidence and rejecting arguments that would improve further the operation of s. 3(2) from a human rights perspective. For instance, although convictions solely on the basis of belief evidence are no longer possible, corroboration may be based on adverse inferences drawn from the conduct of the accused where a person under Garda questioning fails to answer questions that are material to the investigation of the offence. These inference provisions are themselves an example of the normalisation of exceptional powers within the ordinary criminal law.[29] An accused convicted on such a basis:

> *"…is met with three distortions of what would be well-established standards in relation to a criminal trial…: the lack of a Jury, the allowance of belief evidence, and the non-disclosure of the material grounding that belief".*[30]

We welcome the majority recommendation that corroborative evidence for belief evidence should not be derived solely from adverse inferences.[31] However, we do not believe that this recommendation is sufficiently strong to cure the defects of s. 3(2).

The case law explained in the majority report creates a *"floor"*, or minimum standard of rights protection, below which reforms to the evidence provisions of the OASA should not drop. What this case law does not establish, however, is that further reforms are impossible. Ultimately, judicial efforts at improving the operation of evidence provisions are limited by the separation of powers. Any further substantial changes to s. 3(2) are more appropriately addressed by the Oireachtas. It does not follow from the fact that s. 3(2) has been upheld as constitutional that no additional safeguards can be added to the provision or that the provision cannot be repealed in its entirety.

[25] *OASA Review Group Majority Report*, at paras. 6.3 to 6.48.

[26] *Redmond v Ireland* [2015] IESC 98, [2015] 4 I.R. 84.

[27] *DPP v Cassidy* [2021] IESC 60, [2021] 2 I.R. 710.

[28] *DPP v Maguire* [2008] IECCA 67, (Unreported, Court of Criminal Appeal, 7th May 2008).

[29] IHREC, *Submission to the Independent Review Group of the Offences Against the State Acts* (November 2021) at p. 24.

[30] Law Society, *Submission to the Independent Review Group on the offences Against the State Acts 1939-1998* (July 2021) at pp. 4-5.

[31] Majority Report (n. 25) at para. 6.59.

We agree with the majority that belief evidence is exceptional and should, therefore, be treated as such.[32] It follows that there must be a compelling need for belief evidence to justify this exceptional deviation from the ordinary rules of evidence. It also follows that there should be commensurate safeguards in place to ensure that the rights of the accused are only interfered with to the minimum extent necessary.

The case law discussed by the majority demonstrates that this question as to the necessity for belief evidence to be admissible is not a question that a court can answer directly. Instead, a court addresses the different question of whether such a provision allowing for the admissibility of belief evidence is compatible with the Constitution. Undoubtedly, this claimed necessity of belief evidence (by the political branches) is a factor the court considers when determining this question and evaluating issues such as the proportionality of the measure's impact on constitutional rights. However, again, the courts do not second-guess the legislature's assessment directly.

Invariably, the courts take a deferential stance on this issue, taking into account the separation of powers and the perceived weak legitimacy of courts on questions of national security. Consequently, the courts have deferred to the political branches on the issue of the necessity of belief evidence.

The deferential approach taken by the courts is perfectly understandable within a particular understanding of the separation of powers. However, it behoves those of us tasked with the job of independent review to step back from such conventions and take a more sceptical view, especially if we take the view that deference – no matter how appropriate in other settings – can limit the horizons of independent review. Although the use of belief evidence has been on the statute books for over fifty years and its constitutionality has been upheld, the exceptional nature of belief evidence and its substantial impact on fair trial rights means that a strong justification must be required for the continuation of s. 3(2). A failure to insist upon a strong justification for the continuation of s. 3(2) would make a hollow gesture of our acknowledgement of its exceptionality.

Simply because belief evidence was considered necessary when it was provided for in legislation in 1972 does not mean that it is still necessary today. It is our contention that the continuing need for such an exception has not been established.

While the constitutionality of section 3(2) has been upheld in several cases, the contextual factors surrounding the enactment of the 1972 Act have featured significantly in these judgments. In *DPP v. Kelly*, Geoghegan J declared that *"it is a reasonable inference to draw that the subsection was enacted out of bitter experience"*.[33] Liz Heffernan and Eoin O'Connor thus note that:

> *"[T]hese dicta are an instructive reminder of the turbulence of the times in which the subsection was enacted and of the perception by the Oireachtas of the need to strengthen the special powers in the OASA by dint of the 1972 amendments"*.[34]

[32] Majority Report (n. 25) at para. 6.58.

[33] [2006] IESC 20, [2006] 3 I.R. 115 at p. 121 (Geoghegan J.).

[34] Liz Heffernan and Eoin O'Connor, *"Threats to Security and Risks to Rights: 'Belief Evidence' under the Offences Against the State Act"* in Mark Coen (ed.), *The Offences Against the State Act 1939 at 80: A Modern Counter-Terrorism Act?* (Hart Publishing, 2021) 95 at p. 102.

Heffernan and O'Connor further note that the case law on s. 3(2) *"exemplifies a willingness on the part of courts to defer to the judgment of the other branches of government when responding to threats to national security."* [35]

In light of this, we believe that it is useful to explain the contextual factors surrounding the 1972 Act as they are important to understanding why the Oireachtas, at the time, considered it necessary to provide for the admissibility of belief evidence. 1972 was the bloodiest year of The Troubles with approximately 476 people killed.[36] Amongst other tragedies, 1972 saw Bloody Sunday, Bloody Friday, and the Claudy bombings. On 1 December 1972, while the Criminal Justice (Amendment) Bill 1972 was in its Second and Committee Stage, two bombs planted by Loyalist paramilitaries exploded in Dublin killing two men. The parliamentary debates surrounding the 1972 Act are replete with references to this deteriorating security situation to justify the changes. They also note the difficulties in securing convictions for membership of an unlawful organisation.[37]

However, the debates also feature concerns over the expedited manner in which the Bill was being passed with Senator Mary Robinson remarking that the Bill was being *"steamrolled through the House."*[38] The Bill was published on 27th November 1972 and was signed into law six days later by the President on 3rd December 1972. The 1972 Act contains no sunset clause or renewal clause requiring regular review by the Oireachtas. As such, the opportunity for legislative oversight as to the continued necessity of belief evidence has been almost wholly absent for the fifty years during which it has been on the statute books.

It is clear that the 1972 Act entered into force when the security situation facing the State was much more acute than it is today. The existence of an emergency-type situation features heavily in the parliamentary debates.[39] While this may not have been a formal emergency in the legal sense under Article 28.3.3° of the Constitution, the circumstances surrounding the 1972 Act and the manner in which it was rushed through the Oireachtas bear all the hallmarks of a *de facto* emergency response. Consequently, the significantly improved security situation in the State today must be considered when evaluating the continued necessity for belief evidence.

It is undeniable that the security situation has improved dramatically since 1972 and that this improvement has been sustained over two decades since the early-1990s. The justification for the necessity of belief evidence that may have existed in 1972 is no longer applicable today and a strong case can be made that the exceptional s. 3(2) should be repealed on this basis and the normal rules of evidence restored. However, this argument has not succeeded in motivating the Oireachtas to effect change in this area in the past five decades. Such is often

[35] *Ibid.*

[36] Malcolm Sutton, *"An Index of Deaths from the Conflict in Ireland"* < https://cain.ulster.ac.uk/sutton/chron/1972.html> accessed 29th March 2023.

[37] See Dáil Deb 1 December 1972, Vol 264, No 4. E.g. Minister for Justice Des O'Malley remarked that: *"It may interest the House to know that since February this year there have been 30 prosecutions in our courts for membership of an unlawful organisation. In only three of those cases has a conviction been secured and I think at least one of those three is well known, and the rather laborious method by which the conviction was obtained is well known, and I think this is indicative of the difficulties which there are in proving an offence under section 21."* See Seanad Deb 2 December 1972, Vol 264, No. 4. < https://www.oireachtas.ie/en/debates/debate/seanad/1972-12-02/speech/297/>

[38] Seanad Deb 2 December 1972 Vol 73, No.14 < https://www.oireachtas.ie/en/debates/debate/seanad/1972-12-02/speech/177/>

[39] *E.g.* Patrick Power T.D. stated that: *"Deputy Sherwin last night and Deputy Blaney this morning let their case rest on the allegation that there was no emergency here. I doubt if the people in Dundalk and the people in Dublin, where a bomb went off recently, would agree with that. I say that there is an emergency. There is intimidation of journalists and witnesses. There is picketing of courthouses. All that adds up to an emergency in my opinion."* See Dáil Deb 1972, Vol 264, No. 4. < https://www.oireachtas.ie/en/debates/debate/dail/1972-12-01/speech/236/>

the case with emergency powers and their propensity to become normalised. Consequently, we consider it important to evaluate the sole remaining justification for belief evidence today: the practical difficulty in securing a conviction in membership cases.

Belief Evidence and the Difficulty of Securing a Conviction in Membership Cases

We note that the majority reached the conclusion that belief evidence, despite its exceptionality, is still necessary to secure a conviction in membership cases:

> *"We accept that belief evidence is an exceptional type of evidence. Notwithstanding this, we agree with view expressed by the majority of the Hederman Committee, and take the view that it is appropriate to continue to provide for the admission of belief evidence in membership trials. Trials for membership offences almost invariably relate to secretive organisations. It is difficult to see how the offence could be effectively prosecuted in many instances without relying, at least in part, on belief evidence. In that context, it appears essential to us to make provision for the admission of belief evidence".*[40]

We also note that four members of the Hederman Committee, including Dr. Gerard Hogan – now Hogan J. of the Supreme Court – considered that these pragmatic justifications in respect of the retention of s. 3(2) were insufficient to surmount the constitutional and evidential objections to this subsection.[41]

As noted by the majority, achieving a conviction in membership cases may be difficult due to the nature of the material upon which the belief is formed which cannot itself be submitted as evidence. In particular, the risk to informants that disclosure of this material would pose was cited as a key justification for continuing to allow the use of belief evidence.[42] It was also suggested to the Review Group that prosecution of membership offences can be difficult due to the nature of the offence where the specific prohibited conduct (the *actus reus*) is diffusely defined and not necessarily confined to a single activity occurring at a single moment in time.[43]

This conclusion of the majority might be more appealing if other jurisdictions with similar offences also made provision for the use of belief evidence. The activity of proscribed organisations is not a uniquely Irish problem. Proscription of unlawful organisations is provided for by, *inter alia:* the UK,[44] Canada,[45] Australia,[46] and New Zealand.[47] Yet Ireland's solution to this ubiquitous problem stands as a stark outlier relative to neighbouring and comparative jurisdictions. None of these jurisdictions make provision for belief evidence.

While it may be contended that these comparators do not all have the same history of dealing with paramilitary organisations as Ireland, this argument cannot be used to discount the experience of Northern Ireland. However, not only has Northern Ireland omitted belief evidence provisions from its proscription offences, the jurisdiction has also expressly

[40] Majority Report (n. 25) at para. 6.58.

[41] Hederman Report (n. 2) at para. 6.95.

[42] The Council of the Bar of Ireland, *Submission to Offences Against the State Acts Independent Review Group* (July 2021) at p. 10.

[43] See e.g., Yvonne Daly and Dr Aimée Muirhead, *Submission to the Offences Against the State Acts Independent Review Group*, at p. 5.

[44] Terrorism Act 2000, Part II.

[45] *E.g.* see Canadian Criminal Code, s. 83.05.

[46] Australian Criminal Code Act 1995, Division 102; See *"Terrorist Organisations", Australia Attorney-General's Department* https://www.ag.gov.au/national-security/australias-counter-terrorism-laws/terrorist-organisations, accessed 2nd April 2023.

[47] New Zealand Terrorism Suppression Act 2002, ss. 20 to 29A.

repudiated the principal justifications for belief evidence relied upon in Ireland to justify s. 3(2). In Northern Ireland, proposals to allow belief evidence were rejected owing to the need to protect the lives of those who would provide the information upon which the police officer's belief would be based.[48] **In other words, the reasons proffered *for* allowing belief evidence in the south were cited as reasons *against* introducing the option of allowing belief evidence in Northern Ireland.**

Furthermore, the Review Group also received submissions explaining that:

> *"…miscarriages of justice in terrorism cases in other jurisdictions, especially the UK, seem to rule out such heavy evidential reliance on police opinion".*[49]

The result is that the Terrorism Act 2000 which contains the UK's principal terrorist offences pertaining to membership and support of an unlawful organisation contains no provision allowing for the use of belief evidence.[50] It is therefore the case that of the two jurisdictions on the island of Ireland, both criminalise membership of a proscribed organisation but only one jurisdiction – Ireland – considers it necessary to allow belief evidence to overcome the practical difficulties of securing a conviction.

This failure to provide for belief evidence has not stopped authorities in Northern Ireland from securing convictions for proscription-related offences as demonstrated by the following table:

Proscription related offences[51]				
	Offence			
Jurisdiction	***Membership***	***Directing a terrorist organisation***	***Supporting a proscribed organisation***	***Total***
Northern Ireland (2001-2021)	*123*	*14*	*21*	*158*
Ireland (2002-2021)	*148*	*1*	*N/A*	*149*

Northern Ireland authorities do not appear to be significantly hampered by the inability to adduce belief evidence when prosecuting membership offences related to proscription.

It is not the case that belief evidence was required to secure every conviction for membership in Ireland. On this point, the Review Group heard and received evidence that the use of belief evidence has been reducing in membership trials. While this may somewhat alleviate concerns as to the extent to which belief evidence is used, it could also indicate that belief evidence is no longer needed.

[48] Heffernan and O'Connor (n. 34) at p. 97.

[49] McLoughlin and Walker, at para 5.1.

[50] Terrorism Act 2000, s. 11.

[51] Northern Ireland Office, Northern Ireland Terrorism Legislation Annual Statistics Reports 2013-2021; DPP, *Independent Review on the Offences Against the State Acts 1939-1998: Submission of the Director of Public Prosecutions* at p. 21.

As acknowledged by the majority,[52] the Review Group received submissions contending that belief evidence is no longer needed as there are now several alternative potential sources of evidence of membership of an unlawful organisation available to law enforcement agencies today that were not available when the provision was enacted over 50 years ago.[53] In the intervening period, the dependency on testimony as a source of evidence has diminished significantly. The 1972 Act predates *"technological advances such as DNA profiling, surveillance technology, mobile phones and social media."*[54] Such advances reduce the necessity for belief evidence as alternative evidential sources are now available. It is also the case that the findings of the Hederman Committee that were made over 20 years ago predate many of these advances. A recent empirical study corroborates this, demonstrating that there is a:

> *"…fairly strong correlation between Garda opinion and the number of evidence sources; where there are more separate sources of evidence, Garda opinion is more likely to be relied upon as evidence. This seems to indicate that Garda opinion is primarily relied upon when there are several other sources of evidence as well".*[55]

This study further suggested that *"…reliance on Garda opinion evidence has become 'baked into' the system in a way that hardwired its consistent use, notwithstanding the strength of other evidence available to support a conviction for terrorism-related offences".*[56] Moreover, this hardwiring of reliance on exceptional evidentiary procedures is potentially indicative of judges becoming comfortable with the use of opinion evidence over time and ceasing to view it as exceptional.[57] Acknowledging that belief evidence is exceptional is not, therefore, the same as treating it as exceptional.

Minority Recommendations on Belief Evidence

Owing to:

(a) The vastly improved security situation in the State when compared to 1972 when provision for belief evidence was first made;

(b) the technological advancements in evidence gathering; and

(c) the fact that comparative jurisdictions to Ireland—including Northern Ireland— have not made recourse to belief evidence notwithstanding the fact that similar membership offences exist on their respective statute books,

we recommend that the provision for belief evidence be repealed and not provided for by way of re-enactment in any replacement of the OASA.

We do not make this recommendation lightly. We are cognisant of the views of An Garda Síochána that belief evidence is still necessary. However, again, we are re-assured that the reduction in the use of belief evidence in recent years and the ability of authorities in Northern Ireland to implement an effective proscription regime without the option to admit belief evidence means that such a proposal would not materially impact upon national security.

[52] Majority Report (n. 25) at para. 6.53.

[53] *Ibid.*

[54] *bid.*

[55] Fionnuala Ní Aoláin, "The Special Criminal Court: A Conveyor Belt of Exceptionality" in Mark Coen (ed.), *The Offences Against the State Act 1939 at 80: A Modern Counter-Terrorism Act?* (Hart Publishing, 2021) 59, at p. 67.

[56] *Ibid* at p. 68.

[57] *Ibid* at p. 69.

As has been demonstrated by the experience of exceptional powers in other jurisdictions: *"Sometimes powers appear necessary but it is possible to make do without them after all."*[58] We see no reason why there should be a uniquely Irish solution to the ubiquitous problem of prosecuting for membership of proscribed organisations.

Disclosure, Privilege and Other Evidential Considerations in the Event that the Use of Belief Evidence is Retained

As explained by the majority:

> *"A chief superintendent giving belief evidence will often rely on information received from confidential informants or derived from security operations. For that reason, the chief superintendent will typically claim privilege over the basis for his or her belief."*[59]

The issues of privilege and disclosure are, therefore, closely connected to belief evidence. They raise two distinct challenges from a fair trial perspective: firstly, in the case of a non-jury trial, the ultimate finder of fact is potentially exposed to prejudicial material that is inadmissible as evidence (the ultimate finder of fact issue); and, secondly, that the accused's right to examine the requisite material is restricted (right to examine issue).

It is important to note that abolition of belief evidence would not cure every instance in which disclosure is at issue in a trial. It would remain the case that in the event of a non-jury trial, the ultimate finder of fact would still potentially be exposed to highly prejudicial material when making decisions as to admissibility. If our recommendation to repeal s. 3(2) is not adopted, we consider it necessary to explore alternative proposals.

As noted, a judge reviewing material underpinning belief evidence which is subject to a broad claim of privilege is at risk of being exposed to potentially prejudicial material. This material may have been obtained in an unconstitutional manner making it unsuitable for disclosure or submission as evidence. That stated, the prohibition on unconstitutionally obtained evidence has been relaxed in recent years since the Hederman Report.[60] Nevertheless, as the finder of fact and law in the Special Criminal Court is one and the same entity, any judge that has seen this prejudicial material must somehow *"remove it from their minds"* before deciding upon the ultimate issue in the case.[61] Justice must not only be done but be seen to be done, and this exposure of the finder of fact to material that might otherwise be inadmissible adversely impacts upon the perceived fairness of the criminal justice system.

It should be noted that in *Donohoe v. Ireland*, the European Court of Human Rights took the view that review by the trial court judge of documents underpinning the belief evidence acted as a safeguard rather than a further risk to an accused.[62] However, the European Court of Human Rights in this case did not address the central issue in *Donohoe*—namely, the court's dual role as arbiter of law and fact. Instead, the European Court of Human Rights focused on the range of safeguards available to the accused.[63] This perception that review of privileged

[58] Jonathan Hall K.C., "Non-Jury Trials: Northern Ireland Office Consultation (November 2022): Response by the Independent Reviewer of Terrorism Legislation", *The Independent Reviewer of Terrorism Legislation* (November 2022) https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2022/11/IRTL-response-to-NJT-consultation-Nov-2022.pdf, accessed 3rd April 2023.

[59] Majority Report (n. 25) at para. 6.18.

[60] *DPP v. J.C.* [2015] IESC 31, [2017] 1 I.R. 417.

[61] Alice Harrison, *Submission to the Offences Against the State Acts Independent Review Group* (9th July 2021) at para. 2.4.

[62] App. No. 19165/08, 12th December 2013.

[63] Harrison (n. 61) [2.5]; Alice Harrison, "Disclosure and Privilege: The Dual Role of The Special Criminal Court in Relation to Belief Evidence" in Mark Coen (ed.), *The Offences Against the State Act 1939 at 80: A Modern Counter-Terrorism Act?* (Hart Publishing, 2021) 111 at p. 117.

material by the ultimate finder of fact is a safeguard is not likely to be shared by defence counsel. The majority of accused persons prefer not to seek such review owing to the *"obvious risks associated with exposing the arbiter of fact to information that might be highly prejudicial, and which they themselves are unable to challenge"*.[64]

During the course of our work, several mechanisms to reform this issue of privilege and disclosure were suggested to the Review Group. These measures vary in terms of the calibration they strike between the right to a fair trial and the interests of national security. They also vary in terms of the specific problem of privilege and disclosure that they address. Some address the ultimate finder of fact issue; others address the right to examine issue. It should be stressed that these measures are not exclusive of each other. In other words, a combination of measures could be deployed. The measures proposed to the Review Group were:

a) Jury trial to ensure finder of fact is not exposed to privileged material;

b) Oversight from a privilege judge;

c) Inspection of material by a special advocate;

d) Obligation of the prosecution counsel to review material;

e) The *status quo* as exists under the OASA.

We shall discuss these provisions below. We discount option (e)—the s*tatus quo* as exists under the OASA— for the detailed reasons outlined above regarding our rejection of belief evidence and our rejection of the Special Criminal Court as the means through which non-jury trials are delivered and, of course, because we concur with the view of the majority that the OASA should be repealed.

(a) Trial by Jury

We have discussed above the importance of ensuring a distinction between the finder of fact and finder of law when outlining the merits of trial by jury. This would substantially improve issues relating to privilege and disclosure. However, in the event that a case does end up before a non-jury court, further measures would have to be provided for. Trial by jury also does not address the right to examine issue.

During the work of the Review Group, it was frequently mentioned that the ultimate finder of fact being exposed to potentially prejudicial material does not necessarily impact on the right to a fair trial under Article 6 of the Convention as most continental systems in Europe do not make provision for trial by jury. A better understanding of how continental systems deal with this issue would have assisted our work appreciably, an issue to which we will return in our discussion (later) of methodology and context.

(b) Oversight from a Privilege Judge

The majority recommendation for oversight of material by a privilege judge would, to an extent, rectify the specific danger of the finder of fact seeing and reviewing highly prejudicial material that is subsequently deemed inadmissible.[65] Currently, the notion of a *voir dire* or *"trial within a trial"* to deal with issues of admissibility of evidence before the Special Criminal Court has been described as *"artificial"*.[66] A privilege judge

[64] Bar Council (n. 42) at 11.

[65] Majority Report (n. 25) at para. 6.64.

[66] Harrison (n. 61) at para. 2.1.

may ensure that the review by a court actually operated as a safeguard as envisaged by the ECtHR. As noted, a similar effect would also be achieved through the use of jury trials in membership offences cases as the ultimate finder of fact—the jury—would also not have access to the privileged material. Here, a *voir dire* would operate as it is supposed to.

The Group received submissions suggesting that this hearing by a privilege judge or *"differently constituted court"* could decide these issues of privilege and disclosure in advance of the trial, on an *ex parte* basis or on notice to the defence. There are, however, difficulties with this. Firstly, if the decision as to disclosure is made *ex parte* in advance of the trial, the prosecution and the court will not have the requisite knowledge of the accused's defence to determine whether a piece of evidence is of significance to it. The privilege judge model therefore does not address the right to examine issue. Secondly, as disclosure is a continuing obligation throughout the trial, an advance hearing would not cure all issues of disclosure and privilege. Having a *"privilege judge"*, either as a fourth judge in membership cases, as suggested by the majority, or on call throughout the trial, may be cumbersome and resource-intensive.

Consequently, the key weakness to this approach is that it fails to address the right to examine issue. The defence would not be in a position to challenge the admissibility of the evidence as they would not be present during any hearing where the judge was reviewing the material over which privilege was claimed. The result of the option favoured by the majority is that this measure still impacts significantly upon the rights of the accused with the calibration shifted heavily in favour of the State's claimed security interests.

(c) The Use of Special Advocates

The Review Group received several submissions suggesting that the Oireachtas should consider the introduction of special advocates in this jurisdiction. Special advocates are:

> *"…a specially appointed lawyer (typically, a barrister) who is instructed to represent a person's interest in relation to material that is kept secret from that person (and his ordinary lawyers) but analysed by a court of equivalent body at an adversarial hearing held in private."* [67]

In the UK, special advocates are prohibited from disclosing closed information to the appellant; moreover, they are not responsible to the person whose interests they are appointed to represent.[68] As such, special advocates are an exceptional deviation from the standard right to legal representation. This exceptionality must be considered, notwithstanding the tacit approval given to special advocates by the European Court of Human Rights. This approval cannot be considered a *"ringing endorsement"*; rather, it amounts to a *"lesser evil than some other systems"*.[69] This tacit endorsement is also evident in several of the submissions that the Review Group received regarding the role of special advocates. These submissions did not necessarily argue for the introduction of special advocates; rather, they stated that the review group should *explore* their introduction. That stated, most of these submissions viewed special advocates as an improvement on the *status quo* that would inject some modicum of defence scrutiny

[67] House of Commons, Select Committee on Constitutional Affairs 7th Report (22nd March 2005) https://publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/32307.htm accessed 6th April 2023 at para. 44.

[68] *Ibid* at paras. 58 to 61.

[69] *Ibid* at para. 49.

to privileged material. They would therefore be an improvement upon a system that would provide for review of the privileged material by a judge alone.

While the Supreme Court has not rejected reading into existing legislation the idea of special advocates, it has said that such a regime is for the Oireachtas to introduce.[70] Special advocates and *"closed material procedures"* (CMPs) are used in the UK, mostly in the context of immigration hearings before the Special Immigration Appeals Commission (SIAC). Like many exceptional measures before them, they have, however, demonstrated a propensity to *"creep"* and spread into other areas of law. The most significant of these developments was the expansion of their use in civil proceedings.[71]

While the UK courts have approved the use of special advocates in criminal settings to review questions of privilege and disclosure, it must be stressed that this use is highly exceptional and controversial. This exceptionality is underlined by the fact that they are rarely used in this criminal context. The Review Group heard from the UK Independent Reviewer of Terrorism Legislation, Jonathan Hall K.C., that any encroachment of the special advocate into the realm of the criminal trial must be treated with caution. According to the Independent Reviewer, such measures run the risk of allowing intelligence to be submitted as evidence, undermining the fairness of the criminal justice system.

We note that the majority considers that the use of special advocates as too detrimental to national security concerns as they could *"involve the wider dissemination of sensitive information."*[72] This view of special advocates was not shared by the majority of submissions received by the Review Group that considered special advocates. Notably, the Bar Council, which represents the interests and expertise of those most likely to be in a position to act as special advocates, suggested that the Review Group give 'particular consideration' to this proposal. Nor was the view that special advocates represent a security risk raised by the UK Independent Reviewer of Terrorism Legislation. In addition, we are unaware of any academic research corroborating the contention that special advocates constitute an undue security risk. Rather, the prevailing consensus appears to be that they enhance the security interests of the State by allowing for the admission of secret evidence in legal proceedings. They then seek to reduce the impact this that this deviation from the ordinary rules of evidence has on the right to a fair hearing by allowing for a less than ideal form of legal representation than would ordinarily be required. They are, at best, a *"lesser evil"*.

(d) Obligation of the prosecution counsel to review material

The Review Group received submissions that consideration be given to couple the *"privilege judge"* with an obligation of the prosecution counsel to review this material owing to their *"overall responsibility in ensuring a fair trial."*[73] This would ensure that the decision is being made by a trained legal official that is sufficiently independent from An Garda Síochána. This model suggests that the prosecution counsel's *"duty to the court and their position as 'ministers for justice' may provide a safeguard for the accused*

[70] *DPP v. Binéad and Donohue* [2006] IECCA 147, [2007] 1 I.R. 374 at p. 396; *Redmond v. Ireland* [2015] IESC 98, [2015] 4 I.R. 84 at p. 95.

[71] Justice and Security Act 2013.

[72] Majority Report (n. 25) at para. 6.66.

[73] Harrison (n. 61) at para. 2.10; *DPP v. Special Criminal Court* [1999] 1 I.R. 60.

throughout the trial, and assist in ensuring that all available legal proof of the facts be presented, although it would not cure the issue entirely."[74]

However, this obligation would mean that the check on this power is still being carried out by the prosecution. It would also not be carried out in public and so would suffer defects in terms of the opacity of the decision being taken. Again, the defence's opportunity to scrutinise this decision is still limited meaning that this measure does not address the right to examine issue. Consequently, the minority considers that while this proposal would be an improvement on the privilege judge model alone, as recommended by the majority, it nevertheless unduly prioritises the security concerns of the State to a much greater degree than the aforementioned special advocates model.

Overall Conclusions as to Alternatives to the Abolition of Belief Evidence and the Issue of Privilege and Disclosure

We found the submission of the UK Independent Reviewer of Terrorism Legislation, Jonathan Hall K.C., especially insightful and those insights were useful when considering the nature of s. 3(2) as a whole. The critique of the use of special advocates in a criminal setting goes to the heart of the dangers of belief evidence. It is, in essence, a means through which intelligence can be submitted as evidence. The Supreme Court has sought to assuage this concern by distinguishing between the basis for the belief and the belief itself, the latter of which is admissible.[75] The Review Group received submissions describing this distinction as *"tenuous at best"*.[76] The minority agrees with this assumption and the refusal of other comparative jurisdictions to introduce similar measures underlines this. This issue is further compounded by the fact that there is no requirement that the belief of the chief superintendent be reasonable or objective.[77]

Much like the use of the Special Criminal Court, the current regime pertaining to belief evidence in s. 3(2) of the OAS(A)A 1972 reaches for the nuclear option first. It provides for the admissibility of belief evidence before a non-jury court and it accompanies this with a blanket claim of privilege. Courts have, to an extent added some safeguards in the form of requiring corroborative evidence but, as noted above, this is currently insufficient. We therefore conclude that the existing regime of belief evidence and accompanying issues of disclosure and privilege disproportionately impact upon the rights of the accused in favour of vague or generalised claims as to the interests of national security.

Consequently, the aforementioned alternatives to the abolition of belief evidence all come with baggage attached. All still run the risk of allowing intelligence to be submitted as evidence. Both a *"privilege judge"* would be required to address the *"ultimate finder of fact issue"* and a system of special advocates would be required to address the separate *"right to examine issue"*. The proposal of the majority fails to address this right to examine issue. While these changes introduced in conjunction with each other may be framed as the *"the lesser of evils"* when compared to the current arrangements regarding belief evidence under the OASA, we again emphasise that no compelling case has been made that belief evidence actually enhances the interests of national security. One would therefore be recommending the introduction of a cumbersome compromise mechanism such as a privilege judge system with special advocates

[74] Harrison (n. 61) at para. 2.14; *R. v. Boucher* [1954] S.C.R. 16.

[75] *DPP v Donnelly* [2018] IECA 201, (Unreported, Court of Appeal, 26th June 2018).

[76] Irish Council for Civil Liberties, *Submission to the Offences Against the State Acts Review Group* (July 2021) at p. 53.

[77] IHREC (n. 29) at p. 22.

for the sake of the retention of belief evidence, rather than for the sake of improving the *"balance"* between national security and human rights.

If belief evidence is to be retained, it is the position of the minority that measures would have to be put in place to tackle *both* the issue of ensuring that the ultimate finder of fact is not exposed to inadmissible material *and* the separate issue of the accused's right to a fair hearing and their ability to challenge and review claims of privilege. A *"privilege judge"* or a jury trial would cure the former whereas making provision for special advocates would make some improvement on the latter. However, the cumbersome nature of these measures would arguably make the system impractical. This impracticality would essentially be serving the continued use of belief evidence, the case for the retention of which has not been made convincingly. Consequently, any *"lesser evil"* measure introduced would not be serving any desirable objective. It would not, we submit, improve the balance between national security and human rights because a case has not been made that the admission of belief evidence actually enhances national security in the first place.

We therefore reiterate our recommendation that the provision for belief evidence should be repealed and not re-enacted in any replacement legislation for the OASAs.

Right to Silence

We agree with recommendations made by the majority that inferences drawn from the silence of the accused are exceptional in nature, as are the statutory provisions which provide for adverse inferences to be drawn from the accused. In the event that provision for the use of belief evidence is not repealed, we agree with the majority that an accused person should not be convicted solely on the basis of belief evidence coupled with adverse inferences drawn from their silence.[78] We agree with the majority that s. 52 of the 1939 Act – criminalising failure to provide an account of movements – should be repealed in its entirety and should not be re-enacted. We also agree with the majority that s. 2 of the Offences Against the State (Amendment) Act 1972 – failure to account for recent movements when found near place of commission of scheduled offence – should be repealed and not re-enacted.

We make these recommendations cognisant of the fact that over 20 years ago, the Hederman Committee reached a similar conclusion against the retention of s. 52.[79] While s. 52 survived a constitutional challenge, in *Heaney v. Ireland*, the European Court of Human rights found that s. 52 *"destroyed the very essence of [the accused's] privilege against self-incrimination and the right to remain silent"*.[80] A similar finding was made on the same day in *Quinn v. Ireland*.[81]

Despite these adverse findings from the European Court of Human Rights and the recommendation from the Hederman Committee against the retention of s. 52, it remains on the statute book. Although s. 52 prosecutions are no longer taken its continued existence as a statutory option is not a positive indicator as to the seriousness with which the State takes its international human rights obligations. It goes without saying that if our unanimous recommendation to repeal the OASAs is implemented s. 52 will be repealed and not re-enacted but the fact that it will have taken two independent reports to bring about this self-evidently necessary eventuality is worthy of note. In the event that the OASAs are not repealed s. 52 should be repealed forthwith.

[78] Majority Report (n. 25) at para. 6.60.

[79] Hederman Committee (n. 41) at para. 8.56.

[80] *Heaney v. Ireland* [1996] 1 I.R. 586.

[81] (2001) 33 E.H.R.R. 264; Yvonne Daly and Dr. Aimée Muirhead, *Submission to the Offences Against the State Acts Independent Review Group*.

Proscription

We agree with the majority that proscription offences are, in principle, a legitimate tool in a state's counter-terrorism arsenal. However, the current model, in effect for over 80 years under the OASA, is archaic and lacking in several safeguards to ensure adequate consideration is given to human rights and rule of law concerns. This makes the State's proscription framework ill-equipped to deal with any change in the nature of terrorist threats facing the State. Since the Hederman Committee reported 20 years ago, Ireland's rules regarding proscription now stand as an outlier relative to comparative jurisdictions. Consequently, significant reforms can and should be implemented in this area. We therefore disagree with the position of the majority expressed as contentment to reiterate the findings of the Hederman Committee in relation to proscription.

There are two means through which an organisation may be proscribed in Ireland: proscription by definition; and proscription by declaration.

Proscription by definition

Section 18 OASA provides that an organisation is proscribed if it meets the following definition:

"18.—In order to regulate and control in the public interest the exercise of the constitutional right of citizens to form associations, it is hereby declared that any organisation which—

(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,

shall be an unlawful organisation within the meaning and for the purposes of this Act, and this Act shall apply and have effect in relation to such organisation accordingly."

This definition has been complemented by the s. 5 of the Criminal Justice (Terrorist Offences) Act 2005 which extends *"unlawful organisations"* in s. 18 to include terrorist groups:

> *"5.— (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.*
>
> (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".*

Under s. 18, there is no need for any public declaration by the Government or any other decision-maker that an organisation is proscribed. This framework is often defended on the basis of its flexibility: it is designed to prevent organisations evading proscription by, for example, simply changing their name.

The difficulty, however, is that this approach of proscription by definition constitutes a substantial deviation from rule of law requirements. Although *"unlawful organisations"* are defined in legislation, the significant breadth of this definition raises questions of clarity and certainty in terms of its application. In turn, this impacts upon the ability of individuals and groups to comport themselves in accordance with the law. This was noted by the Hederman Committee in relation to ss. 18(e) and (f). The Hederman Committee expressed reservations at the scope of the s. 18 definition impacting upon the activities of some protest organisations and trade unions. Notably, s. 18(f) would have potentially captured organisations advocating the boycott of water charges in the aftermath of the 2008 financial crisis.[82] It could also potentially capture environmentalist groups such as Extinction Rebellion whose UK adherents have been depicted as extremists and even identified as targets for counter-terrorist measures by some UK police forces.[83]

There is, however, a deeper rule of law problem with s. 18 in that it deems an organisation to be unlawful without the requirement of an *ex-ante* declaration of proscription by the State. As such, this omission may leave organisations unclear as to whether or not they are actually unlawful. This uncertainty may have a chilling effect on organisations and individuals engaged in the type of legitimate political activity that one can expect to occur in any healthy democracy. This lack of express declaration also clashes with some justifications proffered for using suppression orders in s. 19: namely, the public repudiation of specific groups by the State, and the disruptive effects that this express declaration of proscription can have on unlawful organisations.[84] In such situations, failure to issue a suppression order may lead an organisation to believe that it is tacitly permitted by the State to exist and function and, so, it may increase its level of activity or fail to cease its operations.

Human rights and the rule of law are often presumed to exist in a state of perpetual tension with the security interests of the State. In other words, in order to increase security, we must sacrifice human rights and the rule of law, and *vice versa*. This potentially counter-productive aspect of proscription by definition in implying a tacit acquiescence to an unlawful organisation's activities is an illustrative example that this understanding of human rights and

[82] Jamie McLoughlin and Clive Walker, "The Proscription of Organisations in the Republic of Ireland" in Mark Coen (ed.), *The Offences Against the State Act 1939 at 80: A Modern Counter-Terrorism Act?* (Hart Publishing, 2021) 145 at p. 150.

[83] *Ibid* at p. 156; Vikram Dodd and Jamie Grierson, "Terrorism Police List Extinction Rebellion and Extremist Ideology" *The Guardian* (10th January 2020).

[84] See Jonathan Hall K.C., "The Terrorism Acts in 2020: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006" (April 2022), at para. 3.9.

the rule of law is over-simplistic. It is not uncommon for the opposite to be true and that adequately taking into account human rights and the rule of law issues can enhance the State's security interests. Conversely, security measures that unduly impact upon human rights can be counter-productive. From internment in Northern Ireland to extraordinary rendition and Guantanamo Bay, responses to terrorism that fail to take sufficient account of human rights risk harming not just human rights but the State's security interests also. Even less extreme responses may damage relations between communities and the State which, in turn, can have negative implications for policing and security.[85] This point was made succinctly by former UN Secretary General Kofi Anan:

> *"I believe that in the long term we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism."* [86]

A similar point was made by Ambassador Fergal Mythen at the UNSC Open Debate on Counter-terrorism in Africa in November 2022 when cautioning against an overly-militarised approach to counter-terrorism:

> *"Ireland's view is that overly militarised counter-terrorism efforts can be ineffective or even counter-productive in the long term. Comprehensive responses look beyond security measures alone."* [87]

Proscription by declaration

The second mode of proscription under the OASA is proscription by declaration via a suppression order issued under s. 19. A clear suppression order puts a group on notice that they are an unlawful organisation. It follows that such groups are aware that they should cease their activities and that failure to do so may attract criminal responsibility. The issuance of a suppression order therefore cures some of the rule of law concerns that undermine proscription by definition.

However, rule of law concerns remain regarding s. 19, particularly when it is compared with similar provisions in other jurisdictions. Notably, a s. 19 suppression order may be issued when the Government is merely *"of the opinion"* that any organisation is an unlawful organisation. This threshold of *"opinion"* is lower than that of belief required in the UK by s. 3(4) of the Terrorism Act 2000; or that of satisfaction on reasonable grounds utilised in Australia as laid down by s. 102.1(2) of the Criminal Code Act 1995.[88] A similar test of satisfaction on reasonable grounds to believe is required by s. 83.05 of the Canadian Criminal Code.[89] Accordingly, s. 19 has been described as placing into the hands of the executive "*extensive subjectively formulated discretion*" to decide whether to issue a suppression order.[90] It is clear, therefore, that the discretion afforded to the executive by s. 19 is considerably broader than that conferred in other comparable jurisdictions.

[85] See for instance, Project Champion in Birmingham. "Project Champion: Scrutiny Review into ANPR and CCTV Cameras" *Birmingham City Council* (2nd November 2010) <https://www.birmingham.gov.uk/download/downloads/id/460/project_champion_scrutiny_review_into_anpr_and_cctv_cameras_november_2010.pdf>

[86] https://www.ohchr.org/en/press-releases/2009/10/secretary-general-terms-respect-human-rights-vital-fight-against-terrorism

[87] https://www.dfa.ie/pmun/newyork/news-and-speeches/securitycouncilstatements/statementsarchive/statement-at-the-unsc-open-debate-on-counter-terrorism-in-africa.html

[88] https://www.legislation.gov.au/Details/C2022C00324

[89] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-9.html#h-116404

[90] McLoughlin and Walker (n. 82) at p. 152.

In addition, the OASA allows for minimal avenues of appeal or review of a suppression order. Section 20 OASA 1939 only allows for an appeal against a suppression order to the High Court *"within thirty days after the publication of such order in Iris Oifigiúil."*[91] Once this original application for a declaration of legality is exhausted, there are no further avenues available for individuals to challenge a suppression order. It has been suggested by some commentators that this short window of appeal may be unconstitutional, as occurred in *Brady v. Donegal County Council* where a two-month time-limit to appeal a planning decision was found to be repugnant to the Constitution.[92]

The Hederman Committee stressed the onerous burden on the defence to challenge the legality of the suppression order and it has also been noted by some commentators that an applicant must put themselves in the difficult position of raising their heads above the parapet and drawing attention to themselves in making such a challenge.[93]

There is no obligation currently on the executive to keep a suppression order under review. To date, only two suppression orders have been made: against the IRA in 1939[94] and the INLA in 1983.[95] The nature of the terrorist threat that the State has faced to date – paramilitarism related to the conflict in Northern Ireland – has meant that there has been no real necessity to have in place a system of review of suppression orders.

If the nature of the terrorist threat evolves beyond dissident Irish republicanism difficulties could arise. While Ireland has not been the subject of an Islamic extremist terrorist attack, the Review Group received evidence, also mentioned in the majority report, that the threat assessment level of such an attack is currently *"moderate"*. Section 5(4) of the Criminal Justice (Terrorist Offences) Act 2005 extends the definition of terrorist group to actions taken outside of the State. While proscription by definition was relied upon by the State in the recent case of Lisa Smith to apply to ISIS, a specific, *ex ante* suppression order on an overseas group, such as those issued by other states in respect of foreign groups, would operate to discourage individuals from travelling or otherwise interacting with such a group.

Furthermore, the growth in right-wing extremism (XRW) seen in other jurisdictions is a factor that must be considered when designing a proscription framework.[96] This growth in XRW is also acknowledged by the majority.[97] It should be noted that recent express proscription orders have been successful in the UK in disrupting the activities of certain XRW groups.[98]

Minority Recommendations on Proscription

We agree with the majority that the current definition of unlawful organisation in s. 18 is too broad and that s. 18(f) should not be re-enacted.[99] We go further, however, and agree with the unimplemented recommendations made by the Hederman Committee over 20 years ago that paras. 18(d) and (e) are too broadly worded at present.[100] We recommend that these be re-drafted with an emphasis on violent conduct.

91 The usual constitutional appeals process to a decision of the High Court are also applicable.

92 McLoughlin and Walker (n. 82) at p. 155.

93 *Ibid;* Hederman Committee (n. 41) at paras. 6.35 to 6.37.

94 Unlawful Organisation (Suppression) Order 1939, S.I. No. 162/1939.

95 Unlawful Organisation (Suppression) Order 1983, S.I. No. 7/1983.

96 Jonathan Hall K.C. (n. 84) at para 3.9..

97 Majority Report (n. 25) at para. 2.20.

98 Jonathan Hall K.C. (n. 84).

99 Majority Report (n. 25) at para 5.54.

100 Hederman Committee (n. 41) at para. 6.14.

Secondly, it is recommended that the provision for proscription by definition in s. 18 be repealed and not re-enacted in any replacement legislation to replace the OASA. Instead, proscription should be provided for through express suppression orders similar to those that can be made under s. 19. The risk of an organisation evading a suppression order has been alleviated to an extent by the Court of Appeal judgment in *DPP v. Campbell* finding that added or amended labels such as *"Real"*, *"Continuity"*, or *"Provisional"*, did not exclude such successor organisations from the suppression order targeted at the IRA.[101] Any risk could be further ameliorated through the inclusion of an additional ministerial power to add alternative names to the original suppression order. A similar power exists in the UK under s. 3(6) of the Terrorism Act 2000.[102] That stated, we note that s. 19(2) already gives the Government the power to *"amend or revoke a suppression order… whenever they so think proper"* and therefore there is already ample flexibility built into s. 19 to deal with the problem of name changes to avoid proscription.

Any new proscription regime should also make provision for greater oversight and review mechanisms for proscription. The aforementioned proscription regimes of the UK,[103] Australia,[104] and Canada[105] are illustrative in this regard. The threshold required for the issuing a suppression order should better align with these comparative jurisdictions and should be raised from mere opinion to belief based on reasonable grounds.

Any future proscription framework should be further strengthened through an improved system of appeal and review of suppression orders. Section 4 of the UK's Terrorism Act 2000 contains a process whereby an individual or organisation can submit a *"deproscription application"* to the Secretary of State. Any unsuccessful application under s. 4 can be appealed to a commission known as the *"Proscribed Organisations Appeal Commission"*.[106] The operational effectiveness of this commission has been hampered to an extent by the lack of an obligation on the part of the Secretary of State to keep a proscription order under review. As such, the state responding to any deproscription application often has to begin from a *"standing start"* when compiling justifications for continued proscription.[107] Consequently, were Ireland to implement a similar model of review and oversight of suppression orders, as we recommend, it should be implemented in accordance with a specific time-limit on a suppression order. This is the case in Australia where proscription order lasts for three years but is renewable. This time-limit provides not only the opportunity for review and oversight but also encourages the maintenance of good evidence and record-keeping in order to facilitate a cogent case for renewal of the proscription order at the end of the three-year period.[108] The whole issue of review and oversight of proscription orders is an obvious area in which the proposed new Independent Examiner might play a useful role.

[101] Unreported, Court of Criminal Appeal, 19th December 2003.

[102] Section 3(6) of the Terrorism Act 2000 as inserted by ss. 3(6) to (9) of the Terrorism Act 2006 states the following:

"Where the Secretary of State believes—

(a) that an organisation listed in Schedule 2 is operating wholly or partly under a name that is not specified in that Schedule (whether as well as or instead of under the specified name), or

(b) that an organisation that is operating under a name that is not so specified is otherwise for all practical purposes the same as an organisation so listed, he may, by order, provide that the name that is not specified in that Schedule is to be treated as another name for the listed organisation."

[103] Part II of the Terrorism Act 2000.

[104] Section 102.1(2) Australian Criminal Code.

[105] See Canadian Criminal Code, s. 83.05.

[106] Terrorism Act 2000, s. 5.

[107] Jonathan Hall K.C., "The Terrorism Acts in 2019: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006" (March 2021) at p. 43.

[108] *Ibid* at para. 3.21.

In sum, we recommend:

- **The definition of an unlawful organisation in s. 18 OASA should be amended and not re-enacted in any replacement legislation. Section 18(f) should not be re-enacted and ss. 18(d) and (e) should be reformulated to focus on violent conduct.**
- **Proscription by definition should not be provided for. Instead, a model of proscription by declaration only through the use of suppression orders should be implemented.**
- **This power to issue a suppression order should be exercised when the executive believes on reasonable grounds that an organisation satisfies the definition of unlawful organisation.**
- **To encourage up-to-date record keeping and monitoring, any suppression order should be time-limited to three years but renewable after this period.**
- **There should also be an avenue available to make an application for deproscription and appeal of any decision to refuse deproscription.**

Internment

We agree with the majority that internment without trial should be abolished. The power to indefinitely detain persons without trial does not belong on the statute books of a democratic state that purports to respect human rights and the rule of law. Internment is an exceptional power and its use must, therefore, be quarantined to truly exceptional situations. Such a power should not be contained within the ordinary laws of the State but, if necessary, should only be introduced in an extreme emergency situation and should last only for as long as is necessary to end such an emergency and restore normalcy. Upon the cessation of such an emergency the power to intern individuals without trial should cease also.

Currently, Ireland sends out mixed signals with regard to the legal status of internment and its compatibility with Ireland's international human rights obligations. A declaration of a state of emergency under Article 28.3.3° of the Constitution is not required in order to introduce internment under the Constitution. Instead, all that is required is a proclamation from the Government under s. 3(2) of the Offences Against the State (Amendment) Act 1940 that internment is *"necessary to secure the preservation of public peace and order and that it is expedient that this Part of this Act [i.e. allowing for internment] should come into force immediately."* Moreover, this existing internment regime introduced under the Offences Against the State (Amendment) Act 1940 is immune from constitutional challenge owing to the Article 26 reference to which it was subjected and in which its constitutionality was upheld.[109]

However, while an emergency under Article 28.3.3° of the Constitution is not required for internment, an express derogation from the ECHR *"in time war or public emergency threatening the life of the nation" is* necessary.[110] This was evident from the last time internment was introduced in Ireland in 1957 in response to the IRA border campaign. Ireland derogated from provisions of the ECHR using Article 15 and the legality of this declaration was upheld by the European Court of Human Rights in *Lawless v. Ireland*.[111] We are therefore left with the paradoxical scenario that in order to introduce internment in Ireland, a state of emergency must exist from the perspective of the ECHR, but no such formal emergency is required under the Irish Constitution. This suggests a disequilibrium in rights protections under both instruments with the appearance of stronger protections under the ECHR.

It is arguable that this divergence between the ECHR and the Constitution has been exacerbated since the Hederman Report, with Ireland giving further effect to the ECHR subject to the Constitution in domestic law through the European Convention on Human Rights Act 2003. While a constitutional challenge to the validity of internment under Offences Against the State (Amendment) Act 1940 is not possible due to the immunity from challenge conferred on that Act by the Article 26 reference, Irish courts under the European Convention on Human Rights Act 2003 are, subject to the Constitution, empowered to interpret any statutory provision compatibly with the ECHR *"so far as is possible"*. Where

[109] *In the Matter of Article 26 of the Constitution and in the Matter of the Offences Against the State (Amendment) Bill 1940* [1940] I.R. 470; Article 34.3.3° of the Constitution of Ireland.

[110] Article 15 ECHR. A similar derogation from Article 9 ICCPR is also required utilising Article 4. Article 4.1 ICCPR provides that: *"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."* Like Article 15 ECHR, Article 4.2 ICCPR also outlines a series of non-derogable rights.

[111] *Lawless v Ireland* (1979-80) 1 E.H.R.R. 27.

this is not possible and when a *"statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions"*, courts may issue a declaration of incompatibility *"where no other legal remedy is adequate or available"*.[112] Thus while a challenge to the constitutionality of internment under the OAS(A)A 1940 is not possible, it may be possible to mount a challenge under the European Convention on Human Rights Act 2003, albeit that the remedy of a declaration of incompatibility with the ECHR would provide a weak form of declaratory relief.

Consequently, we agree with the majority and recommend that any future introduction of indefinite detention without trial or *"internment"* should only be done via new legislation enacted in accordance with the emergency provisions contained Article 28.3.3° of the Constitution. Such legislation should be time-limited and last only so long as is necessary. This requirement for new, time-limited legislation, would provide the Oireachtas with the opportunity to democratically legitimate the introduction and continuation of internment. Such democratic oversight is currently absent from the OAS(A)A 1940.

We note, however, that a gap in protections for human rights and the rule of law between the Constitution and the ECHR would still exist owing to expansive provision for emergency powers contained in Article 28.3.3°. The reintroduction of the death penalty is currently the only express prohibition on the scope of legislation enacted under Article 28.3.3°. This stands in contrast to Article 15 ECHR which outlines a list of non-derogable rights and, further, the requirement that any measures taken in response to a *"war or other public emergency threatening the life of the nation' be 'proportionate to the exigencies of the situation*". Any future legislation providing for internment in an emergency should abide by the minimal obligations contained in the ECHR, notwithstanding the considerably more permissive standards enabled by Article 28.3.3° of the Constitution as currently worded.

[112] European Convention on Human Rights Act 2003, s. 5.

Methodology and Context

As the Review Group was established during the COVID pandemic most of its deliberative and consultative work was carried out remotely with the Group meeting in-person on only a handful of occasions. The work of the Secretariat to the Review Group in facilitating the review process in less than optimal circumstances was highly commendable. Our various interactions with stakeholders (remote and in-person) were useful and illuminating and the written submissions received by the Review Group were most helpful. The in-person *"Chatham House Rules"* consultative event attended by various experts and stakeholders in May 2022 was, in our view, especially helpful.

The research directed by the Review Group on developments since the publication of the Hederman Report in 2002 had a strong doctrinal focus. For the avoidance of doubt, responsibility for the research agenda and methodology adopted by the Review Group is that of the Group and the researchers bear no responsibility in this connection. Their work was thorough and done to an excellent standard. Any comments we make in relation to the Majority Report are not to be construed and are not intended to be critical of the work of the researchers.

The research carried out was largely concerned with case law and legislative developments in Ireland. This focus is reflected extensively in the majority report which provides a meticulous update on jurisprudential developments that have occurred since 2002. We have endeavoured not to replicate too much of that descriptive content in this report. There was some comparative research, especially of comparable legislative provisions in the UK (including Northern Ireland), and relevant international developments were also summarised. There was no comprehensive review of academic literature apart from that pertaining to Ireland. For example, as mentioned earlier (on p. 20), we believe that some research into continental systems where judges without juries act as finders of fact and finders of law would have been of appreciable benefit to the Review Group.[113]

If our purpose, as a Review Group, is to advise the Government on the *political* question of whether or not the ordinary courts are adequate to secure the effective administration of justice and the preservation of public peace and order we believe that the Group has not focused sufficiently on the issues that require to be studied, in greater depth and detail, in order to advise definitively on this question and make the kinds of recommendations made by the majority.

Tracking legislative and jurisprudential developments since 2002 (when the Hederman Committee reported) has a value, especially when combined with some comparative perspective-taking from other jurisdictions, but it does not add hugely to our empirical knowledge nor to our objective understanding of the related and unrelated contexts of terrorism and organised crime. For example, issues like the reasons for trying co-defendants in different courts for scheduled or non-scheduled offences were not studied in sufficient detail; neither was there sufficient analysis of cases where the ordinary courts were used in circumstances where the Special Criminal Court might have been used; the reasons given by the DPP for not explaining decisions to certify cases for trial before the Special Criminal

[113] See e.g. John D. Jackson and Sarah J. Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge University Press, 2012).

Court – usually national security – did not receive the level of study and analysis that ought to be required in a review such as this.

A disproportionate focus on jurisprudential developments in the Irish superior courts under the OASAs since 2002 is, inevitably, *"OASA-centric"*, especially when most of the cases involved appeals or constitutional challenges, and hardly the best basis upon which to make considered recommendations on legislation to replace the OASAs. This problem is underscored by the degree to which court decisions are characterised by judicial deference, as discussed in some detail earlier. It also falls short when it comes to considering the full range of legislative options available under Article 38 of Bunreacht na hÉireann 1937.[114]

On core practical matters such as the role of An Garda Síochána and that of the DPP one of the biggest challenges faced by the Review Group, in our view, was the impossibility of researching or interrogating assertions made by some stakeholders, especially those assertions that were not supported by testable data or empirical evidence.

For example, it was not possible to ascertain precisely how many requests for certifying cases for trial before the Special Criminal Court were refused by the DPP on an annual basis. We know that the number of requests is small and that the number of refusals is probably a small proportion of that small number but we do not know the actual numbers which, given the size of the data set, is most unsatisfactory. This is not to say that we have any reason to suspect that the power is currently being abused but the simple fact is that we do not know and cannot know under the system as it currently operates. In a constitutional democracy defined by respect for human rights and the rule of law this is unacceptable. Constitutional systems provide for a separation of powers and for modes of accountability and oversight of these powers for a reason—to prevent abuse. Constitutional systems cannot run on trust alone.

It is, furthermore, unacceptable in this day and age, when public confidence can so easily be undermined by disinformation, not to have reliable and verifiable information available through accessible and transparent processes. Whatever about the general availability of such data it is even more concerning that a review group appointed by the Minister for Justice could not be facilitated sufficiently in this connection by the relevant agencies even if this involved collating data manually.

Similarly, the lack of published judgments of the Special Criminal Court, which came as a surprise to some members of the Review Group, about which the Group communicated with concern to the relevant authorities, was not addressed. The existence of a reasoned written judgment by a three-judge court, which might well be put forward by some as an advantage – in terms of the administration of justice and the right to a fair trial – over a non-reasoned jury verdict, is clearly diminished by the absence of published judgments available to the general public. It would have enlightened the Review Group appreciably to have been able to read the actual judgments of the Special Criminal Court in addition to cases decided by the Irish superior courts about proceedings before the Special Criminal Court.[115]

[114] A similar example of self-limiting horizons is evident in the Hederman Report of 2002, Chapter 4, where the Offences Against the State Act 1939 is compared favourably to Article 2A of the Irish Free State Constitution.

[115] Some analysis was available to the Group through academic material by authors such as Fergal Davis and Colm Campbell, as well as more recent material by Fionnuala Ní Aoláin and others in Coen (ed.) *op. cit.* and from the seminal book on the Special Criminal Court by Alice Harrison. One member of the Review Group had extensive experience of practising in the Special Criminal Court and this was a source of valuable insight to other members of the Group, such as ourselves, without such experience. The contributions by various practitioners with experience of appearing regularly before the Special Criminal Court at the Chatham House Rules event in May 2022 were also of serious value.

In the absence of such transparency, and without questioning the good faith of any stakeholders, we believe that it is not advisable to make definitive recommendations – such as the one to establish a permanent or *"standing"* non-jury court with trial venue to be determined by the DPP – in what is a decidedly incomplete evidential context.

An Garda Síochána, the Defence Forces, the Department of Justice and the National Security Analysis Centre (NSAC) based in the Department of An Taoiseach have particularly valuable knowledge and insights in relation to these contexts, and we benefitted considerably from our interactions with them, but we cannot adopt their knowledge and insights as our own and turn them into re-presented advice to Government with an added veneer of combined additional *"expertise"*.

In any event, this advice is already available to Government through direct channels over many years. We note it as relevant and largely persuasive information in relation to national and State security but not as a sufficient basis on which to make anything other than tentative recommendations on a range of available options. This is notably apposite when set against our own knowledge, however incomplete, of countervailing narratives from other jurisdictions and counter-arguments in respect of policy options for Ireland made convincingly by other interested parties. We differ from our colleagues in the majority on the degree to which deference should be shown to conclusions arising from security assessments, however persuasive, and the case to be made for establishing a permanent non-jury court and other matters based on these conclusions.

It is clear that this data deficit is not just a cause of frustration for those of us tasked with independent review but it is also a matter of frustration for Irish parliamentarians faced with the annual task of reviewing certain provisions of the OASAs and other legislation prior to renewal on the basis of annual Government reports seeking renewal. This undermines the degree to which effective oversight, however limited, can be exercised by the democratically elected representatives of the people.[116]

We are not suggesting that a beyond reasonable doubt standard is required in order to make the kind of recommendations made by the majority but we strongly concur with the views of the minority in the Hederman Committee, the Irish Human Rights and Equality Commission, the Irish Council for Civil Liberties and others that the incomplete and inadequate data that exist do not, absent a very deferential view of the Government's prerogative in this matter support a definitive conclusion that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order such as to warrant a permanent non-jury court to replace the *"temporary"* Special Criminal Court that has existed for the past 50 years.

Our considered view is that many of the arguments for maintaining the *status quo,* which were made forcefully to us, are unconvincing. Many of the arguments for minimalist reform are superficially appealing but ultimately meretricious.

[116] See further: Bacik, "The Offences Against the State Acts: Reflections from Practice and the Legislature" in Coen (ed.), *The Offences Against the State Act 1939 at 80: A Model Counter-Terrorism Act?* (Hart Publishing, 2021), at pp. 216 to 217.

Use of International Law Standards[117]

It is not the task of an independent Review Group such as this one to advise Government on what it can do by reference to orthodox understandings of international law (or, indeed, the Irish Constitution). That is the task of offices such as the Attorney General or the Legal Adviser in the Department of Foreign Affairs. As we move into a new era of independent oversight of State and national security a group such as this should be more ambitious for what can be achieved within the framework of international law, especially international human rights law. We should also be conscious of the fact that countries like Ireland that can, without doubt, be described as robustly democratic have a duty to set and not merely follow standards, standards to be emulated by other democracies.

The constitutional rule of dualism (Article 29.6 of Bunreacht na hÉireann 1937[118]) that requires legislative incorporation of international law before it can be given effect in domestic law is not a bar to using international law, whether incorporated or not, as a benchmark of best practice or as a means of reinforcing or augmenting constitutional standards. International standards are typically promulgated as minimum standards[119]. This is to be expected from instruments that are multilateral in form covering vastly differing jurisdictions and legal systems. Therefore, an independent Review Group such as this, bearing in mind its terms of reference, should not confine itself by engaging in a minimalist analysis of the applicable international standards. Rather it should seek to establish high but attainable standards of compliance.

This would be consistent with the high priority attached to human rights and the rule of law in Irish foreign policy, a priority strongly indicated in our recent membership of the UN Security Council.[120]

As the Review Group is unanimously of the view that the OASAs should be repealed but not in full agreement on what should replace them we feel that the option of seeking technical assistance from the UN Special Rapporteur on Human Rights and Counter-Terrorism should be considered. This is something that the Government could seek directly or, in the event that our reports are referred to an Oireachtas Committee, indirectly. Availing of such assistance would have the advantage of enhanced comparative perspective-taking to balance the strong domestic doctrinal focus of the research done in the course of this review. It would also have the benefit of availing of an authoritative and objective human rights-proofing of legislative and policy options open to the Oireachtas in legislating to replace the OASAs.

As a matter of international law Ireland will continue to be reviewed by international human rights bodies. As the OASAs and the continued existence of the Special Criminal Court have been subjected to criticism by such bodies over the years it is likely that whatever, if anything, is introduced by way of alternative to the Special Criminal Court and replacement of the OASAs will be subjected to close scrutiny.

[117] See generally: Law Reform Commission Discussion Paper on Domestic Implementation of International Obligations [LRC 124-2020].

[118] Article 29.6 provides: *"No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."*

[119] See, for example, Article 53 of the European Convention on Human Rights (ECHR).

[120] In this connection it is also worth noting that four of the current mandate-holders as UN Special Rapporteurs are Irish: Professor Siobhán Mullally, Professor Fionnuala Ní Aoláin, Dr. Mary Lawlor and Professor Gerard Quinn. The presidency of the European Court of Human Rights is currently held by an Irish woman, Judge Síofra O'Leary. Additionally, Professor Aoife Nolan is the President of the Council of Europe Committee of Social Rights; the Director of the EU Fundamental Rights Agency, Michael O'Flaherty, is Irish; as is the EU Ombudsman, Emily O'Reilly.

To seek the technical assistance of the UN Special Rapporteur in order to augment the review process in which we have participated would show a seriousness about balancing security imperatives with human rights obligations that moves beyond merely noting human rights concerns as rhetorical or decorative.

The Belfast/Good Friday Agreement 1998 and *"Equivalence"*

The normalisation that might have been expected in the aftermath of the Belfast/Good Friday Agreement of 1998, leading to a reduction in use of the Special Criminal Court or a proclamation by Government declaring the ordinary courts to be adequate to secure the effective administration of justice and the preservation of public peace and order, thus terminating the proclamation of 1972, did not occur. The Hederman Committee, which was established pursuant to the security provisions of the Belfast/Good Friday Agreement, did not make such a recommendation.

Despite the significant reduction in subversive or paramilitary crime the use of the Special Criminal Court actually increased and in 2016 a second Special Criminal Court was established. Although not central to the motivation of Government in proclaiming the ordinary courts inadequate to secure the effective administration of justice in 1972, the Special Criminal Court is increasingly used to deal with *"organised crime"* and what are colloquially described as *"gangland offences"*.

Apart from security undertakings, under the Belfast/Good Friday Agreement 1998 the Irish Government undertook to ensure that at least an equivalent level of protection of human rights would apply in this part of the island of Ireland as applies in Northern Ireland. The concept of *"equivalence"* is open to interpretation and does not necessarily connote *"identical"* but it is of relevance to our task of advising on the political question relating to the adequacy or not of the ordinary courts especially when that advice has a bearing on fair trial rights in this part of the island of Ireland.

The option of non-jury trial is available to prosecution services in both parts of the island of Ireland but the legal frameworks within which these options can be availed of differ markedly. There is also, in Northern Ireland, an open and deliberate policy thrust towards further reducing the use of non-jury courts with the obvious corollary of further restoring jury trial as the norm in that jurisdiction.

If this entails greater protection of the rights of accused persons – and we believe that it does – it raises troubling questions about the degree to which less favourable protection of accused person's rights in this jurisdiction is a breach of the equivalence requirement of the Belfast/Good Friday Agreement. If we see the right to a trial by jury as a core element of equality before the law the relative ease with which this right can be dispensed with in this part of the island of Ireland by contrast to Northern Ireland – a much smaller jurisdiction with an intractable history of intense community conflict – points unavoidably to a conclusion that the rights involved do not enjoy at least an equivalent level of protection in this part of the island of Ireland. This is especially evident in relation to the use of belief evidence, a topic discussed in some considerable detail earlier.

In any future discussion of legislative options to replace the OASAs the *"equivalence"* requirement will have to be considered even if arrangements in both jurisdiction on the island

remain non-identical for some time. Although conceptually nebulous it allows for more open perspective-taking and poses a challenge to the casual exceptionalism that characterises some of the discourse on the OASAs in this part of the island of Ireland.

Oversight and Independent Scrutiny

The majority note the pending establishment of an office of Independent Examiner of Security Legislation – as set out in Part 7 of the Policing, Security and Community Safety Bill 2022 published in recent months – as a cause for some optimism. This proposal, which was made originally by the Commission on the Future of Policing in Ireland[121] in 2018, has the potential to correct the deficit in ongoing, independent oversight of security legislation that has existed for most of the period in which the Offences Against the State Acts have been in force. We concur with the majority that the lack of independent oversight in the 20 year period since the Hederman Committee reported and the establishment of the Review Group of which we are members is regrettable.

The proposal to establish an office of Independent Examiner based on the office of Independent Reviewer of Terrorism Legislation in the United Kingdom arose in the context of deliberations by the Commission on the Future of Policing about the so-called *"dual role"* of An Garda Síochána in respect of policing and national security. The establishment of such an independent office coupled with the creation of a fusion-type intelligence centre in the form of what ultimately became the National Security Analysis Centre (NSAC) was agreed as a basis for the continuation of the dual role of An Garda Síochána in policing and national security. NSAC does not exist on any statutory basis.

It remains to be seen whether the office of Independent Examiner will provide the level of rigorous independent oversight provided by the UK Independent Reviewer.[122] The Bill restricts eligibility for the office of Independent Reviewer to present or past holders of judicial office in the superior courts. Such a restriction does not exist in the equivalent UK legislation. There are also restrictions on the kinds of security or intelligence information that can be shared with the Independent Examiner which fall short of legislative standards in other comparable jurisdictions including the UK.[123] A further difference between Ireland and the UK is the level of parliamentary oversight of national or State security.[124]

The existence of an office of Independent Examiner of Security Legislation, whatever its shortcomings, will mean that there is unlikely to be the kind of prolonged hiatus that occurred between the Hederman Review in 2002 and this review which commenced in 2021 in respect of the Offences Against the State Acts.

As noted elsewhere, because this Review Group is unanimously recommending repeal of the Offences Against the State Acts it is likely that the Independent Examiner, once established, will be required to consider this recommendation and related matters.

[121] Again, by way of declaration of interest, one of the authors of this Minority Report, Professor O'Connell, was a member of the Commission on the Future of Policing in Ireland.

[122] Significant concerns have been expressed by the Irish Human Rights and Equality Commission in its Legislative Observation on the Bill: https://www.ihrec.ie/app/uploads/2023/03/Submission-on-the-Policing-Security-and-Community-Safety-Bill.pdf

[123] For a detailed analysis of the relevant provisions of the Bill see further: https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2023/2023-04-11_l-rs-note-policing-security-and-community-safety-bill-2023-independent-examiner-of-security-legislation_en.pdf

[124] In this regard it should be noted that the Commission on the Future of Policing in Ireland did not recommend a similar level of parliamentary oversight for Ireland as exists in the UK.

Concluding Remarks

It can be difficult to have a reasonable debate on the Offences Against the State Acts and the use of the Special Criminal Court. Despite the apparently strong political consensus in favour of the use of non-jury courts to try defendants in terrorism or organised crime cases disagreement remains on some fundamental issues.

This review process, which commenced in 2021, is reflective of such disagreement and, perhaps, of differing mindsets.

Although we, as a Review Group, have reached a consensus on the need to repeal the Offences Against the State Acts we do not agree on what should replace them nor on the proposal to establish a permanent or *"standing"* non-jury court by statute. But this review does not have to be the last word on reform and can, with good purpose, be viewed as the beginning rather than the end of a deliberative process leading eventually to reform in this area.

By offering a minority perspective we hope we have aided this deliberative process in a way that is seen as thoughtful and constructive. We simply cannot support the set of proposals favoured by the majority based on the review process in which we engaged with them as colleagues. In particular, we view the proposals to continue to use a non-jury court with the decision on trial venue to be taken by the DPP with the continued use of belief evidence and outmoded rules regarding proscription, albeit with certain safeguards, to be largely cosmetic.

We offer an alternative perspective to that of our colleagues in the majority in the hope that this will inform and enhance whatever stage comes next in the deliberative process that will eventually result in repeal and replacement of the Offences Against the State Acts and reform in related areas.

We believe that this deliberative process would be enhanced appreciably by being opened up further to external perspectives so that the full range of options available to the State are considered seriously and interrogated with rigour. This kind of analysis is absolutely essential if the seven principles which we outlined at the start of this report are to be reflected meaningfully in any reform outcome.

The safeguard of trial by jury is, to quote the late Ó Dálaigh C.J., a safeguard against *"an improbable but not to be overlooked future"*[125] Improbable futures can become *"the present"* in the blink of an eye. We either take the right to trial by jury seriously or we do not. Despite the paucity of data generally it is undeniable that the conviction rates in the Special Criminal Court are markedly higher than those of the High Court and Circuit Court where juries are used.

We accept that, although elevated to a standard of pre-eminence by the Irish Constitution, the right to trial by jury is not absolute. We also accept, as a pragmatic inevitability, that the core norm of jury trial can coexist with non-jury trials in exceptional situations.

[125] *Melling v. Ó Mathghamhna* [1962] I.R. 1. This phrase featured strongly in the dissenting judgment of the late Hardiman J. in the case of *DPP v. J.C.* [2015] IESC 31, [2017] 1 I.R. 417.

We differ, however, from our colleagues in the majority on the degree to which we seek to prevent the exceptional becoming the norm and on how this risk can be minimised or averted by legislation.

Dr Alan Greene

Professor Donncha O'Connell