

Preliminary Submission to Independent Review Group set up to examine the Offences against the State Acts

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1. ICCL welcomes the present review as presenting a useful opportunity to consider the significant constitutional and human rights issues that are presented by the Offences Against the State Acts and the Special Criminal Court. We note, however, the recommendation of the Commission on the Future of Policing that an Independent Examiner of Terrorist and Serious Crime Legislation should be established, as well as the Government's commitment to implement this recommendation. ICCL believes that the establishment of such an Examiner is fundamental to the protection of human rights in the context of counter-terrorism and serious crime in Ireland, and the present Review in no way diminishes the urgency of that establishment.
2. The purpose of this submission is to set out what ICCL identifies as the main issues constitutional and human rights issues which arise in relation to the OASA and the operation of the Special Criminal Court. ICCL intends to make detailed submissions to the Review Group on each of these points during the course of the Review Group's work.

A. Right to a trial by jury

3. The right to trial by jury is a fundamental right of every accused person as guaranteed by Article 38.1 of the Constitution.* Section 39 of the OASA 1939 provides that the Special Criminal Court shall operate without a jury and instead be composed solely of three judges. This provision deviates from the constitutional norm and creates a situation of inequality before the law.

B. The dual role of the Special Criminal Court

4. The Special Criminal Court operates without a jury, the judges are therefore triers of both fact and law. Judges can be exposed to inadmissible material; this gives rise to an apprehension of bias on the part of the triers of fact. Both domestic courts[†] and the ECtHR[‡] have confirmed that the judges of the Special Criminal Court can assess materials over which privilege is claimed; this gives rise to an apprehension of bias on the part of the triers of fact.
5. The judges of the Special Criminal Court can view material over which privilege is claimed and can uphold this claim of privilege without the accused ever having sight

* This has been confirmed in cases such as *Murphy v Ireland* [2014] 1 IR 198 at 215

[†] *DPP v Special Criminal Court & Ward* [1999] 1 IR 60

[‡] *Donohoe v Ireland* [2013] ECHR 1363

of this material. This interferes with the principle of equality of arms, gives rise to an apprehension of bias on the part of the triers of fact and interferes with the right of an accused to be tried by an independent and impartial tribunal, as protected by the Constitution and under article 6 of the European Convention on Human Rights (ECHR).[§]

C. Power of the Director of Public Prosecutions

6. Sections 45-47 of the OASA 1939 together with s3 of the Prosecution of Offences Act 1974 provide that the Director has the sole power to send matters forward to the Special Criminal Court. The Director may send forward both scheduled and non-scheduled matter for trial in the Special Criminal Court; this gives the Director wide discretion in sending matters forward.
7. There is no procedure or mechanism by which to have matters transferred back to the ordinary courts from the Special Criminal Court.** There are no checks and balances in place to limit the discretion held by the Director.
8. The lack of clear criteria for the exercise of this prosecutorial discretion interferes with fundamental rule of law principles requiring precision, clarity and foreseeability in the law. It also allows for arbitrary distinctions between accused with no basis in objective criteria. This creates a situation where some accused have their right to a fair trial interfered with and others have the full protection of the right. This is a clear interference with the right to equality before the law.

D. Claims of Privilege

9. Privilege can be claimed over a wide range of written documents and non-written information such as information verbally provided by witnesses.†† There is no formal procedure for setting out claims of privilege in the Special Criminal Court and the Supreme Court has rejected the proposition that such a procedure should be introduced.‡‡ Informer privilege is frequently claimed over information and materials before the Special Criminal Court.

[§] ECHR ARTICLE 6 provides: 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

** *DPP v Special Criminal Court & Ward* [1999] 1 IR 60, 89

†† Harrison, 'Practice and Procedure in the Special Criminal Court' (Bloomsbury Professional, 2019) [8.32]

‡‡ *People (DPP) v McKevitt* [2009] 1 IR 525, 531

10. Informer privilege can be claimed over information which leads to procedural steps being taken by the Gardaí, such as search, arrest and detention. There is a limited ability of an accused person to challenge such a claim^{§§}; this interferes with the right to a fair trial.
11. Informer privilege can be claimed over information which forms part of the prosecution case^{***}. There is a limited ability of an accused person to challenge such a claim^{†††}; this interferes with the right to a fair trial.
12. Public interest privilege is frequently claimed over information and materials before the Special Criminal Court. Public interest privilege can be claimed over information which forms part of the prosecution case.^{†††} There is a limited ability of an accused person to challenge such a claim; this interferes with the right to a fair trial
13. Denying access to the evidence against an accused is a clear interference with article 6(3) ECHR, which protects the right of an accused to have adequate time and facilities to prepare a defence and to examine witnesses.

E. Belief evidence

14. Section 3(2) of the OASA 1972 provides a statutory basis on which belief evidence can be given in a trial before the Special Criminal Court. Where a claim of privilege is made in respect of belief evidence given by a Chief Superintendent, this substantially interferes with an accused person's right to cross-examine.^{§§§}
15. There is a strong level of deference shown by the Courts to members of an Garda Síochána who offer belief evidence.^{****} Belief evidence can be based on inadmissible evidence such as hearsay, and informer privilege can be claimed over such evidence. This interferes with the right of the accused to cross-examine.
16. Belief evidence can be based on information provided to other members of An Garda Síochána by informants. There is no requirement for the Chief Superintendent giving the belief evidence to have direct knowledge of the witnesses or information on which their belief is based.^{††††}
17. Although in general, convictions cannot be secured on the basis of belief evidence without corroboration, this corroboration can be offered by way of inferences.^{††††} This severely dilutes the standard of proof and interferes with the right to a fair trial, in particular article 6(3) ECHR, which protects the right of an accused to have adequate time and facilities to prepare a defence and to examine witnesses against him.

^{§§} *People (DPP) v Eccles, McPhillips & McShane* (1986) 3 Frewen 36

^{***} *People (DPP) v Kavanagh* [2011] IECCA 102

^{†††} *People (DPP) v Eccles, McPhillips & McShane* (1986) 3 Frewen 36

^{†††} *DPP v Special Criminal Court & Ward* [1999] 1 IR 60

^{§§§} The right to cross-examine is derived from Art 38.1 of the Constitution and has been confirmed in cases such as *Re Haughey* [1971] IR 217 and *Donnelly v Ireland* [1998] 1 IR 321

^{****} *DPP v Kelly* [2006] 3 IR 115

^{††††} *DPP v Kelly* [2006] 3 IR 115

^{††††} *DPP v Binéad & Donohue* [2007] 1 IR 374

F. Inferences

18. Inferences can be drawn from silence for the purposes of conviction of an offence of membership of an illegal organisation, as provided for by section 2 of the OASA 1998. This substantially interferes with the constitutional right to silence.
19. Inferences can be used to corroborate belief evidence.^{§§§§} This severely dilutes the standard of proof required in criminal trials and interferes with the right to a fair trial.
20. Section 21 of the OASA 1939 allows adverse inferences to be drawn where an accused person fails to answer material questions which relate to the investigation of an offence under the Act.
21. Section 72A of the Criminal Justice Act 2006 allows adverse inferences to be drawn where an accused person fails to answer material questions which relate to the investigation of an offence under Part 7 of the Criminal Justice Act 2006. Sections 18 and 19 of the Criminal Justice Act 1984 allow for adverse inferences to be drawn where an accused person fails to account for objects, substances or marks on their person or clothing or fails to account for their presence at a particular place.
22. The inference provisions which can be invoked against an accused person are wide-ranging and interfere with the accused's constitutional right to silence and right to a fair trial.

G. Practice and procedure in the Special Criminal Court in light of s41(4) of OASA

23. Section 41(4) of the OASA requires that the practice and procedure applicable to the trial of a person on indictment in the Central Criminal Court shall, so far as practicable, apply to the trial of a person by a Special Criminal Court. The current procedure in the Special Criminal Court fails to meet the requirements of this statutory provision.
24. Section 41(4) of the OASA requires that the rules of evidence applicable to a trial in the Central Criminal Court shall apply to every trial by a Special Criminal Court. The current procedure in the Special Criminal Court fails to meet the requirements of this statutory provision.

^{§§§§} *DPP v Binéad & Donohue* [2007] 1 IR 374

About ICCL

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