LAW SOCIETY SUBMISSION

SUBMISSION TO THE INDEPENDENT REVIEW GROUP ON THE OFFENCES AGAINST THE STATE ACTS 1939 TO 1998

JULY 2021

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

Introduction

The Law Society of Ireland ('the **Society'**) appreciates the opportunity to make submissions to this long overdue review of the Offences Against the State Acts 1939 to 1998 ('the **OASA'**).

The Society would refer to the only previous review chaired by Mr. Justice Hederman[1] and to the submissions which the Society made in respect of that review process.

We note that many of the recommendations of the Hederman Report were not implemented. The intervening years has seen the introduction of a considerable body of legislation tended to bolster or add to the provisions of the OASA. Equally, human rights legislation in Ireland has evolved over the last 20 years with the introduction of the European Convention of Human Rights Act 2003 and the EU Charter of Fundamental Rights. That said, one could certainly contend that emergency legislation and the powers provided for in the OASA are not in sync with a properly functioning modern democracy. This was the view expressed by Professor Dermot Walsh in the Hederman Review[2].

The Society wishes to set out what it considers to be the most pressing legal issues in relation to the OASA and refers to matters which, in the view of the Society, should be addressed as a matter of priority by the Oireachtas. The submission does not recite extensive case law as it wishes to focus instead on the substantive difficulties which have been raised by our member practitioners.

Special Criminal Court

Part 5 of the OASA and Section (3) of the Prosecution of Offences Act 1974 are relevant to the establishment of the Court, its jurisdiction and how an accused may be sent for trial to the Special Criminal Court.

The Society recognises that the establishment of Special Criminal Courts under the Constitution is a matter for the Oireachtas. That said, if the constitutional right to be tried by Jury is to be curtailed, any such limitation of rights must be necessary and proportionate with clear reasons set out in respect of why such rights continue to be curtailed.

In a previous submission to the Hederman Review, the Society highlighted that the OASA was intended as a temporary measure and raised concerns around its continuation many decades later. We also emphasised that the powers under these provisions remained in force on foot of the 1972 Declaration despite the changing political landscape during that period. The lawfulness of these provisions depend on their constant review and regular reviews have not taken place.

During its lifetime, the Special Criminal Court has seen high volumes of cases being referred to it as well as periods where, for months, it has not sat at all.

The Government made provision for the second Court in 2004[3] and appointed Judges to the Special Criminal Court on 28 October 2015. Since then, there has been a constant flow of prosecutions to the Court. That is not due to an increase in subversive activity but rather an increase in the referral to the Court of non-subversive trials or offences related to organised crime, such as money laundering.

Review of Decision of DPP to Direct Trial in the Special Criminal Court

[1] Report of the Committee to Review the Offences Against the State Acts 1939-1998, May 2002

[2] Report of the Committee to Review the Offences Against the State Acts 1939-1998, May 2002, page 275

[3] Order of Government, 21st December 2004 as published in Iris Oifigiúil

As far back as the early 70s, it was recommended that a review of what was then the Attorney General's role, in referring cases to the Special Criminal Court, be carried out. Reference to same was made in the Society's submission to the Hederman Review, twenty years ago.

Given the large increase in referrals to the Court, it is the Society's view that it is now even more important that there should be a fast-track independent mechanism to review, what is now, the Director of Public Prosecution's power to make decisions to refer cases to the Special Criminal court under Part (5) of the OASA.

The Hederman Review considered four oversight mechanisms whereby decisions made by the DPP to direct that an accused, charged with a non-scheduled offence, be tried in the Special Criminal Court could be independently reviewed[4]. The Society believes that the mechanism whereby OASA scheduled offences are, by default, sent forward for trial to the Special Criminal Court should be reviewed given that trials for those offences are generally heard by the Circuit Court.

It is incumbent on the Executive to take great care to ensure that unjustifiable inroads into the right to trial by jury are not allowed to be normalised through increased use.

Opinion Evidence and Inference Provisions

The incursion of rights is further amplified by the use of Section 3 (2) of the OASA.

This provides a legal basis for the admissibility of belief evidence of a senior Garda as to whether an accused is a member of an illegal organisation. The majority of the Hederman Committee noted that the opinion evidence of the Chief Superintendent violated three established rules of evidence[5]. As a consequence of the special role given to the Chief Superintendent in terms of belief evidence, a claim of privilege is usually made over the material which grounds the belief of the Chief Superintendent. It is often argued that the information underpinning the belief evidence relates to operational procedures (for example, around observation methods) and that disclosure of such information would reveal the tradecraft of intelligence officers. Similarly, informer privilege, public interest privilege, or indeed security privilege, is frequently claimed during the course of trials before the Special Criminal Court. The accused person's right to cross examine and to test belief evidence is severely inhibited as a result. The lack of regular and independent review only serves to allow these claims to be dealt with in the unique environment of the Court. The Society strongly recommends that each of these exceptions to the normal rules of trial need to be scrutinised independently and regularly.

This area has been the subject of comment by various Supreme Court Judges over the last 40 years. In the case of *Redmond v Ireland*[6], Hardiman J noted that where privilege is successfully asserted, it seems to exclude an 'examinable reality' in the case and limits the potential to challenge the evidence upon which the belief is claimed. While it has often been stated that convictions cannot be secured on the basis of belief evidence alone, belief evidence, together with inference provisions arising from the refusal to answer material questions, can be found to be sufficient to ground a conviction. In said circumstances, an accused person is met with three distortions of what would be well-established standards in relation to a criminal trial, with all having been breached: the lack of a Jury, the allowance of

[4] Report of the Committee to Review the Offences Against the State Acts 1939-1998, May 2002, pages 236=237

[5] Report of the Committee to Review the Offences Against the State Acts 1939-1998, May 2002, paragraph 6.91.

[6] Redmond v Ireland [2015] 4 IR 84, paragraph 25

belief evidence and the non-disclosure of the material grounding that belief. Any court established by law, and given the power to deal with cases in this manner, should be subjected to regular independent review, not just to review by appellant Courts as is the current position.

The issues highlighted here have been emphasised in the recent application for a Certificate of a Miscarriage of Justice in the case of *DPP –vs- Michael Connelly*[7] and also during the hearing of the appeal *DPP –vs- Murphy & Kennedy*[8]. It is submitted that these cases highlight the need to introduce a legislative procedure to enable an independent review of information underpinning belief evidence. The Society does not make a positive recommendation as to how this could be achieved but suggests that comparative study should be undertaken, which examines both the unique needs of this jurisdiction and the procedures which apply in comparable jurisdictions, as a means to consider appropriate mechanisms.

Further adjustments to long established rights of the accused persons can be found in the provisions of Section (2) of the OASA. Inferences can be drawn from a suspect's refusal to answer material questions. Inferences can be used to corroborate the evidence of the Chief Superintendent as to the belief that the accused person was a member of an unlawful organisation. These two pillars of evidence, which together may be sufficient to convict an accused person, are both exceptional provisions.

Legislative provisions have been introduced by the Oireachtas over the years, outside the OASA, to strengthen the powers of law enforcement agencies. Inference provisions are now widely used before the Special Criminal Court in relation to non-scheduled Offences. The inference provisions set out in sections 18,19 and 19A of the Criminal Justice Act 1984 (substituted by the Criminal Justice Act 2007) and the evidential presumptions provided by the Criminal Justice (Money laundering and Terrorist Financing) Act 2010 are regularly invoked in the Special Criminal Court, a court which already has extensive powers.

The extensive use of inference provisions is an example of how emergency legislation and emergency powers can be deployed and normalised by State authorities to bolster their already extensive investigatory powers, making further inroads against what would be considered established fair trial rights.

Withholding Information

Section 9 (1) of the OASA was widely used as an investigative tool for many years, where people were arrested under section 30 for an offence of withholding information in respect of a particular offence.

The recent constitutional appeal to the Supreme Court in the decision of *Sweeney v Ireland, AG, DPP*[9] clarified the parameters of the offence so as to exclude from its remit, participants to the serious offence the subject of investigation. This use of section 9 as the basis of an arrest has changed since the High Court decision in *Sweeney* (which found the provision to be unconstitutional)which was later overturned by the Supreme Court.

This review provides an opportunity for the Independent Review Group to consider section 9 and its interaction, if any, with section 19 of the Criminal Justice Act 2011, both similarly worded.

[7] Coffey J, Special Criminal Court, 12 April 2021
[8] Heard before the Court of Appeal (Criminal) on 2 July 2021
[9] [2019] 2 ILRM 457

Conclusion

The Society firmly believes that exceptional powers which restrict the rights of accused persons should be subjected to regular reviews as to whether they are still required. Sunset clauses may provide a mechanism by which they cannot continue to exist in the absence of review.

The admissibility of belief evidence in a membership prosecution should be reviewed to assess its compatibility with human rights norms and the right to a fair trial.

The exceptional provisions which enable the DPP to direct that an accused be tried in the Special Criminal Court and the practice whereby access to information underpinning the belief evidence of a Chief Superintendent is restricted, require independent review mechanisms if such powers are to be retained.

Given the changing profile of the offences which are tried before the Special Criminal Court, the Society also questions whether trials for scheduled offences should, by default, be tried in the Special Criminal Court.

We would ask that the review would also consider the extensive legislative provisions which have been introduced since the last review including those which target organised crime which, amongst other provisions, have created new offences and strengthened inference provisions and legislative presumptions. This significant body of law, which has been introduced over the last 20 years, raises questions as to whether there is a continuing need for the exceptional powers set out in the OASA.

We hope that the Independent Review Group will find these comments to be constructive. The Society will be glad to engage further on any of the matters raised.

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