ICCL Follow Up Submission to Independent Review Group on the Special Criminal Court

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Introduction

A. Issues

This submission addresses four issues:

1. Adoption of a special advocate procedure in Ireland;
2. Right to a jury trial on election in common law jurisdictions;
3. Best practices for trying terrorism offences in ordinary jury trials; and
4. Discretion to send someone forward to the Special Criminal Court ('the SCC').

Special Advocates

Introduction

A special advocate is a lawyer with the necessary security clearance who is appointed by a court from an established panel to act on behalf of a party in certain proceedings.[1] They perform broadly the same functions as counsel in ordinary hearings.[2] A special advocate is 'not in the ordinary sense professionally responsible' to that party but is charged to represent their interests.[3] They test the state's claim that material must be closed and seek to have as much of it as possible disclosed while generally protecting the interests of the party on whose behalf they act.[4]

The procedure originates in England and Wales where disclosure was largely left to 'the judgment of the prosecuting authorities and only exceptionally did the court make any ruling'.[5] Criminal defendants 'were commonly unaware of what had not been disclosed and there was no judicial decision against which a defendant could appeal'.[6] Following judgments of the European Court of Human Rights ('the ECtHR'), legislation was

[1] Adam Tomkins, 'National Security and the Due Process of Law' (2011) 64 CLP 215, 217; *Minister of Citizenship and Immigration and Anor v Harkat*, 2014 SCC 37; [2014] 2 RCS 33, para. 35.
[2] *Harkat*, para. 35.
[3] *R v H and Ors* [2004] UKHL 3; [2004] 2 AC 134, 149–150.
[4] Tomkins 217; Eoin O'Connor and Michael Lynn, *National Security Law in Ireland* (Bloomsbury Professional 2019), para. 6.47.
[5] *R v H* 148.
[6] ibid.

introduced in the 1990s providing for special advocates in certain areas involving national security.[7] Since then, special advocates have appeared in criminal trials.[8]

The purpose of special advocates is to address an unfairness in the trial process. Fairness is a 'constantly evolving concept', the standards of which may change by the decade.[9] Aspects of SCC proceedings which may have been considered fair by the courts in previous decades may no longer be so. A useful starting point in this regard are four statements of principle which, taken together, lay a foundation for the adoption of the special advocate system.

First, the Supreme Court of Canada in *R v Stinchcombe*[10] pointed out that:

> 'the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done'.[11]

Second, in *Van Mechelen v Netherlands*,[12] the European Court of Human Rights ('the ECtHR') stated that:

> '[h]aving regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied.'[13]

Similarly, in the immigration case of *Chahal v UK*,[14] the ECtHR commented:

[7] *Edwards and Lewis v UK* (App Nos. 39647/98 and 40461/98) Grand Chamber (27 October 2004) (2005) 40 EHRR 24, para. 43.
[8] See for example, *Malik v Manchester Crown Court and Ors* [2008] EWHC 1362 (Admin), para. 97. See also the comments of the House of Lords in *R v H*, para. 22: 'novelty is not of itself an objection, and cases will arise in which the appointment of an approved advocate as special counsel is necessary, in the interests of justice, to secure protection of a criminal defendant's right to a fair trial.'
[9] *H and Ors*, para. 11.
[10] [1991] 3 SCR 326.
[11]
[12] (1997) 25 EHRR 647.
[13] ibid, para. 58.
[14] (1996) 23 EHRR 413.

> '[T]here are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.'[15]

Fourth, in *Rowe and Davis v United Kingdom*,[16] the same Court said:

> '60. It is a *fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence*. The right to an adversarial trial means, in a criminal case, that *both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party*. In addition Article 6(1) requires... that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused.
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> 61. However, as the applicants recognised, *the entitlement to disclosure of relevant evidence is not an absolute right*. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. *However, only such measures restricting the rights of the defence which are strictly necessary are permissible under article 6(1). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities*.'

From its inception, an abundance of material has been generated on the function, advantages, criticisms, and best practices of the special advocate. This material has been

[15] ibid, para. 131.
[16] (App. No. 28901/95) Grand Chamber (16 February 2000); (2000) 30 EHRR 1.

distilled in the following subsections followed by an analysis of the background against which the special advocate procedure would be introduced in Ireland.

Function

The role of the special advocate encompasses the following aspects:

(a) Represent the accused at first instance and on appeal;[17]

(b) Advocate vigorously for the interests of the defendant;[18]

(c) Safeguard generally against the risk of judicial error or bias;[19]

(d) Test and make submissions on the closed material (such as its relevance, reliability and sufficiency),[20] including arguing:

  (i) against the designation of information as closed material and the strength of claims in favour of same;[21]

  (ii) in relation to the relevance of undisclosed material and its helpfulness to the defence;[22]

  (iii) for more of the closed material to be opened up;[23]

  (iv) for a lower level of redaction on disclosed material;

  (v) as regards the content of the summary of information and whether it discloses enough to give the accused an opportunity to comment on any potentially prejudicial information; and

  (vi) that information which cannot be disclosed may be excluded.[24]

(e) Special advocates are subject to a statutory obligation to maintain the confidentiality of the material save as expressly permitted by law;[25] and

(f) Special advocates have powers similar to those of the accused's lawyer at hearing, such as calling and cross-examining witnesses[26]

[17] *Edwards and Lewis*, para. 44 (citing Robin Auld, 'The Review of the Criminal Courts in England and Wales' (2001), para. 193.
[18] New Zealand Law Commission, *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings*, Report 135 (2015) NZLCR 135, paras. 5.65 and 9.3 ('NZLC'); O'Connor and Lynn (n 4), para. 6.47.
[19] *Edwards and Lewis*, para. 44.
[20] John Jackson, 'Reappraising Special Advocates' (2020) 3 AR 8, 8; O'Connor and Lynn (n 4), para. 6.47; *Harkat*, para. 35.
[21] NZLC (n 18), p. 112, R38; *Edwards and Lewis*, para. 44; *Harkat*, para. 35.
[22] *Edwards and Lewis*, para. 44.
[23] ibid; NZLC (n 18), para. 8.8.
[24] ibid, p. 112, R38.
[25] ibid, para. 9.20, p. 112, R36.
[26] ibid, para. 9.33, p. 112, R38; *Harkat*, para. 35.

Advantages

The advantages of the special advocate procedure can be summarised as follows:

(a) 'Even the most assiduous judge can never be a substitute for the lawyer for the absent party in testing the arguments presented by the opposing side',[27] and a legal system should not 'oblige a judge to take on the demanding role of counsel';[28]

(b) Special advocates can assist in 'counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments' on the accused's behalf;[29]

(c) They can therefore provide an important safeguard in ensuring that the fullest possible disclosure is made to the accused as is consistent with the public interest;[30] and

(d) What is disclosed after a special advocate intervenes 'is almost always considerably more than the executive proposed to give before it';[31] and

Criticisms

There are two primary criticisms of the special advocate procedure. First, it is said that the disadvantage a defendant is placed at by not being privy to the entirety of the evidence cannot be offset to any acceptable degree by the appointment of a special advocate. That is, the role represents such a clear departure from traditional adversarial proceedings[32] and, given the constraints they operate under, the question arises as to whether they can adequately reduce the unfairness in proceedings they act in.[33] In short, the standard of fairness attained through the use of a special advocate still falls short of an acceptable level in criminal proceedings.[34] Moreover, it has been suggested that 'the very availability of the procedure has led to more use of the procedure, and more closed hearings, than might have been anticipated, or is in principle deisrable'.[35]

[27] Lucy Line and David Plater,'Police, Prosecutors and Ex Parte Public Interest Immunity Claims: The Use of Special Advocates' (2014) 33(2) UTLR 255, 283, concisely paraphrasing the comment of Lord Kerr in *Al Rawi and Ors v Security Service and Ors* [2011] UKSC 34; [2012] 1 AC 531, para. 93.
[28] Line and Plater (n 27) 283-284.
[29] *A and Ors v UK* (App. No. 3455/05) Grand Chamber (19 February 2009) (2009) 49 EHRR 29, para. 220.
[30] ibid, para. 219; *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28; [2010] 2 AC 269, para. 115.
[31] *MH and Ors v Secretary of State for the Home Department* [2008] EWHC 2525 (Admin), para. 36.
[32] John Jackson, 'The Role of Special Advocates: Advocacy, Due Process and the Adversarial Tradition' (2016) 20(4) 343, 354.
[33] John Ip, 'The Adoption of the Special Advocate Procedure in New Zealand's Immigration Bill' (2009) NZLR 207.
[34] ibid 357.
[35] *AP v Minister for Justice and Equality* [2019] IESC 47; [2019] 3 IR 317, para. 132.

Such unfairness is caused primarily by the second criticism: that it is 'virtually impossible' for special advocates to take effective instructions from a defendant.[36] This is because they will be hampered by being unable to take instructions from their client on 'closed material'.[37] Further, it is said that ethical concerns arise given the absence of 'the quality of confidence inherent in the ordinary lawyer-client relationship'.[38] Should an absolute prohibition exist on advocates communicating with the accused after they view the said material, this is 'the most significant restriction' on the special advocate's ability to operate effectively,[39] and the 'major constraint' on the effectiveness of the procedure.[40]

While these concerns are addressed fully in the following subsection, in respect of the alleged ethical duties, it is useful to refer to the judgments of the ECtHR delivered by the same members on the same day in February 2000. On broadly similar issues, the Court unanimously found a breach of Article 6 of the ECHR concerning closed material in *Rowe and Davis*, while in *Fitt v UK*[41] and *Jasper v UK*,[42] the Court concluded by the slimmest of majorities, 9:8, that no such violation had occurred. In virtually identical dissenting opinions in both cases, Hedigan J observed that:

> 'The duty owed by the special counsel to the accused is one which in general terms ought to be capable of resolution by the relevant professional bodies. Such ethical problems are the everyday work of the professional ethics committees of the same. Whilst not easy to resolve, nothing in the Government's rather general objection suggests that the problem is insurmountable.'

Best Practices

In meeting those criticisms and gaining the stated advantages of the system, the best practices for special advocates include:

[36] Edward Santow and Nicholas McGarrity, 'Balancing National Security and a Fair Hearing' in Victor Ramraj, Michael Hor, Kent Roach and George Williams (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2012) 146.
[37] *Al Rawi*, para. 36; O'Connor and Lynn (n 4), para. 6.49.
[38] *H and Ors*, para. 22.
[39] NZLC (n 18), para. 9.22.
[40] Ip (n 33) 217.
[41] (App. No. 29777/96) Grand Chamber (16 February 2000).
[42] (App. No. 27052/95) Grand Chamber (16 February 2000).

Generally

(a) The special advocate procedure should be provided for in legislation;[43]

(b) Special advocates must be highly skilled trial advocates with adequate resources, training and independence from the state;[44]

(c) There should be a reasonably large panel of security-cleared lawyers who may act as special counsel, of sufficient size to afford a degree of choice;[45]

(d) A panel encourages the setting of a clear standard of knowledge and experience requirements, including specialist knowledge and understanding of intelligence methods and capacities;[46]

(e) The said panel should be diverse, incorporating lawyers who have act and have acted against the state;[47]

(f) Senior and experienced counsel must be present on the special advocate panel;[48]

(g) Defendants may nominate a lawyer from the panel for appointment by the court. A court should only override this choice in exceptional circumstances;[49]

(h) Special advocates must be given meaningful legal, technical and administrative support which is competent and independent;[50]

(i) Special advocates should receive appropriate training;[51]

Functioning

(a) The trial judge may direct that a summary of the closed material be provided to the defendant and their counsel, as far as possible without revealing its content, to enable them to instruct the special advocate;[52]

(b) The state should then make full disclosure to the special advocate.[53] Considering that Canadian lawyers consider it crucial to receive the 'entire

[43] NZLC (n 18), p. 111, R30; Craig Forcese and Lorne Waldman, *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of "Special Advocates" in National Security Proceedings* (2007 University of Ottawa) vi-vii.
[44] Forcese and Waldman (n 43) vi-vii.
[45] NZLC (n 18), paras. 5.67 and 9.7, and p. 111, R32.
[46] ibid, para. 9.12.
[47] Daragh Murray *et al.*, 'Effective Oversight of Large-Scale Surveillance Activities: A Human Rights Perspective' (2021) 11(3) JNSLP 743, 758.
[48] NZLC (n 18), para. 5.67.
[49] ibid, para. 9.11, p. 112, R35.
[50] ibid, para. 5.67. For more detail, see para. 9.12 onwards.
[51] ibid, paras. 9.13-9.15.
[52] ibid, para. 6.33(d).
[53] Forcese and Waldman (n 43) vi-vii.

intelligence file' rather than 'just the evidence that the government seeks to use and any exculpatory material', whereas UK lawyers view it as burdensome due to time pressure, the absence of adequate support, and there being no instructing solicitor to assist them,[54] special advocates must have sufficient support in their role;

(c) Special advocates must have access to the accused to (i) understand their case, (ii) view the closed information in context, and (iii) more effectively mitigate the prejudice inherent in the process;[55]

(d) A special advocate should have unrestricted access to the defendant prior to viewing the closed material.[56] While some restrictions must be placed on communications after the special advocate has accessed the closed material, channels of communication must remain as open as possible.[57] After being provided with the said material, the special advocate's communications with a defendant may be subject to judicial oversight.[58] A judge should take a liberal approach and refuse communications only where the state has demonstrated, on a balance of probabilities, a real risk of injurious disclosure;[59]

(e) Special counsel must be permitted a broad scope of argument;[60]

(f) Prosecutors should be able to withdraw a prosecution if the judge orders disclosure of security information which they consider is too sensitive to justify continuing;[61]

(g) Special advocates generally need not be present throughout the trial;[62]

[54] John D Jackson, 'In a World of Their Own: Security-Cleared Counsel, Best Practice, and Procedural Tradition', (2019) 46(S1) JLS S115, S124. See also, See, John Jackson, *Special Advocates in the Adversarial System* (Routledge 2021).
[55] NZLC (n 18), para. 9.21.
[56] ibid, para. 9.23, p. 112, R37.
[57] ibid, para. 9.22; Forcese and Waldman (n 43) vi-vii. See Jackson (n 54) S124: 'in the US, such lawyers 'are able to communicate with them even after they have been shown classified information, although they are made subject to protective orders barring any disclosure of this information to their clients… Guantanamo lawyers have learned that their questioning of detainees can often be guided usefully by the closed evidence without impermissible disclosures.'
[58] NZLC (n 18), para. 9.23, p. 112, R37. See Jackson (n 54) S124: 'In more than a decade of experience with hundreds of such counsel, the US government had not accused cleared counsel of passing information to detainees.'
[59] *Harkat*, para. 69.
[60] NZLC (n 18), para. 5.21.
[61] ibid, para. 8.9.
[62] *Edwards and Lewis*, para. 44.

Immunity and Expense

(h) The legislation should provide for a limited form of immunity to protect special advocates from claims of professional misconduct or unsatisfactory conduct';[63] and

(i) The state must meet the costs of the special advocate and their support.[64]

Irish Position

a. Background: *DPP v Special Criminal Court*

The special advocate procedure has been considered by the Irish courts in both civil and criminal proceedings. The judiciary has been clear that legislation will be required to introduce this concept into Irish law.[65] To support the argument that special advocates should be introduced by legislation in respect of SCC proceedings, it is necessary to examine the difficulties in the Irish position.

In *DPP v Special Criminal Court*,[66] the Supreme Court confirmed that the SCC should review documents over which claims of privilege have been made by the prosecution on the basis of this solution having 'worked well on the civil side'.[67] It has been persuasively argued that such a justification for the implementation of this solution in criminal proceedings is unsatisfactory as, *inter alia*, (i) criminal prosecution may interfere with the constitutional right to liberty of an accused which means the stakes are far higher than in civil litigation; (ii) specific rules and protections therefore exist in criminal cases to shield an accused from the power of the State; (iii) the criminal standard of proof is far higher than the civil standard; and (iv) civil cases do not involve the power imbalance which exists in the criminal system.[68]

One way in which this difficulty could be ameliorated is through the special advocate procedure. But it has been pointed out that, due to the judgments delivered in *DPP v*

[63] NZLC (n 18), para. 9.6; p. 111, R31.
[64] ibid, paras. 6.55 and 9.19, p. 112, R34.
[65] In the context of the SCC, see *DPP v Cassidy* [2021] IESC 60, para. 11; *DPP v RK* [2021] IECA 342, para. 76; *DPP v Binéad and Donohue* [2006] IECCA 147, [2007] 1 IR 374, 396. In the civil context, see *AP v Minister for Justice and Equality* [2019] IESC 47; [2019] 3 IR 47, paras. 17, 46 and 132.
[66] [1999] 1 IR 60.
[67] ibid, 88. See also, Gemma McLoughlin-Burke, 'Procedural Fairness and the "Dual Role" of the Special Criminal Court' (2021) 31(3) ICLJ 63, 64.
[68] McLoughlin-Burke (n 67) 64–65.

Special Criminal Court, a special advocate procedure was rejected in Ireland.[69] Although the courts have stated on many occasions that the introduction or otherwise of this system is a matter for the Oireachtas, it is worth considering if the special advocate procedure really was rejected in that case, and by extension whether its introduction would conflict with the jurisprudence of the Superior Courts.

The said difficulty stems in large part from *DPP v Kelly*[70] where Fennelly J, on behalf of the Supreme Court, commented as follows:

> '77 **The solution of special advocates appears to have been firmly rejected in this jurisdiction** (see *Burke v. Central Independent Television plc…* and *Director of Public Prosecutions v. Special Criminal Court…*). Our courts have preferred to resolve conflicts between the conflicting imperatives of a fair trial and the protection of public confidential information by asking the responsible court itself to examine the material. This, as I have already mentioned was suggested by Keane C.J. in the case of *Director of Public Prosecutions v. Mulligan…* **and was specifically ordained by this court** in *Director of Public Prosecutions v. Special Criminal Court…* In that case, O'Flaherty J. commented at p. 87 on the conflict between the principle of informer's privilege and the preservation of law and order. Having referred to a *dictum* in a Canadian case that "the right to disclosure is not to trump privilege," he remarked that "they must both be accommodated".'[71] (Emphasis added)

But the judgments in *DPP v Special Criminal Court* appear not to have specifically rejected advocates. Rather, they were simply neutral on the issue.

b. *DPP v Special Criminal Court*: Special Advocates

Fennelly J was of the view that the courts in *DPP v Special Criminal Court* had 'specifically ordained' a firm rejection of the special advocate procedure. The relevant comments from that case can be listed as follows:

[69] Alice Harrison, *The Special Criminal Court: Practice and Procedure* (Bloomsbury Professional 2019), para. 8.99. Additionally, while O'Connor and Lynn acknowledged at para. 6.46 the same difference argued below (that a special advocate and a regular trial advocate are separate roles), they do note at para. 5.128 that the comments of the courts in *DPP v Special Criminal Court* render the introduction of special advocates in Ireland unlikely: O'Connor and Lynn (n 4).
[70] [2006] IESC 20; [2006] 3 IR 115.
[71] This passage has been cited by the Supreme Court as recently as 2019: *AP v Minister for Justice and Equality* [2019] IESC 47; [2019] 3 IR 317, para. 109.

a. Carney J and O'Flaherty J (on behalf of the Supreme Court) cited *R v Davis*[72] where it was observed that '[i]t would wholly undermine *counsel's relationship with his client* if he were privy to issues in court but could reveal neither the discussion nor even the issues to his client';[73] (Emphasis added)

b. Having referred to that passage, Carney J ruled that allowing defence lawyers to view such documentation would fundamentally alter 'the established relationship *between defence lawyers and their client* ;[74] (Emphasis added) and

c. Quoting from *Burke*, O'Flaherty J stated that '[t]his would constitute an unprecedented and wholly undesirable breach in duty in which counsel would *owe to their client* and in the proper trust which should exist *between a client and his/her lawyers*' (Emphasis added).[75]

The emphasised words illustrate that neither Court engaged with the difference in relationship between (i) a lawyer and their client and (ii) a *special* advocate and the party on behalf of whom they argue. Far from 'specifically ordaining' a rejection of the special advocate procedure, the courts in *DPP v Special Criminal Court* made no comment on it at all. The remarks made related to the traditional lawyer/client relationship. The special advocate procedure is not the same,[76] nor does it pretend to operate as such: different principles govern that process. As commented by the House of Lords, it is a role 'hitherto unknown to the legal profession'.[77] Just as the Special Criminal Court is a special court to which different rules apply, so for a special advocate.

Those differences are material ones:

[72] [1993] 1 WLR 613.
[73] *DPP v Special Criminal Court* 75 and 85.
[74] ibid 75.
[75] ibid 85.
[76] The distinction between the roles has been a consistent feature of the jurisprudence and commentary. See, for example, *Secretary of State for the Home Department v M* [2004] EWCA Civ 324, para. 13; *Line and Plater* 282.
[77] *R v H* **para, ._____**

(a) A special advocate merely represents 'the defence perspective' when a court assesses the relevant material,[78] rather than representing the accused 'in the same fulsome sense as their own solicitors and counsel;[79]

(b) The purpose of a special advocate is to argue 'for greater disclosure to the affected party and/or *the party's lawyer*';[80] (Emphasis added)

(c) 'Although the special advocate certainly represents the non-Crown party's interests, the advocate cannot act for the party in the way that the party's chosen counsel does. The special advocate will have access to information that cannot be disclosed to the affected party, and this is contrary to a lawyer's obligation of full disclosure to his or her client. The relationship between the special advocate and the excluded party is not an ordinary client/legal counsel relationship. Therefore the role and duties of the special advocate should be clearly provided for in legislation.'[81]

Put rather simply in an immigration context by the Supreme Court of Canada, '[n]o solicitor-client relationship exists between the special advocates and the named person'.[82] The UK Special Advocates Support Office 'Open Manual' states that the relevant legislation:

> 'is careful to set out that a special advocate acts only in the best "interests" of an appellant to whom [they are] appointed. [They do] not "act" for the Appellant and the Appellant is not [their] client. [They owe] an Appellant no duty of care in relation to the role [they] undertakes'.[83]

Accordingly, it is argued that the Supreme Court in *Kelly* was not quite accurate when observing that the special advocate procedure had been 'specifically ordained' to be incompatible with Irish law. More accurately, and as alluded to by the Supreme Court in *AP v Minister for Justice and Equality*,[84] the matter has not yet been decided:

[78] New Zealand Law Commission, para. 5.59.
[79] Lucy Line and David Plater, 'Police, Prosecutors and Ex Parte Public Interest Immunity Claims: The Use of Special Advocates in Australia' (2014) 33(2) UTLR 255, 277.
[80] NZLC, para. 5.65.
[81] NZLC, para. 9.5.
[82] *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37; [2014] 2 SCR 33, para. 36.
[83] See, John Jackson, 'The Role of Special Advocates: Advocacy, Due Process and the Adversarial Tradition' (2016) 20(4) IJEP 343, 351.
[84] [2019] IESC 47; [2019] 3 IR 317.

> 'No provision has been made by statute in this jurisdiction for any such procedure, whether by way of closed material hearings by decision-makers or courts, or for the appointment of special advocates. I do not wish to express any view on whether any such procedure would be possible or consistent with the Constitution, and if so, the limitations of any such process.'[85]

In fact, the Court went on to implicitly endorse it, or at least to recognise the problems may be 'compounded' in its absence:

> [131] … If national security concerns are properly raised, it cannot be the case that merely by seeking a decision, an interested party can demand access to information, the confidentiality of which is deemed essential to national security. It is worth noting, however, that in *R. (Haralambous)*… the restrictions on providing the gist of material occurred *after there had been a limited closed materials procedure in which the information concerned was subject to some scrutiny independent of the state*. Furthermore, it must be recognised that fundamental issues are involved if it is contended that a person can be the subject of an adverse decision on a matter of significance to them based upon materials not disclosed to them, and where the reasons for that decision are similarly withheld… *The problem is compounded in this jurisdiction because there is no legislation dealing with the closed material procedure or any special advocate procedure, or any other method of addressing the difficult problem which arises not just in the area of naturalisation, but in many areas of the law*.' (Emphasis added)

O'Donnell J (as he then was) went on:

> '[132] I agree with Hogan J. in the Court of Appeal, and with Clarke C.J. in this court, that it does not appear possible for the court to devise a complete procedure, cut from whole cloth, which is capable of being applicable in all of the many different and difficult situations where the issue of disclosure of information arises, and where it is resisted on the grounds of public interest. I do not rule out the possibility that, in certain circumstances, *ad hoc* solutions might be sought… *I also agree that there are, to put it at its lowest, serious doubts that it would be permissible to*

[85] ibid, para. 108.

provide that, certainly in respect of court proceedings, a court could proceed upon material which was not available to be considered or challenged by or on behalf of one party. While the special advocate and closed material procedures were introduced to address obvious problems of fairness, it is apparent that, as a solution, it has not been universally welcomed. The procedure is necessarily limited, since the special advocate is restricted in the extent to which he or she can challenge material without receiving instructions on it… On the other hand, concerns have been expressed that the very availability of the procedure has led to more use of the procedure, and more closed hearings, than might have been anticipated, or is in principle desirable. *The primary objective should be to seek the maximum disclosure that is possible, and to ensure that, in so far as possible, any restriction on disclosure of reasons is demonstrably the least that is necessary*.[86]

[133] *For this reason, I agree… that, in principle, it would at least be possible to put in place an enhanced process by which an independent assessment could be made as to whether any version of the information could be provided in a way which would not affect State interests to the extent that disclosure should not be required at all.* Such a process of advice from an independent person with access to the information, which in this case has, after all, been seen already by a judge of the High Court, would itself also enhance confidence in any decision made.' (Emphasis added)

c. A Useful Test

A test for non-disclosure on the basis of public interest immunity and the possibility of appointing a special advocate was laid down by the House of Lords in *H and Ors* at para. 36:

'(1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail.

[86] See also: *H and Ors*, para. 148: 'some derogation from the golden rule of full disclosure may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial'.

(2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below) be ordered.

(3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.

(4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?

This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. *In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected... In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).*

(5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.

(6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller

disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.

(7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced?

It is important that the answer to (6) should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review.

37. Throughout his or her consideration of any disclosure issue the trial judge must bear constantly in mind the overriding principles referred to in this opinion. In applying them, the judge should involve the defence to the maximum extent possible without disclosing that which the general interest requires to be protected but taking full account of the specific defence which is relied on.'[87] (Emphasis added)

Non-Jury Trials on Election

In certain circumstances, non-jury trials are available on election in Canada. The Canadian 'Commission of Inquiry into the Bombing of Air India Flight 182' was asked to consider the possibility of trying terrorist offences in a three-judge court rather than before a jury. It concluded in 2010 that such a practice would violate the right under subsection 11(f) of the Canadian Charter of Rights and Freedoms of those facing five years' imprisonment or more to trial by jury.[88]

Rather, terrorism offense in Canada are prosecuted in the ordinary courts and the accused has the same rights in respect of choosing the mode of trial, including trial by a judge and jury, as exists for other crimes.[89] If the accused does not elect a judge-only trial, a trial by jury is the default procedure.[90] Of the nineteen prosecutions undertaken in relation to

[87] This remains the applicable test and has been approved in recent judgments such as *R v Austin* [2013] EWCA Crim 1028, [2013] 2 Cr App R 33, para. 61 and *R v Kelly* [2018] EWCA Crim 1893, para. 30.
[88] Roach 249.
[89] Public Prosecution Service of Canada Deskbook, 'Guideline of the Director Issued under Section 3(3)(c) of the Director of Public Prosecutions Act' (2021) https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch01.html accessed 28 April 2022.
[90] Kent Roach, 'Trial by Jury and the Toronto 18' (2021) 44 MLJ 221, 248, fn 100.

terrorist offences in Canada between September 2001 and September 2018, nine were tried by a judge alone while ten were tried by a jury.[91]

Similarly, the position in Australia was recently helpfully summarised by Campbell.[92] In Western Australia, s.118 of the Criminal Procedure Act 2004 (WA), and in Queensland, s.615 of the Criminal Code Act 1899 (Qld), allow for either defence or prosecution to apply for the case to be heard by a judge alone in the interests of justice, though if it is the application of the prosecution, the order can only be made with the consent of the accused.[93]

Jury Trials for Terrorist Offences: Best Practices

The primary rationale for the existence of the non-jury trial in the SCC is 'the potential for juror intimidation and the fear that jurors could be coerced in their decision-making'.[94] Similarly, in the 1972 'Report of the Commission to consider legal proceedings to deal with terrorist activities in Northern Ireland' chaired by Lord Diplock, it was stated at para. 36 that '[a] frightened juror is a bad juror even though [their] own safety and that of [their] family may not actually be at risk'. Against this background, best practices for jury trials from common law jurisdictions are outlined below.

New Zealand

In 2001, the Law Commission of New Zealand recommended that, for the 'most serious offences against the person and against the state, there should be a presumption of a trial by jury, which should only be displaced if the accused can show that a fair trial by jury is not possible'.[95]

Section 103(1) of the Criminal Procedure Act 2011 provides that a judge may, on the application of the prosecution, order that the defendant be tried without a jury. To make such an order, a judge must be satisfied, in accordance with s.103(3), that there are reasonable grounds to believe (a) 'that intimidation of any person or persons who may be selected as a juror or jurors has occurred, is occurring, or may occur', and (b) 'that the

[91] Michael Nesbitt, 'An Empirical Study of Terrorism Charges and Terrorism Trials in Canada between September 2001 and September 2018' (2019) 67 CLQ 95.
[92] Liz Campbell, 'The Offences Against the State Acts and Non-Subversive Offences' in Mark Coen (ed), *The Offences Against the State Act 1939 at 80: A Model Counter-Terrorism Act?* (Hart Publishing 2021) 138.
[93] ibid.
[94] Harrison (n 69), para. 1.59.
[95] Law Commission, *Juries in Criminal Trials*, Report 69 (2001), para. 108.

effects of that intimidation can be avoided effectively only by making an order under subsection (1)'.

United States

Overall, as of 25 January 2022, there have been 977 criminal defendants in the United States arising from terrorism offences.[96] Of that number, 363 have pleaded guilty, 202 were found guilty at trial, and 3 were acquitted.[97] The most common charge is that of 'material support' for terrorism (525 individuals; 54% of the total figure), followed by criminal conspiracy (206 individuals; 21% of the total).[98] It is necessary to separate these figures into criminal proceedings in ordinary Federal courts and cases in military tribunals. Whereas terrorism prosecutions in the federal courts have proceeded with no more complication and delay ordinary complex criminal cases, the latter have been much slower.[99]

Of most relevance from the Federal courts is that the anonymisation of juries is a well-established practice where the safety of jurors may be in danger.[100] Predominantly, it occurs in high-profile organised crime trials.[101] Schulhofer argued that there is:

> 'no reason to think that revenge attacks on trial participants are more likely in terrorism cases than in drug or organized crime prosecutions. Safety concerns, though often substantial in those contexts, are addressed through the use of anonymous juries, witness protection programs, and security details for judges and prosecutors'.[102]

United Kingdom

Trial on indictment in Northern Ireland is permitted in the absence of a jury under the Justice and Security (Northern Ireland) Act 2007 where the DPP believes, *inter alia*, that there is a link to a proscribed organisation and therefore that there is a risk to the

[96] 'Trial and Terror' *The Intercept* (25 January 2022) https://trial-and-terror.theintercept.com/ accessed 2 May 2022.
[97] ibid.
[98] ibid.
[99] Stephen J Schulhofer, 'Prosecuting Suspected Terrorists: The Role of the Civilian Courts' (2008) 2(2) JACS 63, 64.
[100] ibid 68.
[101] Human Rights Watch, 'Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions' https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions accessed 2 May 2022.
[102] Serrin Turner and Stephen J Schulhofer, 'The Secrecy Problem in Terrorism Trials' (2005) 58 https://www.brennancenter.org/sites/default/files/2019-08/Report_The_Secrecy_Problem_Terrorism_Trials.pdf accessed 2 May 2022.

administration of justice if the trial was to proceed with a jury.[103] In the UK more broadly, the Criminal Justice Act 2003 permits non-jury trials if there is evidence of a real and present risk that jury tampering will occur and that, despite preventative efforts, there is such a substantial danger of same so as to justify a juryless trial in the interests of justice.[104] However, in *R v J and Ors*,[105] the Court of Appeal of England and Wales observed:

> 'We must emphasise as unequivocally as we can that, *notwithstanding the statutory arrangements introduced in the 2003 Act which permit the court to order the trial of a serious criminal offence without a jury, this remains and must remain the decision of last resort, only to be ordered when the court is sure (not that it entertains doubts, suspicions or reservations) that the statutory conditions are fulfilled*. Save in extreme cases, where the necessary protective measures constitute an unreasonable intrusion into the lives of the jurors, for example a constant police presence in or near their homes day and night and at the weekends, or police protection, which means that at all times when they are out of their homes, they are accompanied or overseen by police officers, again day and night and at the weekend, with its consequent impact on the availability of police officers to carry out their ordinary duties, the confident expectation must be that the jury will perform its duties with its customary determination to do justice.'[106]

Lord Justice Haddon-Cave, the Senior Presiding Judge of the Court of Appeal of England and Wales, recently set out in detail the current practice in relation to the prosecution of terrorist offences in that jurisdiction.[107] He pointed out that the most common charges in this area are preparation for acts of terrorism (s.5 of the Terrorism Act 2006) and membership of a proscribed organisation (s.11 of the Terrorism Act 2000), before commenting that:

> 'Terrorism naturally arouses heightened concern by the public and State entities. Terrorism trials are often the subject of particular public and press attention. This all

[103] Campbell (n 92) 136-137.
[104] ibid 137.
[105] [2010] EWCA Crim 1755; [2011] 1 Cr.App. R. 5.
[106] ibid, para. 8.
[107] Charles Haddon-Cave, 'The Conduct of Terrorism Trials in England and Wales' (2021) 95 ALJ 1.

> brings its challenges. *But the role of the courts remains a simple one – to ensure a fair trial for all defendants within a reasonable timescale. In this regard, terrorism trials are no different from other criminal trials. Indeed, while recognising the special features of terrorism trials, it is important that terrorism trials are not "special" in any sense but just seen and treated as any other criminal trial. Terrorist offences are criminal offences.*'[108] (Emphasis added)

He stated that pre-trial disclosure is an important safeguard for a defendant.[109] In terrorist cases, the prosecution 'will often, in addition, provide a "Disclosure Management Document" to serve as an open and transparent basis for disclosure decisions and encourage early-stage defence participation in the disclosure process'.[110] He remarked that the prosecution may refuse to disclose material for national security reasons and apply for public interest immunity.[111] Where a judge orders disclosure, they may require 'summaries of the intelligence, edited or anonymised documents and the appointment of a Special Advocate… [I]f the limited disclosure will render the trial process unfair, greater disclosure will be ordered'.[112]

In respect of juries, he said that '[j]ury selection at the trial will normally involve a questionnaire to elicit whether jurors can hear the case objectively', and that '[i]n very rare cases involving national security, there is a procedure to ballot potential jurors by number and not by name'.[113] In this regard, it is worth pointing out that in Northern Ireland, the right to inspect the panel from which jurors are drawn, which 'affords considerable potential for intimidation', has been abolished.[114] Lord Justice Haddon-Cave went on:

> 'The jury will be reminded by the judge of their oath and the need to approach their task objectively and dispassionately solely by reference to the evidence which they hear and see in court, putting out of their minds anything they see or hear outside the courtroom, including any reports in the press. They will also be reminded of the absolute prohibition against carrying out their own research, whether on the internet or in any other way, and the serious consequences of doing so, including

[108] ibid 2-3.
[109] ibid 3.
[110] ibid.
[111] ibid 4.
[112] ibid.
[113] ibid 6-7.
[114] Liz Campbell, 'The Prosecution of Organised Crime: Removing the Jury' (2014) 18(2) IJEP 83, 97.

potentially imprisonment. The judge will seek to ensure that the jury feels safe and comfortable throughout the trial in order to be able to concentrate on their task with no distractions. It is common for arrangements to be put in place for jurors to enter and leave the court building using separate entrances to the public.'[115]

Furthermore, the Court of Appeal of England and Wales has determined, when asked to allow an entire trial to be heard *in camera*, that instead the 'core of the trial' should proceed in such a manner, whereas other elements such as the swearing in of the jury and the verdicts be done in open court.[116]

Lord Justice Haddon-Cave went on to observe that the 'Terrorism Bar' is small, comprising approximately 20 highly specialist barristers who usually must choose between acting for the defence or prosecution 'because of the danger of inadvertent disclosure if one has a mixed practice'.[117]

Other recommended processes

In addition to practices already existing in various common law jurisdictions, it is worth highlighting other processes which have been recommended:

(a) Limit the right to inspect the panel from which jurors are drawn and place restrictions on the disclosure of juror information by court, electoral and police officers as well as by jurors themselves;[118]

(b) Permit the jury to view proceedings from a secure location by way closed-circuit television;[119]

(c) Where juries are present in court, the risk of them being followed home may be alleviated by jurors being transported to the court from a distance so that they are less likely to be followed;[120]

(d) Members of the jury could be anonymised, such as has occurred in the United States in the trial of suspected organised criminals.[121]

[115] ibid 7.
[116] *Guardian News and Media Limited v Incedal* [2014] EWCA Crim 1861; [2015] 1 Cr.App. R. 4, para. 37.
[117] ibid 4.
[118] Campbell (n 114) 97.
[119] ibid; McLoughlin-Burke (n 67).
[120] ibid 98.
[121] ibid; McLoughlin-Burke (n 67).

Campbell has argued that '[o]nly anonymisation holds the potential to safeguard the jury adequately'. She notes that this solution, in addition to juries viewing proceedings from a secure location, may prejudice the defendant in terms of 'implying guilt or at least dangerousness on the part of the accused'. It seems fair to say, however, that a trial being held in the SCC implies these matters regardless. Therefore, so long as such trials continue, fears of prejudice cannot offset the benefits of a jury trial.

Conclusion

In addition to the general recommendations just summarised, the following practices from common law jurisdictions can be identified:

(a) In Australia, while either side may apply for a non-jury trial, where the prosecution makes the application (focused on intimidation, corruption or threatening of a juror), the accused must consent to a trial before a judge only.

(b) In New Zealand, a judge must be satisfied of reasonable grounds to believe the existence, past existence, or possibility of jury intimidation, and that the effects of that can only be avoided effectively by a judge-only trial;

(c) In the United States, it is common in organised crime trials for juries to be anonymised;

(d) In the United Kingdom, non-jury trials are permitted where there is a real and present risk of jury tampering and that, despite preventative efforts, the risk is such as to justify a juryless trial in the interests of justice. Nevertheless, this is a decision or last resort, to be taken where a court 'is sure (not that it entertains doubts, suspicions or reservations) that the statutory conditions are fulfilled'; and

(e) In Northern Ireland, the right to inspect the panel from which jurors are drawn has been abolished.

It has been pointed out that the SCC offers two positive features which are not found in other jurisdictions: the involvement of multiple judges and the requirement for a written judgment.[122]

[122] Campbell (n 92) 138.

Discretion to Send Someone Forward to the SCC

Statute

The discretion to send an accused forward for trial before the SCC is vested in the Director of Public Prosecutions ('the DPP') by s.48 of the Offences Against the State Act 1939 ('the 1939 Act'). The threshold in s.48(a) of mirrors the language of Article 38.3.1° of the Constitution:

> '*if the Attorney-General certifies that the ordinary Courts are, in his opinion, inadequate to secure the effective administration of justice and the preservation of public peace and order* in relation to the trial of such person on such charge, the Attorney-General shall cause an application, grounded on his said certificate, to be made on his behalf to the High Court for the transfer of the trial of such person on such charge to a Special Criminal Court, *and on the hearing of such application the High Court shall make the order applied for*…'[123] (Emphasis added)

The emphasised words make clear that, where the DPP considers that the ordinary Courts are inadequate to secure the effective administration of justice and the preservation of public peace and order, she may apply to the High Court for the trial to take place before the SCC, and the courts must accede to such an application. Moreover, save in exceptional circumstances,[124] the reasons why the DPP considers the ordinary courts to be inadequate are secret.

As the courts have no discretion to refuse to make the order sought, s.48 vests a great deal of power in the DPP. The question arises as to whether there exists any benchmark for the DPP to judge the adequacy of the ordinary courts? On its face, this standard is one so high as could almost never be met. For the ordinary courts to be inadequate to secure the effective administration of justice means that the entire court system is failing to fulfil its sole purpose. As early as 2009, O'Malley wrote that 'there should also be a proper empirical examination of the prior question as to whether the ordinary courts are inadequate to secure the effective administration of justice.'[125]

[123] References to the Attorney-General are now construed as the DPP: Prosecution of Offences Act 1974, s.3.
[124] Gerard Hogan, David Gwynn Morgan and Paul Daly, *Administrative Law in Ireland* (5th edn, Round Hall 2019), para. 17-277.
[125] Thomas O'Malley, *The Criminal Process* (Round Hall 2009), para. 9-47.

Interpretation

The courts first[126] dealt with the question of whether the ordinary courts are inadequate to secure the effective administration of justice in *Re MacCurtain*.[127] This judgment is important because the approach adopted by the Supreme Court has been followed in the decades since.

The Appellant challenged ss. 35(3) and 46(3) of the 1939 Act, both of which refer to the threshold contained in Article 38.3.1° of the Constitution as to the adequacy of the ordinary courts. On behalf of the Supreme Court, O'Sullivan J offered the following assessment of those provisions:

> '[Article 38.3] is a specific Article dealing with the establishment of Special Courts and in face of that Article no question can arise as to delegation of the legislative and judicial powers dealt with by other Articles of the Constitution. Clause 3, par. 1, expressly provides that the question whether the ordinary Courts are inadequate to secure the effective administration of justice and the preservation of public peace and order is to be determined in the manner provided by the Act by which the Special Courts are established. It was left to the Legislature to choose the particular method by which that question should be determined and to provide accordingly, and any provision so made is in compliance with the Constitution. *That is sufficient to dispose of the contention that s. 35, sub-s. 2, and s. 46, sub-s. 2, of the Act are repugnant to the Constitution and invalid*.'[128] (Emphasis added)

This is as far as the Court went on this question. It did not interrogate what it might mean for the ordinary courts to be inadequate. The Court referred to the constitutional threshold of inadequacy without considering how high a standard it might be, or offering any guidance to the executive in relation to it. This is difficult to reconcile with the fact that, outside of interpreting the Constitution, 'the only proper role of the courts is to play their part in the evolution of the common law… or to interpret legislation'.[129] Accordingly, the task of the judiciary in respect of the 1939 Act is to interpret its meaning to provide

[126] See, *Murphy v Ireland and Ors* [2014] IESC 9; [2014] 1 IR 198, para. 20.
[127] [1941] IR 83 (SC).
[128] ibid 89-90.
[129] *OR and Anor v An tArd Chláraitheoir and Ors* [2014] IESC 60; [2014] 3 IR 533, para. 190.

guidance to the DPP in exercising her functions under it. Being the first case to consider the concept of the adequacy of the ordinary courts, the judgment in *MacCurtain* did not carry out this task.

Therefore, *MacCurtain* initiated a situation, which still exists today, whereby the executive is fulfilling *its* role under the separation of powers in telling us *when* the ordinary courts are inadequate, but the judiciary has never fulfilled *its* role of interpreting *what* inadequacy might mean.

MacCurtain has often been cited with approval without consideration of the precise meaning of the standard of the adequacy of the ordinary courts,[130] and in general the standard required by 'adequacy' has simply not been addressed. In fact, in *Murphy v Ireland and Ors*,[131] the High Court observed that the Plaintiff had 'submitted that in no previous decision of this Court or of the Supreme Court had the question of the procedures which should be followed by the Director of Public Prosecutions in making a decision to issue a Certificate pursuant to the provisions of s. 46(2) of the Act of 1939, been addressed.' However that Court, too, declined to deal with this issue. As is evident from the Supreme Court judgment in *Kavanagh v Ireland*, the courts have been content to reason as follows:

> 'The question of whether the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order is to be determined 'in accordance with such law'.

The law in question is the Offences Against the State Act, 1939. It is clear therefore that under our system the question of whether special criminal courts should be established is a matter for the legislature and the question of whether the Part of the Offences Against the State Act, 1939, providing for the establishment of special criminal courts should be brought into force or should cease to be in force is a matter for the Government.

Provided these powers have been exercised in a *bona fide* manner the ordinary courts have no function in relation to them. There is a certain logic in this as the question under

[130] *Re the Criminal Law (Jurisdiction) Bill, 1975* [1977] IR 129, 151; *Savage and McOwen v DPP* [1982] ILRM 385 (HC), 388-389; *O'Reily and Judge v DPP* [1984] ILRM 224 (HC), 227-228; *Kavanagh v Ireland* [1996] 1 IR 321, 344.
[131] [2011] IEHC 536.

consideration is the adequacy or otherwise of the ordinary courts to secure the effective administration of justice and the preservation of public peace and order.

> *The question of whether the ordinary courts are or are not adequate to secure the effective administration of justice and the preservation of public peace and order is primarily a political question, and, for that reason, is left to the legislature and the executive*.'[132] (Emphasis added)

In *Kavanagh*, Keane J (as he then was) agreed that it was a political question.[133] But this does not grant the government free reign in making its decisions. It is a political question permitted by the text of the Constitution and by the text of a statute. While the DPP retains the ultimate decision-making power as to the adequacy of the courts, it is the courts themselves who must interpret how adequacy should be read in this context and to provide guidance to the DPP in making such a decision in order to fulfil their fundamental role in interpreting and upholding the Constitution.

The lack of a clear definition of 'adequacy' or a clear defining threshold for use of Special Courts in line with the Constitutional permission places a fundamental question-mark over whether or not the ongoing use of the Special Criminal Court, beyond the emergency period that justified its current existence, is in fact constitutional. We also question whether the decisions by the DPP without such a clear definition, high threshold, or reasoning to send cases to the Special Criminal Court may mean such decisions are neither in line with the Constitution, or the right to a fair trial.

Conclusion

ICCL reiterates all of its recommendations outlined in its first submission to the Independent Review Group. In particular, we call for a recommendation that the Special Criminal Court is abolished and that other measures such as Special Advocates and protected juries be considered where specific security concerns warrant exceptional departures from the fulfilment of the requirements of a right to a fair trial in our ordinary criminal courts.

[132] *Kavanagh v Ireland* 353-354.
[133] ibid 365.

The Irish Council for Civil Liberties (ICCL) is Ireland's oldest independent human rights body. We have been at the forefront of every major rights advance in Irish society for over 40 years. ICCL helped legalise homosexuality, divorce, and contraception. We drive 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.