

ICCL Submission to the Public Consultation on Jury Reform

November 2024

Table of Contents

Introduction.....	3
1. Jury tampering	3
2. Capacity to carry out the functions of a juror	7
3. Jury selection and extending qualification for jury service	9

Introduction

The Irish Council for Civil Liberties (ICCL) welcomes the opportunity to make a submission to the Consultation on Jury Reform. ICCL views trial by jury as a fundamental procedural right and has campaigned for decades on its protection. This submission addresses three issues raised in the Consultation Paper: jury tampering; capacity to carry out the functions of a juror; and jury selection.

At the outset, it is important to note that ICCL endorses the guiding principles set out in Chapter 1 of the Law Reform Commission's Report on Jury Service,¹ in particular the idea that jury service is more accurately described as a civic duty rather than an enforceable individual right. This does not preclude the duty on the State to take reasonable measures to facilitate a person's fulfilment of their civic duty and to ensure the right of an accused person to a fair trial is vindicated.

ICCL considers the right to a trial by jury to be an essential component of an adversarial common law system. It is from this position that our submission addresses the issue of jury tampering, in particular the use of the non-jury Special Criminal Court. ICCL endorses the recommendations of the minority report of the Offences Against the State Act Review Group,² including the recommendation to abolish the Special Criminal Court and replace it with measures that protect jurors while upholding the accused person's right to a fair trial.

1. Jury tampering

Jury tampering involves attempts to influence the deliberations or decisions of a jury, including through juror intimidation. The risk of jury tampering is one of the primary justifications for the continued existence of the Special Criminal Court, whereby the risk of jurors being intimidated is purported to be such that it fulfils the requirement under Article 38.3.1 of the Constitution that the ordinary courts are "inadequate to secure the effective administration of justice".

¹ [Law Reform Commission, Jury Service](#) (LRC 107-2013).

² [Independent Review Group to Examine the Offences Against the State Acts, Report of the Minority](#), May 2023.

ICCL opposes the use of a non-jury court as a response to a risk of jury tampering. This risk is not limited solely to terrorist organisations, as was initially anticipated when the Court was established.³ 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 exceptional, without qualitative evidence regarding the risk of jury tampering.

The right to trial by jury is linked to the fundamental right of every accused person to a fair trial as guaranteed by Article 38.1 of the Constitution. With the exception of those tried in the Special Criminal Court, all persons tried on indictment (i.e., tried for serious crimes) in Ireland are entitled to be tried by a jury of their peers. As noted above, Article 38.3 deviates from this norm and allows for the establishment of “special courts” which operate without a jury. The importance of a trial by jury in a common law system has been emphasised time and again as an essential prerequisite to a fair trial and as the most effective shield an accused person has against the power of the State.⁴

The Juries (Protection) Act 1929 was drafted with the stated purpose of making “further and better provision for the protection of jurors and witnesses concerned in the trial of criminal issues”. The Act was never commenced. However, almost a century later its provisions are indicative of at least some of the alternatives open to the courts in dealing with potential jury tampering. The provisions of the Act include:

- I. The introduction of secret jury panels;
- II. The exclusion of the public from jury empanelment;
- III. Prohibition on the publication of the names of jurors;
- IV. The return of a verdict by nine members;

³ [Dáil Debate, 15 June 1972, vol. 261 no. 10.](#)

⁴ The most famous assertion of the importance of trial by jury is Lord Devlin’s observation that “trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives” Patrick B. Devlin, *Trial by Jury*, (Stevens & Sons, 1956) 164.

V. The creation of offences and penalties for those found guilty of jury intimidation.

The introduction of a similar, modernised Jury Protection Act, to ensure that juries are protected, would dispense with a key justification for the existence of the Special Criminal Court. Advances in technology provide a solution to potential jury intimidation. For example, the availability of video link technology and platforms such as Pexip (a remote platform used to conduct virtual court hearings in Ireland) means that a jury need not even be required to sit in a physical court to adjudicate upon cases. When determined as necessary, juries could operate from confidential locations assigned by the Courts Service, with remote platforms allowing for communications to be made to the court.

In Northern Ireland, the use of juryless courts is reserved for exceptional cases. Part 7 of the Criminal Justice Act 2003 provides for trials on indictment without a jury. Section 44 of the Act allows for the Director of Public Prosecutions to apply to a judge of the Crown Court for a trial without a jury where the following conditions are satisfied:

“(4) The first condition is that there is evidence of a real and present danger that jury tampering would take place.

(5) The second condition is that, notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.

(6) The following are examples of cases where there may be evidence of a real and present danger that jury tampering would take place—

(a) a case where the trial is a retrial and the jury in the previous trial was discharged because jury tampering had taken place,

(b) a case where jury tampering has taken place in previous criminal proceedings involving the defendant or any of the defendants,

(c) a case where there has been intimidation, or attempted intimidation, of any person who is likely to be a witness in the trial.”

The provisions require more than a mere assertion that, on account of the parties involved in the case, that jury tampering is likely to occur. Instead, it is required that an application grounded on evidence is made to the court showing that jury tampering would likely take place *and* it must be shown that there are no alternative steps which could be taken to alleviate concerns in relation to potential jury tampering.

Section 36 of the Offences Against the State Act 1939 provides that the Special Criminal Court may try a case that would have a jury present where it involves a “scheduled offence”, that is, an offence specifically listed as one for which the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. The Law Reform Commission has queried the appropriateness of scheduled offences and appears to favour “a more individualised case-by-case approach”.⁵ ICCL considers that the Northern Irish provisions are significantly more protective of the position of the accused than the provisions of the Offences Against the State Acts.

The potential for jury intimidation remains the dominant rationale for the continued existence of the Special Criminal Court.⁶ However, the Oireachtas has failed to take basic measures to make jury intimidation more difficult. The Law Reform Commission recommended in 2013 that the right of inspection of the jury panel, which may facilitate persons who wish to contact or identify jurors, should be restricted.⁷ It also recommended the abolition of the daily roll call of serving jurors in open court. Neither of these recommendations have been implemented. It is ICCL’s position that these measures would significantly reduce - with immediate effect - the risk of jury tampering.

ICCL endorses the position of the minority report of the Offences Against the State Acts Review Group, which recommends “reasonable steps” to prevent jury intimidation on a case-by-case basis, to include the facilitation of remote juries, anonymised jury lists, and/or the transfer of jury trials to a different location.⁸

⁵ [Law Reform Commission, Jury Service \(LRC 107-2013\)](#) 102.

⁶ *Ibid* (n. 1) 7.

⁷ [Law Reform Commission, Jury Service \(LRC 107-2013\)](#) 104.

⁸ *Ibid* (n.1) 7.

The efficacy of remote jury attendance has been seen in Scotland, where during the Covid-19 pandemic the Bar introduced technology to protect the right to a jury trial and facilitate jury attendance. Venues such as theatres were used to host juries that attended remotely through video link. The Review Group's minority report outlined its interaction with a representative from the Scottish Faculty of Advocates, who outlined the success of the project and noted that the rate of completion of trials increased during the period of operation.⁹ ICCL supports the introduction of a similar measure in this jurisdiction where a risk of jury intimidation is identified.

While it is ICCL's position that the Special Criminal Court should be fully abolished and replaced with the aforementioned jury protection measures, in the interim period it is important to note that the State could introduce the proposed measures before repealing the Offences Against the State Acts.

2. Capacity to carry out the functions of a juror

Given that participation in jury service is a key part of public participation and facilitates social inclusion, ICCL commends the extensive consultation and research undertaken by the Law Reform Commission in Chapter 4 of its 2013 Report and encourages the implementation of the Commission's reform recommendations. ICCL endorses the Commission's position that the involvement of jurors with disabilities must be considered in the context of the role of jury trial, in particular the vindication of the accused person's right to a fair trial.¹⁰

In particular, ICCL welcomes the Assisted Decision-Making (Capacity) (Amendment) Act 2022, which was enacted to give domestic effect to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Section 96 of the Act amends the Juries Act 1976 to allow people who are deaf and who require the services of an interpreter to be eligible for jury duty. The Bill also somewhat amends the grounds on which a person with a mental health issue may serve on a jury, by defining the criteria to be assessed.

⁹ *Ibid.*

¹⁰ [Law Reform Commission, Jury Service \(LRC 107-2013\)](#) 58.

Article 13 of the UNCRPD provides that States are required to ensure effective access to justice for people with disabilities on an equal basis with others, including by providing “reasonable accommodations”. The UNCRPD defines reasonable accommodation as: “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”¹¹

ICCL recommends increased funding in the courts to make the justice system more accessible. Courthouses should be modernised to ensure they are fully accessible, including through providing permanent wheelchair ramps and wheelchair-accessible juror benches and witness boxes. Further, ICCL agrees with the Law Reform Commission’s recommendation that the Courts Service should provide disability awareness training to personnel dealing with jurors and guidelines for reasonable accommodation of people with physical disabilities.¹²

The Assisted Decision Making (Capacity) Act 2015 has been commenced since the publication of the Commission’s Consultation Paper. ICCL submits that any reform to the jury service should align with the foundational principles of that Act, in particular the presumption of capacity. ICCL endorses the recommendation that individuals should be presumed to have capacity and, where necessary, assessed on a case-by-case basis and subsequently provided with reasonable accommodations.

The Law Reform Commission’s consultation paper emphasised the importance of juror competence in ensuring the right to a fair trial for the accused and, therefore, recommended that persons with an intellectual incapacity should continue to be ineligible for jury service.¹³

Regarding impaired mental health, the Commission’s consultation paper recommended that people should not be excluded automatically from jury service, but instead that people believing themselves to be incapacitated should apply for an excusal. ICCL agrees with the Commission in emphasising the importance of distinguishing between intellectual capacity and ill-health.

¹¹ [United Nations Convention on the Rights of Persons with Disabilities](#), (adopted 24 January 2007, A/RES/61/106) article 2.

¹² *Ibid* (n. 7) 57.

¹³ *Ibid*.

Providing a brief outline of the capacities and skills required to serve as a juror to allow for self-assessment may serve as a practical step which would allow a person to either apply to the Courts Service for excusal on that basis, or at that stage to make an application for assessment for reasonable accommodations.

3. Jury selection and extending qualification for jury service

In the 2002 minority report of the Committee to Review the Offences Against the State Acts 1939-1998 ("the 2002 Review Committee"), Hederman J, Professor Walsh and Professor Binchy stated¹⁴:

"Trial by jury is a cornerstone of the criminal law system. It ensures that the innocence or guilt of a person charged with an offence is determined by twelve randomly chosen members of the community, each of whom brings to the process the benefit of his or her life-experience and individual perspective."¹⁵

In line with this, ICCL believes that the community from which the random 12 people are selected should be one which accurately reflects modern Irish society. ICCL endorses the recommendation of the Law Reform Commission that jury panels be based on the register of electors for Dáil, European and local elections, noting that non-Irish citizens are eligible to vote in local elections. There has been significant social change in Ireland since the Juries Act 1976¹⁶ was introduced and the number of non-Irish citizens living and working here has increased. It is important that jury panels reflect this social change and are an accurate representation of modern Irish society.

¹⁴ *Ibid.*

¹⁵ *Ibid* (n. 1) para. 9.88.

