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CRIMINAL JURY TRIALS DURING THE COVID-19 PANDEMIC

ACCESS TO JUSTICE: JURY & CASE MANAGEMENT

INTRODUCTION

1. Since the restrictions announced by the Taoiseach on 27th March 2020, arrangements have been put in place by the Courts Service which have severely impacted upon the criminal justice system. As a short-term measure, only urgent criminal matters are being dealt with and all new jury trials have effectively been suspended.
2. There were already regrettable delays in the criminal justice system arising from a lack of resources to meet the growing volume and complexity of criminal cases. While we are grateful to the judiciary and the Courts Service for ensuring that the impact of the inadequate resources has been mitigated as far as possible, the suspension of jury trials is likely to exacerbate the current delays and cause a considerable backlog of cases to build up. Therefore, there is a significant public interest in criminal prosecutions re-commencing as expeditiously as possible. Moreover, the interests of victims of crime as well as the concomitant right of an accused to an expeditious trial demand the safe resumption of jury trials within a reasonable timeframe.
3. While the Statement of the Courts Service dated Friday, 8th May 2020 provided no specific plan for re-commencing criminal jury trials in the Central Criminal Court, Mr. Justice White, the Judge in Charge of the Court, has been involved in discussions with the relevant stakeholders with a view to re-commencing jury trials. We are grateful for his efforts in that regard.
4. In respect of the re-commencement of Circuit Court jury trials, the Courts Service Statement sets out that:

“Jury Trials to resume in *many venues* in the Circuit Court in *September 2020*. There will be criminal sittings in Cork and Limerick for the duration of the Michaelmas Term. There will be extended criminal sittings in other venues if the assigned Judge feels it necessary.”

The Statement, while giving a commencement month of September 2020 for Circuit Court jury trials does not specify the Circuits or venues for resumed trials. However, this will undoubtedly become clear in the weeks ahead as the President of the Circuit Court, Ms. Justice Ryan continues to engage with the relevant stakeholders. We wish to express our gratitude to her, the judges of the Circuit Court and the Courts Service for their considerable preparatory work to date and we look forward to assisting them in their further efforts to safely re-commence jury trials.

5. For jury trials to re-commence, the jury empanelment process, in which hundreds of potential jurors gather at court, has to be commenced well in advance with the issuing of jury summonses. This requires a lead in time and impacts the possibility of commencing jury trials at short notice.
6. In consultation with the Chairman of the Bar Council, a Sub-Committee of the Criminal & State Bar Committee was set up to consider measures which might assist when criminal jury trials re-commence, conscious of the fact that they will be operating during a Covid-19 national emergency.
7. This submission should be considered alongside the Bar of Ireland's recommendations and suggestions in respect of progressing civil matters in the courts during this period.

SUMMARY OF RECOMMENDATIONS

Having considered a number of different measures, the Sub-Committee recommends:

Empanelling of Juries

8. A number of measures should be taken to allow for the safe empanelling of jurors and to ensure that juries can hear evidence and deliberate safely. These measures might include, amongst others:

- enhancing the efficiency of jury selection procedures through Information and Communication Technology (“ICT”) so as to improve the current system for summoning and empanelling jurors such that physically assembling a large number of people in a court room or jury assembly area each morning is negated;
- convening potential jurors in larger nearby spaces such as theatres and/or nearby hotel ballrooms so that they can be brought to the Courts in smaller groups at staggered intervals, if any Court building does not allow for the safe congregation of a jury pool;
- selecting jury members from the jury pool in a larger venue near the Court with the judge, Registrar and legal practitioners; attending that venue and only the selected jurors reconvening in the courtroom for the trial;
- bringing the jury pool to assembly areas and/or a Court room in smaller groups at staggered intervals to prevent the congregation of any large numbers;
- Jury boxes could be reconfigured to hold fewer people, with remaining jurors spread around the court room;
- Erecting Perspex or plexiglass sheets in the jury box so jurors are partitioned from one another;
- Allowing jurors to deliberate in empty courtrooms or large rooms in nearby venues;

- If court rooms cannot be re-configured for social distancing, other venues could be used, if they are in public ownership or venues hired, such as convention halls, lecture theatres, ballrooms in hotels, cinemas or theatres;
- Two courtrooms might be utilised to ensure social distancing, provided the jury is always in the same room where the evidence is given *viva voce*.

Preliminary Trial Hearings & Active Case Management

9. Legislation should be implemented to commence Preliminary Trial Hearings. This would front-load legal issues which would be decided in advance of jury participation by a judge who will then hear the trial before a jury. A Preliminary Trial Hearing should be accompanied by active case management to determine inter alia if witnesses can be read under Section 21 CJA 1984, give evidence remotely by Pexip, or other videoconferencing facilities in line with current legal provisions for the giving of remote evidence and those witnesses who need to give evidence *viva voce*. This should ensure jurors are involved in the trial process for the minimum amount of time necessary.

Number of Jurors

10. We are not recommending that a jury for criminal trials should be temporarily reduced from 12. We believe the Court Service can take measures to safely empanel jurors and to ensure social distancing in courtrooms so that juries can continue to sit as a jury of 12. If it proves unduly difficult to secure juries of 12, only then should the more draconian measure of a reduced number of participants on a jury be considered.
11. We do not recommend that peremptory challenges to jurors should be temporarily eliminated and/or abolished at this time but that the matter should be kept under review if it proves unduly difficult to secure juries of 12.

Trial by jury

12. Article 38.4.5 of the Constitution states that apart from summary trial for minor offences, trial by special courts and trial by military tribunal, no person shall be tried on any criminal charge without a jury. Trial by jury is therefore a fundamental element of Ireland's criminal justice system, guaranteed by the Constitution. Lord Devlin described the jury as more than an instrument of justice and more than one wheel of the Constitution but rather "the lamp that shows that freedom lives." We are of the view that it is a safeguard in our democracy which should only be interfered with when entirely necessary and after all other proportionate measures have been considered and/or attempted and proven to be ineffective.

Impact of Jury Trials on Jurors/Witnesses/Complainants During a Pandemic

13. Re-commencing jury trials has the potential to pose a number of difficulties because so many participants need to be present - Judges, jurors, legal practitioners, defendants, witnesses, Registrar, members of An Garda Síochána, prison officers and court staff. Potential health risks include jurors becoming ill with COVID-19 during a trial, which would require isolation of all other remaining jurors and other participants in the trial and create an unacceptable potential for a mistrial. Jurors could likely be distracted by, and anxious about, the physical environment of the trial and their deliberations, unless safety precautions are put in place. Some jurors compelled to report for jury duty may be anxious about being in contact with other jurors and court staff unless they see strong measures in place.
14. Complainants and witnesses who are required to give live evidence may fear placing themselves at risk of contracting COVID-19 if they attend a jury trial and they may be reluctant to attend because they are in a high-risk health category. Measures will need to be put in place to assuage such concerns.
15. However, the potential impact of serving as a juror or giving evidence in this national emergency must be balanced with the rights of victims to have access to the criminal justice system and to the rights of accused persons to criminal justice and a fair and reasonably

expeditious trial, particularly if they are in custody. All parties will have to be creative and flexible as they imaginatively explore how criminal jury trials can safely operate.

16. There is a special onus on the Court Service to protect the health of jurors who are performing an important civic duty. The process of empanelling juries which often involves bringing large numbers of people together in relatively confined spaces will have to be handled differently. While it requires organisational thinking and new practices, the problems are not insurmountable.
17. We note the Courts Service announcement that it has established a team comprising front line staff from across the courts to agree measures to be applied in every courtroom as health restrictions are eased and that it has appointed a full-time Health & Safety Officer whose responsibilities include reviewing the proposed measures to ensure that we are compliant with all necessary legislation and public health advice. We further note that the Courts Service has fitted out a “prototype courtroom” in Naas, designed to address safety concerns and social distancing requirements where screens will be provided for Judges, staff and witnesses, along with floor markings and 2m distancing signage. A consultative user group is to be established to ensure that court users are involved in informing decisions and we remain willing to assist in such work.

Jury Selection

18. The Law Reform Commission (“LRC”) Report on Jury Service (2013) noted an attrition rate of between 60% and 70% of these summoned for jury service broken down as follows:
 - a. 10% of issued summonses are returned because for example the person has left the address or is deceased.
 - b. A further 10% of persons who are summoned do not attend on the date specified in the summons.
 - c. Another 20% to 25% are within the lists of persons who are excusable as of right, ineligible for jury service or disqualified arising from a criminal conviction.

- d. A further 20% to 25% are qualified and eligible to serve but are excused on the basis of the discretion to do so under the 1976 Act: the most common reasons for allowing a discretionary excusal are that the person is a full-time carer, has a medical procedure that cannot be postponed, work commitments (in particular where the person is self-employed) or because holidays have been booked.
19. The LRC noted that the large attrition rate of potential jurors and the consequent requirement for potential jurors to attend court on a number of days without being called could be ameliorated, in particular through Information and Communications Technology (ICT). It further noted that the then DPP, James Hamilton suggested in 2010 that developments in technology ought to render unnecessary and redundant the process of physically assembling hundreds of people in a court room each morning to select 12 jurors, which he described as “a waste of citizens’ time.”
20. A number of submissions received by the LRC in 2012 and 2013 suggested the use of an ICT system at the initial summoning stage of selecting a jury panel from the electoral register, the use of e-mail and texting to notify summoned jurors of the date for attending court initially (and any changes to this) and the creation of a live website listing all cases in progress and any attendant delays.
21. The LRC commended the ongoing commitment of the Courts Service to enhance the efficiency of jury selection procedures through the use of ICT resources and through its proposal to establish a central Jury Management system, which has the potential of (i) leading to a higher proportion of those summoned for jury service actually serving on a jury, (ii) enhancing further the efficient and effective running of jury trials and (iii) reducing the administrative costs of the jury selection process.
22. We encourage the Courts Service to enhance the efficiency of its jury selection procedures as an immediate priority through ICT and other measures so as to improve the current system for summoning and empanelling jurors such that physically assembling a large number of people in a court room each morning is negated.

Recommendations on Jury Selection

23. Even in circumstances where a large number of people must physically assemble for jury service, a number of measures could be taken to allow for safer empanelling of jurors. These measures might include, inter alia:
- **convening potential jurors in larger nearby spaces** such as theatres and/or nearby hotel ballrooms so that they can be brought to the Courts in smaller groups at staggered intervals, if any Court building does not allow for the safe congregation of a jury pool;
 - **selecting jury members from the jury pool in a larger venue** near the Court with the judge, Registrar and legal practitioners attending that venue and only the selected jurors reconvening in the courtroom for the trial;
 - bringing the jury pool to assembly areas and/or a Court room in **smaller groups at staggered intervals** to prevent the congregation of any large numbers;

Recommendations on Jury participation

24. Once empanelled, jurors spend significant periods of time in relatively close contact, in the jury box and the jury room. However, that is not essential and measures could be taken to ensure social distancing. Courtroom spaces can be rearranged to ensure social distancing between jurors during both the hearing of cases and their deliberations. Measures might include:
- Jury boxes could be reconfigured to hold fewer people, with remaining **jurors spread around the court room**;
 - **Erecting Perspex** or plexiglass sheets in the jury box so jurors are partitioned from one another;

- Jury deliberation is an intellectual, non-contact exercise. Jurors can easily be accommodated to carry out that exercise **by allowing them to deliberate in empty courtrooms** or large rooms in nearby venues, coming back in to Court when required;
- If certain court rooms cannot be re-configured for social distancing, **other venues could be used**, if they are in public ownership. Alternatively, other venues could be hired such as convention halls, lecture theatres, ballrooms in hotels or theatres and used for a jury trial. For example, the dining hall of the Kings Inns could be utilised as a Court room with adequate social distancing easily achieved;
- **Two courtrooms might be utilised** to ensure social distancing, provided the jury is always in the same room where the evidence is given *viva voce*.

25. We note that in the Criminal Courts of Justice (CCJ), the Courts Service has already spread jurors around the courtroom instead of confining them to the jury box in a small number of cases which had to continue or still continue during the current Covid-19 restrictions. We also note that jurors have deliberated in an empty courtroom instead of in the much smaller jury room. The experience in these trials shows that with a degree of flexibility and imagination and with social distancing in mind, jury trials can re-commence safely.

MEASURES TO REDUCE THE BURDEN OF JURY SERVICE

Preliminary Trial Hearings

26. The then Minister for Justice and Equality, Frances Fitzgerald published a General Scheme of a Criminal Procedure Bill in 2015 for pre-legislative scrutiny and consultation with key stakeholders. The General Scheme was revised in light of those consultations. The Bill, which included provision for Preliminary Trial Hearings has never been passed as legislation.
27. The primary aim of General Scheme of a Criminal Procedure Bill, 2015 was to reduce delays and increase the efficiency and fairness of the criminal trial process. Preliminary Trial Hearings were to allow for procedural arguments to be front loaded and dealt with before a jury was empanelled, thereby saving time and allowing juries to focus on the facts of the case.
28. Head 2 of the General Scheme is set out in Appendix 1.
29. Pre-trial procedures have been considered by a number of groups commencing with the Working Group on the Jurisdiction of the Courts (Fennelly Report) in 2003. Since then, a number of Reports from the Committee on Pilot Preliminary Hearings, the National Steering Committee on Violence Against Women Legal Issues Sub-Committee, the Working Group to Identify and Report on Efficiencies in the Criminal Justice System, and most recently by the Expert Group On Article 13 of The European Convention On Human Rights (McDermott Report). They have all made recommendations to make statutory changes allowing for preliminary trial hearings. In 2019, the DPP in her Annual Conference for Prosecutors stated that the introduction of pre-trial hearings was the most important thing, in her view, that would help the criminal justice system work more efficiently and would be “in aid of juries, but also victims and witnesses, who are often left waiting for days, or weeks, while legal argument goes on.” Judges and Juries in Ireland: An Empirical Study, by Mark Coen, Niamh Howlin, John Lynch and Colette Barry, which was published in March, 2020 and collated from interviews with 22 judges and 11 barristers again called for the

introduction of pre-trial hearings, a measure universally recommended by participants in their study.

Recommendation for Preliminary Trial Hearings

30. We recommend that Preliminary Trial Hearings **be legislated for as soon as possible in advance** of the re-commencement of Jury Trials and as a stand-alone piece of legislation, if necessary. This will facilitate a more streamlined trial with legal issues front-loaded. Jurors can then focus on the facts of the case with less interruption.
31. Head 2 of the **2015 General Scheme of a Criminal Procedure Bill contains the blueprint** for a Preliminary Trial Hearing provision augmented by Head 3, related to acquittals by a judge arising out of the exclusion of evidence during a Preliminary Trial Hearing.
32. Such hearings should **be accompanied by active case management** to agree
 - (i) those witnesses who can be read under Section 21 CJA 1984
 - (ii) those witnesses who can give evidence remotely *via* Pexip, Zoom or other videoconferencing facilities in line with current legal provisions for the giving of remote evidence
 - (iii) those witnesses whose evidence needs to be given in Court. Legislation in this area was already called for pre-pandemic and could be passed in short order; we believe it should now be a priority for the Oireachtas.

Reduction in the number of jurors

33. While Article 38.4.5 of the Constitution states that no person shall be tried on any criminal charge without a jury, apart from summary trial for minor offences, trial by special courts and trial by military tribunal, the Constitution is silent as to what features and functions are fundamental to the constitutional notion of a jury. The Constitution does not prescribe a jury of twelve.
34. In the United Kingdom, legislation has been used to allow for a temporary reduction in the number of jurors required. During the Second World War,

the Administration of Justice (Emergency Provisions) Act 1939 (2 & 3 Geo. 6 c. 78) provided for juries in criminal cases in England and Wales (except treason and murder) to number 7.

35. Section 7(1) read:

"Notwithstanding anything in any enactment, for the purpose of any trial with a jury or inquiry by a jury in any proceedings, whether civil or criminal, it shall not be necessary for the jury to consist of more than seven persons:

"Provided that the preceding provisions of this subsection shall not apply in relation to the trial of a person on any charge, if the court or a judge thinks fit, by reason of the gravity of the matters in issue, to direct that those provisions shall not apply, and shall not in any case apply in relation to the trial of a person on a charge of treason or murder."

36. Similar legislation was passed for Scotland - Administration of Justice (Emergency Provisions) (Scotland) Act 1939 - and Northern Ireland - Administration of Justice (Emergency Provisions) (Northern Ireland) Act 1939. The rationale behind the legislation in The UK was to accommodate for the pressures of national conscription during the war.

37. In Ireland, because of the then poor transportation in rural Ireland, an Emergency Powers Order during the Second World War reduced the number of jurors in the Circuit Courts in Ireland to 7, though at that time unanimous verdicts were required. The Central Criminal Court still required 12 jurors. Thus, in Ireland, there is also precedent for operating Circuit Court trials with 7 jurors. Although it may be controversial to once again reduce the size of jury trials in Ireland, it is a move that has been advocated in the UK and by some commentators in Ireland.

Twelve jurors not prescribed in the Constitution

38. In *O'Callaghan v Attorney General*, [1993] 2 I.R. 17, the Supreme Court, in deciding majority verdicts were constitutional, stated:

"The purpose of trial by jury is to provide that a person shall get a fair trial, in due course of law and be tried by a reasonable cross

section of people acting under the guidance of the judge, bound by his directions on law, but free to make their findings as to the facts. *The essential feature of a jury trial is to interpose between the accused and the prosecution people who will bring their experience and common sense to bear on resolving the issue of guilt or innocence of the accused.* A requirement of unanimity is not essential to this purpose.” (emphasis added)

39. O’Flaherty J in shedding light on the fundamental characteristics of jury trial as protected by the 1937 Constitution, noted:

“The operation of jury trials in criminal cases is not to be regarded as fixed and immutable; this was made clear by the amendment of the law that was brought about as a consequence of *de Burca v Attorney General* [1976] IR 38.”

40. The rationale for a jury system in criminal cases has been that it provides a buffer between the individual and the State and thereby a guarantee against state tyranny. It was entrenched in the Irish Constitution largely because of fear of abuse of power on the part of the State. There does not appear to be any reason why a jury of less than twelve doesn’t equally act as a buffer between the individual and the State, provided it is of a sufficiently large number for adequate representation.
41. However, notwithstanding the possibility of legislating for a jury of less than twelve, we believe that a valid argument still exists for the retention of a jury of twelve, even during a national emergency. A jury of twelve is not so large a number as to become impossible to reach decision and yet not so small as to increase the chances of an unrepresentative sample of society. Research over the years also points to the merits of a larger jury for consistency and better decision making.

Research on jury size

42. In a 1977 study carried out by psychologist and law professor Michael J. Saks, PhD, participants were assembled into juries of size six or twelve, shown a videotaped trial, and asked to deliberate to a verdict. The researchers measured the process and products of the group decision-making. Smaller sized groups fostered behaviour that would be beneficial for some purposes in that members shared more equally in the discussion, found the deliberations more satisfying, and were more cohesive. Larger groups were more contentious, debated more vigorously, collectively recalled more evidence from the trial and made more consistent and predictable decisions. The latter finding suggested that as juries grow smaller, in criminal cases they may make more errors of acquitting the guilty and convicting the innocent.
43. The research concluded that in keeping with classic research on the psychology of conformity, because larger groups increase the likelihood that a dissenter will have an ally (or several), those in the minority in larger juries are better able to resist pressure to yield to group pressure. A later statistical digest of all empirical studies of jury size concluded that larger juries are more likely than smaller juries to contain members of minority groups, more accurately recall trial testimony, spend more time deliberating, hang more often, and most importantly, reach fewer erroneous decisions.
44. In 2001, Penny Darbyshire of the University of Kingston was commissioned by the Criminal Courts Review of England and Wales to analyse empirical research and analyse personal accounts of jury service and extrapolate lessons for the English legal system. In conclusions similar to the Saks study, she recommended against reducing jury size because juries would be less representative of the population and their verdicts may be more erratic.

No recommendation to reduce jury size

45. We are concerned that any significant reduction in jury size would diminish the quality of jury deliberations and reduce the number of varied perspectives on a jury. It has the potential to lead to a reduced recall of evidence during a trial. We are concerned that a reduced number of jurors

may make more errors of acquitting the guilty and convicting the innocent. For that reason, we do not recommend that a jury for criminal trials should be temporarily reduced from 12.

46. We believe the Court Service should be given an opportunity to take measures to safely empanel jurors and to ensure social distancing in courtrooms so that juries can continue to sit as a jury of twelve. If it proves unduly difficult to secure juries of twelve, we believe that only then should the more draconian measure of a reduced number of participants on a jury be considered. If that stage were reached, a number of procedural protections would have to be considered including a requirement of unanimity and the retention of 12 jurors for any offence tried before the Central Criminal Court.

Elimination of peremptory challenges

47. Section 20(2) of the Juries Act 1976 provides that, in every criminal trial involving a jury, the prosecution and each accused person may challenge seven jurors without cause shown. This is referred to as peremptory challenges. Section 21(2) of the Juries Act 1976 provides that “any number of jurors” may be challenged for cause shown by both the prosecution and each accused. A possibility to reduce the number of persons who might have to be summoned for jury service is to reduce the number of peremptory challenges or to abolish the right to challenge jurors for cause shown altogether.
48. In England and Wales, the right of peremptory challenge was abolished entirely by section 118(1) of the Criminal Justice Act 1988. Likewise, In Scotland, the right of peremptory challenge was abolished in 1995 and in Northern Ireland, in 2007. In England and Wales, in 1948, the number was reduced from 20 to 7 and in 1977, it was reduced further to 3.
49. The LRC Report on Jury Service (2013) concluded that on balance, the arguments in favour of retaining peremptory challenges outweigh those in favour of their abolition, remarking that the peremptory challenge process as it operates in practice in Ireland has the effect that juries are broadly representative of the pool or panel from which they are selected. The LRC took into account that, apart from the UK, in the majority of common law

jurisdictions reviewed, the concept of peremptory challenge had been retained, including after extensive consideration by law reform agencies.

50. It agreed with the views expressed by the New Zealand LRC that the retention of peremptory challenges affords the accused some degree of control over the composition of the jury, that, in practice, it is consistent with securing a representative jury, and that it also ensures that competent and impartial jurors are selected. It agreed that, when suitably explained, the process of peremptory challenge has an advantage over the process of challenges for cause which can be more demeaning because the solicitor or counsel must publicly articulate their reasons for asserting a juror's unsuitability.
51. The LRC felt that the complete abolition of peremptory challenges could lead to lengthy pre-trial selection of jurors, based on detailed questioning of candidate jurors, which in itself could be intrusive and demeaning, as well as involving additional trial costs.

No recommendation to abolish peremptory challenges

52. We do not recommend that peremptory challenges to jurors should be temporarily eliminated and/or abolished at this time but that the matter should be kept under review if it proves unduly difficult to secure juries of 12, where the number of peremptory challenges might be re-considered.

CONCLUSION & KEY RECOMMENDATIONS

53. Having considered a number of different measures, the Sub-Committee recommends:

(1) Jury Empanelling/Selection

A number of measures should be taken to allow for the safe empanelling of jurors and to ensure that juries can hear evidence and deliberate safely. These measures might include:

- a) enhancing the efficiency of jury selection procedures through Information and Communication Technology (“ICT”) so as to improve the current system for summoning and empanelling jurors such that physically assembling a large number of people in a court room each morning is negated;
- b) convening potential jurors in larger nearby spaces such as theatres and/or nearby hotel ballrooms so that they can be brought to the Courts in smaller groups at staggered intervals, if any Court building does not allow for the safe congregation of a jury pool;
- c) selecting jury members from the jury pool in a larger venue near the Court with the judge, Registrar and legal practitioners attending that venue and only the selected jurors would reconvene in the courtroom for the trial;
- d) bringing the jury pool to assembly areas and/or a Court room in smaller groups at staggered intervals to prevent the congregation of any large numbers;
- e) Jury boxes could be reconfigured to hold fewer people, with remaining jurors spread around the court room;
- f) Erecting Perspex or plexiglass sheets in the jury box so jurors are partitioned from one another;
- g) allowing jurors to deliberate in empty courtrooms or large rooms in nearby venues;
- h) If certain court rooms cannot be re-configured for social distancing, other venues could be used, if they are in public ownership. Alternatively, other venues could be hired such as convention halls,

lecture theatres, ballrooms in hotels or theatres and used for a jury trial;

- i) Two courtrooms might be utilised to ensure social distancing, provided the jury is always in the same room where the evidence is given *viva voce*.

(2) Preliminary Trial Hearings & Active Case Management

Legislation should be implemented to commence ***Preliminary Trial Hearings***. This would front-load legal issues which would be decided in advance of jury participation by a judge who will then hear the trial before a jury.

A Preliminary Trial Hearing should be accompanied by active case management to determine inter alia if witnesses can be read under Section 21 CJA 1984, give evidence remotely by Pexip, Zoom or other videoconferencing facilities in line with current legal provisions for the giving of remote evidence and those witnesses who need to give evidence *viva voce*.

This should ensure jurors are involved in the trial process for the minimum amount of time necessary.

(3) Jury Size

We are not recommending that a jury for criminal trials should be temporarily reduced from 12. We believe the Court Service should be given an opportunity to take measures to safely empanel jurors and to ensure social distancing in courtrooms so that juries can continue to sit as a jury of 12. If it proves unduly difficult to secure juries of 12, only then should the more draconian measure of a reduced number of participants on a jury be considered. If that stage were reached, a number of procedural protections would seem to be essential including a requirement of unanimity and retention of 12 jurors for any offence tried before the Central Criminal Court.

(4) Peremptory Challenges

We do not recommend that peremptory challenges to jurors should be temporarily eliminated and/or abolished at this time but that the matter should be kept under review if it proves unduly difficult to secure juries of twelve.

Further engagement

54. We note that the Judge in Charge of the Central Criminal Court, Mr. Justice White is making efforts to re-commence criminal jury trials. We are grateful for these efforts to ensure that no appreciable backlog of cases builds up. We believe that jury trials could safely re-commence in the Central Criminal Court when the more serious travel restrictions are due to ease on 20th July 2020. We will continue to engage with the judiciary and the Courts Service to achieve this aim and to discuss how best to select cases for the initial jury trials under new conditions.
55. We further note that Circuit Court jury trials are to resume in many venues in the Circuit Court in September 2020. We will continue to engage with the President of the Circuit Court and the Courts Service to explore the extent of jury trials anticipated, the venues anticipated, how the Courts can be adapted for social distancing, how cases for jury trials are selected and case managed and to assist in collaborating on how such jury trials can safely re-commence.
56. There may also be merit in re-commencing some trials on some Circuits before the end of Trinity Term, perhaps when the more serious travel restrictions are due to ease on 20th July 2020. This would ensure that any issues are identified and resolved before jury trials are implemented on a more widespread basis in September, 2020 and we will continue to work with the President of the Circuit Court, Ms. Justice Ryan and the Courts Service to explore whether this is feasible.

APPENDIX 1

General Scheme of a Criminal Procedure Bill in 2015

“Head 2 - PRELIMINARY TRIAL HEARINGS

(1) Where an accused person is before the Circuit Court, the Central Criminal Court or a Special Criminal Court, a judge of the court concerned, or in the case of a Special Criminal Court no less than three judges of that court, may of the court's own motion or upon the application of the prosecutor or the accused, hold a preliminary trial hearing.

(2) One or more preliminary trial hearings may be held prior to the empanelling of the jury in a case before the Circuit Court or the Central Criminal Court and before the commencement of the trial in a case before a Special Criminal Court.

(3) A preliminary trial hearing shall be part of the trial and the accused shall be arraigned at the start of the preliminary trial hearing unless he or she has already been arraigned.

(4) At a preliminary trial hearing the court may, upon its own motion or upon the application of the prosecutor or the accused, make: - a) an order that certain evidence may or may not be admitted at the trial; b) an order that [the trial on any charge should be prohibited/stayed permanently] [any charge be struck from the indictment] where it appears to the court that there is a real or serious risk of an unfair trial; c) an order that the trial of an accused person be carried out separately from the trial of another accused person; d) an order that any count on the indictment be tried separately from any other count on the indictment; e) any order which it could make during a trial of an accused in the absence of a jury, f) such other order as appears necessary to the court to ensure that due process and the interests of justice are observed.

(5) An application or order made under subhead (4) may include any application or order which is required by law to be made during the currency of a trial.

(6) The court may, if satisfied that it is expedient for the purpose of ensuring that the accused will not be prejudiced in his or her trial, do any one or more of the following:— a) subject to subhead (8), exclude the public or any particular portion of the public or any particular person or persons except bona fide representatives of the Press from the court during the hearing; (b) prohibit the publication of information in relation to the proceedings or any particular part of them or impose restrictions or limitations on such publication, for such period as it deems appropriate.

(7) The provisions of subhead (6) are in addition to any other provision of law that governs the exclusion of the public or any particular portion of the public or any particular person or persons from the court or that governs the prohibition of the publication of information in relation to the proceedings or any particular part of them or that imposes restrictions or limitations on such publication.

(8) In any proceedings where the accused is a person under the age of eighteen years, a parent, guardian, or other relative or friend of that person shall be entitled to remain in Court during the whole of the hearing.

....

(12) Rules of court may provide for notice, pleadings, the hearing of evidence, and other matters necessary to an application under subhead (4).”