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# The Bar of Ireland

Submission to the Department of Justice on  
the Jury Reform Consultation

December 2024

## Introduction

The Council of The Bar of Ireland (“the Council”) represents the independent referral Bar, consisting of approximately 2,150 practising barristers. Members of the Bar are renowned for providing representation and advice of the highest professional standards. Central to their work are the principles of independence, an overriding duty to the proper administration of justice, and the fearless defence of clients’ interests within ethical bounds.

1. The Council welcomes the Department of Justice’s invitation to respond to its Consultation Paper on Jury Reform (October 2024). The paper sets out recommendations made by the Law Reform Commission (hereafter “the Commission”) in its 2013 Report on Jury Reform. This submission reflects observations made within a limited timeframe.
2. This submission is based on the views of members of the Council and the Criminal State Bar Committee which is comprised of barristers not only with extensive experience in the practice of criminal law and the mechanics of jury trials but also in civil practice and the less frequent practice of jury trials in civil proceedings. Whilst the focus of the LRC paper (and this submission by way of reply) is on criminal juries the observations apply with equal force to juries hearing civil actions and in so far as this submission refers to a defendant in criminal proceedings they apply equally to both parties in civil actions
3. The Consultation Paper raises 53 questions across 10 categories. This submission addresses each category, aiming to respond comprehensively to all posed questions.
4. The Department of Justice and Equality’s Justice Sector Working Group on Jury Service, established in 2018, appeared to cease operations without a final report.<sup>1</sup>

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<sup>1</sup> *Government suspends work of jury reform group due to ‘other priorities’*, Irish Times, June 18, 2021.

This report was anticipated to inform a Juries Service Bill and subsequent legislative reforms.

5. The Council commends the Department for seeking submissions on this topic. The Juries Act 1976 (hereafter “the Act”) remains largely unchanged, warranting serious consideration in light of more recent and significant developments: the internet’s impact on information access, high juror attrition rates, and the nation’s demographic changes.
6. The Council would encourage that any considerations of jury reform ought to be approached with one critical consideration in mind, that we believe to be of paramount importance: what effect, if any, will the proposed measure have on ensuring a fair trial?
7. Legislative inertia since 1976 stems largely from a lack of empirical evidence about any deficiencies or efficiencies in the current system. Although jury deliberations are shrouded in secrecy, making objective assessments challenging, other jurisdictions have engaged deeply with these issues. Further research may counter the commonly held view that “you can never tell with a jury”.
8. The Council urges renewed focus on jury reform, particularly given demographic shifts, juror attrition, and the proliferation of internet-enabled devices.

## **CHAPTERS 1 & 2**

9. The demographic landscape in Ireland has changed considerably since the Juries Act 1976. While Article 38.5 guarantees trial by jury, it does not mandate that juries reflect the nation’s population. Nevertheless, there is a shared understanding that juries should be representative of the community at large.<sup>2</sup>

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<sup>2</sup> See *De Búrca and Anderson v The Attorney General* [1976] IR 38

10. It is worth noting that, historically, “aliens” were excluded from jury service in Ireland under the Juries (Ireland) Act 1871. In contrast, at the same time, by virtue of the UK’s Juries Act 1870, non-citizens who resided in the UK for 10 years have been eligible. There does not appear to be a sound basis for insisting that citizenship be an essential prerequisite for jury service.
11. The courts increasingly see non-national, non-citizen defendants come before them<sup>3</sup>, yet, other than the inclusion of persons over the age of 70<sup>4</sup>, the pool of potential jurors has remains unchanged since 1976 and is not reflective of today’s population. A jury composed exclusively of citizens risks undermining public confidence in the justice system’s fairness when trying non-citizen defendants.
12. The Council supports the Commission’s recommendation for a residency requirement of at least five years for jury service eligibility. The Department asks what risks, if any, attach to opening up jury service to non-citizens. Juries are instructed by trial judges, in making their deliberations, to draw on their own experiences and every-day common sense. It might be argued that a wealth of variables make up a juror’s perspective, cognition and decision-making processes. It might be feared that jurors from countries with starkly different cultural, societal and legal backgrounds would lack the requisite competency to deliberate properly and fairly in accordance with Irish law. Additionally, it might be argued that given such varying perspectives within a panel of twelve individuals, it would be more difficult to find consensus. If such concerns can be properly said to exist, a residency requirement would address them: each juror would have had a considerable amount of experience interacting within the community and engaging with local norms.

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<sup>3</sup> see Howlin N, *Multiculturalism, Representation and Integration: Citizenship Requirements for Jury Service*’ (2012) 35 Dublin University Law Journal 148-172

<sup>4</sup> Section 54 Civil Law (Miscellaneous Provisions) Act 2008

13. The Commission makes reference to reports of jury attrition rates of up to 70% in Dublin, Cork and Limerick in or around 1993.<sup>5</sup> This trend has continued.<sup>6</sup> Expanding eligibility could alleviate high juror attrition rates, by drawing from an “*untapped reservoir of potential jurors*”.<sup>7</sup>

### CHAPTER 3

14. The Council supports retaining peremptory challenges. While empirical research into their impact is lacking, defendants often perceive them as enhancing fairness by allowing some control over jury composition. Removing peremptory challenges could lead to dissatisfaction and claims of unfair trials based on jury composition.
15. If peremptory challenges are removed altogether, it would seem inevitable that dissatisfied defendants and litigants would complain that they had no prospect of a fair trial given the composition of their juries.
16. Judges play a critical role in reassuring jurors challenged without explanation. Clear guidance from the bench can mitigate juror discomfort, preserving confidence in the process.
17. Introducing guidelines or judicial oversight for peremptory challenges would contradict their purpose: to empower the defence and prosecution independently.
18. Challenges for cause are rare in practice. More often than not, a panel of twelve jurors is successfully sworn before all peremptory challenges have been exhausted. Establishing cause is difficult without concrete evidence of bias, prejudice or inability. The questioning of potential jurors by counsel is not

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<sup>5</sup> *The Irish Jury Selection System* (Report Number 3/93, June 1993] cited in the LRC 2013 Report

<sup>6</sup> Mulherin, J. (2018). *An Exploratory Study of Jury Representativeness in Ireland*. Dissertation. Technological University Dublin.

<sup>7</sup> *per Henchy J in deBurca* [1976] IR 38, at 76

appropriate and a refusal by a trial judge to allow such questioning will be upheld as valid<sup>8</sup>. Additionally, the use of questionnaires is looked upon as constituting an unacceptable inference with the normal rules governing the jury system<sup>9</sup>. Indeed the only questioning of jurors regarding their qualifications that the Act envisages is by the presiding judge.<sup>10</sup>

19. Notwithstanding these restrictions, if there is real evidence that a potential juror is incapable of trying the matter fairly in accordance with his/her oath, then the Council can see no merit or justification for limiting the number of such challenges that can be raised.
20. Conducting challenges for cause *in camera* could address concerns about juror embarrassment. However, the use of questionnaires, while viewed as interference with traditional jury processes, warrants consideration if it significantly increases fairness without undue delay.

#### CHAPTER 4

21. The Court Services demonstrated commendable adaptability during the Covid pandemic. Their ability to implement effective accommodations reinforces their capacity to address logistical challenges in jury reform.
22. Juror capacity is a fundamental consideration for ensuring the effective functioning of the jury system. Reasonable supports and accommodations to assist jurors with capacity issues should be a priority and in keeping with statutory requirements. The Disability (Miscellaneous Provisions) Bill 2023 aims to amend pre-existing legislation on disability services and the state of equal status in Ireland.<sup>11</sup>

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<sup>8</sup> *(Attorney General) v Lehman (No.2)* [1947] IR 137 and *The People (Attorney General) v Singer* [1975] IR 408

<sup>9</sup> *DPP v Haugh* [2002] 3 IR 1

<sup>10</sup> Section 35(3) of the Act

<sup>11</sup> The Disability Act 2005 & The Equal Status Act 2000

23. Introducing individual assessments of juror capacity would provide both the prosecution and defence with greater clarity on whether a potential juror is capable of fulfilling their duties. Such assessments would facilitate a more informed selection process and enhance the overall fairness and reliability of the system. While individual assessments may lengthen trial proceedings, this should be viewed as a necessary adjustment if it helps to address deficiencies regarding juror capacity.
24. The formulation of individual assessments could involve the use of voluntary questionnaires, allowing prospective jurors to self-report their capacity to serve. This approach, while requiring further research, could offer a practical and discreet means of evaluating juror readiness.
25. Requiring jurors to sign a declaration of capacity when returning their summons would similarly serve to reinforce their responsibility in this regard. However, the procedure for summoning jurors and the practical input required from potential jurors is outside the common knowledge of criminal barristers.
26. Jurors should also bear responsibility for informing the court of any concerns regarding the capacity of fellow jurors. This duty should be clearly communicated, with the understanding that capacity is presumed unless exceptional circumstances suggest otherwise. Reinforcing this responsibility should be approached delicately, ensuring that it does not contribute to discriminatory assumptions or actions among jurors.
27. Non-binding guidelines on what constitutes "good cause" for excusal due to capacity issues would provide valuable clarity. These guidelines could outline available supports, reinforcing the principle that accommodation should be provided wherever reasonably practicable. Such an approach would also help address concerns about potential indirect discrimination against certain groups, such as the elderly, who are statistically more likely to require additional support.

28. Finally, the eligibility requirement for jurors to read, write, speak, and understand English should remain, as it is essential for effective participation in jury service. Further research into the practicability of accommodations, international best practices, and the potential implications for the accused's rights would be beneficial before considering any changes. Proficiency in Irish should not be a requirement, as this would unnecessarily restrict the pool of eligible jurors without clear justification.

## **CHAPTER 5**

29. The First Schedule of the Act lists those members of the population who are ineligible to participate as a jury member and those who are excusable as of right. The immediate exclusion of certain members of the community arises out of a well-founded concern that they would have a conflict of interest or be incapable of adjudicating in an impartial manner. The exclusion of legal professionals, for example, is premised, in part, on the belief that an undue deference would be paid by other juror members to the legal professional in the deliberation room.
30. Section 9(1) of the Act lists individuals excusable as of right, including medical professionals, teachers, and full-time students. Although the Act mandates that some require certification before being excused, by and large, very few persons who appear on the schedule are ever called for service jury or indeed serve as jury members. This broad excusal results in juror pools that fail to represent a cross-section of society. The Council concurs with the Commission's recommendation to repeal Section 9(1) and Part II of the Act, replacing them with a general right to excusal for just cause.
31. However, Section 9(1) also allows excusal for those who served on a jury within three years or received longer excusal from a judge post-trial. The Council sees no justification for amending this aspect of the provision.



32. In determining just cause for excusal, the Commission also recommends the issuing of guidelines to county registrars to assist them in making their determinations. The Council would urge that it be emphasised that they are non-binding. The County Registrar under the legislation is the *persona designata* and his/her discretion cannot be fettered by a strict adherence to direction from elsewhere. In that regard, the Council notes the repeal of Section 27 of the Act, which allowed ministerial instructions on jury administration.<sup>12</sup>

## CHAPTER 6

33. Under the Act, certain convicted persons are disqualified from acting as jurors. Those who have either served a term of imprisonment of 5 years or more, or for a period of 3 months or more within the previous 10 years are excluded. Their exclusion is premised on the reasonable belief that they have too close a connection to the administration of justice that they may, *inter alia*, harbour pre-conceived ideas about what evidence ought to be considered, how it ought to be weighted and how the trial process ought to operate. These concerns apply irrespective of where offences are committed. As such, the Council agrees with the Commission's recommendation that the Act be amended to exclude those who have committed offences outside the State, and any concomitant administrative changes necessary in the information provided in process of summoning jurors.
34. The Commission's recommendation of a 'sliding scale' approach, whereby the period of disqualification be measured in proportion to the nature and term of sentence imposed, follows the scale as proposed in the Criminal Justice (Spent Convictions) Bill 2012. The bill as enacted—the Criminal Justice (Spent Convictions and Certain Disclosures Act) 2016—provides for no such scale, only that *in nuce* a range of minor, non-excluded offences are spent after a period of 7 years.

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<sup>12</sup> Section 28 of the Courts and Civil Law (Miscellaneous Provisions) Act 2003

35. The Council considers it more appropriate, from a consistency and equality perspective, that the provisions of the 2016 Act be replicated in the disqualification criteria from jury service, notwithstanding that this represents a less condign and proportionate regime, and does not increase the pool of available jurors.
36. It is important to repeat and bear in mind that jury service is a civic duty and not a constitutional or statutory right. The need to increase a jury pool can be served by expanding it to incorporate other categories of individuals already discussed.
37. There are many persons without any prior convictions who have been charged and await trial. Although they enjoy the presumption of innocence, they too have too close a connection with the administration of justice. The majority of these individuals will be tried within their own electoral district area and as such, would not be appropriate candidates for jury selection. As such, the Council agrees with the Commission's recommendation that they too be excluded from consideration.

## **CHAPTER 7**

38. Jury intimidation has always been of concern in this jurisdiction. Following the enactment of the Juries Act 1927, the Oireachtas intervened to address the issue. The Juries (Protection) Act 1929 and the Juries (Protection) Act 1931 provided various protections for juror members by creating an offence of intimidation, prohibiting loitering near criminal courts, excluding members of the public during the calling of the jury panel and by depriving an accused person of a copy of the panel of jurors. Their existence was short-lived. The 1929 Act contained a sunset clause of 30 September 1931. It was extended by the Juries (Protection) Act 1931, which also had a sunset clause of 30 September 1933. There were no further extensions and both enactments were ultimately repealed by the Statute Law Revision Act 2016.

39. Jury intimidation remains a concern that must be guarded against. With the advent of the internet and the proliferation of social media accounts, the opportunity and ability to find, track, contact and engage with jurors are not limited to those with investigative skills or resources. The Council therefore supports any measures recommended by the Commission guarding against such activity that does not have an adverse effect on litigants' right to a fair trial.
40. A balance must be struck between a defendant's ability to effectively challenge the inclusion of potential juror members and the need to avoid the risk of jury tampering. The Council recognises that there is room for reform of Section 16 of the Act which makes provision for the inspection of jury lists. Although Section 16 allows for the inspection of the jury panel list at virtually any stage, the reality is, recourse to it is often only made by legal representatives on the morning of a trial. As such, the Council has no difficulty with the Commission's recommendations limiting access to the list four days prior to trial and for its removal following the swearing in of the jury. Such measures reduce the opportunity for information being garnered about jurors' personal details.
41. The Commission recommends that access to the list be confined to the parties' legal representatives save where a party is not legally represented. A defendant's legal representatives are officers of the court. This, in and of itself, operates as a protective measure against the misuse of a jury list. The Commission further recommends that where a party is legally represented, he or she may be provided with information from the list, but not a copy of the list. Those who choose to represent themselves would not be equally deprived under the recommendations. As such, the Council would be slow to support this particular recommendation.
42. The Council does support the Commission's recommendation calling for the abolition of the daily roll call of jurors. Its abolition would assuage certain concerns about jury embarrassment and privacy and its purpose can be achieved

just as efficiently by the presentation of valid identification by those who answer their jury summonses.

43. The Council supports the drafting of legislation with the objective of deterring jury tampering. Kearns J in *The People (DPP) v Walsh*<sup>13</sup> found it surprising that embracery, given the serious nature of the offence, was not a statutory offence. That still remains the case. Certainly intimidating jury members is captured by the statutory offence of intimidation<sup>14</sup>, but embracery is an inchoate offence and the type of behaviour it prohibits is not limited to simply threats but includes *inter alia* attempts to influence a jury.

## CHAPTER 8

44. Fitzgibbon J in *re M. M. and H. M.*<sup>15</sup> cites with approval the jurist Hawkins in making the following statement in relation to embracery: *Every person who shall be guilty of the offence of embracery, and every juror who shall wilfully or corruptly consent thereto, shall and may be respectively proceeded against by indictment*” [emphasis added]. Although embracery is an offence at common law, jury misconduct is not. It cannot properly be termed a corresponding offence with embracery given the inchoate nature of embracery. The offence of jury misconduct as proposed by the Commission is similar though insofar as neither require any particular consequence to occur as an element of the offence.
45. The Commission proposes making unlawful jury members disclosing to non-jurors, during the currency of a trial, information regarding juror deliberations, or how jury members formed an opinion or conclusion in relation to an issue at trial. It is not proposed to criminalise such discussions between jurors or if there is judicial consent to any such disclosure.

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<sup>13</sup> [2006] IECCA 40

<sup>14</sup> Section 41(1) of the Criminal Justice Act 1999

<sup>15</sup> [1933] IR 299

46. The offence can only be committed “during the trial”. In other words, it does not seek to criminalise such disclosures being made after the trial has concluded. The rationale being that it seeks to prohibit disclosures that would affect the fairness of the trial. If jurors are otherwise abiding by the direction of the presiding judge, however, deliberations only commence after all the evidence is heard, closing speeches have been made and the judge has charged the jury. If that is the case, it begs the question, in what way would a third party, equipped with knowledge about the deliberations of the jury, affect the trial process? In addition, *ceretis paribus*, the offence can only be committed during a very discrete period of time during the trial process.
47. The Commission also recommends criminalising jurors acting in contravention of a trial judge’s direction by making inquiries of the accused or any other matter relevant to the trial, extraneous to the evidence presented in the case.
48. The Council is not opposed to the criminalisation of behaviour that undermines the trial process *per se*. As will be discussed, it is the common experience of court practitioners that juries carry out their functions diligently and conscientiously without financial reward. There also appears to be widespread consensus that more should be done to facilitate, allow and encourage a wider portion of the population to act as jurors. A miscarriage of justice need not take place in order for a juror to be prosecuted under either of the proposed pieces of legislation. Given that, a successful prosecution of a juror who engaged in activity that had little or no bearing on the trial itself might serve to militate against all other efforts encouraging jury activity.
49. It is quite clear that the threat of penal sanction has had no effect in preventing members of the public from failing to respond to jury summonses. This may be due to the failure to prosecute offences contrary to Sections 34 & 35 & 36 of the Act. It the experience of the Bar that no such prosecutions have been brought in many years. It may also be due to the difficulty in proving those offences. Those who fail to attend contrary to Section 34 “without reasonable excuse” would likely

encounter little difficulty providing such an excuse in his/her defence in the District Court.

50. Studies have repeatedly shown that it is the certainty of detection rather than the consequences of detection that operate as the greater deterrent. Given the prospect that prosecutions of jurors might have a chilling effect in encouraging others to answer jury summonses, it might worth exploring other avenues. There is widely held acceptance that juries, for the most part, adhere to the directions of trial judges. As such, in directing a jury, judges ought to encourage individual juror members to report to any misconduct by fellow jury members that they have witnessed.
51. If jury misconduct is made a criminal offence then it would appear to the Council that it would be mandatory that a trial judge warn the jury about the consequences of that behaviour. Although jurors may answer their summons to serve out of a sense of civic duty, their non-attendance attracts penal sanction. Being present and acting under the threat of penal sanction mandates that a clear warning be given about jury misconduct, what constitutes jury misconduct, the fact that it constitutes an offence and that it attracts penalties.

## **CHAPTER 9**

52. The Commission recommended introducing a modest flat fee for jurors to cover expenses incurred during jury service. Jury duty can be time-consuming, emotionally taxing, and complex, requiring intense concentration. For many, especially self-employed individuals, it can also be financially burdensome. Currently, jurors receive no remuneration, with only lunch vouchers and refreshments provided.
53. A study by way of interviews conducted with members of the Bar and the Judiciary in this jurisdiction<sup>16</sup> reveals that judges frequently excuse jurors on grounds of

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<sup>16</sup> Coen, M., Howlin, N., Barry, C., & Lynch, J. (2020). "Respect, Reform and Research: an Empirical Insight into Judge-Jury Relations" [2020] *Irish Judicial Studies Journal* Vol 4(2) 116

financial hardship, particularly self-employed individuals for whom prolonged service would be intolerable. This suggests a significant portion of eligible jurors, namely small business owners and the self-employed, is effectively excluded from service. Similarly, low-income jurors face barriers due to inadequate allowances and the time commitment required.

54. As has been stated previously, jury service is a civic duty that all eligible, competent and qualified citizens are obligated to undertake. Trial judges and court practitioners often commend jurors' conscientious engagement, as evidenced by the thoughtful questions posed by forepersons to presiding judges. This dedication occurs despite the lack of financial reward.
55. A flat fee, however, risks monetising jury service, potentially altering jurors' attitudes. Alternative measures, such as reimbursing vouched out-of-pocket expenses, could alleviate financial burdens. In the UK, for example, jurors receive compensation for parking and childcare in certain circumstances and there is empirical evidence carried out by the UK Ministry of Justice that suggests that financial compensation maintains jury diversity, particularly in high-profile cases.

## CHAPTER 10

57. The Commission has looked at the issue of jury comprehension in the 2013 Report and called for the provision of empirical research into the topic prior to any legislative intervention in the area. The Council would support such an approach. Rather than engaging in such research, the Oireachtas has intervened by making provision for written documents to jury members.<sup>17</sup> Other mechanisms such as "Route-to-Verdict" documents have not been considered. *The Director of Public Prosecutions v Jose Lacerna Pena*<sup>18</sup> appears to be the only authority in this jurisdiction where reference has been made to their use.

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<sup>17</sup> The Criminal Procedure Act 2021

<sup>18</sup> [2022] IECA 15

58. The Council is not convinced that the use of Assessors will assist the trial process. There is a delicate balance to be struck in all trials, whether criminal or civil, between the presentation of the evidence and ensuring that the Jury is assisted in coming to a determination of the issues. It appears to the Council that this is best done by both sides presenting their evidence, including any expert evidence, in accordance with the existing laws of evidence. Trial Judges have a critical role in summing up such expert evidence to the Jury. The provisions of the Criminal Procedure Act 2021 (where applicable) enable juries to be provided with further information, and juries can raise questions with the Trial Judge if they require further assistance during their deliberations.
59. Introducing assessors may affect the balance that is required in trials. Such a third party role for an assessor means that the adversarial approach to trials is lost. It will also lead to greater complexity in trials, and it is inevitable that it will also lead to greater costs. The work of the assessor must be paid for, and it is unclear to the Council whether it will, in fact, assist in the overall context of the case itself.

## CHAPTER 11

60. The potential use of questionnaires to assess jurors' competencies and capabilities has been raised. Post-trial questionnaires or juror interviews, subject to consent, could provide valuable insights into jury decision-making. Such mechanisms, commonly used in the United States, offer less speculative and more practical research data. There is no clear prohibition in Irish law against questioning jurors post-trial, as trial proceedings have concluded. Judicial support for such feedback has been noted.<sup>19</sup>
61. Another critical issue arises from jury misconduct. Once a verdict is rendered, the presiding judge, whose duty is to ensure a fair trial, becomes *functus officio*. Case law suggests limited jurisdiction for trial judges to arrest a verdict once announced and recorded. In *The People (Attorney General) v. Michael Quinn*<sup>20</sup>, the Court of

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<sup>19</sup> (Mark Coen, Niamh Howlin, Colette Barry and John Lynch, *Judges and Juries in Ireland: An Empirical Study*. (UCD, 2020) Coen, 2020, p. 130).

<sup>20</sup> [1965] IR 366



Criminal Appeal held that trial judges lack jurisdiction to set aside jury verdicts in criminal matters. This principle was upheld in *The People (Attorney General) v. Longe*<sup>21</sup> and reaffirmed in *The People (DPP) v. McDonagh*<sup>22</sup> and *The People (DPP) v. DF*<sup>23</sup>.

62. Recent cases, including *DPP v. AA*<sup>24</sup> and *DPP v. BB*<sup>25</sup>, acknowledge that the jurisdiction to arrest a verdict is limited, typically for defects on the record, such as an offence unknown to law on the indictment. Dissatisfied litigants or defendants retain the right to appeal, but this inevitably delays access to justice. While this issue is tangential to jury reform, it underscores the significant consequences of jury misconduct and merits consideration.

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<sup>21</sup> [1967] IR 369

<sup>22</sup> [2015] IECA 244

<sup>23</sup> [2020] IECA 144

<sup>24</sup> [2024] IECA 154

<sup>25</sup> [2024] IECA 155



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