



**AN BILLE UM CHEARTAS COIRIÚIL (LEASÚ) 2009
CRIMINAL JUSTICE (AMENDMENT) BILL 2009**

EXPLANATORY MEMORANDUM

Purpose of the Bill

The primary purpose of this Bill is to introduce additional measures targeted at combating organised crime. The Bill targets those who direct the activities of criminal organisations and those who participate in the activities of such organisations. The Bill also addresses the increasing levels of violence and intimidation directed at witnesses and other members of the public. In addition to increased penalties, it makes provision for the use of the Special Criminal Court for the hearing of particular organised crime offences unless the Director of Public Prosecutions directs otherwise. The Bill also amends Garda detention, re-arrest and search powers.

Provisions of the Bill

PART 1

Preliminary and General

Part 1 sets down the short title of the Act and defines certain terms used in the Act.

Section 1 provides that the short title of the Act will be Criminal Justice (Amendment) Act 2009.

Section 2 defines certain terms used in the Act.

PART 2

Organised Crime

Section 3 amends section 70 of the Criminal Justice Act 2006. Subsection (1) amends the definitions of “criminal organisation” and “structured group” contained in that section. Subsection (2) defines “a person ordinarily resident in the State”.

Section 4 amends section 71 of the Act by substituting the words “person ordinarily resident in the State” for the words “stateless person habitually resident in the State”. This amendment harmonises section 71 with changes being made to other sections of the 2006 Act.

Section 5 inserts a new section 71A into Part 7 of the Criminal Justice Act 2006. Subsection (1) defines “directs” and provides that “activities” includes activities that do not constitute criminal offences, or that take place outside the State. Subsection (2) of the new section 71A makes it an offence for any person to direct, at any level of a criminal organisation, the activities of such an organisation. The maximum penalty following conviction on indictment is imprisonment for life.

The section seeks to target those in a criminal organisation who give the orders. Some of these people may not themselves directly participate in the commission of criminal offences. By including the words “at any level of the organisation’s structure” in subsection (2), it is ensured that persons directing the activities need not necessarily be one of those at the top of the organisation or that they be shown to be such. Subsection (3) of the new offence permits any statement or conduct of the accused, causing a reasonable inference that the person was directing the activities of a criminal organisation, to be admissible as evidence. Subsection (4) provides guidance for a court or jury, as the case may be, in determining whether or not an offence has been committed. Subsection (5) makes provision for inferences that may be drawn from documentary evidence. Subsection (6) provides that the definition of document or record is as defined in section 71B.

Section 6 amends the Criminal Justice Act 2006 by substituting a new section for the existing section 72 which relates to participation in organised crime. The new section will simplify the existing offence of participation in a criminal organisation. Subsection (1) of the new section, makes it an offence to participate in any activity in the knowledge that doing so could reasonably, or reckless as to whether such participation would, enhance or facilitate the commission of an offence by a criminal organisation. Subsection (2) provides a penalty where convicted of this offence of a fine and/or up to 15 years imprisonment. Subsection (3) confirms that the commission of a serious offence includes an act done outside the State. Subsection (4) provides that it is not necessary to prove that an offence has actually been carried out or that the defendant actually enhanced or facilitated an offence, or that the defendant knew the specific nature of any offence. Subsection (5) provides that the court may consider evidence whether or not the person uses a name, word or symbol which is associated with the organisation, or receives any benefit from the organisation. Subsection (6) provides that certain incriminating articles can be used as evidence that the defendant’s state of mind was such that he/she had a deliberate intention to commit the offence.

Section 7 inserts a new section after section 71 of the Criminal Justice Act 2006 to provide for proof of the evidence of the existence of a criminal organisation. This will enhance the ability to bring prosecutions for offences of directing or participating in organised crime. Subsections (1) and (2) allow for the admissibility of expert opinion evidence of a member of the Garda Síochána in determining the existence of a criminal organisation. Subsection (3) further details the types of evidence which may be put forward by a member of the Garda Síochána, including evidence of previous convictions of gang members for arrestable offences. Subsections (4) and (5) provide that documents and records relevant to the criminal organisation are admissible as evidence.

Section 8 provides, at subsection (1), a declaration that the ordinary courts are inadequate for the purpose of the effective administration of justice and the preservation of public peace in relation to

the offences contained in Part 7 of the Criminal Justice Act 2006 (excluding the conspiracy offence under section 71). This provision is not permanent and, depending on the threat posed by organised crime gangs, will have to be renewed on a regular basis. Subsection (2) has the effect of scheduling the offences specified in subsection (1) for the purpose of the provisions under the Offences against the State Act 1939 relating to the use of the Special Criminal Court. It allows the Special Criminal Court to hear prosecutions for the offence in question without prejudice, *inter alia*, to the power of the DPP to direct that a person not be sent forward for trial by that court (subsection (3)). Subsections (4) to (6) are the renewal provisions providing for the duration of this section. Subsection (4) sets down the expiry of operation of the section after one year unless a resolution continuing the section has been passed by both Houses of the Oireachtas. Subsection (5) allows further resolutions permitting, as needed, the continuation in force of the section. Under subsection (6), the Minister for Justice, Equality and Law Reform shall, before a resolution is passed by either House of the Oireachtas, place a report before each House concerning the operation of the provision to date.

Section 9 provides a new section 72A in the Criminal Justice Act 2006. Subsection (1) of this new provision permits inferences to be drawn as a result of the failure, in particular circumstances, of an accused to answer questions. It will apply to the organised crime offences under Part 7 of the Criminal Justice Act 2006 including the additional offence of directing the activities of a criminal organisation introduced in this Act. The remaining provisions of the section contain safeguards common to other similar existing provisions in Irish law such as the accused must be informed of the effect of a failure to answer a question; a reasonable opportunity must be given to the accused to consult a solicitor and the questioning is recorded unless the accused consents otherwise. Subsection (8) confirms that the section shall not apply in relation to a failure to answer a question if the failure occurred before the passing of the section.

Section 10 amends section 73 (*Commission of an offence for a criminal organisation*) of the Criminal Justice Act 2006, to increase the penalty for that offence from 10 to 15 years.

Section 11 amends section 74 of the Criminal Justice Act 2006 to apply the jurisdiction provisions of section 74 (*Proceedings relating to offences committed outside the State*) to the offences of directing and participating in organised crime.

Section 12 creates a new provision after section 74 of the Criminal Justice Act 2006 establishing as an aggravating factor, for the purpose of sentencing, the fact that a serious offence was committed within the framework of a criminal organisation. This provision, in addition to providing an additional tool for the punishment of offences involving organised crime, fulfils an obligation arising under Article 3.2 of the European Union Council Framework Decision of 24 October 2008 on the fight against organised crime.

Section 13 confirms that a court may exclude evidence if, in the opinion of the court, the prejudicial effect of evidence outweighs its probative value.

Section 14 creates a new provision in the Criminal Justice Act 2007, introducing post-release (restriction on certain activities) orders which can be applied to persons committing certain offences. These orders may apply, in accordance with subsection (1), to organised crime offences under Part 7 of the Criminal Justice Act 2006

and to the offences listed in Schedule 2 to the 2007 Act. Schedule 2 lists offences to which the sentencing provisions contained in Part 3 of the 2007 Act apply, namely the provisions on repeat offending (section 25) and monitoring and protection of persons orders (section 26). The court-issued order will apply following release from prison for the purpose of restricting the offender including restrictions on his or her movements, actions or activities or association with others. The order may also involve the imposition of conditions on an offender as to, for example, their engagement in any activity (subsection (3)). The imposition of an order under this section is subject to the public interest and other relevant matters before the court (subsection (2)). Under subsection (4), an order may apply for a period up to 7 years following release. Also under this section, an offender may apply to the court to vary or revoke the order. Failure to comply with a post-release (restriction of certain activities) order is an offence liable on conviction to a fine of up to €5,000 and/or imprisonment for up to 12 months.

Section 15 amends the Schedule to the Bail Act 1997. The Schedule lists the offences that are defined as “serious offences” and section 2 of the Bail Act provides for the circumstances in which bail may be refused for such offences. As a result of this amendment, the new directing offence under *section 5* will also be added to the Bail Schedule.

Section 16 increases the penalty for the offence of intimidation of witnesses, jurors or others from 10 years to 15 years.

Section 17 provides that the procedure available under section 13 of the Criminal Procedure Act 1967 whereby the District Court may, in the circumstances where an accused person pleads guilty to an indictable offence, deal with that offence summarily or send the accused forward for sentencing shall not apply to the directing the activities of a criminal organisation offence introduced by this Bill.

Section 29 of the Criminal Procedure Act 1967 is also amended to provide that a person charged with the directing offence may be admitted to bail only by the High Court. This is consistent with the treatment of the other offences under Part 7 of the Criminal Justice Act 2006.

PART 3

Offences under certain enactments; provisions for extra-territorial effect.

Section 18 provides for jurisdiction over obstruction of justice offences relating to interference with the actions of the judiciary or law enforcement authorities and where committed on board an Irish ship, aircraft, or such offences committed by an Irish citizen/resident while in another jurisdiction. This is an important new provision to ensure that persons involved in organised crime can be pursued in respect of transnational offences. These provisions also meet our obligations under the UN Convention against Transnational Organised Crime.

Section 19 provides for jurisdiction over the offence of inducement of witnesses to give false testimony where committed on board an Irish ship, aircraft, or such an offence committed by an Irish citizen/resident while in another jurisdiction. This provision ensures that persons involved in organised crime can be pursued in respect of transnational offences. These provisions also meet our obligations under the UN Convention against Transnational Organised Crime.

PART 4

Amendments concerning detention and re-arrest powers

The purpose of this Part is to amend the Garda detention and re-arrest powers contained in:

- the Offences against the State Act 1939,
- the Criminal Justice (Drug Trafficking) Act 1996,
- the Criminal Justice Act 2007, and
- the Criminal Justice Act 1984.

Section 20 amends sections 30 and 30A of the Offences against the State Act 1939, as amended. Subsection (1) amends section 30. Section 30 provides that a person suspected of committing any offence under the 1939 Act or any offence that is scheduled for the purposes of Part V of the Act (i.e. may be tried before the Special Criminal Court) may be detained for up to 72 hours where that is necessary for the proper investigation of the offence in question. The first 48 hours is subject to Garda authorisation and the remaining 24 hours are subject to judicial authorisation. Paragraph (a) inserts a new subsection (3A) in order to provide that a person detained under section 30 may continue to be detained for an offence other than the offence to which the detention relates. In order for this provision to apply: the “other offence” must come within the category of offences to which section 30 applies; a member of the Garda Síochána must have reasonable cause to suspect the detained person’s involvement in the other offence; and the member in charge of the Garda station or, in the event that the person is detained in a place other than a Garda station as permitted by the section, a member of the Garda Síochána not below the rank of inspector must have reasonable grounds for believing that the continued detention of the person is necessary for the proper investigation of the other offence concerned. The person may not be detained in excess of the maximum allowed i.e. 72 hours. The other statutory detention powers already include a provision along these lines.

Paragraph (b) makes a number of changes to the procedures applying to the extension of time application under section 30(4).

A new subsection (4BA) is inserted in order to minimise the risk of prejudice to the criminal investigation concerned arising from the disclosure of information during the hearing of the extension of time application. The judge is given discretion: to direct that the application be heard otherwise than in public; to limit attendance at the hearing to the persons directly concerned with the application, officers of the court and bona fide representatives of the Press; and to direct that certain information be disclosed in the absence of the suspect and legal representatives. The new subsection also prohibits the publication or broadcasting of any information about an application under subsection (4) other than the fact that the application has been made by the Gardaí in relation to a particular investigation and the decision on the application. Breach of this prohibition is a criminal offence.

A new subsection (4BB) is inserted in order to make it clear that the lawfulness of the arrest or detention of the suspect is not a matter to be raised during the hearing of an application for an extension of time. Such matters are properly the subject of a habeas corpus application to the High Court.

A new subsection (4BC) is inserted in order to provide that the officer of the Garda Síochána making the application for an extension of time (who must be a superintendent or above) may give evidence of matters related to the application not within his/her personal knowledge but within the personal knowledge of another member i.e. hearsay evidence may be given by the applicant officer. The judge hearing the application may in the interests of justice direct another member to attend to give direct oral evidence. The hearing may be adjourned to allow time for the member to attend.

Paragraph (c) substitutes subsection (4D) (inserted by section 187 of the Criminal Justice Act 2006) in order to provide that where the detention period expires during the time that the suspect is at the venue for the hearing of the extension of time application it shall be deemed not to expire until such time as the application is determined by the judge. This provision is subject to the safeguard that the time of arrival must be certified by a court clerk in attendance at the venue. As the law stands at present it only addresses the situation where the detention period would expire during the hearing.

Subsection (2) amends section 30A (inserted by section 11 of the Offences against the State (Amendment) Act 1998) in order to add to the grounds on which a court may authorise the re-arrest of a person previously detained under section 30 of the 1939 Act but released without charge. Section 30A provides that a warrant issued by a District Court judge is required to arrest a person again for the offence to which his or her detention related or for an offence which at the time of the first arrest the arresting member suspected or ought reasonably to have suspected the person of having committed. Under the existing law, in order for the judge to issue the warrant information concerning the person's suspected participation in the offence for which his or her arrest is sought that has come to the knowledge of the Gardaí since the person's release must be supplied on oath. This amendment adds an alternative ground viz., that notwithstanding that the Gardaí had knowledge of the person's suspected participation in the commission of the offence for which his or her arrest is sought, prior to his or her release, the questioning of the person in relation to that offence prior to release would not have been in the interests of the proper investigation of the offence. An application for an arrest warrant under this section is to be heard otherwise than in public.

Subsection (3) makes a consequential amendment to section 30A(2) arising from the amendment to section 30.

Section 21 amends sections 2, 4, 5 and 11 of the Criminal Justice (Drug Trafficking) Act 1996.

Subsection (1) amends section 2 of the Act. Section 2 provides that a person suspected of committing a drug trafficking offence (as defined in section 3(1) of the Criminal Justice Act 1994) may be detained for up to 7 days for the proper investigation of the offence — 48 hours under Garda authority and a further 120 hours under judicial authority.

Paragraph (a) makes a number of changes to the procedures applying to the extension of time application under section 2(2).

A new subsection (3A) is inserted in order to minimise the risk of prejudice to the criminal investigation concerned arising from the disclosure of information during the hearing of the extension of time application. The judge is given discretion: to direct that the application be heard otherwise than in public; to limit attendance at the

hearing to the persons directly concerned with the application, officers of the court and bona fide representatives of the Press; and to direct that certain information be disclosed in the absence of the suspect and legal representatives. The new subsection also prohibits the publication or broadcasting of any information about an application under subsection (2) other than the fact that the application has been made by the Gardaí in relation to a particular investigation and the decision on the application. Breach of this prohibition is a criminal offence.

A new subsection (3B) is inserted in order to make it clear that the lawfulness of the arrest or detention of the suspect is not a matter to be raised during the hearing of an application for an extension of time. Such matters are properly the subject of a habeas corpus application to the High Court.

A new subsection (3C) is inserted in order to provide that the officer of the Garda Síochána making the application for an extension of time (who must be a chief superintendent or above) may give evidence of matters related to the application not within his/her personal knowledge but within the personal knowledge of another member i.e. hearsay evidence may be given by the applicant officer. The judge hearing the application may in the interests of justice direct another member to attend to give direct oral evidence. The hearing may be adjourned to allow time for the member to attend.

Paragraph (b) substitutes subsection (7A) (inserted by section 10 of the Criminal Justice Act 2006) in order to provide that where the detention period expires during the time that the suspect is at the venue for the hearing of the extension of time application it shall be deemed not to expire until such time as the application is determined by the judge. This provision is subject to the safeguard that the time of arrival must be certified by a court clerk in attendance at the venue. As the law stands at present it only addresses the situation where the detention period would expire during the hearing.

Subsection (2) amends section 4 of the Act in order to add to the grounds on which a court may authorise the re-arrest of a person previously detained under section 2 of the Act but released without charge. Section 4 provides a warrant issued by a judge of the District Court or a judge of the Circuit Court is required before such a person may be arrested again for the offence to which his or her detention related or for an offence which at the time of the first arrest the arresting member suspected or ought reasonably to have suspected the person of having committed. Under the existing law, in order for the judge to issue the warrant information concerning the person's suspected participation in the offence for which his or her arrest is sought that has come to the knowledge of the Gardaí since the person's release must be supplied on oath. This amendment adds an alternative ground viz., that notwithstanding that the Gardaí had knowledge of the person's suspected participation in the commission of the offence for which his or her arrest is sought, prior to his or her release, the questioning of the person in relation to that offence prior to release would not have been in the interests of the proper investigation of the offence. An application for an arrest warrant under this section is to be held otherwise than in public.

Subsection (3) amends section 5 of the Act. It applies an amendment to section 4 of the Criminal Justice Act 1984 (see section 23 of the Bill) to persons detained under section 2 of the 1996 Act.

Subsection (4) repeals section 11 of the Act. The effect of this is to make sections 2, 3, 4, 5 and 6 of the Act permanent thereby eliminating the need for these sections to be renewed every two years by a resolution of the Houses of the Oireachtas.

Section 22 amends sections 50, 51 and 52 of the Criminal Justice Act 2007. Section 50 provides that a person suspected of committing: murder involving the use of a firearm or explosive, murder to which section 3 of the Criminal Justice Act 1990 applies (capital murder), an offence under section 15 of the Firearms Act 1925 (possession of firearms with intent to endanger life) or an offence under section 15 of the Non-fatal Offences Against the Person Act 1997 involving the use of a firearm (the offence of false imprisonment) may be detained for up to 7 days for the proper investigation of the offence — 48 hours under Garda authority and a further 120 hours under judicial authority.

Subsection (1) amends section 50(1) of the Act in order to extend the list of offences to which the section applies. The offences under Part 7 of the Criminal Justice Act 2007 (organised crime offences) are added.

Subsection (2) amends section 50 in order to make a number of changes to the procedures applying to the extension of time application under section 50(3).

A new subsection (4A) is inserted in order to minimise the risk of prejudice to the criminal investigation concerned arising from the disclosure of information during the hearing of the extension of time application. The judge is given discretion: to direct that the application be heard otherwise than in public; to limit attendance at the hearing to the persons directly concerned with the application, officers of the court and bona fide representatives of the Press; and to direct that certain information be disclosed in the absence of the suspect and legal representatives. The new subsection also prohibits the publication or broadcasting of any information about an application under subsection (3) other than the fact that the application has been made by the Gardai in relation to a particular investigation and the decision on the application. Breach of this prohibition is a criminal offence.

A new subsection (4B) is inserted in order to make it clear that the lawfulness of the arrest or detention of the suspect is not a matter to be raised at the hearing of an application for an extension of time. Such matters are properly the subject of a habeas corpus application to the High Court.

A new subsection (4C) is inserted in order to provide that the officer of the Garda Síochána making the application for an extension of time (who must be a chief superintendent or above) may give evidence of matters related to the application not within his/her personal knowledge but within the personal knowledge of another member i.e. hearsay evidence may be given by the applicant officer. The judge hearing the application may in the interests of justice direct another member to attend to give direct oral evidence. The hearing may be adjourned to allow time for the member to attend.

Paragraph (b) substitutes subsection (9) in order to provide that where the detention period expires during the time that the suspect is at the venue for the hearing of the extension of time application it shall be deemed not to expire until such time as the application is determined by the judge. This provision is subject to the safeguard

that the time of arrival must be certified by a court clerk in attendance at the venue. As the law stands at present it only addresses the situation where the detention period would expire during the hearing.

Subsection (3) amends section 51 in order to add to the grounds on which a court may authorise the re-arrest of a person previously detained under section 50 of the Act but released without charge. Section 51 provides that a warrant issued by a District Court judge or a Circuit Court judge is required to arrest such a person again for the offence to which his or her detention related or for an offence which at the time of the first arrest the arresting member suspected or ought reasonably to have suspected the person of having committed. Under the existing law, in order for the judge to issue the warrant information concerning the person's suspected participation in the offence for which his or her arrest is sought that has come to the knowledge of the Gardaí since the person's release must be supplied on oath. This amendment adds an alternative ground viz., that notwithstanding that the Gardaí had knowledge of the person's suspected participation in the commission of the offence for which his or her arrest is sought, prior to his or her release, the questioning of the person in relation to that offence prior to release would not have been in the interests of the proper investigation of the offence. An application for an arrest warrant under this section shall be heard otherwise than in public.

Subsection (4) amends section 52 of the Act. It applies an amendment to section 4 of the Criminal Justice Act 1984 (see section 23 of the Bill) to persons detained under section 50 of the 2007 Act.

Section 23 amends sections 4, 9 and 10 of the Criminal Justice Act 1984. Section 4 of the Act provides that a person may be detained for up to 24 hours subject to Garda authorisation where this is necessary for the proper investigation of an arrestable offence (an offence punishable by 5 years or more). The 24 hour maximum does not include any periods not to be reckoned in its calculation e.g. absences from the Garda station connected with the making of a habeas corpus application (section 4(8A)) and to attend hospital (section 4(8)).

Subsection (1) amends section 4 of the Act by inserting a new subsection (8B). Section 4(8) already provides that any time that a person detained under section 4 is absent from the station for the purpose of hospitalisation is to be excluded in the reckoning of the detention period. New subsection (8B) seeks to address the situation where a detainee is assessed as unfit for questioning but does not require hospitalisation, for example where the detainee is intoxicated. It is proposed that where a medical practitioner certifies that the detainee is unfit for questioning no questioning shall take place during the period certified and that period shall not be included in the reckoning of the detention period. The period cannot exceed 6 hours and a certificate can be provided on one occasion only. Paragraph (b) makes a consequential amendment to section 4(9).

Subsection (2) amends section 9 of the Act. The effect of this is to apply section 4(8B) to persons detained under section 30 of the Offences against the State Act 1939.

Subsection (3) amends section 10 of the Act in order to add to the grounds on which a court may authorise the re-arrest of a person previously detained under section 4 of the Act but released without charge. Section 10 provides that a warrant issued by a District Court judge is required before such a person may be arrested again for the offence to which his or her detention related or for an offence which

at the time of the first arrest the arresting member suspected or ought reasonably to have suspected the person of having committed. Under the existing law, in order for the judge to issue the warrant information concerning the person's suspected participation in the offence for which his or her arrest is sought that has come to the knowledge of the Gardaí since the person's release must be supplied on oath. This amendment adds an alternative ground viz., that notwithstanding that the Gardaí had knowledge of the person's suspected participation in the commission of the offence for which his or her arrest is sought, prior to his or her release, the questioning of the person in relation to that offence prior to release would not have been in the interests of the proper investigation of the offence. An application for an arrest warrant under this section shall be heard otherwise than in public.

PART 5

Miscellaneous

Section 24 amends section 6 of the Offences against the State (Amendment) Act 1998, which deals with the offence of *Directing activities of an unlawful organisation*. These amendments are required to ensure consistency with the offence of *Directing activities of a criminal organisation* contained in *section 5* of this Bill.

Section 25 clarifies that all applications for search warrants whether to a court or a judge are to be heard otherwise than in public.

Financial Implications

The Bill may give rise to additional costs insofar as the Bill may result in prosecutions of persons accused of offences under it. However, there are no grounds for believing that any significant expenditure will arise.

An Roinn Dlí agus Cirt, Comhionannais agus Athchóirithe Dlí, Meitheamh, 2009.