



**AN BILLE UM CHEARTAS COIRIÚIL, 2011
CRIMINAL JUSTICE BILL 2011**

EXPLANATORY MEMORANDUM

Main Purpose of the Bill

The purpose of the Bill is to amend the criminal law to improve certain procedural matters and strengthen Garda investigative powers. The intention is that such improvements will assist in reducing the delays associated with the investigation and prosecution of complex crime, in particular white collar crime.

The Bill also addresses two matters relating to the investigation of offences more generally: (i) refinements to our processes around the constitutional/European Convention on Human Rights entitlement of a person in Garda custody to access legal advice, and (ii) the circumstances in which a person detained under section 4 of the Criminal Justice Act 1984 may be questioned between midnight and 8 a.m.

Provisions of the Bill

Preliminary and General (Part 1)

Section 1 provides for the short title of the Bill and its commencement.

Section 2 defines terms used in the Bill.

Section 3 provides for “relevant offences” for the purposes of this Bill. *Subsection (1)* provides that a relevant offence means an arrestable offence as specified in the Schedule to the Bill, or as the Minister may specify in an order made under *subsection (2)*. An arrestable offence is an offence punishable by imprisonment for a period of 5 years or more. Aiding, abetting, counselling, procuring, conspiracy and incitement of these offences are also included in the definition. *Subsection (2)* provides that the offences which may be specified by Ministerial order are offences relating to banking, investment of funds and other financial activities, company law, money laundering and financing terrorism, theft and fraud, bribery and corruption, competition and consumer protection, crime relating to electronic communications networks and information systems and the raising and collection of taxes and duties. The Minister must consider that the powers under the Bill are, by reason of the nature of the arrestable offence concerned and the prolonged period of time that may be required for the investigation of such offences as a result of the complexity of such investigations, necessary for the investigation of that offence. *Subsection (3)* provides that the

Minister must consult with any other relevant Minister before making an order under *subsection (2)*.

Section 4 is a standard provision relating to the making of regulations and the laying of orders made by the Minister before each House of the Oireachtas.

Section 5 provides for the repeal of sections 47 and 52 of the Criminal Justice (Miscellaneous Provisions) Act 2009 which amend section 4 of the Criminal Justice Act 1984 and Regulation 12 of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 respectively. Sections 47 and 52 have not been commenced and are being repealed as a consequence of section 7 of the Bill.

Section 6 is a standard provision regarding expenses incurred in the administration of the Bill.

Detention (Part 2)

Section 7 amends section 4 of the Criminal Justice Act 1984, which provides for the detention of persons arrested by the Garda Síochána.

The amendments will allow the period of detention under section 4 of the 1984 Act to be suspended and the person released during the period of suspension. The purpose of these provisions is to allow the Gardaí to follow up on information obtained during questioning. Section 7 also provides for matters relating to the questioning of persons between midnight and 8 a.m.

Paragraph (a) inserts six new subsections ((3A) to (3F)) into section 4 of the 1984 Act. Subsection (3A) allows the Gardaí to suspend the detention of a person being detained in respect of a relevant offence where there are reasonable grounds for believing that it is necessary for the purpose of permitting enquiries or investigations to be made for the further and proper investigation of the offence for which the person is detained. Where a person's detention is so suspended, he or she must be released from Garda custody forthwith unless his or her detention is authorised apart from the 1984 Act. Subsection (3B) provides that a person's detention may be suspended on no more than 2 occasions. The total time for which a person's detention may be suspended must not exceed 4 months from the date of the first suspension. The person must return to such Garda station at such date and time as is specified by notice in writing given to him or her under subsection (3C) or at such other date and time or Garda station as may be notified under subsection (3D).

Subsection (3C) provides that the person concerned must be given notice in writing that his or her detention is being suspended, of the Garda station and of the date and time on which he or she must return for the continuation of the detention, and of the consequences under section 4A and 4B (to be inserted by *section 8*) of failing to return. The effect of the notice must be explained to the person orally by a Garda. Subsection (3D) provides that a member of the Garda Síochána not below the rank of inspector may issue a notice appointing a new date, time or different Garda station for the person's return where that member has reasonable grounds for believing that it is necessary for the proper investigation of the offence concerned to so change the return date and time or Garda station. The person must be given such notice of the change as is prescribed in regulations under section 4C of the 1984 Act (to be

inserted by *section 8*). Only one such notice may be issued to a person during each period of suspension. However, the person may request a notice appointing a new date and time or Garda station, and such a notice may be issued where a member of the Garda Síochána not below the rank of inspector is satisfied that there is good and sufficient reason for doing so.

Subsection (3E) provides that where a person whose detention has been suspended returns in accordance with subsection (3B) or is returned under section 4A, his or her detention shall be continued in accordance with section 4 of the 1984 Act for such period as is authorised under that section. The period of time commencing on the person's return to the Garda station for the continuation of the detention shall be included in reckoning a period of detention permitted by section 4. However, where the member in charge of the Garda station concerned no longer has, at the time of the person's return, reasonable grounds for believing that the person's continued detention is necessary for the proper investigation of the offence concerned, the person must be released from custody forthwith unless his or her detention is otherwise authorised by law.

Subsection (3F) clarifies how suspension of detention will operate in cases where the person is detained for another offence or the detention is continued under section 4(5A) of the 1984 Act in relation to another offence.

Paragraph (b) provides for a consequential amendment to section 4(5A) of the 1984 Act, which relates to the investigation of an offence other than that for which the person has been detained.

Paragraph (c) substitutes subsection (6) which concerns the questioning between midnight and 8 a.m. of a person detained pursuant to section 4 of the 1984 Act. It provides that a detained person shall not be questioned during that period other than (i) where the suspect objects to the suspension of questioning or (ii) the member in charge authorises questioning on the grounds that to delay would involve a risk of one of a specified list of circumstances occurring. The list includes: injury to other persons; serious loss of, or damage to property; the destruction of, or interference with evidence; alerting accomplices or hindering the recovery of property obtained as result of an offence. Provision is made for the detained person to be notified that he or she may object to suspension. Provision is also made for the person to be notified of any authorisation that questioning is to continue and its effect. The period during which questioning is suspended shall be excluded from the calculation of the detention period.

Paragraph (d) provides for consequential amendments to section 4(9) of the 1984 Act.

Paragraph (e) inserts a new subsection (12) into section 4 of the 1984 Act to provide for the definition of terms in that section.

Section 8 inserts new sections 4A, 4B and 4C into the Criminal Justice Act 1984. Section 4A provides that a person who fails to return to a Garda Síochána station for the continuation of a period of detention which was suspended may be arrested without warrant and returned to the Garda station appointed for the continuation of the detention concerned. Where a person is returned to a Garda Síochána station under this section, the period of time commencing on his or her arrest and ending on his or her arrival to the Garda station concerned shall be excluded in reckoning a period of detention permitted under section 4 of the 1984 Act. Section 4B

provides for an offence of failing to return to the Garda station concerned. Section 4C provides for a regulation-making power in relation to the procedures to apply to the suspension of detention.

Section 9 makes further amendments to the Criminal Justice Act 1984. *Paragraph (a)* inserts new sections 5A and 5B into the 1984 Act.

Section 5A provides that no questioning of a person detained pursuant to section 4 of that Act may take place until such time as he or she has had access to legal advice (in person or by telephone). This is subject to two exceptions: where he or she has waived the right to consult a solicitor; or where the member in charge has authorised questioning on the grounds that to delay would involve a risk of one of a specified list of circumstances occurring. The list includes: injury to other persons; serious loss of, or damage to property; the destruction of, or interference with evidence; alerting accomplices or hindering the recovery of property obtained as result of an offence. Provision is made for the detention clock to stop pending a solicitor making him or herself available for a consultation. The period for which the detention clock may stop is restricted to a maximum of 3 hours for the most part but up to 6 hours where a person detained pursuant to section 4 of the 1984 Act objects to the suspension of questioning between mid-night and 8 a.m. These periods may be reduced by Ministerial regulation.

Section 5B makes provision for a regulation-making power in relation to procedural matters concerning access to a solicitor by detained persons.

Paragraph (b) amends section 9 of the 1984 Act in order to apply the new section 5A to the detention power under section 30 of the Offences against the State Act 1939.

Paragraphs (c), (d) and (e) amend sections 18, 19 and 19A of the 1984 Act in order to make it clearer that an inference adverse to an accused arising from his or her failure or refusal to account for suspicious circumstances etc. on being questioned by a Garda cannot be drawn in proceedings unless the accused was informed before such failure or refusal occurred that he or she had the right to consult a solicitor and was afforded an opportunity to do so (other than where he or she waived that right).

Sections 10, 11 and 12 provide for similar amendments to the inference provisions in section 2 of the Offences against the State (Amendment) Act 1998, section 72A of the Criminal Justice Act 2006 and section 3 of the Criminal Justice (Forensic Evidence) Act 1990.

Sections 13 and 14 apply the new section 5A to the detention powers under section 2 of the Criminal Justice (Drug Trafficking) Act 1996 and section 50 of the Criminal Justice Act 2007.

Provisions relating to documents and information (Part 3)

Section 15 provides for applications to the District Court by the Garda Síochána for orders requiring the production of documents or the provision of information. Under *subsection (1)*, for the purposes of the investigation of a relevant offence, a Garda may apply to the District Court for an order in relation to the making available by a person of documents or the provision by a person of information (by answering questions or making a statement), or both. *Subsection (2)* provides for orders in relation to the production of documents or the

giving of access to them. *Subsection (3)* provides for orders in relation to the provision of information to the Garda Síochána by answering the questions specified in the application or making a statement setting out the answers to those questions, or both, and the making of a declaration of the truth of the answers to such questions. In either case, the District Court judge must be satisfied, on information on oath of the Garda concerned, that there are reasonable grounds for believing that the document or information is relevant to the investigation of the relevant offence concerned, there are reasonable grounds for suspecting that the document or information may constitute evidence of or relating to the commission of that offence, and there are reasonable grounds for believing that the documents or information should be provided, having regard to the benefit likely to accrue to the investigation and any other relevant circumstances. Where the judge orders the production of documents, he or she may order the person to identify and categorise the documents in the particular manner (if any) sought by the Gardaí or in such manner as the judge may direct.

Subsection (4) provides that an order to provide information may only be made in respect of information that the person concerned has obtained in the ordinary course of business.

Subsection (5) provides that an order providing for access to documents in a specified place may require a Garda to be allowed to enter the place to obtain access to the documents. *Subsection (6)* makes provision for access to passwords, etc. where the documents concerned are in non-legible form, e.g. contained in a computer. *Subsection (7)* provides that an order under this section empowers a member of the Garda Síochána to make copies of documents and to take the copies away. The order does not confer any right to production of, or access to, any document subject to legal professional privilege. The order has effect notwithstanding any other obligation as to secrecy or other restriction on disclosure of information imposed by statute or otherwise.

Subsection (8) provides, in certain circumstances, for the retention by, or return to, a person of documents which may be taken away by the Gardaí under this section where the documents are required for the purposes of a person's business or other legitimate purpose. The person must undertake in writing to keep the documents safely and securely and when requested, to furnish them to the Garda Síochána in connection with any criminal proceedings for which they are required. This provision also applies to third parties affected by an order under this section. *Subsection (9)* provides that documents taken away by a member of the Garda Síochána under this section may be retained by the member for use as evidence in any criminal proceedings. *Subsection (10)* provides that a statement or admission made by a person pursuant to an order under this section is not admissible as evidence in proceedings against the person for an offence (other than an offence under *subsection (15), (16) or (17)*). *Subsection (11)* provides that an order under this section for the production of, or access to, documents may, on the application of the Garda Síochána and if the judge considers it appropriate, require the person to furnish a certificate affirming the authenticity of the documents, and in the case of a document in non-legible form that is reproduced in legible form, the system and manner of that reproduction.

Subsection (12) provides that where a person who produces documents under this section claims a lien on the documents or some of them, the production shall be without prejudice to the lien.

Subsection (13) allows the court to vary or discharge the order on application by the person who is the subject of the order or the Garda Síochána. *Subsection (14)* provides that the court may order the return of documents to third parties affected by an order under this section. *Subsection (15)* provides that a person who fails or refuses to comply with an order under this section is guilty of an offence. *Subsection (16)* provides for an offence of providing false or misleading information or statements. *Subsection (17)* provides that a person who fails to comply with an undertaking given by him or her under *subsection (8)* is guilty of an offence. *Subsection (18)* provides for the geographical jurisdiction of the District Court under this section. *Subsection (19)* provides that this section shall not affect the operation of any other legislative provision under which a court may order production of documents to the Gardaí or any other person in connection with the investigation of an offence.

Section 16 makes provision for determining legal professional privilege issues which arise in relation to District Court orders under section 15 requiring disclosure of documents to the Garda Síochána.

Subsection (1) defines the term “privileged legal material” for the purposes of this section.

Subsection (2) provides that if a person refuses to disclose a document or give access to it pursuant to an order under section 15 on the grounds that it is privileged legal material, a member of the Garda Síochána may apply to a District Court judge for a determination as to whether the document is privileged legal material.

Subsection (3) provides that a person who refuses to disclose a document or give access to it pursuant to an order under section 15 on the grounds that the document is privileged legal material may apply to a District Court judge for a determination as to whether the document is privileged legal material.

Subsection (4) imposes an obligation on a person who refuses to produce a document or give access to it on the grounds that the document is privileged legal material to preserve the document and keep it in a safe and secure place pending the final determination of an application under *subsection (2)* or *(3)*.

Subsection (5) allows a District Court judge, pending the final determination of an application under *subsection (2)* or *(3)*, to give interim or interlocutory directions, including, where a case involves a substantial volume of documents, the appointment of an experienced, independent person with legal qualifications to examine the documents and prepare a report for the judge with a view to assisting or facilitating the judge’s determination as to whether the documents are privileged legal material.

Subsection (6) allows the District Court judge to direct that an application under *subsection (2)*, *(3)* or *(5)* be heard otherwise than in public. *Subsection (7)* sets out the notice requirements for applications under this section.

Subsection (8) provides that an appeal against the determination of a District Court judge under this section shall lie to the Circuit Court. No further appeal shall lie from an order of the Circuit Court

made on such an appeal. *Subsection (9)* provides that rules of court may make provision for the expeditious hearing of applications to a District Court judge, and any appeals against the determinations of such a judge, under this section. *Subsection (10)* enables the Minister to make regulations for the purposes of this section relating to the awarding, and payment, of costs to or by any party pursuant to an application or an appeal under this section.

Section 17 provides for an offence relating to the falsification, concealment or destruction of documents relevant to a Garda investigation into a relevant offence (other than an offence to which section 51 of the Criminal Justice (Theft and Fraud Offences) Act 2001 applies).

Section 18 provides for certain evidential presumptions to arise where documents are admitted as evidence in proceedings for a relevant offence. It provides for presumptions on the creation, ownership, receipt and other matters relating to documents. These presumptions may be rebutted by the defendant.

Section 19 provides for a new offence, similar to the former misprision of felony offence, which relates to the failure to report information to the Gardaí. A person who has information which he or she knows or believes might be of material assistance in preventing the commission by another person of a relevant offence or in securing the apprehension, prosecution or conviction of another person for such an offence, and who fails without reasonable excuse to disclose such information as soon as practicable to the Garda Síochána, will be guilty of an offence.

Section 20 is a standard provision regarding offences by bodies corporate.

The *Schedule* sets out the offences which will be “relevant offences” for the purposes of the Bill.

Fines

The Fines Act 2010 provides for a new system of categorisation and indexation of District Court fines. The fines in the Bill are specified in accordance with that categorisation. For ease of reference, the categorisation is as follows:

“class A fine” means a fine not exceeding €5,000;

“class B fine” means a fine not exceeding €4,000;

“class C fine” means a fine not exceeding €2,500;

“class D fine” means a fine not exceeding €1,000;

“class E fine” means a fine not exceeding €500.

Financial implications

It is not expected that the measures contained in the Bill will result in any significant costs to the Exchequer.

*An Roinn Dlí agus Cirt agus Comhionannais,
Bealtaine, 2011*