



An Bille um Cheartas Coiriúil (Cionta Éillithe), 2017
Criminal Justice (Corruption Offences) Bill 2017

Meabhrán Mínitheach
Explanatory Memorandum



**AN BILLE UM CHEARTAS COIRIÚIL (CIONTA ÉILLITHE), 2017
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EXPLANATORY MEMORANDUM

The main purpose of the Bill is:

To provide a single Act to repeal and replace the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, the Prevention of Corruption Act 1916, section 38 of the Ethics in Public Office Act 1995, the Prevention of Corruption (Amendment) Act 2001, Part 5 of the Proceeds of Crime (Amendment) Act 2005 and the Prevention of Corruption (Amendment) Act 2010. The Bill also gives effect to some of the recommendations of the Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments (2012) (Mahon).

The Bill makes renewed provision for the main requirements of a number of international anti-corruption instruments, which Ireland has already ratified. It also provides for various recommendations made in the course of evaluations of Ireland's implementation of the international agreements. The key instruments are as follows:

- the Convention drawn up on the basis of Article K (3)(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union done at Brussels on 26 May 1997 and adopted by Ireland on 11 March 2003;
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted at Paris on 21 November 1997 and ratified by Ireland on 22 September 2003;
- the Council of Europe Criminal Law Convention on Corruption done at Strasbourg on 27 January 1999 and ratified by Ireland on 3 October 2003;
- the EU Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector;
- the Additional Protocol to the Council of Europe Criminal Law Convention on Corruption done at Strasbourg on 15 May 2005 and ratified by Ireland on 11 July 2005;
- the United Nations Convention Against Corruption done at New York on 31 October 2003 and ratified by Ireland on 9 November 2011.

Provisions of the Bill

Part 1

Preliminary

Section 1: Short title and commencement

Section 1 provides for the short title of the Bill and for its commencement by an order or orders to be made by the Minister for Justice and Equality.

Section 2: Interpretation

Section 2 defines key terms used in the Bill. Of particular note is the term “corruptly”. The majority of definitions in statute are stated as “means” y. The definition of “corruptly” is stated as “includes...”. The definition is intended not to be exhaustive, but to allow for “corruptly” to be construed in the context of the terms which are explicitly referred to in the definition and in a wider context of the ordinary meaning of the word. Most offences in the Act depend upon an act or omission being done “corruptly”. The concept is central to the construction of those offences and in understanding how the Bill gives effect to aspects of the international anti-corruption instruments.

Traditionally there has been (and in the modern international agreements there is) a particular focus in the law on corruption by public officials. “Irish official” is defined to capture a very broad range of specified office holders and the officers, employees and members of any “Irish public body” which in turn is defined to include a wide list of bodies established by an enactment or which are State-owned in some way.

The definition of official is significant in three main ways. Certain offences apply to either an “official” (section 6) or an “Irish official” (section 7). The presumptions in Part 4 of the Bill only apply in relation to acts or omissions involving officials. The criminal penalty of forfeiture of office, position or employment in section 17(4)(b) applies only to a subset of “Irish officials” defined in that section.

Section 3: Regulations

Section 3 empowers the Minister for Justice and Equality to make regulations providing for any matter referred to in the Act as prescribed or to be prescribed. Such matters include the prescribing of a body as a public body for the purposes of Schedule 1 to the Bill.

Section 4: Repeals

Section 4 provides for all enactments to be repealed and the extent of each repeal is listed in Schedule 2.

Part 2

Types of Corruption

Section 5: Active and passive corruption

Section 5 provides for offences of active (bribe-giving) and passive (bribe-taking) corruption. Unlike the provisions of the Prevention of Corruption Acts 1889 to 2010, these offences do not contain explicit references to corruption of or by an “agent”. The offences address corruption within both the public and private sectors without distinction. The reference to office, employment, position or business is intended to cover all public and private sector positions, including those in voluntary bodies such as sporting or charitable organisations.

A bribe is referred to in the section and throughout the Bill as “a gift, consideration or advantage”. The offences provide for a bribe to be given

or received directly or indirectly, alone or with another person. The bribe need not be aimed at inducing or rewarding the act of the recipient to fulfil the requirements of the offence; it may be an inducement or reward or otherwise on account of any person doing an act.

The bribe need not be actually given to fulfil the active offence as offering or agreeing to give are also specified. Similarly, the passive offence is fulfilled by accepting, obtaining or agreeing to accept. As it is, at common law, an offence to attempt to commit an offence, there is no specific reference in the Bill to attempting to commit any of the offences.

Section 6: Active and passive trading in influence

Section 6 of the Bill gives effect to a recommendation of the Council of Europe Group of States Against Corruption (GRECO) to provide a discrete offence of “trading in influence” so as to better fulfil Article 12 of the Council of Europe Criminal Law Convention on Corruption. It prohibits the promise of an undue advantage to someone who asserts he or she can exert an improper influence over a public official’s decision making. This section covers both active and passive trading in influence, i.e. a person offering a bribe in order to induce a third party to exert an improper influence over an act of an official and corruptly accepting the bribe on these grounds. Subsection (3) provides that it is immaterial whether the alleged ability to exert the improper influence existed or whether the supposed influence led to the intended result.

Section 7: Corruption in relation to office, employment, position or business

Section 7 criminalises any act of an Irish official, carried out in relation to his or her office, employment, position or business for the purpose of corruptly obtaining a gift, consideration or advantage for any person. Subsection (2), in light of a recommendation of the Mahon Tribunal, makes it an offence for an Irish official to use confidential information obtained in the course of his or her office, employment, position or business for the purpose of corruptly obtaining a gift, consideration or advantage.

Section 8: Giving gift, consideration or advantage which may be used to facilitate offence under this Act

Section 8 contains a new offence of giving a gift, consideration or advantage to another person, where the giver knows or ought reasonably to know that it will be used to facilitate the commission of an offence under the Act. This provision is based on a recommendation of the Mahon Tribunal.

Section 9: Creating or using false, etc., document

Section 9 makes it an offence to corruptly create or use a document which the person knows or believes to contain a statement which is false or misleading in a material particular. Such creation or use of the document must be done with the intention of inducing another person to do an act to his or her prejudice or that of another person. “Document” is defined in subsection (2) to include a broad range of paper, electronic and other forms of records.

Section 10: Intimidation

Section 10 incriminates corruptly threatening harm to a person with the intention of influencing that person or another to carry out an act in relation to his or her office, employment, position or business. Harm is defined in broad terms in subsection (2). This is an innovative provision which reflects the fact that the negative inducement of a threat can be used in place of a bribe when seeking to influence the actions of another.

Part 3

Corruption Occurring Partly in or Outside State

Section 11: Corruption occurring partly in State

Section 11 provides that a person may be tried in the State if any act which partly constitutes an offence under the Bill occurs in Ireland, on an Irish ship, or on an Irish aircraft.

Section 12: Corruption occurring outside State

Section 12 provides for extensive extra-territorial jurisdiction in respect of corruption offences under:

- sections 5, 6, 7, 8 or 18(1), or
- section 9 concerning false accounting, auditing or financial documents.

Subsections (3) to (5) give effect to Article 7 of the Convention on the fight against corruption involving officials of the European Communities or officials of European Union Member States.

Section 13: Location of proceedings relating to offences committed outside State

Section 13 allows for proceedings for an extra-territorial offence to be taken in any place in the State.

Part 4

Presumptions Relating to Corruption

Section 14: Presumption of corrupt gift, consideration or advantage

Section 14 provides that if it is proved that a gift, consideration or advantage is given to an official by a person with an interest in the functions of the official, then it is presumed that it has been given and received corruptly as an inducement or reward for the official acting in relation to those functions. The presumption operates whether the gift etc. is given directly or indirectly to the official. The presumption, like all presumptions in the Bill, can be rebutted by evidence proving the contrary on the balance of probabilities.

Subsection (2) provides a presumption that a gift, consideration or advantage given to an official has been given and received corruptly where an official performs (or omits to perform) a prescribed function so as to confer an undue advantage on the giver.

Subsection (3) lists the functions of officials to which the presumptions in subsections (1) and (2) apply.

Reflecting the recommendations of the Mahon Tribunal, the presumptions in this section extend to gifts or advantages given to or received by or for the benefit of a “connected person” of an “official”. “Connected person” is defined at subsection (5) to include various close relatives or business connections.

Subsection (4) provides for the Minister to prescribe a class of persons to be “connected persons” on the basis of any heightened risk that they may be involved in corruption arising from their close relationship with officials.

Section 15: Presumption of corrupt donation

Section 15 provides for a presumption whereby if a TD, Senator, Local Authority Member, or a Member of the European Parliament receives a donation in excess of a relevant amount or of a type prohibited by the Electoral Act 1997 or the Local Elections (Disclosure of Donations and Expenditure) Act 1999, and the donor had or has an interest in the recipient's actions, the donation is deemed to have been given and received corruptly. The exception is where the donation is returned to the donor or Standards in Public Offices Commission has been notified, as required.

This presumption is based on that contained in section 3 of the Prevention of Corruption (Amendment) Act 2001. It has been broadened in light of Mahon Tribunal recommendations to apply to impermissible political donations as well as excessive value donations.

Section 16: Presumption of corrupt enrichment

Section 16 relates to Irish public officials or office holders, such as persons who are required to declare certain statements of interests pursuant to the Ethics in Public Office Acts 1995 and 2001, and who have failed to make the necessary declarations. The section provides for a rebuttable presumption of corrupt enrichment in respect of the undeclared interests, i.e. that the property concerned derives from a gift or advantage received, on account of the person carrying out an act in relation to his or her office or business.

Part 5

Penalties and Enforcement

Section 17: Penalties

Section 17 sets out the penalties for offences under the Bill. All offences are, upon summary conviction, subject to imprisonment for up to 12 months and a Class A fine. Upon conviction on indictment, all offences are subject to an unlimited fine and up to ten years' imprisonment. There are two exceptions:

- Penalties for the trading in influence offence in section 6 are the same for a summary conviction. However, on conviction on indictment, the penalties can be a fine and/or up to 5 years' imprisonment.
- Bodies corporate convicted under section 18(1) can be liable to, on summary conviction, a class A fine and, on conviction on indictment, to a fine.

Provision is also made for the forfeiture of bribes connected with an offence (or property of equivalent value) whether conviction is summary or upon indictment. Any combination of imprisonment, fine or forfeiture of bribe can be applied in each case.

Provision is made for forfeiture of office, position or employment as an Irish official, following conviction on indictment for certain corruption offences under this Bill. The law on corruption has always been particularly concerned with breaches of trust vested in public officials. The Public Bodies Corrupt Practices Act 1889 originally contained in section 2 (c) a liability to be adjudged incapable of public office upon conviction. Article 30 of the United Nations Convention Against Corruption requires consideration of measures such as is contained in section 17(4)(b). The application of this provision can only occur where, in accordance with subsection (5), the court considers it is in the interest of maintaining or restoring public confidence in the public administration of the State and where it is in the interests of justice to do so.

Some offices are excluded from the forfeiture of office penalty, mainly because either the Constitution or an Act of the Oireachtas has made removal from office contingent upon resolutions of the Houses of the Oireachtas. Other offices are excluded because the power of removal from office derives from a Constitutional power.

Section 17(4)(c) also provides for the prohibition of a person from seeking public office for a period of up to ten years following conviction on indictment for certain corruption offences. This prohibition will not apply to a person seeking to be elected to the Dáil, Seanad, European Parliament or a Local Authority.

Section 18: Offences under this Act and bodies corporate

Section 18 establishes the criminal liability of bodies corporate where a director, manager, secretary or other officer, employee or subsidiary commits an offence under the Bill with the intention of obtaining or retaining business or an advantage in the conduct of business for the body corporate. Subsection (2) provides a defence for a body corporate which proves that it took all reasonable steps and exercised due diligence to avoid the commission of the offence.

Subsection (3) provides, as many other enactments do, for the individual criminal liability of senior officers of a company for offences committed by the company with their consent, connivance or because of their wilful neglect. Subsection (4) is also a common provision relating to bodies corporate managed by members.

Subsection (5) clarifies that the liability for bodies corporate established in subsection (1) is in addition to any other enactment or rule of law relating to the liability of bodies corporate.

Section 19: Evidence

Section 19 provides that a certificate from the Department of Foreign Affairs and Trade in relation to a person's citizenship shall be evidence that this is the case.

Section 20: Seizure of suspected bribe

Section 20 allows a member of the Garda Síochána to seize and detain property suspected to be a bribe (gift or consideration within the meaning of sections 5 to 8 of the Bill) for up to seventy two hours. Under subsection (3), a judge of the Circuit Court may order the continued detention of the property for a three month period where satisfied that there are reasonable grounds to suspect that the seized property is a bribe and one or more of the following applies:

- the origin of the property is being investigated,
- an application for forfeiture under section 21 has been made, or
- proceedings for an offence connected with the property are contemplated.

Section 21: Forfeiture of bribe

Section 21 provides for the forfeiture of a seized bribe if a judge of the Circuit Court is satisfied that it is a gift or consideration for the purpose of Section 5, 6, 7 or 8. This order may be made whether or not proceedings under the Bill are being brought against the person with whom the gift is connected.

Section 22: Application of Sections 40, 41, 42 and 45 of the Criminal Justice Act 1994 to Seized Property

Section 22 provides for certain sections of the Criminal Justice Act 1994 relating to appeals against forfeiture orders, interest on cash detained, procedure and disposal of forfeited cash to apply in relation to cash and any other gift or consideration detained under section 20 or forfeited under section 21.

Part 6

Miscellaneous

Sections 23 to 31: Amendments of various Acts

Sections 23 to 26 will update the references in other legislation as appropriate to corrupt conduct, corruption offences, offences against the administration of justice and relevant offences to take account of the offences in the Bill.

Sections 27 – 31 will amend various pieces of legislation relating to the election or removal of TDs, Senators, MEPs and Local Authority Members. This is to provide clarity around the procedure involved should a court order the forfeiture of an elected office.

Section 32: Saver

Section 32 is a saving provision clarifying that a person will not be exempt from the provisions of the Bill by virtue of their appointment to any office, employment or position being invalid. This replicates a provision in the Public Bodies Corrupt Practices Act 1889.

Schedule 1

Irish Public Bodies

Schedule 1 contains a list of the Irish public bodies as recognised for the purposes of this Bill.

Schedule 2

Enactments Repealed

Schedule 2 provides the complete list of legislation being repealed by this Bill, and the extent of the repeal.

*An Roinn Dlí agus Cirt agus Comhionannais,
Deireadh Fómhair, 2017.*