



**An Bille um Nós Imeachta Coiriúil agus Nithe
Gaolmhara, 2021**
Criminal Procedure and Related Matters Bill 2021

Meabhrán Mínitheach
Explanatory Memorandum



**AN BILLE UM NÓS IMEACHTA COIRIÚIL AGUS NITHE
GAOLMHARA, 2021
CRIMINAL PROCEDURE AND RELATED MATTERS BILL 2021**

EXPLANATORY MEMORANDUM

Section 1 defines certain terms used in the Bill.

Section 2 empowers the Minister to amend by regulation, Rule 9 of the Judges' Rules¹, which mandates that the questioning Garda records the contents of any interview in writing and submits it for the signature of, or alteration by, the suspect². This means that, when a member of An Garda Síochána is interviewing a suspect, the pace of questioning can only question proceed at the speed at which the conversation can be written down by hand. In the modern era, all Garda interview rooms are equipped with video and audio recording equipment. This section allows the Minister to make changes to the manner in which Garda interviews are recorded, notwithstanding that the Judges' Rules do not have force of law³.

Section 3 deals with a difficulty identified by the Court of Appeal⁴. The prohibition against awarding costs against the Prosecution – the DPP (and her predecessor) and An Garda Síochána prosecuting on her behalf – has been the law since the foundation of the State. Previously the rule has been provided for in the various iterations of the Rules of the District Court. However, the Court of Appeal held that it requires primary legislation to introduce such a rule and the Rule of the District Court was *ultra vires* the rule making committee, since it was secondary legislation. The wording of the proposed section is taken from the impugned rule of court which has otherwise survived detailed judicial scrutiny.

1 9. Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.

2 *In The People (DPP) v. Pringle* (1981) 2 Frewen 57 at 98, O'Higgins CJ identified the purpose of Rule 9 as follows: "It seems clear that this Rule, which, of course, is not a rule of law but rather an admonition for the carrying out of fair procedures of interrogation, was designed to achieve a situation in which (a) there would be accuracy in the recording of any statement made to be achieved by the early writing down of it so as to obviate errors of recollection and (b) in which an accused person would, at a time when he should have a sufficient memory of what he had said, be given an opportunity of challenging the accuracy of the record made." (Followed by the Court of Criminal Appeal in *The People (DPP) v. Kelly (No.2)* [1983] IR 1.)

3 *The People (DPP) v. Farrell* [1978] IR 13 at 21 – O'Higgins CJ: "The Judges' Rules are not rules of law. They are rules for the guidance of person taking statements. However, they have stood up to the test of time and will be departed from at peril. ... Where ... there is a breach of the Judges' Rules ... each of such breaches calls for an adequate explanation. The breaches and the explanations (if any) together with the entire circumstances of the case are matters to be taken into consideration by the trial Judge before exercising his judicial discretion as to whether or not he will admit such statement in evidence."

4 *DPP v. McGrath* [2019] IECA 320

Sections 4 and 6 address the same difficulty as in section 5, which was identified by the Supreme Court⁵. The presumptive mandatory minimum sentence for the offence of suspicious possession of a firearm contrary to section 27A of the Firearms Act 1964 can be departed from only in exceptional and specific circumstances, and removes the court's discretion in respect of a second or subsequent section 27A offence, thereby breaching the separation of powers.

Sections 4 and 6 repeal the unconstitutional provisions in the Firearms Act 1964 and the Firearms and Offensive Weapons Act 1990 respectively.

Section 5 addresses a difficulty identified by the Supreme Court.⁶ In firearms legislation, there is a presumptive mandatory minimum sentence for the offence of suspicious possession of a firearm contrary to section 27A of the Firearms Act 1964. This can be departed from in exceptional and specific circumstances. Section 27(8) provided that, for a second or subsequent section 27A offence, a court had no discretion and had to impose the mandatory minimum sentence. The Supreme Court held that subsection (8) breached the separation of powers in removing judicial discretion in sentencing second or subsequent section 27A offenders. An identical provision in relation to the presumptive mandatory minimum sentences for section 15A drugs offences is set out in subsections (3E) and (3F) of section 27 of the 1997 Misuse of Drugs Act (as amended). It suffers from an identical constitutional infirmity and will inevitably be struck down by the Superior Courts if not repealed.

Section 7 amends the Criminal Justice Act 1993 and rectifies a legislative *lacuna*⁷. The court identified that when a review of sentence occurs and the respondent is no longer a child, the court cannot impose a new sentence as the current wording of the section only allows the court to impose a sentence that the court below could have imposed. As the respondent is no longer a child, the Court of Appeal cannot impose a child sentence on him. The court cannot impose sentence on him as an adult, either, because the court below could not have done so. This is an issue which has the potential to arise frequently as children are often sentenced for offences at a time close to their 18th birthdays and have often turned 18 before the sentence review is heard. Without the amendment, the DPP effectively has no right of appeal in such cases.

Section 8 deals with the same legislative *lacuna* as in section 7, but from a respondent perspective: appeal cases against the severity of the sentence imposed upon children have the capacity to present an identical difficulty. Again, this is an issue that has the potential to arise frequently as children are often sentenced for offences at a time close to their 18th birthdays and have often turned 18 before their appeals are heard. Without the amendment, a child might be deprived of his or her right of appeal. Therefore, there is the potential for the subsection to be found to be unconstitutional without amendment.

Section 9 addresses the same issue as in sections 4, 5 and 6, and removes the provisions of section 25 of the Criminal Justice Act 2007, which has been indicated by the Supreme Court as being unconstitutional for its encroachment on the separation of powers⁸. Section 25 unconstitutionally and unduly restricts the discretion of a sentencing judge and pre-empts its striking down by the superior courts.

⁵ *Ellis v. Minister for Justice* [2019] IESC 234

⁶ *Ellis v. Minister for Justice* [2019] IESC 234

⁷ Identified by the Court of Appeal in *The People (DPP) v. PMcC* [2018] IECA 309

⁸ *Ellis v. Minister for Justice* [2019] IESC 234

Section 10 deals with the short title and commencement of the Bill.

*Senator Barry Ward, Senator Mary Seery Kearney,
Senator Martin Conway,
Feabhra, 2021.*