THE BAR OF IRELAND

The Law Library

SUBMISSION TO JOINT COMMITTEE ON JUSTICE GENERAL SCHEME OF THE PROCEEDS OF CRIME (AMENDMENT) BILL 2024

29 February 2024

INTRODUCTION

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,150 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

The Council has prepared this submission in response to the invitation from the Oireachtas Joint Committee on Justice received on 15th February 2024 and is structure on a 'Head by Head' basis as requested.

HEAD 3 - AMENDMENT OF SECTION 1A

1. This provision enables the Bureau to obtain a short-term detention order in the District Court over property seized during a search, which freezing order can be extended for another short term period to enable the Bureau to continue any investigation into whether the property is the proceeds of crime and whether it intends to make an application pursuant to Section 2 and/or 3 Proceeds of Crime Acts 1996-2005 ("POCA 1996"). The entire period of the freezing order must not exceed 90 days. The court order provided for is by way of extension to a detention order which will previously have been made by the Chief Bureau Officer pursuant to Section 1A(2) of the Proceeds of Crime Act 1996 for a period not exceeding 21 days (following in turn upon an initial detention order for not more than 24 hours that may be made by a Bureau officer.

2. Some thought might be given to whether the invocation of the jurisdiction of the court should properly occur rather earlier than 22 days after initial seizure of the property. Orders of this nature constitute an interference with property rights and should, in principle, therefore be judicially authorised. It is acknowledged that there may be a necessity for urgent orders of this nature to be made before judicial authorisation can reasonably be obtained. The duration of such order is, however, a different matter. There is an argument of principle to be made that the proper duration of such non-judicial orders ought not to exceed the period of time necessary to obtain judicial authorisation.

3. The existing Section 17 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 and the proposed Head 4 of the present General Scheme, which bear some similarity of purpose with this Head, both provide for a Garda power amounting to an interference in property rights not exceeding 7 days. Subject to the observations made below in respect of Head 4, it is not apparent what justification exists for there to be a significantly longer period provided for in Head 3.

HEAD 4 - RESTRAINT ORDERS

4. Head 4 provides for a power to enable a Bureau officer who is a member of An Garda Síochána of at least Superintendent rank, to issue an order, and a court to extend such an order, restraining services or transactions in relation to property suspected on reasonable grounds to be the proceeds of crime. It is obviously modelled on Section 17 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, which provides for a similar power in respect of services or transactions suspected of comprising or assisting in money laundering or terrorist financing.

5. Again, the necessity for a period of restraint is obvious, as is the possible necessity for such an order in advance of a court application. But it is not obvious that a 7-day period of restraint without an application to court is either necessary or appropriate. Since sub-Heads 12 and 13 clearly contemplate the possibility of an application to court by a person affected, there may in principle be no good reason why a positive application should not be made by the Bureau. Orders of this nature represent an interference with the enjoyment of property rights and should, therefore, always be subject to judicial authorisation, save for cases of real urgency.

HEAD 5 - AMENDMENT OF SECTION 4

6. A Section 3 Order application involves a full High Court hearing if it is contested and that hearing can include cross-examination and expert evidence or an adjournment to plenary hearing where necessary, albeit that the latter is rare nowadays. A Section 3 Order is a final order which can exist indefinitely unless a Section 4 Order is made (even though the legislation refers to a Section 3 Order as an “Interlocutory Order”, the Supreme Court has clarified that it is a final order).

7. It may be reasonable to abridge the time for disposal of property after an interlocutory order is made and it may be that a period of 7 years - sufficient to allow a presumption of death at common law in the case of missing persons - is too long a period in the case of proceeds of crime, bearing in mind the significance and consequences of obtaining a Section 3 Order. However, since the period of time is intended as a means of protection of the rights of persons who have an interest in the

property and may not be aware of the making of the interlocutory order, it might make more sense to more closely align the period with one of the limitation periods for civil proceedings. 2 years may simply be too short a period given the rights-protective purpose served by the delay.

8. There appears to be an intended tightening of the parameters of the Section 4 application. The existing Section 4(8) states that the Court shall not make a Disposal Order under Section 4 if it is satisfied that there would be a serious risk of injustice. That provision is not being changed.

9. The existing Section 4(6) reads as follows:

> *"In proceedings under subsection (1), before deciding whether to make a disposal order, the Court shall give an opportunity to be heard by the Court and to show cause why the order should not be made to any person claiming ownership of any of the property concerned".*

10. It is proposed now to change this provision to read as follows:

> *"In considering whether to make a disposal order, the Court shall—*
>
> *(a) Give an opportunity to be heard and to show cause why the order should not be made to any person claiming ownership of any of the property concerned;*
>
> *(b) Be bound by the determinations of the Court in making an interlocutory order, and in particular that the property in question is the proceeds of crime."*

11. It is not clear how the proposed new Section 4(6) will work in practice, especially when Section 4(8) (the interests of justice proviso) is taken into account too.

12. If the Court is bound by the Section 3 finding that the property is the proceeds of crime, then what is the benefit of giving someone a right to be heard? The courts have routinely stated that, if property is found to be the proceeds of crime, then a person claiming ownership has no right to it, regardless of whether it is a family home protected under the Constitution.

13. The obvious logic of the proposed amendment is to prevent a re-litigation of the Section 3 application in a Section 4 hearing. It might be better if Section 4(6) instead

restricted rehearing of the Section 3 Order by the parties who were on notice of the Section 3 application.

HEAD 8 - APPOINTMENT OF RECEIVER

14. This is an important amendment as it ensures that a receiver is appointed ("*the court shall*" – but with exceptions built in) over property. This will protect the property, which is generally in the interests of both the Exchequer and any person claiming ownership.

HEAD 11 - SHARING OF INFORMATION

15. The information held by the Bureau may be extremely sensitive. It is doubtful whether a statutory regime framed in such general terms is consistent with data protection principles. Since it appears to be possible to provide a functional limit for information sharing with foreign authorities, the question might reasonably be asked why no such limit is provided for domestically.

16. Further, the apparent ability to share information internationally without regard, for example, to European Union data protection rules is questionable. That said, having regard to globalisation and the sophisticated way in which drug traffickers and white-collar criminals organise their affairs now, there may well be a necessity to both receive and impart information at an international level.

17. Some thought might be given to the possibility that, where information is to be shared outside the EU, such sharing should first be approved judicially. Independent, judicial scrutiny of the lawfulness and proportionality of the sharing of information provides a means of ensuring to that only information that meets a minimum reliability threshold is shared, and then, only so far as is lawful and proportionate.

CONCLUSION

The Council of The Bar of Ireland welcomes the opportunity to respond to this consultation and is available to provide any further insight and comment as may be required.