REVISED GENERAL SCHEME

of a

Criminal Procedure Bill

Revised in April 2015 in light of pre-legislative scrutiny and pubic consultation

Submitted to Government for Approval: June 2015

CONTENTS

HEAD 1 – INTERPRETATION 3

Head 2 - PRELIMINARY TRIAL HEARINGS..... 4

HEAD 3 - DECLARATION OF ACQUITTAL 10

HEAD 4 - JUDICIAL REVIEW AND SLIP RULE 12

HEAD 5 - ELECTRONIC TRANSMISSION OF WARRANTS 16

HEAD 6 - SUBSTITUTION OF SECTION 33 OF PRISONS ACT 2007.....18

HEAD 7 - REMAND WHERE FAILURE TO ESTABLISH OR BREAKDOWN OF VIDEOLINK 26

HEAD 8 - SUBSTITUTION OF SECTION 34 OF CRIMINAL PROCEDURE ACT 2010...30

HEAD 9 - PROVISION OF INFORMATION TO JURIES 34

Head 10 - AMENDMENT TO SECTION 4Q2 CRIMINAL PROCEDURE ACT 1967.....37

HEAD 11 AMENDMENT OF SECTION 5 OF THE CRIMINAL JUSTICE MISCELLANEOUS PROVISIONS ACT 1997.....38

HEAD 12 – AMENDMENT OF SECTION 99 (POWER TO SUSPEND SENTENCE) OF THE CRIMINAL JUSTICE ACT 2006.....42

HEAD 13 – SHORT TITLE AND COMMENCEMENT 57

HEAD 1 – INTERPRETATION

Provide that –

In this Act –

“Preliminary trial hearing” means a hearing held in accordance with head 2;

Head 2 - PRELIMINARY TRIAL HEARINGS

Provide that –

(1) Where an accused person is before the Circuit Court, the Central Criminal Court or a Special Criminal Court, a judge of the court concerned, or in the case of a Special Criminal Court no less than three judges of that court, may of the court's own motion or upon the application of the prosecutor or the accused, hold a preliminary trial hearing.

(2) One or more preliminary trial hearings may be held prior to the empanelling of the jury in a case before the Circuit Court or the Central Criminal Court and before the commencement of the trial in a case before a Special Criminal Court.

(3) A preliminary trial hearing shall be part of the trial and the accused shall be arraigned at the start of the preliminary trial hearing unless he or she has already been arraigned.

(4) At a preliminary trial hearing the court may, upon its own motion or upon the application of the prosecutor or the accused, make: -

a) an order that certain evidence may or may not be admitted at the trial;

b) an order that [the trial on any charge should be prohibited/stayed permanently] [any charge be struck from the indictment] where it appears to the court that there is a real or serious risk of an unfair trial;

c) an order that the trial of an accused person be carried out separately from the trial of another accused person;

d) an order that any count on the indictment be tried separately from any other count on the indictment;

e) any order which it could make during a trial of an accused in the absence of a jury,

f) such other order as appears necessary to the court to ensure that due process and the interests of justice are observed.

(5) An application or order made under subhead (4) may include any application or order which is required by law to be made during the currency of a trial.

(6) The court may, if satisfied that it is expedient for the purpose of ensuring that the accused will not be prejudiced in his or her trial, do any one or more of the following:—

a) subject to subhead (8), exclude the public or any particular portion of the public or any particular person or persons except bona fide representatives of the Press from the court during the hearing;

(b) prohibit the publication of information in relation to the proceedings or any particular part of them or impose restrictions or limitations on such publication, for such period as it deems appropriate.

(7) The provisions of subhead (6) are in addition to any other provision of law that governs the exclusion of the public or any particular portion of the public or any particular person or persons from the court or that governs the prohibition of the publication of information in relation to the proceedings or any particular part of them or that imposes restrictions or limitations on such publication.

(8) In any proceedings where the accused is a person under the age of eighteen years, a parent, guardian, or other relative or friend of that person shall be entitled to remain in Court during the whole of the hearing.

(9) A person who contravenes an order or direction of the court under subhead (6) shall, without prejudice to his or her liability for any other offence of which he or she may be guilty, be guilty of an offence under this section and shall be liable –

(a) on summary conviction thereof to a Class A fine or to imprisonment for a term not exceeding 12 months or to both such fine and imprisonment, or

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding five years or to both such fine and imprisonment.

(10) The judge referred to in subhead (1) means, in the case of the Circuit Court, a judge assigned to the circuit of that court in which the trial concerned is to take place.

(11) Subject to subhead (5), the Circuit Court, the Central Criminal Court or a Special Criminal Court, may during the course of a trial make any order listed in paragraphs a) to f) of subhead (4) whether or not such an order is within the inherent jurisdiction of the court.

(12) Rules of court may provide for notice, pleadings, the hearing of evidence, and other matters necessary to an applications under subhead (4).

NOTES:

Pre-trial procedures have been considered by a number of groups including the Working Group on the Jurisdiction of the Courts (Fennelly Report), the Report of the Committee on Pilot Preliminary Hearings, the National Steering Committee on Violence Against Women Legal Issues Sub-Committee, the Working Group to Identify and Report on Efficiencies in the Criminal Justice System, and most recently by the Expert Group On Article 13 Of The European Convention On Human Rights (McDermott Report). While much has been, and is being, done by the Courts and practitioners to ensure the fair and efficient operation of the criminal trial process within the bounds of current legislative provisions, this proposed measure reflects the recommendations of many of the above-mentioned working groups to make statutory changes allowing for preliminary trial hearings.

The Head is intended to provide for the widest range of matters which a court could reasonably address in advance of the empanelling of a jury. The intention is that, insofar as possible, all contentious matters concerning the process of the trial and the evidence to be admitted will be settled before a jury is empanelled. This should result in a smooth presentation of the evidence to the jury, thus allowing them to focus on their tasks as adjudicators of fact without unnecessary interruptions for legal argument. Equally, the preliminary trial hearing will allow for matters which would ultimately prevent a case being submitted to a jury to be identified in advance thus avoiding the empanelling of a jury and subjection of a person to an unnecessary trial.

This legislation should facilitate the management of the trial process in a way that leaves as much discretion as possible to the judiciary to ensure that all the norms of due process and the rights of parties are respected. A court cannot be compelled to hold a preliminary trial hearing, and it will be a matter for the court to decide whether it would be appropriate to hold a preliminary trial hearing in any given case.

It is expected to be of value in complex cases, for example, where a number of critical questions on the admissibility of evidence might usefully be settled before empanelling a jury in what might be expected to be a lengthy trial.

Subhead (1) sets out that courts which hear trials on indictment may hold a preliminary trial hearing on their own motion or upon application of the prosecutor or the accused.

Subhead (2) allows for the preliminary hearing to happen before a jury is empanelled or in the case of the Special Criminal Court before the commencement of the trial.

Subhead (3) states that the preliminary hearing is part of the trial and requires that the accused, if not already arraigned, be arraigned at the outset of a preliminary trial hearing. This will ensure that the accused and the court formally hear the charges on the indictment and understand what is at stake in the hearing. As the preliminary hearing is stated to be part of the trial it is envisaged that the same judge would preside over both. This could present challenges to the listing system of the Dublin Circuit Court were a preliminary trial hearing assigned to a particular judge who would then be bound to hear the trial proper at an as yet undetermined date in the future. It is envisaged, therefore, that the rules of court and practice directions might regulate the timing of an application for a preliminary trial hearing and might, for example, restrict the making of such an application until after a date had been sought or set down for the trial proper.

Subhead (4) provides for orders to be made on a range of matters which might arise during the trial proper but are matters which can be decided on at the preliminary trial hearing therefore minimising disruption and delays within the trial itself.

Subhead (4)(a) allows for all applications concerning the admission of evidence. It is intended to that this would include any such application the substance of which may be governed by common law or by other statutory provisions. For example, it is intended that an application in accordance with section 3 of the Criminal Law (Rape) Act 1981 (to admit evidence about any sexual experience of a complainant with a person other than that accused) could be made at a preliminary trial hearing and that the conditions of section 3 of the 1981 would all apply at that hearing. This would be advantageous to all concerned including victims and accused persons. Subhead (5) is of particular relevance to such applications which are governed by other statutory or common law provisions.

Subhead (4)(b) provides for the making of an order where it appears to the court that there is a real or serious risk of an unfair trial. This could arise for example, in a case where an accused asserts that delay will prejudice his case and wishes to prevent the trial from proceeding. At present (following the jurisprudence established by rulings in *The State (O'Connell) v Fawsitt* [1986] IR 362 and subsequent cases) the accused must seek the relief of prohibition by way of judicial review. In a pre-trial hearing, the court can make an appropriate order to uphold the

rights of the accused to due process and a fair trial before the jury is empanelled and without the accused having to go through the process of seeking leave to apply from the High Court. Subhead (11) is also relevant to the issue of prejudicial delay.

Subhead (5) clarifies that where the law requires a particular application to be made during the currency of a trial that there is no doubt that jurisdiction is conferred upon a preliminary hearing to deal with such an application. A previous version of this subhead envisaged the possibility of different judges hearing the preliminary trial hearing and the trial proper. In order for such an arrangement to be of value it was felt that the orders made at a preliminary trial hearing should be binding on the trial proper. This in turn led to concerns expressed about the emergence of new facts later in the trial which might call into question the validity and fairness of the preliminary ruling. The subhead no longer refers to the binding nature of a preliminary ruling. It is felt that this is unnecessary as there is no specific provision for multiple judges and subhead (3) provides that the preliminary hearing is part of the trial proper. It will be a matter for the discretion of the trial judge (as it is at present) as to whether he or she should reconsider any ruling made in light of new facts or circumstances emerging.

The provisions of subhead (6) are modelled in part on section 20, Criminal Justice Act 1951, now repealed. The related provision in subhead (9) for an offence where an order under subhead (6) is breached reflects the serious consequences which can result from a breach, e.g. where a trial for a serious offence such as murder or rape is prohibited because of prejudicial disclosure or publicity.

Subhead (11) is to ensure that during the trial proper, a court can make any order that might be made at a preliminary trial hearing. This would apply, for example, where concerns arose during the trial proper that a delay in bringing the prosecution gave rise to prejudice or that evidence which the prosecution sought to adduce could not fairly be admitted. While it is unlikely that such concerns would not be raised and addressed at a preliminary hearing, it is important to dispel any doubt that may exist as to the power of a court during the trial proper to ensure due process.

Subhead (12) provides for rules of court governing applications under subhead (4), this is particularly relevant in relation to orders under subhead (4)(a) & (b). Consideration will be required regarding the matters which should be covered by Rules of Court, e.g. the hearing of oral evidence, written pleadings, etc.

The provisions of this Head can be contained in the Criminal Procedure Bill as a stand alone provision or inserted by amendment into the Criminal Procedure Act 1967.

HEAD 3 - DECLARATION OF ACQUITTAL

Provide that –

(1) Where the Circuit Court, the Central Criminal Court or a Special Criminal Court, whether at a preliminary trial hearing or in the course of a trial, orders the exclusion of certain evidence the prosecutor or the accused may make an application to the said court for a declaration of acquittal in accordance with this section.

(2) The Court shall grant an adjournment, if sought, for the purpose of considering whether to bring an application for a declaration of constructive acquittal.

(3) In a case where the order excluding the evidence in question is made at a preliminary trial hearing an application for a declaration of acquittal must be made on notice, without delay, and in any event within 21 days of the making of the order excluding the evidence in question.

(4) In a case where the order excluding the evidence in question is made during the course of a trial, an application for a declaration of acquittal must be made before any evidence or further evidence on the charges is heard by the jury, or, in the case of a special criminal court, the Court.

(5) Where the Court is satisfied that the evidence that it excluded was evidence without which a jury would be unlikely to convict the accused of the offence concerned, it shall declare that the accused has been acquitted.

(6) Where a person is acquitted in accordance with subhead (5), the prosecutor may appeal the acquittal in accordance with section 23 (1) of the Criminal Procedure Act 2010.

NOTES:

As it stands, Section 23 of the Criminal Procedure Act 2010 provides for the prosecution to appeal an acquittal where a person is tried on indictment and acquitted. The appeal is to the Supreme Court on a question of law. The appeal can result in the acquittal being overturned and a re-trial ordered.

The appeal under section 23 would be restricted to rulings which erroneously excluded ‘‘compelling evidence’.

The provision in this head is to address circumstances where the court of trial excludes evidence which is fundamentally important to the case for the prosecution. In such circumstances, the prosecutor may be of the view that she or he cannot reasonably proceed with the prosecution in good faith, but, because the trial has not reached an acquittal (whether by the jury on the merits of the case or by direction of the judge) she or he has no avenue to appeal the ruling of the trial judge excluding the compelling evidence.

In light of views expressed during the public consultation the phrase “constructive acquittal” has been amended to “acquittal” to remove any perception that an acquittal under this head might in some way be of a different or lesser quality than acquittal obtained by other means. Provision has also been made for an accused to apply under this head.

HEAD 4 - JUDICIAL REVIEW AND SLIP RULE

Provide that –

(1) An application for leave to apply for judicial review in respect of criminal proceedings shall not be made unless, prior to such application for leave –

(a) where any of the circumstances referred to in subhead (2), applies, an application has been made been made to that court in accordance with subhead (2) , or

(b) where appropriate alternative relief is available from the court of trial whether at a preliminary trial hearing or in the course of a trial, an application has been made to that court.

(2) A court which has made an order in criminal proceedings may, in any of the circumstances referred to in the following paragraphs, on application made on notice by the prosecution or the accused, make the order referred to in the paragraph concerned –

(a) where there has been a clerical mistake in the order, or an error arising therein from any accidental slip or omission – an order correcting such mistake or error,

(b) where the order concerned does not, as drawn, correctly express what the court actually decided and intended – an order rectifying that deficiency,

(c) where there has been any other error in the order which does not render the conduct of the proceedings procedurally unfair having regard to the provisions of the Constitution – an order correcting such error.

(3) An application for an order referred to in subhead (2) shall be made within fourteen days from the date of the order concerned or such further period as the court in the criminal proceedings concerned may permit.

(4) The powers exercisable in the circumstances referred to in paragraphs (a) and (b) of subsection (2) are in addition to any other power of the Court to do all or any of the things which those paragraphs authorise.

(5) Rules of Court may provide for matters relating to the making of applications and orders under subhead (2).

NOTES:

The purpose of the Head is to avoid unnecessary recourse to Judicial Review where suitable reliefs are available from the criminal courts. It is intended to apply in two broad circumstances. Firstly, it is to apply in circumstances where an application may be made to a trial court for an appropriate alternative remedy at a trial hearing or a preliminary trial hearing. This includes remedies newly available to a trial court at a preliminary trial hearing, such as the power to prohibit or permanently stay a charge in accordance with Head 2 (4) (b). Secondly, it is to apply where a remedy is available from a summary or indictable trial court via the expanded slip rule in subhead (2). This Head applies to all criminal courts and not just to trials, but to any orders arising from all types of appearances, including remand hearings in the District Court and pre-trial appearances in the Higher Courts.

This Head is intended to apply to judicial review applications and not to applications in accordance with Article 40.4 of the Constitution or High Court Bail applications where a person's liberty is immediately at stake.

The slip rules (for clerical errors) are currently provided for in court rules as follows, with varying level of detail and procedure attached:

- Order 12, Rule 17 District Court Rules – provides that clerical mistakes may be corrected at any time by the court
- Order 65, Rule 3 Circuit Court Rules – as above but also includes County Registrar and provides for motion on notice to the party sought to be affected by such correction.
- Order 28, Rule 11 (substantially revised in 2009) - more detailed and provides for one procedure where parties consent and one where they do not consent.

At present, slip rule issues may be addressed without a formal hearing before the court. If the basic slip rule is expanded as proposed, consideration may be required as to the circumstances in which a hearing will be necessary.

Order 84 of the Rules of the Superior Courts provides for the procedures to be applied in relation to applications for judicial review. There is a 2 stage process involved, and an application for judicial review cannot be made unless the court has granted leave to apply. The Rules set out the grounds for an application for such leave (Rule 20). In *G v DPP* [1994] 1 I.R.374 it was held by the Supreme Court (Finlay C.J.) that an applicant for leave must satisfy the High Court in a prima facie manner by the facts set out in the affidavit and submissions made in support of the application of specified matters – one of these is "that the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is on all the facts of the case, a more appropriate method of procedure."

The preclusion to making an application for Judicial Review in subhead (1) is intended only to require that an application for alternative relief has been made. Subhead (1) is silent as to whether the application has been heard or ruled upon by the trial court. It would be open to the High Court to consider whether an applicant has made appropriate efforts to seek an alternative remedy, and in circumstances where the trial court has not ruled on the application for alternative remedy (for whatever reason) to decide that an application for leave to apply for judicial review may proceed.

Subhead (1) is intended to refer to various applications which could be made to a court of trial including applications seeking to prevent a trial from proceeding on the grounds of prejudicial delay.

Subhead (2), in light of the recommendations of the McDermott Report, seeks to make a limited extension to the jurisdiction of courts to address errors in their orders beyond simple clerical errors so that orders which do not correctly express what the court actually decided and intended can be rectified and also provides that the court may correct an error in the order which does not render the conduct of the proceedings procedurally unfair having regard to the provisions of the Constitution.

Subhead (3), provides that an application under subhead (2) must be made within 14 days from the date of the relevant order unless the court permits a further period. The intention of this provision is to encourage the timely application for an order while also allowing the court in question discretion to extend the time limit as appropriate.

Subhead (5) provides for Rules of Court to govern applications under subhead (2). Consideration will have to be given to the interaction between the time limits in such rules and those applicable in the superior court rules for judicial review applications so as to ensure that applicants' opportunities are not unduly curtailed.

Issues concerning the judge or judges to whom an application could be made and the places or sittings where an application could be made can be addressed in the rules.

HEAD 5 - ELECTRONIC TRANSMISSION OF WARRANTS

Provide that –

(1) Notwithstanding any other enactment or rule of law, a court may issue and or transmit a warrant by any means capable of producing a legible record, including by electronic means.

(2) Rules of Court may provide for matters relevant to the issuing, transmission and authentication of warrants.

(3) In this Head –

"electronic means" includes electrical, digital, magnetic, optical, electromagnetic, biometric and photonic means of transmission of data and other forms of related technology by means of which data is transmitted; and

"legible record" includes such a record produced by a person, other than an officer of the court or Courts Service staff member, to whom the warrant has been transmitted by the court.

NOTES:

This provision aims to address a problem identified by the Working Group to Identify and Report on Efficiencies in the Criminal Justice System. It is particularly relevant to videolink hearings where the court is at a considerable distance from where the prisoner is held. It is considerably more convenient and efficient in many circumstances (for both the prisoner and the Irish Prison Service) for a court

appearance to occur via videolink. Efficiency is then undermined where the Irish Prison Service has to despatch a prison officer to the court to receive a committal warrant. Making specific statutory provision for the electronic issuing and transmission of warrants in criminal cases will remove any doubt as to whether such issuing and transmission is permissible.

Subhead (2) provides for the detailed procedures to be dealt with in rules of court. Existing rules governing warrants will need to be reviewed and amended as necessary to provide for electronic issuing and transmission of warrants.

Subhead (3), provides for a definition of "electronic means" is by reference to the same definition used in section 917EA of the Taxes Consolidation Act 1997 and section 140 of the Personal Insolvency Act 2012. Consideration will have to be given to the adequacy of the definition in light of the means of transmission intended or likely to be used in future. It also provides for a definition of "legible record".

HEAD 6 - SUBSTITUTION OF SECTION 33 OF PRISONS ACT 2007

Provide that –

Section 33 of the Prisons Act 2007 is substituted by the following -

"Certain applications to court to be heard using videolink.

33.— (1) This section applies to:

(a) criminal proceedings or applications specified in *subsection (7)* before a court where -

(*i*) the accused or person convicted of the offence concerned ("the prisoner") is in a prison,

(*ii*) the application is made or to be made by the Director of Public Prosecutions or by the prisoner, and

(*iii*) the prisoner is legally represented;

and

(b) notwithstanding the provisions of section 26 of the Civil Law (Miscellaneous Provisions) Act 2008, to proceedings or applications before the High Court in relation to an application for bail (whether in accordance with the Bail Act 1997, the European Arrest Warrant Act 2003, the Extradition Act 1965 or otherwise) and any application

relating to the surrender of a person whether in accordance with the European Arrest Warrant Act 2003, the Extradition Act 1965 or any other enactment

where -

(*i*) the suspect, accused or person convicted of the offence concerned ("the prisoner") is in a prison,

(*ii*) the application is made or to be made by the Minister for Justice and Equality, the Director of Public Prosecutions or the prisoner, and

(*iii*) the prisoner is legally represented.

(2) An application or proceedings to which this Head applies may be heard without the prisoner being present in court unless the court [on application to it or of its own motion] directs otherwise on being satisfied that—

(*a*) to do so would be prejudicial to the prisoner,

(*b*) the interests of justice require his or her presence at the hearing,

(*c*) the facilities provided by a live television link between the court and the prison concerned are not such as to enable—

(i) the prisoner to participate in, and to view and hear, the proceedings before the court,

(ii) those present in the court to see and hear the prisoner, and

(iii) the prisoner and his or her legal representative to communicate in confidence during the hearing,

(iv) the interpretation of the proceedings where necessary,

(*d*) to do so is otherwise inappropriate having regard to—

(i) the nature of the application,

(ii) the complexity of the hearing,

(iii) the age of the prisoner, and

(iv) his or her mental and physical capacity,

or

(*e*) other circumstances exist that warrant the prisoner's presence in court for the hearing.

(3) An application for a direction in accordance with subsection (2) may be made *ex parte* to the judge, or a judge, of the court concerned by or on behalf of the Director

of Public Prosecutions, the Minister for Justice and Equality, or the Attorney General as the case may be, or the prisoner.

(4) On such an application the judge, if he or she considers it desirable in the interests of justice to do so, may require notice of the application to be given to the prisoner or his or her legal representative or, as the case may be, to the Director of Public Prosecutions, the Minister for Justice and Equality or the Attorney General.

(5) Where the provisions of this section are complied with in relation to the hearing of an application to which this section applies, the prisoner is deemed to be present in court for the purposes of any enactment or rule of law or order of any court requiring the presence in court of an accused or convicted person during criminal proceedings against him or her.

(6) Nothing in this section affects the right of the prisoner to be present during any criminal proceedings other than the hearing of an application to which this section applies.

(7) The following applications or proceedings (other than applications under *subsection (3)* are specified for the purposes of *subsection (1)(a)*:

(*a*) an application for bail or free legal aid;

(b) where the prosecutor and the prisoner consent to the application being heard without the prisoner being present in court other than by virtue of being deemed so by subsection (5), an application relating to the arraignment of the prisoner;

(*c*) in relation to proceedings on indictment, any other application except—

(i) an application relating to the arraignment of the prisoner, unless subsection (7)(b) applies,

(ii) an application relating to the sentence of the prisoner, unless subsection (7) (d) (i) (II) applies,

(iii) an application made after the court has started to hear opening statements or evidence to be considered in reaching a verdict on a charge on the indictment, or

(iv) any other application that appears to the court to require the presence of the prisoner at the hearing, including—

(I) an application relating to the capacity of the prisoner to stand trial, or

(II) an application to dismiss the charges against the prisoner on the ground that there is not sufficient evidence to put him or her on trial;

(*d*) in relation to proceedings in the District Court –

(i) where the prosecutor and the prisoner consent to the matter being heard without the prisoner being present in court other than by virtues of being deemed so by subsection (5) –

(I) an application for the accused to be sent forward for trial or sentence, or

(II) the acceptance of a plea of guilty on a charge and the sentencing of the person in relation to that charge,

(ii) any other application to the Court before the date on which—

(I) a trial before it begins or the court accepts a plea of guilty, or

(II) the accused is sent forward for trial or sentence;

(*e*) any application in appeal proceedings, the hearing of an appeal, or any subsequent proceedings.

(8) In this section "criminal proceedings" means proceedings for an offence and includes any appeal proceedings or subsequent proceedings."

NOTES

The Working Group to Identify and Report on Efficiencies in the Criminal Justice System has considered a number of issues relating to the use of the videolink system. This head provides for an amended section 33 of the Prisons Act 2007. Instead of videolink hearings being dependent on an application to the court and a direction of the court as the legislation requires at present, the new provision would allow for (not require) videolink hearings to happen by default. Provision is made for either the prosecutor or the prisoner to apply to the court to direct that the prisoner be present in court for the hearing.

The revised section 33 will also allow for arraignment hearings to be heard via videolink where the parties both consent. Additionally, where both parties consent, the District Court will be empowered to accept a plea of guilty and impose sentence in relation to that plea via videolink.

A concern has been raised as to whether unrepresented persons should appear via videolink and as to how they might apply for a direction for the matter to be heard in person. In light of this concern, subhead (1) has been amended to preclude the use of videolink for unrepresented persons.

Provision is now made for High Court Bail applications to be heard via videolink. Reference is made to bail applications in accordance with various statutory provisions "or otherwise" so as to account for bail applications in accordance with the courts constitutionally conferred original jurisdiction.

Extradition proceedings before the High Court are now also provided for in subsection (1) (b). Extradition proceedings, while they may be linked to criminal matters, are not in themselves criminal proceedings. It should be noted, therefore, that, subsection 1 (b) is not linked to subsection (7) as the latter subsection applies only to criminal proceedings.

It has been suggested that the hearing via videolink of an application to have the accused sent forward for trial need not be subject to the consent of the accused.

HEAD 7 - REMAND WHERE FAILURE TO ESTABLISH OR BREAKDOWN OF VIDEOLINK

Provide that -

(1) Section 24 (5) of the Criminal Procedure Act 1967 is amended by the insertion of the following paragraph after paragraph (b):

"(c) Where –

(i) it is not possible for an application to the Court in proceedings specified for the purpose of section 33(1) of the Prisons Act 2007 to be heard, or for the hearing of that application to be continued, by reason, as the case may be, of -

(I) a failure to establish the live television link to be used for the hearing, or

(II) a breakdown of the live television link during the hearing,

(ii) the application is made by or in relation to a person who at the time of the application had been remanded in custody in the proceedings concerned,

and

(iii) the Court is satisfied that it is not practicable that that person be brought before it for the purpose of commencing or continuing the hearing on the same day,

the Court may, in that person's absence, remand him or her for such further period, not exceeding 15 days, as it considers reasonable.

(d) Where -

(i) it is not possible for an application to the Central Criminal Court, Circuit Court or [a] [the] Special Criminal Court in proceedings specified for the purpose of section 33(1) of the Prisons Act 2007 to be heard, or for the hearing of that application to be continued, by reason, as the case may be, of -

(I) a failure to establish the live television link to be used for the hearing, or

(II) a breakdown of the live television link during the hearing,

(ii) the application is made by or in relation to a person who at the time of the application had been remanded in custody in the proceedings concerned, and

(iii) the court concerned is satisfied that it is not practicable that that person be brought before it for the purpose of commencing or continuing the hearing on the same day,

the court concerned may, in that person's absence, remand him or her for such

further period, not exceeding 15 days, as it considers reasonable."

NOTES:
The remand powers of the District Court are specified in detail by Part III (sections 21 to 32) of the Criminal Procedure Act 1967. Section 21 provides –

> "21.Where an accused person is before the District Court in connection with an offence the Court may, subject to the provisions of this Part, remand the accused from time to time as occasion requires."

Section 24 sets out the periods of remand which apply. It is therefore suggested that provision for remand by the District Court in cases of failure to establish or breakdown of a live television link would most appropriately be included in Part III of the 1967 Act, and more particularly by insertion after section 24(5), which subsection confers a power of remand in respect of a person remanded in custody who is unable to be brought before the Court at the expiry of the remand period due to illness or accident, or any other good and sufficient reason." Section 24(5)(a) was substituted by section 37(c) Criminal Procedure Act 2010 to extend the application of this provision from the limited conditions such as accident and illness so that it would also include "for any other good and sufficient reason. It is understood that this was to deal with situations such as where a person is before a number of courts and remand dates coincide or where they are before the High Court on their own application.

As there is no specific statutory regime governing remand powers of the indictment jurisdictions, it is suggested that fresh provision - along the lines of subhead (1)(d) - be made a for those jurisdictions in a separate subhead as above. However, consideration is required as to whether:

(a) it is appropriate to include such a provision in a section and part of an Act which deals with remands in the District Court , and
(b) It is appropriate to apply a specific timeframe in such situations in the context that no statutory regime appears to exist for remand situations in such courts, presumably including cases where a person is unable to attend due to illness or accident (or whether it should be left to the discretion of the court).

Section 24 of the 1967 Act generally refers to "person". The expression "accused or person convicted of the offence concerned" is used in section 33(1)(b), Prisons Act 2007, which paragraph introduces a shortened reference for that expression, viz. "the prisoner". It is suggested that "person" is more appropriate if the approach will be to amend section 24.

Section 33(9) of the Prisons Act 2007 provides:

> "(9) Where the provisions of this section are complied with in relation to the hearing of an application to which this section applies, the prisoner is deemed to be present in court for the purposes of any enactment or rule of law or order of any court requiring the presence in court of an accused or convicted person during criminal proceedings against him or her."

The non-functioning of the video link would displace this statutory assumption as to the presence in court of the person concerned.

Section 24(5) of the Criminal Procedure Act 1967, as amended, allows the court, if satisfied that a person remanded in custody is unable to be brought before the Court at the expiry of the remand period due to illness or accident, or any other good and sufficient reason, to remand for "such further period, which may exceed fifteen days, as the Court considers reasonable However, it may be queried whether the giving of a power of remand without express limitation as to its period (other than the criterion of reasonableness of the period) would, in circumstances of a failure/breakdown of equipment, be sufficiently certain and transparent. The Head, therefore, in contrast provides for a maximum of 15 days. In the case of a person remanded on bail, section 24(5)(b) provides for a period which may exceed eight days which is the same period applied in section 24(1)(b).

HEAD 8 - SUBSTITUTION OF SECTION 34 OF CRIMINAL PROCEDURE ACT 2010

Provide that –

Section 34 of the Criminal Procedure Act 2010 is substituted by the following -

"Expert evidence adduced by defence.

34.— (1) An accused shall not call an expert witness or adduce expert evidence unless leave to do so has been granted under this section.

(2) Where the defence intends to call an expert witness or adduce expert evidence, whether or not in response to such evidence presented by the prosecution, notice of the intention shall be given to the prosecution in the case of a trial upon indictment at least 28 days prior to the scheduled date of the start of the trial or any scheduled preliminary trial hearing whichever is earlier, or at such earlier date as a Judge of the court concerned shall direct, upon application by either party.

(3) A notice under *subsection (2)* shall be in writing and shall include—

(*a*) the name and address of the expert witness, and

(*b*) any report prepared by the expert witness concerning a matter relevant to the case, including details of any analysis carried out by or on behalf of, or

relied upon by, the expert witness, or a summary of the findings of the expert witness.

(4) The court may grant leave to call an expert witness or adduce expert evidence even if no report or summary of the findings are included as required by *subsection (3)(b)*, if the court is satisfied that the accused took all reasonable steps to secure the report or summary before giving the notice.

(5) The court shall grant leave under this section to call an expert witness or adduce expert evidence, on application by the defence, if it is satisfied that the expert evidence to be adduced satisfies the requirements of any enactment or rule of law relating to evidence and that—

(*a*) *subsections (2)* and *(3)* have been complied with,

(*b*) where notice was not given at least 28 days prior to the scheduled date of the start of the trial or preliminary hearing in the case of a trial upon indictment it would not, in all the circumstances of the case, have been reasonably possible for the defence to have done so,

(*c*) where the prosecution has adduced expert evidence, a matter arose from that expert's testimony that was not reasonably possible for the defence to

have anticipated and it would be in the interests of justice for that matter to be further examined in order to establish its relevance to the case, or

(d) that it is otherwise necessary in the interests of justice.

(6) The prosecution shall be heard in an application under *subsection (4)* or *(5)*.

(7) A notice required by this section to be given to the prosecution may be given by delivering it to the prosecutor, or by leaving it at his or her office or by sending it by registered post to his or her office.

(8) Where the court grants leave under this section, the prosecution shall be given a reasonable opportunity to consider the report or summary before the expert witness gives the evidence or the evidence is otherwise adduced.

(9) In this section—

“expert evidence” means evidence of fact or opinion given by an expert witness, and

“expert witness” means a person who appears to the court to possess the appropriate qualifications or experience about the matter to which the witness's evidence relates.”

NOTES:

The purpose of this head is to facilitate more efficient preparation of trials. The amendment moves the notice requirement for a defendant intending to call an expert witness forward from 10 days before trial to 28 days before a trial on indictment or a preliminary hearing. As is the case with the existing provision subheads 5 (b) and (c) maintain discretion in certain circumstances for the court to admit expert evidence without notice. Subhead 5 (d) adds an additional general discretion for the court to waive the notice requirement where necessary in the interests of justice.

HEAD 9 - PROVISION OF INFORMATION TO JURIES

Provide that –

(1) In any trial on indictment, the trial judge may order that copies of any or all of the following documents or materials shall be given to the jury in any form that the judge considers appropriate:

(a) any document admitted in evidence at the trial,

(b) the transcript of the opening speeches of counsel or an audio recording of the same,

(c) any charts, diagrams, graphics, schedules or agreed summaries of evidence produced at the trial,

(d) the transcript of the whole or any part of the evidence given at the trial or an audio recording of the same,

(e) the transcript of the closing speeches of counsel or an audio recording of the same,

(f) the transcript of the trial judge's charge to the jury or an audio recording of the same,

(g) any other document that in the opinion of the trial judge would be of assistance to the jury in its deliberations including, where appropriate, a report by an accountant summarising, in a form which is likely to be comprehended by the jury, any transactions by the accused or other persons which are relevant to the offence.

(2) If the prosecutor or the accused proposes to apply to the trial judge for an order that a document mentioned in subsection (1)(g) shall be given to the jury, he or she shall give a copy of the document to the other party in advance of the application and, on the hearing of the application, the trial judge shall take into account any representations made by or on behalf of either party in relation to it.

(3) Where the trial judge has made an order that a report mentioned in subsection (1)(g) shall be given to the jury, the accountant concerned—

(a) shall be summoned by the prosecutor or the accused as the case may be to attend at the trial as an expert witness, and

(b) may be required by the trial judge, in an appropriate case, to give evidence in regard to the report and any relevant accounting procedures or principles.

(6) Section 57 Criminal Justice (Theft and Fraud Offences) Act 2001, section 110 Company Law Enforcement Act 2001, section 10 Competition Act 2002 and section 1078C Taxes Consolidation Act 1997 are hereby repealed.

Notes

This Head is intended to implement a recommendation in paragraph 10.27 of the Law Reform Commission Report on Jury Service (2013) in relation to complex and lengthy trials. Subheads (1) to (3) implement the recommendation that section 57 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*, which concerns the provision of specified documentation to juries, should be extended to all trials on indictment.

The existing provisions in the 2001 Act, the Company Law Enforcement Act 2001, the Competition Act 2002 and the Taxes Consolidation Act 1997 are to be repealed to

avoid any confusion. It should be noted that the provision is a permissive one and its application is ultimately a matter for the trial judge.

Head 10 - AMENDMENT TO SECTION 4Q2 CRIMINAL PROCEDURE ACT 1967

Provide that –

Section 4Q(2)(b) of the Criminal Procedure Act 1967 is amended by the deletion of "4B(3) or (5)".

Notes:

Part 1A of the Criminal Procedure Act 1967, which contains section 4Q was inserted by section 9 of the Criminal Justice Act 1999 which provided for the abolition of preliminary examinations and the introduction of other procedures. The Criminal Justice (No.2) Bill 1997 Bill, after its consideration by Seanad Éireann, provided that after a person had been sent forward for trial the trial court would hear all subsequent applications (with the exception of depositions). However, a number of amendments were made to the Bill in Dáil Éireann including a change to the procedure to provide that the District Court would continue to deal with remand hearings until the book of evidence had been served, after which the accused would be sent forward for trial. It would appear that this amendment also required technical changes in some other provisions so that the reference to "trial court" was amended to " District Court". Section 4Q deals with 'Jurisdiction of Circuit Court to remand accused to alternative circuit and hear applications'. Section 4Q(2)(b) provides that "a reference in section 4B(3) or (5), 4E or 4P to the trial court shall be read as a reference to the alternative court to which the accused is remanded, and…" As section 4B deals with the service of documents on an accused there seems to be no need to a reference to this section as this process occurs before the accused is sent forward for trial and relates to District Court functions.

HEAD 11 AMENDMENT OF SECTION 5 OF THE CRIMINAL JUSTICE MISCELLANEOUS PROVISIONS ACT 1997

Provide that section 5 of the Criminal Justice Miscellaneous Provisions Act 1997 is amended -

(a) by the substitution for subsection (3) of the following –

"(3) Notwithstanding the provisions of the said section 79 a person may, if he or she wishes, enter a plea of guilty before an alternative court to an offence in regard to which he or she has been remanded to appear before that alternative court. "

and

(b) by the insertion of the following subsections after subsection (3):

(3A) An alternative court may accept a plea of guilty in accordance with subsection (3) and may –

(a) If the offence is one which may only be prosecuted summarily, dispose of the matter summarily,

(b) dispose of the matter in accordance with section 13 (2) of the Criminal Procedure Act 1967 if it is a matter to which that section applies, or

(3B) Where, having accepted a plea of guilty under subsection (4) the alternative court determines that the offence is not one which may be disposed of in

accordance with subhead (4) (a) and that it is not an offence which the alternative court [is satisfied to] [can] dispose of in accordance with 13 (2) of the Criminal Procedure Act 1967, the alternative court shall remand the person on bail or in custody to -

(a) the alternative court,

(b) to a sitting of the court in the District Court District in which the offence to which the trial relates was committed, or

(c) to a sitting of the court in the District Court District in which the person resides or was arrested -

for consideration of whether the person should be sent forward for trial in accordance with section 4A of the Criminal Procedure Act 1967.

(3C) An alternative court shall, for the purposes of the trial of a person, remand the person to a sitting of the court in the District Court District—

(*a*) in which the offence to which the trial relates was committed, or

(*b*) in which the person resides or was arrested.

NOTES:
This proposed amendment to section 5 of the 1997 Act is aimed at facilitating persons who have been remanded in custody to appear before an alternative court. By allowing such persons to enter a plea of guilty before the alternative court their case can be disposed of without the delay and cost that would be occasioned by referring the case back to the District where they were first charged. The new subsections confer the necessary statutory jurisdiction on the alternative court to

hear accept the plea and dispose of the case. The subsections are permissive. The accused person who wishes to enter a guilty plea is not obliged to do so before the alternative court, neither is the alternative court obliged to accept it. Both the accused and the judge can opt to have a guilty plea dealt with by the District Court where the accused first appeared in connection with the charge.

Subsection (3A) (a) refers to matters which may only be prosecuted summarily, e.g. assault contrary to section 2 of the Non Fatal Offences Against the Person Act.

While there are various enactments which govern the summary trial of indictable offences including section 2 of the Criminal Justice Act 1951 and section 53 of the Criminal Justice (Theft and Fraud Offences) Act 2001, they are not directly relevant where a guilty plea is entered to an indictable offence in accordance with section 13 (2) of the Criminal Procedure Act 1967. The proposed subsection (3A) (b) addresses indictable offences and provides for a guilty plea to be disposed of by the alternative court in accordance with section 13 (2) of the 1967 Act.

Section 13 (2) applies to all indictable offences other than:

- an offence under the Treason Act 1939, murder, attempt to murder, conspiracy to murder, piracy,
- an offence under section 7 (genocide, crimes against humanity and war crimes) or 8 (ancillary offences) of the International Criminal Court Act 2006, an offence under the Criminal Justice (United Nations Convention against Torture) Act, 2000 , the offence of murder under section 2 of the Criminal Justice (Safety of United Nations Workers) Act, 2000, or an attempt or conspiracy to commit that offence,
- the offence of killing or attempted killing under paragraph (h) or (j) of section 2 (1) of the Maritime Security Act 2004
- the offence of murder under section 6 or 11 of the Criminal Justice (Terrorist Offences) Act 2005 or an attempt to commit such offence or an offence under section 71 , 71A, 72 or 73 of the Criminal Justice Act 2006 (organised crime offences)
- a grave breach such as is referred to in section 3 (1) (i) of the Geneva Conventions Act, 1962 , including an offence by an accessory before or after the fact.

Disposal of a case by the District Court in accordance with section 13 (2) allows for sentence to be imposed by the District Court or for the accused to be sent forward on a signed plea of guilty, subject to the consent of the prosecutor.

The reference in the proposed substitute subsection (3) to “notwithstanding the provisions of provisions of the said section 79” is required to override the particular limits on jurisdiction contained in those provisions.

Section 5 (3) of the Criminal Justice Miscellaneous Provisions Act 1997 (as amended) provides -

(3) An alternative court shall, for the purposes of the trial of a person, remand the person to a sitting of the court in the District Court District—

(a) in which the offence to which the trial relates was committed, or

(b) in which the person resides or was arrested.

Section 79 (3) of the Courts of Justice Act 1924 (as amended) provides –

(3) A judge of the District Court exercising jurisdiction under subsection (2) shall not have jurisdiction to—

(b) try an accused for an offence, unless that jurisdiction is exercised in the District Court District—

(i) in which the offence was committed, or
(ii) in which the accused resides or was arrested.

HEAD 12 – AMENDMENT OF SECTION 99 (POWER TO SUSPEND SENTENCE) OF THE CRIMINAL JUSTICE ACT 2006

Provide that section 99 of the Criminal Justice Act 2006 is amended by the substitution for section 99 of the following section -

"**Power to suspend sentence**

99.—(1) Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order.

(2) It shall be a condition of an order under *subsection (1)* that the person in respect of whom the order is made keep the peace and be of good behaviour during—

(a) the period of suspension of the sentence concerned, or

(b) in the case of an order that suspends the sentence in part only, the period of imprisonment and the period of suspension of the sentence concerned,

and that condition shall be specified in the order concerned.

(3) The court may, when making an order under *subsection (1)*, impose such conditions in relation to the order as the court considers—

(a) appropriate having regard to the nature of the offence, and

(b) will reduce the likelihood of the person in respect of whom the order is made committing any other offence,

and any condition imposed in accordance with this subsection shall be specified in that order.

(4) In addition to any condition imposed under *subsection (3)*, the court may, when making an order under *subsection (1)* **[ ]** or upon an application under *subsection (6)*, impose any one or more of the following conditions in relation to that order or the order referred to in the said *subsection (6)*, as the case may be:

(a) that the person co-operate with the **Probation Service** to the extent specified by the court for the purpose of his or her rehabilitation and the protection of the public—

(i) in a case where the person was convicted summarily of the offence concerned, for a period not exceeding 18 months, or

(ii) in a case where the person was convicted on indictment of the offence concerned, for a period not exceeding 2 years;

(b) that the person undergo such—

(i) treatment for drug, alcohol or other substance addiction,

(ii) course of education, training or therapy,

(iii) psychological counselling or other treatment,

as may be approved by the court;

(c) that the person be subject to the supervision of the **Probation Service—**

(i) in a case where the person was convicted summarily of the offence concerned, for a period not exceeding 18 months, or

(ii) in a case where the person was convicted on indictment of the offence concerned, for a period not exceeding 2 years.

(5) A condition (other than a condition imposed, upon an application under *subsection (6)*, after the making of the order concerned) imposed under *subsection (4)* shall be specified in the order concerned.

(6) A **probation officer** may, at any time before the expiration of a sentence of a court to which an order under *subsection (1)* consisting of the suspension of a sentence in part applies, apply to the court for the imposition of any of the conditions referred to in *subsection (4)* in relation to the order.

(7) **(1)**Where a court makes an order under this section, it shall cause a copy of the order to be given to—

(a) the Garda Síochána, or

(b) in the case of an order consisting of the suspension of a sentence in part only, the governor of the prison to which the person is committed and the Garda Síochána.

(2) Notwithstanding any other enactment or rule of law, a court may give and or transmit a copy by any means capable of producing a legible record, including by electronic means.

(3) Rules of Court may provide for matters relevant to the giving, transmission and authentication of copies.

(8) **(1)** Where a court has made an order under *subsection (1)* **that** imposes conditions under *subsection (4)* **or** upon an application under *subsection (6)*, it shall cause a copy of the order and conditions to be given to—

(a) **the Probation Service,** and

(b) (i) the Garda Síochána, or

(ii) in the case of an order consisting of the suspension of a sentence in part only, the governor of the prison to which the person is committed and the Garda Síochána.

(2) Notwithstanding any other enactment or rule of law, a court may give and or transmit a copy by any means capable of producing a legible record, including by electronic means.

(3) Rules of Court may provide for matters relevant to the giving, transmission and authentication of copies.

(9) Where a person to whom an order under subsection (1) applies is **convicted of an offence, being an offence committed during the period of suspension of the sentence concerned,** the court before which proceedings for the offence are brought**, shall on being informed by the prosecutor of the said order and after imposing sentence for that offence, remand the person in custody or on bail to a sitting of the court that made the said order**.

(9A) Where, under *subsection (9)*, the prosecutor informs the court that the person is subject to more than one order under *subsection (1)*, it shall be a matter for the court to decide to which court to remand the person under *subsection (9)*.

The court shall have regard to the following before making an order under this section:

(a) the gravity of the offence for which sentence was imposed,

(b) the length of the sentence, including the length of the period of the sentence which was suspended,

(c) the court which imposed the sentence, including whether or not the sentence was imposed following conviction on indictment,

(d) the fact that there were other orders made pursuant to *subsection (1)* at the time the offence under *subsection (9*) was committed.

(9B) Where the order under *subsection (1)* referred to in *subsections (9), (13) or (14)* was imposed on appeal from a lower court, the court to which the person shall be remanded under *subsections (9), (13) or (14)* shall be the lower court which had imposed the sentence from which the appeal was taken and such court shall have jurisdiction in accordance with this section as if it were the court that imposed the sentence under *subsection (1)*.

(10) **(a) Subject to paragraph (b) a court** to which a person has been remanded under *subsection (9)* shall revoke the order under *subsection (1)* unless it considers that the revocation of that order would be unjust in all the circumstances of the case, and where the court revokes that order, the person shall be required to serve the entire of the sentence of imprisonment originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody (other than a period spent in custody by the person in respect of an offence referred to in *subsection (9)*) pending the revocation of the said order.

(b) Where an appeal from the conviction referred to in *subsection (9)* has been taken an appeal to adjourn consideration of the revocation order under *subsection (1)* shall be made by the person who has been remanded under *subsection (9)* and the court shall adjourn proceedings with liberty to re-enter subject to paragraph (c).

(c) Where the person does not prosecute the appeal referred to in paragraph (b) expeditiously the prosecutor may apply to the court concerned for re-entry of the adjourned proceedings.

(d) Where any proceedings in relation to the appeal referred to in paragraph (b) have been determined and the conviction upheld the court concerned, on the initiative of the prosecutor, shall remand the person in custody or on bail to a sitting of the court referred to in paragraph (a) for the purpose of that court considering whether to revoke the order under *subsection (1)* in accordance with paragraph (a).

(e) Where any proceedings in relation to the appeal referred to in paragraph (b) have been determined and the conviction has been set aside the clerk shall notify the clerk of the court referred to in paragraph (a) that the conviction has been set aside and the adjourned proceedings under *subsection (1)* shall be deemed to be dismissed.

(10)(A) Nothing in *subsection (9), (9A), (9B) or (10)* shall be construed as meaning that the court referred to in *subsection (9)*, before which proceedings for the offence concerned are brought, may not make a determination under *subsection (10)* in relation to the revocation of an order under *subsection (1)* without remanding the person in custody or on bail to another sitting where that court is the court that made the said order.

(11) (a) Where an order *under subsection (1*) is revoked under *subsection (10)*, any period of imprisonment required to be served by the person under

subsection (10), being the entire of the sentence originally imposed by the court or a part of that sentence, shall not commence until the expiration of a sentence of imprisonment (other than a sentence consisting of imprisonment for life) imposed on the person concerned under *subsection (9)*, where such a sentence has been imposed.

(b) This subsection shall not affect the operation of section 5 of the Criminal Justice Act 1951.

(12) Where an order under *subsection (1)* is revoked in accordance with this section, the person to whom the order applied may appeal against the revocation to such court as would have jurisdiction to hear an appeal against any conviction of, or sentence imposed on, a person for an offence by the court that revoked that order.

(13) Where a member of the Garda Síochána or, as the case may be, the governor of the prison to which a person was committed has reasonable grounds for believing that a person to whom an order **under *subsection (1)*** applies has contravened the condition referred to in *subsection (2)* **or a condition imposed under *subsection (3),*** he or she may apply to the court to fix a date for the hearing of an application for an order revoking the order under *subsection (1)*.

(14) **Where a probation officer [ ]** has reasonable grounds for believing that a person to whom an order under *subsection (1)* applies has contravened a condition imposed under *subsection **[ ]** (4)*, **he or she may** apply to the court to fix a date for the hearing of an application for an order revoking the order under *subsection (1).*

(15) Where the court fixes a date for the hearing of an application referred to in *subsection (13) or (14)*, it shall, by notice in writing, so inform the person in respect of whom the application will be made, or where that person is in

prison, the governor of the prison, and such notice shall require the person to appear before it, or require the said governor to produce the person before it, on the date so fixed and at such time as is specified in the notice.

(16) If a person who is not in prison fails to appear before the court in accordance with a requirement contained in a notice under *subsection (15)*, the court may issue a warrant for the arrest of the person.

(17) A court shall, where it is satisfied that a person to whom an order under *subsection (1)* applies has contravened a condition of the order, revoke the order unless it considers that in all of the circumstances of the case it would be unjust to so do, and where the court revokes that order, the person shall be required to serve the entire of the sentence originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody pending the revocation of the said order.

(18) A notice under *subsection (15)* shall be addressed to the person concerned by name, and may be given to the person in one of the following ways:

(a) by delivering it to the person;

(b) by leaving it at the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, at that address;

(c) by sending it by post in a prepaid registered letter to the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, to that address.

(18A) For the avoidance of doubt, where the court revokes an order under *subsection (10)* or *subsection (17)* and the person is required to serve a part of the sentence of imprisonment originally imposed by the court, the court may make a further order under *subsection (1)* and where such an order is made, it is to be treated for the purposes of this section as if it were an order made pursuant to *subsection (1)* of this section.

(19) This section shall not affect the operation of—

(a) section 2 of the Criminal Justice Act 1960 or **Rule 59 of the Prison Rules 2007 (S.I. No. 252 of 2007)**, or

(b) subsections (3G) and (3H) of section 27 of the Misuse of Drugs Act 1977.

(20) Where a court imposes a sentence of a term of imprisonment that is to run consecutively to a sentence of a term of imprisonment the operation of a part of which is suspended, the first-mentioned sentence shall commence at the expiration of the part of the second-mentioned sentence the operation of which is not suspended.

(21) In this section –

"electronic means" includes electrical, digital, magnetic, optical, electromagnetic, biometric and photonic means of transmission of data and other forms of related technology by means of which data is transmitted; and "legible record" includes such a record produced by a person, other than an officer of the court or Courts Service staff member, to whom the copy has been transmitted by the court."

NOTES:

Section 99 (Power to suspend sentence) of the Criminal Justice Act 2006, as amended, placed the institution of the suspended sentence on a statutory footing for the first time. Prior to that the suspended sentence was a purely common law sentencing option. Section 99 provides that a person who receives a suspended sentence will have that sentence revoked where he is convicted of another offence (a "triggering" offence) during the period of suspension unless the court considers that to do so would be unjust.

A person convicted of a "triggering" offence is remanded in custody or on bail by the court dealing with that offence to the "next sitting" of the court which imposed the suspended sentence, in order to have the matter of revocation of the suspended sentence dealt with, prior to being returned to the court dealing with the "triggering offence" for sentencing. The revoked sentence is served before the sentence for the "triggering" offence.

The procedures set out in section 99 have given rise to a number of operational difficulties and challenges – these relate to the fact that conviction for the "triggering" offence must take place during the period of suspension; that revocation of the suspended sentence is dealt with prior to sentencing for the "triggering" offence and that this procedure fails to respect the right of a person convicted of a triggering offence to appeal their conviction; that the date of the "next sitting" of a court is not always easily identifiable and that, in certain circumstances, there is a limited right of appeal.

The purpose of the proposed amendments is intended to clarify the procedures to be followed. Under the revised section 99 a conviction will not have to be handed down during the period of suspension; a person will be convicted and sentence will be imposed for the "triggering" offence before revocation of the suspended sentence is dealt with; difficulties relating to "next" sittings of courts, the appeals procedure and the sequencing of sentencing are also addressed.

A number of technical amendments to clarify and improve the operation of the section in cases where the court wishes to impose Probation Service supervision as a condition of a suspended sentence have also been included.

The amendments proposed to be made to section 99 by the General Scheme are as follows -

Subsection (4) makes it clear (with the deletion from subpara. (4) of "consisting of the suspension in part of a sentence of imprisonment") that Probation Service supervision can be imposed in relation to both a fully-suspended and a part-suspended sentence. It also provides for the introduction of time limits on the supervision period so that the period of supervision cannot exceed 18 months in the case of a summary offence and 2 years in the case of a conviction on indictment.

Subsection (6) substitutes "**probation officer**" for "probation and welfare officer" to reflect current terminology.

Subsection (8) contains a technical amendment which clarifies the requirement to give notice of orders under section 99 which involve the imposition of conditions under subsection (4). Provision is made in subsection (7) and (8) to allow notification by electronic means.

Subsection (9) has been amended as follows -

(i) The requirement that the conviction for a potential "triggering" offence be handed down during the period of the suspended sentence can act as an incentive for some persons to draw out proceedings beyond the date of expiry of the suspended period in order to escape the consequences of having breached the "keep the peace and be of good behaviour" condition of the suspended sentence. The requirement also allows a person who absconds and cannot be prosecuted for a potential triggering offence to benefit from the suspended sentence.

Taking account of the policy intention that consequences should generally follow a breach of a condition; of subsections (13) and (14) which do not require applications for revocations by members of the Gardaí/Prison Governors/Probation Officers to be made while a suspended sentence is current and also of the flexibility afforded by the "unjust in all the circumstances" test in subsection (10), the requirement that the conviction for the "triggering" offence be handed down during the currency of the suspended sentence has been removed without specifying a time limit.

"conviction" as it is used in subsection (9) is intended to refer to the conviction at first instance rather than appeal. Whether this requires to be stated can be considered further at drafting.

(ii) the fact that it is the responsibility of the prosecution to bring any suspended sentences to the attention of the trial court has been clarified.

(iii) difficulties arising due to the separation of the conviction from the imposition of sentence for the "triggering" offence have also been addressed. In so far as the District Court is concerned, this separation delays the lodging of an appeal against the "triggering" offence until the revocation issue has been determined. This is due to the fact that appeals against convictions in the District Court to the Circuit Court cannot be brought against conviction alone.

The approach taken is to revert to the position following enactment of the Criminal Justice Act, 2006, whereby the trial court will impose sentence for the "triggering" offence before remanding the person in custody or on bail to

the court with jurisdiction to deal with the question of revocation. This bringing together of the handing down of the conviction and the imposition of the sentence will allow the person to lodge their appeal against a conviction for a triggering offence prior to determination of the revocation issue which will be adjourned pending determination of any appeal.

The use of the term "remand" has resulted in the provision not being applied to persons who appear before the court by way of summons as such cases are put back by way of adjournment rather than remand. The appropriate terminology, where the sentence imposed is not one of imprisonment but is a fine or an alternative to prison such as community service, can be considered further at drafting. The policy intention is that all convictions for offences committed during a suspended sentence should come within subsection (9).

(iv) following sentencing for the "triggering" offence, a person will be remanded to "a sitting" of the court which will deal with revocation of the suspended sentence rather than a "next sitting" of the court. The requirement that the person be remanded to the "next sitting" of the court has given rise to practical difficulties and resulted in judicial review proceedings where the date of the "next sitting" has been incorrectly identified. The proposed amendment is intended to remove these difficulties.

Subsection (9A) deals with the situation where a person may be subject to a number of suspended sentences. It is not thought that one conviction should trigger consideration of the revocation of more than one suspended sentence, however, at present no guidance is given to the court. It is, therefore, proposed that the court should have discretion in deciding to which of a number of courts the convicted person should be referred to for the purpose of an application to revoke a suspended sentence. Matters to be considered by the court in the exercise of such discretion are provided for to make it clear that the policy is to ensure that it is the most serious and/or longest sentence which should give rise to the revocation application.

A new subsection (9B) deals with sentences on appeal and provides that where a suspended sentence is imposed on appeal as a result of the quashing or setting aside of a sentence originally imposed by a lower court, the lower court from which the appeal was taken is the court to which the person will be remanded in order to deal with the revocation of the suspended sentence and that lower court will have jurisdiction as if it were the court that imposed the suspended sentence.

This subsection has been included in order to address a "legislative omission" in section 99 - the fact that a right of appeal against revocation of a suspended sentence [as provided for by subsection (12]) is not available where the suspended sentence is imposed, by either the Circuit Court, the Court of Criminal Appeal and, now, the Court of Appeal, on appeal from a lower court.

This arises from a recent High Court judgment (McCabe v Ireland & Ors [2014] IEHC 435) where it was found that the absence of such a right breached Articles 34.3.4 and 40.1 of the Constitution and a declaration was made that enforcement of a revoked sentence would be unconstitutional. This decision has been appealed by the DPP (Court of Appeal, 11 March last) and judgment is expected in the coming weeks on the constitutionality of a very limited or non-existent right of appeal against a revocation decision.

The new provision will also apply to Garda and Probation Service referrals under subsections (13) and (14).

Subsection (10) deals with revocation of a suspended sentence and provides, as is the current situation, that a court will revoke the order to suspend a sentence unless it considers that the revocation of that order would be unjust in all the circumstances of the case.

Three new sub-paragraphs - (b), (c) and (d) - set out the procedures which will apply in relation to the revocation hearing where an appeal is taken against a conviction for a "triggering" offence. These amendments arise from the fact that, under the revised procedure, proceedings in relation to the "triggering" offence will be dealt with before the revocation issue is addressed.

Sub-paragraph (b) provides for the adjournment of the revocation hearing pending the outcome of the appeal proceedings with liberty to re-enter. In order to ensure that the court dealing with the suspended sentence is made aware of the appeal from the subsection (9) conviction, the application for an adjournment should be made by the appellant. The possibility of adjournment only arises where an appeal has been taken.

Sub-paragraph (c) provides that where an appeal is taken and the defence does not prosecute it expeditiously the prosecution may seek to have the matter re-entered.

Sub-paragraph (d) provides that, where the appeal is unsuccessful, the prosecutor will alert the court dealing with the revocation issue to the adjourned proceedings and the appeal court will remand the person, whether in custody or on bail, to a sitting of that other court for consideration of the revocation issue. The question of whether this provision is necessary, as the proceedings will have been adjourned with liberty to re-enter, will be considered at drafting.

Sub-paragraph (e) provides that the court dealing with the revocation issue will be informed there the appeal is successful and the conviction set aside.

A substituted subsection (10A) clarifies that where the sentencing court for the "triggering" offence referred to in subsection (9) is the same court which made the order to suspend the sentence under subsection (1) that court is not required to remand the person to another sitting. It may, if it wishes, deal with the revocation of

the suspended sentence immediately after imposing sentence for the “triggering” offence.

As the handing down of the conviction and the imposition of the sentence will be brought together, the existing subsection (10A)(inserted by section 60 of the Criminal Justice Act 2007) is no longer required and has been deleted (this will be considered further in the context of transitional provisions at drafting).

In keeping with general principles for consecutive sentencing, a substituted subsection (11)(a) reverses the sequence in which a revoked suspended sentence (or part of a revoked suspended sentence) and a sentence of imprisonment for a triggering offence are to be served. As the sentence of imprisonment for the triggering offence will be imposed before the relevant court considers the revocation issue (and in the event of the person being remanded in custody pending consideration of the revocation issue, will have been part served) - it is necessary for the sentence for the “triggering” offence to be served first.

The policy of serving periods of imprisonment consecutively is retained by providing that the whole or part served suspended sentence will be served after the sentence for the “triggering” offence where such a sentence is imposed. This provision only applies where the person is required to serve time in prison for the triggering offence. The revoked sentence (either in whole or in part) will be served consecutively to the trigger sentence. This will ensure that whether a person is at liberty or serving part of a suspended sentence when sentence for the “triggering” offence is imposed, the sequencing of consecutive sentences is preserved.

Technical amendments to subsections (13) and (14) clarify who should apply to court for revocation of a suspended sentence following breach of a condition. The amendments make it clear that the Probation Service will be the appropriate applicant in the case of non-compliance with conditions under subsection (4). The Garda Síochána or the Governor of the prison to which the person was committed will be the appropriate applicant in the case of non-compliance with conditions under subsections (2) and (3). It is also proposed to align the wording of subsections (13) and (14) for consistency with each other.

Subsection (18A) addresses what is to happen to the remaining portion of a suspended sentence when part only is revoked under subsections (10) or (17). Under those subsections an order to suspend a sentence under subsection (1) can be revoked in whole or in part. Where the suspension is revoked in part the court may make a new order under subsection (1). Where such an order is made, it will be treated as if it were an order made pursuant to subsection (1) of that section – otherwise it might be arguable that the machinery for revocation of that sentence would not apply as subsection (9) refers expressly and exclusively to an order under subsection (1). This provision is intended to apply only where the original suspended sentence has not expired.

The phrase “for the avoidance of doubt” has been included on the basis that the new subsection reflects current practice and in the absence of such a qualification the courts might infer that the Legislature did not think that they already had this jurisdiction.

In subsection (19) the reference to the Prison Rules has been updated to reflect the fact that the 1947 Rules, referred to in the 2006 Act, have been revoked.

Subsection (21) provides for a definition of “electronic means”. The same definition is used in section 917EA of the Taxes Consolidation Act 1997 and section 140 of the Personal Insolvency Act 2012. It also provides for a definition of “legible record”.

Consideration will be given, at drafting, to any transitional provisions required.

HEAD 13 – SHORT TITLE AND COMMENCEMENT

Provide that –

1. (1) This Act may be cited as the Criminal Procedure Act 2014.

(2) This Act shall come into operation on such day or days as the Minister for Justice and Equality may appoint by order or orders, either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes or different provisions.