

General Scheme

Transfer of Sentenced Persons (Amendment) Bill 2019

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Head 1 Short title and collective citation

Provide that:

- (1) This Bill may be cited as the Transfer of Sentenced Persons (Amendment) Bill 2019.

- (2) The Transfer of Sentenced Persons Acts 1995 and 1997 and this Bill may be cited together as the Transfer of Sentenced Persons Acts 1995 and 2019.

Note

This is a standard provision.

Head 2 Amendment of section 7 of Transfer of Sentenced Persons Act 1995

Provide that:

Section 7 of the Transfer of Sentenced Persons Act 1995, as amended by section 1 of the Transfer of Sentenced Persons (Amendment) Act 1997, is hereby amended by the insertion of the following subsections after subsection (6) -

- “(6A) Without prejudice to the generality of subsection (6), where a court adapts (the legal nature or duration of) a sentence under subsection (5) which consists of a period of deprivation of liberty and a period of conditional release, whether under licence or otherwise, the court may in adapting the sentence substitute a suspended sentence of imprisonment for that period of conditional release [subject to such conditions as the court considers appropriate having regard to any conditions which attached to that period of conditional release], and any such substitution shall not be deemed to aggravate the nature or duration of the sentence.
- (6B) Without prejudice to the generality of subsection (6), where a court adapts (the legal nature or duration of) a sentence under subsection (5), the court [may] [shall], where the law of the sentencing state does not provide a right to remission of sentence for good behaviour, order that the provisions of the Prison Rules relating to remission shall not apply to the sentenced person.”

Note

General Background

The purpose of this Bill is to respond to the 2016 Supreme Court judgement in the case of O’Farrell and others v the Governor of Portlaoise Prison. Legal advice on the judgement confirmed the need for amendments to the Transfer of Sentenced Persons Acts 1995 and 1997.

Mr O'Farrell was convicted in England of serious offences and sentenced to a term of imprisonment of 28 years, as well as two concurrent terms of 12 years. Under English law at the time, he had a statutory right to be conditionally released after serving two thirds of the sentence (English law was subsequently changed to entitle prisoners serving fixed terms to be released conditionally at the halfway point). Mr O'Farrell sought to transfer to an Irish prison under the Transfer of Sentenced Persons Acts. The warrant issued by the Irish High Court in 2006 under section 7 of the Transfer of Sentenced Persons Act 1995, authorising the transfer and imprisonment of Mr O'Farrell, cited the sentences imposed as 28 years imprisonment (and concurrent sentences of 12 years imprisonment). The understanding at the time was that the sentence to be administered in the State was one of 28 years (minus any remission under Irish prison rules). This would have meant that Mr O'Farrell would serve longer in prison if he transferred to the State than if he stayed in England.

However, this understanding of the administration of such English sentences was found to be incorrect in a subsequent Supreme Court judgement (*Sweeney v Governor of Loughan House* 2014). This found that a prisoner who transferred from England to the State, and who had been sentenced in England to a composite sentence consisting of a period of imprisonment and a period of conditional release, could only be imprisoned here for the custodial part of the sentence, and that the conditional release part of the sentence, being unknown to Irish law, was unenforceable and simply fell away.

In the case of Mr O'Farrell, the Supreme Court applied its judgement in the *Sweeney* case, and considered other aspects of the Transfer of Sentenced Persons Acts which had not directly arisen in the *Sweeney* case.

The impact of the judgement has effectively been to pause all prisoner transfers until the issues raised are resolved.

Head 2

Under section 7 of the Transfer of Sentenced Persons Act 1995, in a case where a prisoner is to be transferred from abroad to the State, the Minister for Justice and

Equality applies to the High Court for a warrant authorising this and authorising the prisoner's detention in the State. The effect of a warrant is to authorise the continued enforcement by the State of the foreign sentence in its legal nature and duration. However, the Court may, if the foreign sentence is by its legal nature incompatible with Irish law, adapt the legal nature of the foreign sentence to that of a sentence prescribed by the law of the State for an offence similar to the foreign offence. The Court may also, but this time only on the application of the Minister, adapt the duration of the foreign sentence if the duration is incompatible with Irish law.

Head 2 amends section 7 and, in the proposed new subsection (6A), provides that, in adapting a foreign sentence which consists of a period of deprivation of liberty and a period of conditional release, the High Court may substitute a suspended sentence of imprisonment for that period of conditional release. It was observed in the Supreme Court judgement that a suspended sentence is perhaps the nearest in Irish law to release on licence. In the O'Farrell case, there was in fact no attempt at adaptation of sentence, but doubt was expressed in the Supreme Court as to whether such adaptation would even have been possible under existing law, given the fundamentally different nature of the English sentence. The purpose of this Head is to expressly provide a statutory basis for such an adaptation of an English composite sentence.

It can be considered during drafting whether there is a need for the words in brackets, which specify that the High Court, in adapting release on licence to a suspended sentence, may set such conditions as the Court considers appropriate having regard to any conditions which attached to that period of release on licence. This provision may not be necessary, but it is the case that, under the English Criminal Justice Act 2003, prisoners released on licence after serving half their sentence are subject to standard prescribed conditions, and possibly other additional conditions.

The proposed new subsection (6B) is aimed at avoiding prisoners who transfer here from England and Wales (and any place else where there are similar laws) from receiving a double benefit of having half the sentence suspended

(corresponding to release on licence) and also remission of sentence under the Irish Prison Rules. It can be considered during drafting whether disapplying remission should be mandatory in such circumstances (which may well be the best option) or whether some discretion should be left to the court to enable it to deal with less clear-cut circumstances.

Head 3 Insertion of section 9A in Transfer of Sentenced Persons Act 1995

Provide that:

The Transfer of Sentenced Persons Act 1995 is hereby amended by the insertion after section 9 of the following section –

- “9A (1) If at any time after the issuing of a warrant under section 7 it appears to the Minister that the sentence, or any adaptation of the sentence under section 7(5), is by its legal nature or duration incompatible with the law of the State, the Minister may apply to the High Court for an adaptation of the sentence or a variation of any adaptation made under section 7(5).
- (2) On an application under section (1) of this section, the High Court may make an order for an adaptation of the sentence or variation of any adaptation made under section 7(5) to that of a sentence prescribed by the law of the State for an offence similar to the offence for which the sentence was imposed, where it considers it appropriate to do so in order that effect may be given to the provisions of the Convention.”

Note

The purpose of the Head is to insert a new section 9A to permit a sentence to be adapted at any time after the issuing of a warrant under section 7. Currently, an adaptation can only be made under section 7 at the time of the issuing of a warrant. While the Minister may, under section 9, apply at any time for a variation (or revocation) of a warrant issued under section 7, the Supreme Court judgements have made clear that a variation of a warrant could not deal with a substantive issue such as an adaptation of sentence.

It could be the case that circumstances might come to light after the transfer of a prisoner which cast doubt on the compatibility of the foreign sentence, or any adaptation of it, with Irish law, and this Head is aimed at providing a mechanism for dealing with such a situation. It has to be acknowledged that any such situation could

still be problematical, in that it could be argued that the prisoner in question was, up to the point of adaptation under this Head, in unlawful detention, but there may be no easy way around this.

Consideration may need to be given to whether it would be desirable to include a clause – similar to what is to be found in section 7(6) of the 1995 Act – specifying that any adaptation shall not aggravate the foreign sentence or exceed the maximum penalty for a similar offence under Irish law. It may be that this is in effect already covered here, in that subhead (2) enables adaptation where the Court considers it appropriate to do so in order that effect may be given to the provisions of the Convention. It is a principle of the Convention that adaptation may not aggravate a foreign sentence or exceed a national maximum.