

Criminal Justice (Mutual Recognition of Custodial Sentences) Bill 2021

Outline of Report Stage Amendments

Head 1: Legal Nature of Sentence to Exclude Early and Conditional Release elements (TSP & TES¹)

Amend Transfer of Sentenced Persons Acts 1995-1997 and Transfer of Execution of Sentences Act to provide that:

- (1) The sentence (and the duration thereof) shall be taken to include both any mandatory custodial period and any periods where early or conditional release may be granted.
- (2) The legal nature of the sentence shall not include the duration of the sentence or measures in respect of early or conditional release, which shall be regarded as measures in respect of the administration of the sentence.

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TSP: Relevant to the Transfer of Sentenced Persons Acts 1995-1997

TES: Relevant to the Transfer of Execution of Sentences Act 2005

MRCS: Relevant to the transposition of Framework Decision 2008/909/JHA on the mutual recognition of custodial sentences

Head 2: Conditional Release (Determinate Sentences) – (MRCS, TSP & TES)

Insert new section 2A into Criminal Justice Act 1960 to provide that:

Conditional release in respect of foreign determinate sentences

- (1) Definitions:
 - (a) [Act of 2022 means the Criminal Justice (Mutual Recognition of Custodial Sentences) Act 2022]
 - (b) Act of 1995 means the Transfer of Sentenced Persons Act 1995 as amended
 - (c) Act of 2005 means the Transfer of Execution of Sentences Act 2005
 - (d) ‘relevant Act’ means the Act of 1995, the Act of 2005 or the Act of 2022 as applicable
 - (e) ‘foreign sentence’ means a sentence imposed in another state and which is now being enforced in the State pursuant to the relevant Act
 - (f) ‘sentenced person’ means a person who is subject to detention in the State pursuant to a foreign sentence
 - (g) ‘sentencing state’ means, in respect of a foreign sentence, the state in which the sentence concerned was imposed on the person
 - (h) ‘release provision’ means, in respect of a foreign sentence, a measure in respect of early or conditional release, as and only to the extent indicated by the sentencing state, which applied to the foreign sentence prior to the transfer of the enforcement of the sentence to the State under the relevant Act
- (2) The Minister may, at his or her discretion, direct that a sentenced person specified in the direction shall be released from prison for such period, and subject to such conditions, as shall be specified in the direction for the purpose of giving effect to applicable release provisions.
- (3) The Minister shall consider whether to make a direction under subsection (2) in all cases where the sentencing state has indicated that release provisions apply and shall do so prior to the earliest time that a person may be eligible for release under the applicable release provisions.
- (4) Where the Minister has decided not to make a direction under subsection (2), the Minister shall review that decision at intervals of no less than 2 years.
- (5) In determining whether to direct release pursuant to section (2), the Minister shall consider whether [, on the balance of probability,] under the applicable release provisions, the person would have been released from custody, subject to conditions or otherwise, at an earlier point of their sentence had they not been transferred, and where the Minister is so satisfied, the Minister shall—
 - (a) Make a direction under subsection (2), or,

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- (b) Refuse to make a direction under subsection (2) for stated reasons.
- (6) A period of release under subsection (2) shall not exceed the greatest period of release that could have applied under the applicable release provisions, applied on a pro rata basis to the portion of the sentence actually served in the sentencing state, adjusted for remission which would apply to the period of release.
- (7) In making a direction under subsection (2), the Minister shall take into account any reduction in the time to be served in custody that has already been applied in respect of the release measures, either at the time of transfer or otherwise, and shall not make a direction where the Minister is satisfied that a reduction in the time to be served has already been applied to give proper effect to the release measures.
- (8) In determining whether reasons exist under subsection (5)(b), the Minister may consider any grounds for the grant or refusal of release under section 2 of this Act, and any other reasons which to him or her appear appropriate.
- (9) This section shall not affect the eligibility of a person for remission (including enhanced remission), temporary release under section 2, commutation or pardon.
- (10) The Minister may, either prior to the transfer or subsequently, provide an indication to the sentenced person as to whether she intends to make a direction under this provision and for what period of time; and on what conditions.
- (11) An indication made under subsection (10) shall under no circumstances bind the Minister's discretion in respect of a direction under subsection (2).
- (12) The Minister shall not make a direction under subsection (2) where
 - (a) the release of that person from prison is prohibited by or under any enactment, whether passed before or after the passing of this Act, or
 - (b) where the person has been charged with, or convicted of, an offence and is in custody pursuant to an order of a court remanding him to appear at a future sitting of a court.
- (13) A direction under this section shall be given to the governor of, or person for the time being performing the functions of governor in relation to, the prison concerned.
- (14) The governor of, or person for the time being performing the functions of governor in relation to, the prison concerned to whom a direction under this section is given shall comply with that direction, and shall make and keep a record in writing of that direction.
- (15) Without prejudice to subsection (2) or (5), the release of a person pursuant to a direction under this section shall not confer an entitlement on that person to further such release.
- (16) The Minister may make rules for the purpose of enabling this section to have full effect and such rules may contain such incidental, supplementary and consequential provisions as the Minister considers to be necessary or expedient.

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- (17) Rules under this section may specify conditions to which all persons released pursuant to a direction under this section shall be subject or conditions to which all persons belonging to such classes of persons as are specified in the rules shall be subject.
- (18) Every rule under this section shall be laid before each House of the Oireachtas as soon as may be after it is made, and if a resolution annulling the rule is passed by either such House within the next 21 days on which that House has sat after the rule is laid before it, the rule shall be annulled accordingly but without prejudice to the validity of anything previously done thereunder.
- (19) This section shall not affect the operation of the Criminal Justice (Release of Prisoners) Act 1998.
- (20) This section shall not apply to life sentences.
- (21) This section shall not prejudice the application of the Parole Act to determinate sentences.

Further amend the Criminal Justice Act 1960 to provide:

- (22) Amend sections 4-6 to include reference to section 2A release

Head 3: Parole in respect of foreign sentences

Amend the Parole Act 2019 to provide that:

- (1) Insert subsection 27(la):
“In respect of a foreign sentence—
 - (i) the relevant release provisions, and
 - (ii) any minimum period of the sentence which under the foreign sentence must be served in custody”
- (2) Insert subsection (5): “In this section ‘foreign sentence’ and ‘release provisions’ shall have the meaning attributed to them in the Criminal Justice Act 1960”.

Head 4: Issue of warrant for bringing person into the State (TSP)

Amend section 7 of the Transfer of Sentenced Persons Acts to provide that:

- (1) The effect of the transfer warrant issued under section 7(2) of the Act shall be for the person to be brought into the State pending the issue of a committal order under Head 5.
- (2) On making an order under section 7(1) the Court shall take all such measures as are necessary to enforce the sentence, and in particular, may make an order under Head [7].

Head 5: Committal order (TSP)

Insert new section to the Transfer of Sentenced Persons Acts to provide that:

- (1) The High Court shall, on application by or on behalf of the Minister, in respect of a person brought before the Court in accordance with a warrant issued under section 7(2), make an order within 21 days committing the person to a place of detention.
- (2) An application under subsection (1) shall be made on notice to the sentenced person.
- (3) Where the High Court is unable to make an order under subsection (1) within the period referred to in that subsection, the period may be extended by such reasonable period as may be required by the court for that purpose and such extension shall not operate to prejudice the power of the court to make the order within such extended period.
- (4) A person may continue to be detained or otherwise restricted in his or her personal liberty pursuant to a warrant issued under section 7(2) notwithstanding that the period referred to in subsection (1) is extended under subsection (3).
- (5) The period for which a person may be committed to a place of detention in a committal order shall, subject to subsection (6) be a period equal to the period of the sentence less—
 - (a) The period of the sentence actually served by the person in the sentencing state; and
 - (b) The deductible period
- (6) In determining the period for which a sentenced person may be committed to a place of detention in a committal order—
 - (a) the High Court shall not have regard to the provisions of law of the sentencing state under which the sentenced person is entitled to early or conditional release,
 - (b) [if upon imposition of the sentence in the sentencing state the execution of part of the sentence has been conditionally suspended, the period for which the sentenced person may be committed to a place of detention shall not include a period that equates to the suspended part of the sentence, and]
 - (c) without prejudice to the generality of paragraph (a) or (b), where by operation of law of the sentencing state the sentenced person would be entitled to be released from custody, whether under licence or otherwise, at a specified time having served a specified portion of the sentence—
 - (i) the High Court shall treat such release as a measure relating to the administration, and not the legal nature or duration, of the sentence, and
 - (ii) the sentence shall be treated as a sentence to be spent in custody or other detention for the full period.
- (7) Notwithstanding subsection (5), the period for which a sentenced person may be committed to a place of detention in a committal order may exceed the period for which he or she could

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lawfully have been detained or otherwise had his or her personal liberty restricted in custody in the sentencing state.

- (8) Enforcement of the sentence specified in a warrant under this section shall cease where the State is notified by the sentencing state of any decision or measure, other than a decision or measure in respect of remission, as a result of which the sentence ceases to be enforceable in the sentencing state.

Head 6: Committal order (TES)

Amend the Transfer of Execution of Sentences Act 2005 to provide that:

(1) Section 10 is amended by substituting the following for subsections (3)-(7):

- (3) The period for which a person may be committed to a place of detention in a committal order shall, subject to (4) be a period equal to the period of the sentence less—
 - (a) The period of the sentence actually served by the person in the sentencing state; and
 - (b) The deductible period
- (4) In determining the period for which a sentenced person may be committed to a place of detention in a committal order—
 - (a) the High Court shall not have regard to the provisions of law of the sentencing state under which the sentenced person is entitled to early or conditional release,
 - (b) if upon imposition of the sentence in the sentencing state the execution of part of the sentence has been conditionally suspended, the period for which the sentenced person may be committed to a place of detention shall not include a period that equates to the suspended part of the sentence, and
 - (c) without prejudice to the generality of paragraph (a) or (b), where by operation of law of the sentencing state the sentenced person would be entitled to be released from custody, whether under licence or otherwise, at a specified time having served a specified portion of the sentence—
 - (i) the appropriate court shall treat such release as a measure relating to the administration, and not the legal nature or duration, of the sentence, and
 - (ii) the sentence shall be treated as a sentence to be spent in custody or other detention for the full period.
- (5) Notwithstanding subsection (3), the period for which a sentenced person may be committed to a place of detention in a committal order may exceed the period for which he or she could lawfully have been detained or otherwise had his or her personal liberty restricted in custody in the sentencing state.
- (6) Enforcement of the sentence specified in a warrant under this section shall cease where the State is notified by the sentencing state of any decision or measure, other than a decision or measure in respect of remission, as a result of which the sentence ceases to be enforceable in the sentencing state.

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- (7) In this section “deductible period” means, in relation to a person to whom this section applies—
- (a) the period spent by the person in custody in the State on foot of a warrant under sections 8, 9 or 10(1)
 - (b) the period (if any) of the sentence indicated by an sentencing state to be deducted from the total length of the sentence—
 - (i) in respect of an amnesty, pardon, clemency or other such decision granted by the sentencing state in relation to the sentence, and
 - (ii) in respect of any other reduction (including a period of remission of sentence) in relation to the part of the sentence which has been served by the person in the sentencing state;

Head 7: Effect of Committal Order (TSP & TES)

Insert new section to the Transfer of Sentenced Persons Acts and the Transfer of Execution of Sentences Act to provide that:

- (1) The effect of an order under [Section 10 TES / Head 5 TSP] shall be to authorise the continued enforcement by the State of a sentence imposed by a sentencing state and such an order shall—
 - (a) where a sentenced person is to be committed to a prison, have the same force and effect as an order imposing a sentence of imprisonment following conviction by the court,
 - (b) where a sentenced person is to be committed to a designated centre, have the same force and effect as an order by the court under section 5(2) of the Act of 2006 committing a person to such a centre, and
 - (c) where a sentenced person is to be committed to a children detention school, have the same force and effect as an order imposing a sentence of detention in a children detention school following conviction by the court
- (2) Without prejudice to the generality of subsection (1), the following shall apply in relation to a sentence which is to be enforced in the State as a result of the recognition of the judgment to which it relates—
 - (a) section 17(3) of the Criminal Justice Administration Act 1914 in respect of a sentenced person committed to a prison,
 - (b) the power to commute or remit a punishment under section 23 of the Criminal Justice Act 1951,
 - (c) the power of the Minister to give a direction that a sentenced person be released from prison for a temporary period under section 2 of the Criminal Justice Act 1960,
 - (d) the power of the Parole Board to make a parole order under section 27 of the Parole Act 2019 in respect of a sentenced person, and
 - (e) in so far as the period served by a sentenced person in a place of detention on foot of a committal order is concerned, the rules or practice whereby sentenced persons generally may earn remission of sentences by industry or good conduct.
- (3) A person in respect of whom an order under section 7 or Head 5 is made shall not be entitled to bring any appeal in the State against the conviction or the sentence imposed in the sentencing state.
- (4) The Criminal Procedure Act 1993 shall not apply to a person in respect of whom an order is made under section 7 or 7A.

Head 8: Adaptation (TSP & TES)

Insert new section to the Transfer of Sentenced Persons Acts and Transfer of Execution of Sentences Act to provide that:

- (1) The High Court, on the application by or on behalf of the Minister (whether as part of an application under [TSP: section 7 or Head 5 / TES: section 10] or at any other time) or of its own motion, may make an order under subsection (3) or (5) adapting a sentence.
- (2) An order under subsection (3) or (5) may be made ex parte save in a case in which the High Court directs that it is in the interests of justice that it be made on notice to the sentenced person.
- (3) Where the sentence imposed by the sentencing state is by its legal nature incompatible with the law of the State, the High Court may make an order adapting the legal nature of the sentence 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.
- (4) The legal nature of a sentence adapted under subsection (3) shall, as far as practicable, correspond to the legal nature of the sentence concerned imposed by the sentencing state and shall not, in any event, either—
 - (a) aggravate it, or
 - (b) exceed the maximum penalty prescribed by the law of the State for a similar offence.
- (5) Where the sentence imposed by the sentencing state is by its duration incompatible with the law of the State, the High Court may make an order adapting the duration of the sentence 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.
- (6) Where a court adapts a sentence in accordance with subsection (5), it may, at the time of making a committal order or subsequently, commit the sentenced person to a place of detention in a committal order for a period not exceeding—
 - (a) in the case of a person who served part of the sentence concerned, the maximum term of imprisonment referred to in that subsection less—
 - (i) the period of the sentence actually served by the person in the sentencing state, and
 - (ii) the deductible period, or
 - (b) in the case of any other person, the maximum term of imprisonment referred to in that subsection less the deductible period.
- (7) The enforcement of a sentence that is by its legal nature or duration incompatible with the law of the State shall not be deemed to be unlawful by reason only of the sentence not having been adapted by way of an order under subsection (3) or (5).

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- (8) A sentenced person may continue to be detained or otherwise restricted in his or her personal liberty pursuant to an order under section 7 or 7A notwithstanding that an application is made under subsection (1) for an order under subsection (3) or (5) adapting his or her sentence.
- (9) In this section, “incompatible with the law of the State” means—
- (a) in so far as it applies to the legal nature of a sentence imposed by a sentencing state, a sentence that consists of a punishment or measure that is different in nature from the punishment or measure which could be imposed on the sentenced person if he or she were—
 - (i) convicted in the State of an offence corresponding to the offence of which he or she was convicted in the sentencing state, or
 - (ii) the subject of a special verdict under section 5 of the Act of 2006,
 - (iii) and
 - (b) in so far as it applies to the duration of a sentence imposed by a sentencing state, a sentence that is greater than the maximum term of imprisonment or other detention to which the sentenced person would be liable if he or she were convicted in the State of an offence corresponding to the offence of which he or she was convicted in the sentencing state.
- (10) Where a sentence to be enforced in the State is in respect of fewer offences than that for which it was imposed in a sentencing state by virtue of the adaptation of the sentence the adaptation shall not be deemed to constitute an aggravation of the nature or duration of the sentence.
- (11) A reference to the legal nature of the sentence shall not include—
- (a) provisions in respect of early or conditional release.
 - (b) the duration of the sentence

Head 9: Withdrawal of transfer (TSP)

Insert new section to the Transfer of Sentenced Persons Acts to provide that:

- (1) The transfer of the person shall not be considered to be complete until a committal order is made by the High Court
- (2) Prior to the completion of the transfer, the Minister may, at his or her discretion and with the consent of the sentencing state, apply to the High Court to order the transfer to be abandoned and the person to be returned to the sentencing state.
- (3) The High Court may grant an application under subsection (2) where it believes that it is in the interests of justice to do so.
- (4) Where the High Court grants an application under subsection (2), the Minister shall, as soon as practicable, issue a warrant for the return of the person to the sentencing state.
- (5) A warrant issued under subsection (4) shall authorise—
 - (a) the taking of the sentenced person to a place in any part of the State and his or her delivery at [either a place of departure from the State into the custody of a person authorised by the administering state to receive the person, for conveyance to the administering state concerned or a place of entry to the executing state] , and the keeping of the person in custody until the delivery is effected, and
 - (b) the removal of the sentenced person, by the person to whom he or she is so delivered, from the State.

Head 10: Revocation and Variation of Warrants (TSP & TES)

Amend Transfer of Sentenced Persons Acts 1995-1997 and Transfer of Execution of Sentences Act 2005 to provide that:

(1) The 1995 Act is amended in Section 9 with subsections (1)(b) and (2) replaced with the following:

- (2) The Minister may at any time apply to the High Court for an order revoking, or varying the terms of, a warrant issued under section 7 or a committal order.
- (3) A sentenced person may in writing request the Minister to bring an application under subsection (2) and the Minister shall bring the application unless, having regard to all the circumstances, he or she is satisfied that it is not necessary.
- (4) The High Court may, upon an application under subsection (2), make an order revoking or varying the terms of a warrant or order referred to in that subsection if the court is satisfied that the revocation or variation is necessary for the purposes of this Act.

(2) The 2005 Act is amended by the insertion of a new section:

- (1) The Minister may at any time apply to the High Court for an order revoking, or varying the terms of a committal order.
- (2) A sentenced person may in writing request the Minister to bring an application under subsection (1) and the Minister shall bring the application unless, having regard to all the circumstances, he or she is satisfied that it is not necessary.
- (3) The High Court may, upon an application under subsection (1), make an order revoking or varying the terms of a warrant or order referred to in that subsection if the court is satisfied that the revocation or variation is necessary for the purposes of this Act.

Head 11: Committal to place of detention rather than prison (TSP & TES)

Amend Transfer of Sentenced Persons Acts 1995-1997 and Transfer of Execution of Sentences Act 2005 to provide that:

- (1) The following definitions are added to the Acts:
 - (a) “Act of 2006” means the Criminal Law (Insanity) Act 2006; “designated centre” has the same meaning as it has in section 1 of the Act of 2006;
 - (b) “children detention school” has the same meaning as it has in section 3(1) of the Children Act 2001;
 - (c) “place of detention” means—
 - (i) a prison,
 - (ii) a designated centre, and
 - (iii) a children detention school;
 - (d) “prison” means a place of custody (other than a Garda Síochána station) administered by or on behalf of the Minister and includes—
 - (i) a place provided under section 2 of the Prisons Act 1970, and
 - (ii) a place specified under section 3 of the Prisons Act 1972;
 - (e) “committal order” means an order under [section 10(1) TES / Head 5 TSP]
- (2) Section 10(1) of the 2005 Act is amended by the substitution of “place of detention” for “prison”
- (3) A sentence within the meaning of the Acts shall be taken to include:
 - (a) an order committing a person to a designated centre on foot of a verdict of not guilty by reason of insanity
 - (b) an order detaining a person in a children detention school
 - (c) orders made in a sentencing state other than the State equivalent to (a) and (b)

Head 12: Conveyance of person (TSP)

Amend Transfer of Sentenced Persons Acts to provide that:

- (1) Amend section 5(2) to allow the transfer of a person to take place at a point of departure from the State or at a point of entry to the other State.

Head 13: Amendments to Section 45B of the European Arrest Warrant Act 2003 in respect of states not operating the Framework Decision (MRCS)

Amend section 53 of the Bill to further amend the European Arrest Warrant Act 2003 to provide that:

- (1) Subheads (2) to (4) apply where the relevant arrest warrant is in respect of a state other than a Member State within the meaning of the Act of 2021.
- (2) 'Act of 1995' refers to the Transfer of Sentenced Persons Acts 1995-1997
- (3) The Minister shall, following the final determination of the proceedings, if the person consents, issue a warrant within the meaning of section 5 of the Act of 1995
- (4) For the purposes of (3), the provisions of the Act of 1995 shall apply in respect of the warrant, subject to the following modifications—
 - (a) A reference to the administering state in the Act of 1995 shall be construed as a reference to the state from which a person under (3) is surrendered;
 - (b) The administering state shall be deemed to have agreed to the transfer;
 - (c) Any other necessary modification.

Head 14: Informed Opinion (MRCS)

Amend the Bill to provide:

- (1) In section 11, add subsection (3):
 - (a) Where a judgment has been forwarded, and the Minister has received material information from the competent authority of an executing state regarding the law of the executing state in respect of the enforcement of the sentence, including information in respect of early or conditional release measures, the Minister shall provide this information to the sentenced person.
- (2) In section 16, add condition to subsection (2):
 - (a) Where the application is in respect of a sentenced person in the State, the Minister is satisfied that reasonable steps have been taken to inform the sentenced person in writing in a language that he or she understands—
 - (i) Of the substance, so far as relevant to the person's case, of the arrangements in accordance with which it is proposed to transfer him or her
 - (ii) Of any material information received by the Minister from the competent authority of an executing state regarding the law of the executing state in respect of the enforcement of the sentence, including information in respect of early or conditional release measures.

Head 15: Provisions in respect of states other than EU Member States (MRCS)

Amend section 2 of the Bill to provide:

- (1) Remove paragraph (b) of the definition of “Member State” and renumber (c) to (b)

Amend section 58 of the Bill to provide:

- (1) Replace “state referred to in paragraph (a) or (b)” with “state referred to in paragraph (a)”
- (2) Replace “for the purposes of paragraph (c)” with “for the purposes of paragraph (b)”