



**LAW REFORM**  
COMMISSION/COIMISIÚN UM  
ATHCHÓIRIÚ AN DLÍ

**REPORT**

**SEARCH WARRANTS AND BENCH WARRANTS**

(LRC 115 – 2015)

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Law Reform Commission

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The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 190 documents (Working Papers, Consultation Papers, Issues Papers and Reports) containing proposals for law reform and these are all available at [lawreform.ie](http://lawreform.ie). Most of these proposals have contributed in a significant way to the development and enactment of reforming legislation.

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Murphy v Shields and Director of Public Prosecutions	High Court 27 November 1998	Irl
J O'C v Director of Public Prosecutions	[2000] 3 IR 478	Irl
O'Callaghan v Mahon	[2005] IESC 9, [2006] 2 IR 32	Irl
Olsson v Sweden (No.1)	10465/83 [1988] ECHR 2	ECtHR
The People (Attorney General) v Hogan	(1972) 1 Frewen 360	Irl
The People (Attorney General) v O'Brien	[1965] IR 142	Irl
The People (DPP) v Balfe	[1998] 4 IR 50	Irl
The People (DPP) v Barnes	[2006] IECCA 165, [2007] 3 IR 130	Irl
The People (DPP) v Birney & Ors	[2006] IECCA 58, [2007] 1 IR 337	Irl

The People (DPP) v Byrne	[2003] 4 IR 423	Irl
The People (DPP) v JC	[2015] IESC 31	Irl
The People (DPP) v Delaney	[2003] 1 IR 363	Irl
The People (DPP) v Delaney	[1996] 3 IR 556	Irl
The People (DPP) v Edgeworth	[2001] IESC 31, [2001] 2 IR 131	Irl
The People (DPP) v Gormley and White	[2014] IESC 17	Irl
The People (DPP) v Idah	[2014] IECCA 3	Irl
The People (DPP) v Jakubowski	[2014] IECCA 28	Irl
The People (DPP) v Kenny	[1990] 2 IR 110	Irl
The People (DPP) v Laide and Ryan	[2005] IECCA 24, [2005] 1 IR 209	Irl
The People (DPP) v McCarthy	[2010] IECCA 89	Irl
The People (DPP) v McEneary	Court of Criminal Appeal 15 February 1999	Irl
The People (DPP) v McGartland	Court of Criminal Appeal 20 January 2003	Irl
The People (DPP) v McMahan	[1986] IR 393	Ire
The People (DPP) v Mallon	[2011] IECCA 29, [2011] 2 IR 544	Irl
The People (DPP) v O'Loughlin	[1979] IR 85	Irl
The People (DPP) v Owens	[1999] 2 IR 16	Irl
The People (DPP) v Tallant	[2003] 4 IR 343	Irl
The People (DPP) v Tully	[2009] IECC 1	Irl
R v Butcher	[1992] 2 NZLR 257	NZ
R v Collins	[1987] 1 SCR 265	Can
R v Goodwin	[1993] 2 NZLR 153	NZ
R v Grant	[2009] SCC 32	Can
R v Inland Revenue Commissioners ex p Rossminster	[1980] AC 952	Eng
R v Sang	[1980] AC 402	Eng
R v Shaheed	[2002] 2 NZLR 377	NZ
R v Te Kira	[1993] 3 NZLR 257	NZ
R v Williams	[2007] NZCA 52	NZ
Rock v Governor of St Patrick's Institution	Supreme Court, 22 March 1993	Irl
Ryan v O'Callaghan	High Court 22 July 1987	Irl

Simple Imports Ltd v Revenue Commissioners	[2000] 2 IR 243	Irl
Smurfit Paribas Bank Ltd. v AAB Export Finance Ltd.	[1990] 1 IR 469	Irl
Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants Marine Insurance Co (The Palitana)	(1923) 16 LI L Rep 374	Eng
State v Powell	428 US 465 (1976)	US
The State (Attorney General) v Fawsitt	[1955] IR 39	Irl
The State (Attorney General) v Roe	[1951] IR 172	Irl
The State (Clarke) v Roche	[1986] IR 619	Irl
The State (O'Flaherty) v Ó Floinn	[1954] IR 295	Irl
Stefanov v Bulgaria	65755/01 [2008] ECHR 426	ECtHR
Stephens v Governor of Castlereagh Prison	High Court, 20 September 2002	Irl
United States v Calandra	414 US 338(1974)	US
United States v Grubb	547 US 90 (2006)	US
United States v Leon	468 US 897 (1983)	US



## SUMMARY

1. This Report, which forms part of the Commission's *Third Programme of Law Reform*,<sup>1</sup> contains its final recommendations concerning the law and procedure relating to search warrants and bench warrants.

### **A Recommendation that over 300 provisions on search warrants should be replaced by a general Search Warrants Act**

2. As of 2015, more than 300 separate legislative provisions (143 Acts and 159 Statutory Instruments) provide for powers to issue search warrants.<sup>2</sup> A large number of legislative provisions also permit members of An Garda Síochána and officers of various regulatory authorities to enter, search and inspect premises without a warrant.<sup>3</sup> Provisions relating to powers of entry without warrant are usually followed by provisions stating that a search warrant is required where the location in question is a private dwelling.
3. The search warrant provision with the widest application is section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended by the *Criminal Justice Act 2006*. It provides that the District Court may issue a search warrant where there are reasonable grounds for suspecting that evidence of or relating to an arrestable offence (an offence carrying at least 5 years imprisonment on conviction) is to be found at a place.
4. As discussed in this Report, the 300 existing legislative search warrant provisions contain significant differences of detail, resulting in a lack of consistency in the search warrant process. Persons involved in the search warrant process, such as members of An Garda Síochána, officers of regulatory bodies, legal practitioners and judges, must engage with many pieces of legislation. The need for the Oireachtas to enact a new legislative provision for each new piece of legislation that requires a search warrant power also involves inefficient use of resources.
5. Against this background, in **Chapter 1 of the Report** the Commission recommends the enactment of a generally applicable Search Warrants Act, a draft Bill for which is included in Appendix C of the Report.

### **A Recommendation that Search Warrants Act should apply to indictable offences and other offences which currently provide for search warrant powers**

6. In **Chapter 1** the Commission discusses the need to ensure that the proposed Search Warrants Act must take into account fundamental rights enshrined in the Constitution of Ireland and the European Convention on Human Rights (ECHR). The use of a search warrant involves the entry and search or inspection of a private dwelling or business premises and therefore constitutes an interference with certain rights. Where the location

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<sup>1</sup> *Report on Third Programme of Law Reform* (LRC 86-2007), Project 3. This Report follows the Commission's *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009), which examined the great majority of the matters that form the basis for the subsequent chapters of this Report. Subsequently, the Commission published its *Issues Paper on Search Warrants* (LRC IP 4-2014), which discussed the scope of a Search Warrants Act (see Chapter 2 of the Report) and a number of technology-related issues in connection with search warrants (see the relevant parts of Chapters 3, 4 and 5 of the Report).

<sup>2</sup> See Appendix A to this Report for a list of search warrant legislative provisions.

<sup>3</sup> See Appendix B to this Report for a list of warrantless legislative powers of entry and search.

is a private dwelling, a search must be compatible with the guarantee in Article 40.5 of the Constitution that a private dwelling is inviolable and cannot be forcibly entered except in accordance with law. A search or inspection of a private dwelling or a business may also interfere with the rights to privacy and property under Article 40.3 of the Constitution and the right to private life under Article 8 of the ECHR. Such rights are not absolute and may be restricted. Any interference with these rights must, however, be proportionate.

7. **Chapter 2 of the Report** discusses the scope of the proposed Search Warrants Act, which the Commission recommends should encompass a broad range of offences, applying an appropriate balance between the rights of the accused person to privacy and protection of the dwelling and society's interest in the investigation of criminal offences.
8. The Commission therefore recommends that the Search Warrants Act should apply to all indictable offences. This would allow for the repeal of existing legislative provisions that authorise the issuing of search warrants for the investigation of specific indictable offences. The majority of existing legislative search warrant provisions, listed in Appendix A of this Report, concern indictable offences and could therefore be repealed.
9. It is important to note, however, that some statutory provisions contain search warrant powers that apply to summary offences only, such as powers relating to immigration law<sup>4</sup> or those in pre-2007 Regulations made under section 3 of the *European Communities Act 1972*.<sup>5</sup> Provision for a search warrant power does not apply to every summary offence, and therefore those to which it has been applied have been selected on a case-by-case basis. Because of this selective approach the Commission does not therefore make any recommendation concerning the repeal of these existing provisions. To ensure a consistency of approach to search warrants, however, the Commission recommends that the generally applicable Search Warrants Act should also apply to those existing search warrant provisions that refer to summary only offences, and that these should be listed in a Schedule to the proposed Search Warrants Act. The benefit of this approach is that a person involved with a search warrant process would be subject to one Act, whether dealing with indictable offences or with the specific summary offences to which a search warrant power applies.
10. In the future, no further separate statutory search warrant provisions would need to be enacted. All that would be required in any future legislation that creates an indictable offence and that authorises search and entry, whether by An Garda Síochána or officers of a regulatory authority, would be to provide that the powers in the proposed Search Warrants Act apply to such a search. Similarly if future legislation provides for a search warrant power for a summary offence, this would simply be added to the Schedule to the Search Warrants Act.
11. The repeal of existing search warrant provisions applicable to specific indictable offences would reduce the overall number of search warrant provisions, as would the application of the Search Warrants Act to existing provisions applicable to summary only offences.
12. It is also necessary to bear in mind that a large number of search warrant provisions allow authorised officers and inspectors of regulatory bodies to enter, search and/or inspect a

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<sup>4</sup> See section 4 of the *Immigration Act 2003*, which provides that a judge of the District Court may issue a search warrant if satisfied that evidence of or relating to an offence under sections 3, 4, 5 or 8 of the *Immigration Act 1999* is to be found at a specified place. Section 9 of the *Immigration Act 1999* contains summary penalties for all offences under the Act.

<sup>5</sup> Section 3 of the *European Communities Act 1972*, as amended by the *European Communities Act 2007*, empowers Ministers to make Regulations for the purposes of implementing EU law which, since 2007, may create indictable offences. Prior to the 2007 Act, the 1972 Act prohibited the creation of indictable offences by such Regulations. Consequently, a large number of pre-2007 Regulations made under section 3 of the 1972 Act contain search warrant powers that apply to summary offences only.

location for reasons not necessarily linked to the investigation of a criminal offence. Such persons are often empowered to enter and inspect premises for routine or unannounced inspections that form part of general regulatory supervision and oversight to determine whether the occupier of the premises complies with the relevant legislation.<sup>6</sup> In many instances, such inspections may lead to a finding that there is compliance, so that no enforcement action or criminal prosecution arises.

13. The main procedural elements of the Search Warrants Act (including the mode of application, the requirement that documents be retained and the time or times during which a search warrant may be executed) would therefore apply to such search warrant provisions, which would be included in a Schedule to the Act. The full statutory framework in the Search Warrants Act (notably, matters related to arrest of persons during a search) would therefore only apply where such entry powers were being used in connection with a suspicion or belief that evidence relating to an offence was present at the premises in question.
14. Similarly, the proposed Search Warrants Act would apply as the default provision unless otherwise specifically provided. For example, the Report recommends that search warrants should, in general, remain valid for 7 days from the date they are issued, and this would apply unless there was a particular need for a longer period, such as the 30 day period prescribed in the *Companies Act 2014*.<sup>7</sup>

### **C Recommendations on applying for search warrants**

15. **Chapter 3** of the Report deals with the procedure for **applying** for search warrants. The Commission recommends that this should involve the following elements:
  - **applicant:** the person empowered to apply for a search warrant should be a member of An Garda Síochána, or other person such as an inspector of a statutory regulatory body, authorised to apply for a search warrant under an enactment listed in a Schedule to the Act.
  - **grounds for application:** “reasonable grounds for suspicion” should be the standard requirement in respect of an application for a search warrant.
  - **affirmation of the opinion of the applicant:** the term “information on oath and in writing” should be the standard phrase as to the requirement for an applicant to affirm his or her opinion.
  - **requests for additional information:** the power of issuing authorities to request further information from the applicant should be placed on a statutory footing.
  - **information forms:** a standard “information for search warrant form” should be used when applying for a search warrant, for which electronic filing should be possible.
  - **personal appearance by the applicant, except in cases of urgency:** as a general rule a person applying for a search warrant should continue to be required to appear personally before a judge to affirm his or her opinion under oath. This requirement may, however, be dispensed with where circumstances of urgency give rise to an immediate need for a search warrant and the delay in appearing in person would frustrate the effective execution of the search warrant.

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<sup>6</sup> See for example, sections 39 and 40 of the *Communications Regulation Act 2002* (authorised officers of ComReg), section 64 of the *Safety, Health and Welfare at Work Act 2005* (Health and Safety Authority inspectors) and section 45 of the *Animal Health and Welfare Act 2013* (authorised officers of the Minister for Agriculture).

<sup>7</sup> Section 787(9) of the *Companies Act 2014* provides for a validity period of 30 days. This replaces section 20 of the *Companies Act 1990*, as amended by section 30 of the *Company Law Enforcement Act 2001* and section 5 of the *Companies (Amendment) Act 2009*, which provided for a validity period of one month.

## D Recommendations on issuing search warrants

16. **Chapter 4** of the Report concerns the procedure for **issuing** search warrants. The Commission recommends that this should involve the following elements:

- **issuing authority:** the issuing authority should in general be a judge of the District Court. Urgent situations may arise where the applicant is unable to appear personally before a judge of the District Court to apply for a search warrant. In those circumstances, an application should be permitted to be made electronically to the High Court and the applicant should affirm his or her opinion under oath by video link or telephone.
- **search warrant form:** a standard and generic search warrant form should be used.
- **records of issued search warrants:** records should be kept by the Courts Service of all issued search warrants.
- **electronic issuing and transmission:** the executing authority, whether a Garda, an authorised officer or an inspector of a regulatory authority, should possess the search warrant so that he or she can show it to the owner or occupier. Where the applicant has not personally appeared before the issuing authority (that is, in the urgent circumstances mentioned above where a delay in applying in person would frustrate the effective execution of the warrant), it should be possible for the search warrant to be transmitted electronically to the executing authority so that he or she can show the owner or occupier the search warrant on a device or a printed copy of the electronically transmitted warrant.

## E Recommendations on executing search warrants

17. **Chapter 5** of the Report deals with the procedure for **executing** search warrants. The Commission recommends that this should involve the following elements:

- **standard validity period:** the standard validity period for a search warrant should be 7 days, with provision for an extension on application to a judge of the District Court.
- **the use of force:** where it is necessary to use force when executing a search warrant, only force that is reasonable in the circumstances may be used.
- **copy of the search warrant to owner or occupier:** a copy of the search warrant should be given to the owner or occupier, subject to the exception that where the executing officer believes that it is not advisable to give a copy of the warrant, it may be withheld from the person.
- **occupier's notice:** the occupier of a location that is the subject of a search should be provided with an occupier's notice outlining the nature of the authority afforded to the executing officer, the procedure for seizing material under the warrant and the rights and obligations of the occupier.
- **search usually carried out at reasonable hours, with break facility:** a search will usually be carried out at reasonable hours (between 6 am and 9 pm), unless there are specific reasons why it is needed at a different time; and the executing authority should be able to leave the premises and re-enter following a short break or overnight break if necessary.
- **assistants at the execution of a search:** the search warrant may be executed by a named member of An Garda Síochána, or another authorised person such as an inspector of a regulatory authority as listed in a Schedule to the Act, accompanied by such member or members of An Garda Síochána as the authorised person thinks necessary, or such other persons as authorised by the Court. Where a non-Garda member is required to assist with the execution of a search warrant, specific permission should be sought from the Court.
- **persons present at location being searched:** where it is necessary and justified in the circumstances, executing officers may: (a) search persons present at a search location (where the executing officer is a Garda only); (b) request

basic personal details from persons present at a search location; (c) request assistance from persons present so as to gain access to materials sought under the search warrant; and (d) require any person that appears to be in a position to facilitate access to information held in a computer to take certain steps to assist the executing officer to access that information.

- **offence of failure to comply with a request or obstruction:** failure to comply with a permissible request by an executing officer, or attempting to obstruct or obstructing the execution of a search warrant is an offence.
- **seizure of material:** an executing officer may seize material found during the execution of a search warrant where he or she reasonably believes it is: (a) evidence of the offence or suspected offence to which the warrant relates, (b) material which may be seized under a scheduled enactment or (c) evidence, found by the executing authority in the course of executing the warrant, of another offence or suspected offence.
- **protection of material subject to privilege:** where material is found during the course of a search that appears to be privileged (such as material subject to legal privilege or litigation privilege), this may not be examined (this includes where there is a need to “search and sift” privileged material mixed with non privileged material); such material will be referred to the High Court to decide whether it is, in fact, subject to privilege.
- **inventories of seized materials:** an inventory of all seized or copied items must be given to the person concerned upon completion of the search.

#### **F Recommendations on admissibility of evidence obtained under search warrants**

18. **Chapter 6** of the Report deals with the admissibility of evidence obtained under search warrants. The Commission recommends that the Search Warrants Act should provide that failure to comply with its provisions will not, of itself, render any evidence obtained inadmissible. Whether the evidence is admissible or inadmissible will remain a matter for a court to determine in accordance with the relevant law in this area. This includes considerable case law on the admissibility of evidence obtained illegally and of evidence obtained unconstitutionally.
19. As to evidence obtained illegally, the Commission outlines the current position, which involves a two-stage approach. In the first stage the court may determine that any error or defect in the search warrant is not sufficient to render the search illegal (because, for example, the error consisted of a misdescription, was otherwise of a trivial or technical nature, did not mislead the person to whom the warrant was directed or that the error was unintentional). If, however, the court finds that the evidence did not fall below this threshold of illegality, the second stage will involve a decision whether, in the court’s discretion, the evidence should be excluded in the interests of justice and having regard to a range of factors (because, for example, the error involved was not trivial or technical, that it did mislead the person to whom the warrant was directed, that the error was intentional or that the prejudicial effect of the evidence would outweigh its probative value).
20. As to evidence obtained unconstitutionally on foot of a search warrant, the Commission refers to the rule governing the exclusion of unconstitutionally obtained evidence (the exclusionary rule), as set out most recently by the Supreme Court in 2015 in *The People (DPP) v JC*.<sup>8</sup> Given the complexity of the exclusionary rule as set out by the Supreme Court, it is likely that the admissibility of illegally obtained evidence or unconstitutionally obtained evidence will be subject to further refinement and development in future cases.
21. The Commission has therefore concluded that the proposed Search Warrants Act should not include a statutory test for the admissibility of illegally or unconstitutionally obtained

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<sup>8</sup> [2015] IESC 31.

evidence, but that this should remain a matter for judicial application and development through case law.

## **G Recommendation on Statutory Code of Practice on Search Warrants**

22. Various bodies involved in the execution of search warrants, such as An Garda Síochána, the Office of the Director of Corporate Enforcement and the Revenue Commissioners, have their own practice and procedural guidelines that govern searches and seizures. In **Chapter 6** the Commission also recommends that the proposed Search Warrants Act should provide for a statutory Code of Practice to provide practical guidance on the search warrant process. Mirroring the approach to breaches of the Act, a breach of the Code of Practice will not, of itself, render evidence obtained inadmissible.

## **H Recommendations on Bench Warrants and Committal Warrants for Unpaid Fines**

23. **Chapter 7** of the Report contains the Commission's conclusions and recommendations on **bench warrants and committal warrants for unpaid court fines**.
24. A bench warrant is an arrest warrant that is issued when an individual who is required to appear in court fails to do so. At any given time, there are between 20,000 to 30,000 unexecuted bench warrants in Ireland.<sup>9</sup> The high figures reflect an accumulation of warrants over the years. Efforts are being made to reduce the number of unexecuted bench warrants, such as the management of bench warrant execution by a Garda Inspector in each Garda Division, the establishment of a working group to address difficulties in the process and the devotion of certain sittings of the District Court to cancelling outstanding bench warrants that are impossible to execute or where their execution is unlikely.
25. Many of the issues surrounding bench warrants are of a procedural or operational nature. The Garda Inspectorate's 2014 *Report on Crime Investigation* recommends the introduction of a standard operating procedure for the management of warrants and the convening of a multi-agency working group to examine and consider changes to the processing of warrants.<sup>10</sup> The implementation of the recommendations of the Garda Inspectorate Report should overcome many of the operational issues surrounding the bench warrant process.
26. A committal warrant is the mechanism used to imprison an individual who has been sentenced to a term of imprisonment (including a default period of imprisonment) or remanded in custody. One circumstance in which a committal warrant is issued is where a court imposes a fine on an individual which remains unpaid by the due date (often referred to as a 'penal warrant'). A large number of committal warrants for unpaid court fines are issued and remain unexecuted.
27. The *Fines (Payment and Recovery) Act 2014*, when commenced, will bring into force measures that should assist in reducing the number of committal warrants issued. Under the 2014 Act, a court will be able to consider alternative methods of enforcing fines to issuing committal warrants. These include the option of paying fines by instalments and the making of a recovery order, an attachment order or community service order.
28. The majority of cases that are dealt with in the District Court are prosecutions under the Road Traffic Acts.<sup>11</sup> Many of these cases can be dealt with under the Fixed Charge Notice

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<sup>9</sup> Garda Inspectorate, *Report on Crime Investigation* (2014), part 10 at 19.

<sup>10</sup> Garda Inspectorate, *Report on Crime Investigation* (2014), part 10 at 29.

<sup>11</sup> The *Courts Service Annual Report 2012* states that in 2012 almost 60% of summary cases dealt with in the District Court related to road traffic offences.

System without having to proceed to prosecution in the District Court.<sup>12</sup> The high volume of road traffic cases means that a significant proportion of persons imprisoned for failure to pay court fines have been convicted of road traffic offences.

29. Reform of the Fixed Charge Notice system is necessary to reduce the number of committal warrants issued for road traffic offences by encouraging and facilitating the payment of Fixed Charge Notices before such cases reach the District Court.<sup>13</sup> Although the measures that will be introduced by the *Fines (Payment and Recovery) Act 2014* should improve the collection rate of court fines, additional methods of enforcement particular to road traffic cases would also be of benefit.
30. In this respect the Report recommends that section 44 of the *Road Traffic Act 2010* should be brought into force. This provides for proceedings to be discontinued where an individual pays a specified fixed charge amount no later than 7 days before the date that the charge is listed for hearing. As many persons attempt to pay the fixed charge notice upon receipt of a court summons but are not currently permitted to do so, the commencement of section 44 of the 2010 Act would assist in reducing the number of committal warrants issued for failure to pay fines for road traffic offences.
31. The Report also concludes that additional methods of addressing non-payment of court fines that are particular to road traffic offences should be implemented, a number of which have been identified in other reviews of this area. For example, as a means of encouraging payment of fines, the Report agrees with the view expressed elsewhere that legislation should be introduced to provide that, where a court imposes a fine on a person who has been convicted of an offence under the Road Traffic Acts and the person does not pay the fine by the due date, the court may direct that motor tax applications and changes in vehicle ownership should not be processed in respect of a vehicle that is registered in the name of the person against whom the fine was imposed.
32. There is no procedure in place permitting persons summoned to appear in court who wish to plead guilty to respond to a summons by post without having to attend court. Some individuals fail to appear due to circumstances such as family or work commitments or lack of transport. The Report recommends that legislation should provide for a postal response system to summonses in respect of summary only offences. Such a procedure would allow such persons to plead guilty to the offence without having to appear in court and the court could proceed with the case instead of issuing a bench warrant.
33. A great number of summonses are delivered by ordinary post, also referred to as "letterbox delivery." The lack of personal engagement associated with letterbox delivery can result in an accused person failing to receive a summons, and therefore being unaware that they are required to attend court. If the prosecutor and Courts Service are not able to state that the accused received the summons, the Court usually adjourns the case; alternatively it may issue a bench warrant. Given the uncertainty associated with letterbox delivery, the Commission considered whether all summonses should be served by personal service or registered post. Consultees referred, however, to the practical difficulties with requiring personal service or registered post in every case. Therefore although summonses should, where possible, be served by these methods, the Report concludes that letterbox delivery should remain as a method of serving summonses.
34. The Report also recommends that, where a person is granted bail, whether at a Garda station or by a court, the relevant authority should be required to take all reasonable steps

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<sup>12</sup> The *Courts Service Annual Report 2012* shows that of the 147,371 defendants who had orders made against them for road traffic offences, 58,416 were prosecuted for penalty point offences and most of these would have originated in a fixed charge notice.

<sup>13</sup> For a full discussion of these issues, see Garda Inspectorate *Report on The Fixed Charge Processing System: A 21<sup>st</sup> Century Strategy* (2014).

to ensure that he or she understands that a condition of bail is the obligation to appear before a court at a later date. The individual should be provided with a document at that time setting out, in simple language, his or her requirement to attend at a court sitting, as well as the time and date upon which he or she is required to appear.

35. The 2014 *Report of the Garda Síochána Inspectorate on Crime Investigation* noted that many warrants are issued because An Garda Síochána or other agencies have not fully verified the identity of the individual involved. This can lead to warrants being issued for the wrong person or a person who does not exist. That 2014 Report recommended the implementation of a Garda Síochána Standard Operating Procedure for identity verification. The Commission supports that recommendation.
36. **Appendix A** contains a list of over 300 search warrant legislative provisions.
37. **Appendix B** contains a list of legislative powers of entry and search that do not require search warrants.
38. **Appendix C** contains a draft *Criminal Justice (Search Warrants) Bill* to give effect to the Commission's recommendations concerning search warrants.



## CHAPTER 1 HISTORY OF SEARCH WARRANTS AND CONSTITUTIONAL AND INTERNATIONAL HUMAN RIGHTS STANDARDS

### A Historical Development of Search Warrants

#### (1) *The development of search warrants in England and the United States*

- 1.01 It is thought that the concept of procedural searches travelled with Romans to Britain during the Roman invasion of 43 AD.<sup>1</sup> Early medieval English common law accepted that, while there was no general authority to issue warrants to search homes because of the general common law protection of the dwelling, it was permissible to do so to search for stolen goods.<sup>2</sup> This common law exception reflected the position under the Roman code of law, the Twelve Tables, concerning searches under the Roman law of theft (*furtum*) that, in the prosecution of “private” offences, a person who suspected that his or her stolen goods were on the premises of another was permitted to enter that place to carry out a search.<sup>3</sup> In addition to the position at common law, legislation providing for search warrants in England was first enacted in the early part of the 14<sup>th</sup> century. The search powers in these early statutes were quite broad in nature and at that time were referred to as “writs” rather than warrants.<sup>4</sup> Writs were general in form, containing little specification or restriction as to what, where or who could be searched and required little supporting evidence to be submitted by the applicant.<sup>5</sup>
- 1.02 The general search warrant that existed in Britain at this time was exported to the United States, then under British rule. Writs were initially provided for by legislation governing customs in the United States and afforded customs officials a “blanket authority” to search any location where they suspected that they would find smuggled goods and to examine any package or container which they saw fit.<sup>6</sup>
- 1.03 In addition to being unspecific as to the persons or places that could be searched under their authority, or the items that could be seized, writs were also general as to the length of time for which they were in operation. Once issued, writs remained “as continuing

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<sup>1</sup> Borkowski and du Pleiss *Textbook on Roman Law* 3<sup>rd</sup> ed (Oxford University Press 2005) at 335. For a more detailed discussion on the procedure for carrying out searches in Ancient Rome, see the *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 1.02-1.05.

<sup>2</sup> See Sir Matthew Hale *History of the Pleas of the Crown* Volume II at 149, and the comments of Lord Halifax in *Entick v Carrington* (1765) 2 Wils 275, 291 (discussed generally below at paragraphs 1.05 to 1.06). Coke’s *Institutes of the Law of England*, Volume IV, at 176, did not accept that the common law allowed even this exception for stolen goods and considered that search warrants were void at common law. This appears to be a minority view.

<sup>3</sup> Nicholas, *An Introduction to Roman Law* (Oxford University Press 1962) at 212.

<sup>4</sup> Writs took their name from the fact that they commanded all of the king’s representatives and subjects to aid their holders in executing them. See Reynard, “Freedom from Unreasonable Search and Seizure – A Second Class Constitutional Right?” (1950) 25 *Indiana Law Journal* 259 at 271. See also Polyviou, *Search and Seizure: Constitutional and Common Law* (Duckworth 1982) at 12.

<sup>5</sup> Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (Johns Hopkins Press 1937) at 26.

<sup>6</sup> Polyviou *Search and Seizure: Constitutional and Common Law* (Duckworth 1982) at 10.

licences” until 6 months after the death of the monarch under whose reign they were issued.

**(2) Criticisms of general search warrants in the 17<sup>th</sup> century**

1.04 During the 17<sup>th</sup> century, a number of the authoritative chroniclers of English law expressed concern over the broad search powers which could be authorised by general search warrants.<sup>7</sup> Similar dissatisfaction with the general warrant system emerged at the same time in the United States.<sup>8</sup> In his leading work on English law, *History of the Pleas of the Crown*, Sir Matthew Hale recommended that certain requirements should be met when search warrants were issued and executed. These included requirements such as: probable cause to suspect that stolen items were in a certain place; making an oath before a justice when seeking a search warrant; limiting search warrants to specified places; directing warrants only to constables and other public officers, rather than to private persons; and returning of seized goods and executed warrants to a justice.<sup>9</sup> These requirements heralded the creation of the modern system of search warrants, complete with procedural safeguards.

**(3) The end for general search warrants under English common law: Entick v Carrington (1765)**

1.05 A fundamental change came about in England in 1765 in *Entick v Carrington*.<sup>10</sup> Entick had published a leaflet, “Monitor or British Freeholder”, which the authorities deemed to be seditious and to contain “gross and scandalous reflections” upon the government. He took an action for trespass following the execution of a search warrant in his home under the licensing statutes. Due to the general nature of the warrant the executing officials searched and examined all the rooms in his home, as well as private papers and materials.

1.06 Delivering judgment in the case, Lord Camden CJ concluded that general warrants were not provided for in English law. He stated that the Court could “safely say that there is no law in this country to justify the defendants in what they [had] done; if there was, it would destroy all the comforts of society”.<sup>11</sup> As Lord Camden CJ explained, the common law “holds the property of every man so sacred that no man can set foot upon his neighbour’s close without his leave. If he does, he is a trespasser... If he will tread upon his neighbour’s ground, he must justify it by law.”<sup>12</sup> The Court added that where a warrant was to be granted for the search for stolen goods, the informer (applicant) and the justice involved should abide by certain safeguards and “proceed with great caution.”<sup>13</sup> The procedure recommended by Lord Camden CJ, which reflected the views of Sir Matthew Hale, discussed above, was that there should be an oath sworn that a person has had his goods stolen and there should be a strong reason to believe that the goods are concealed in a particular place. Thus, the Court in *Entick v Carrington* rejected the concept of general warrants, but accepted the principle of search warrants subject to procedural safeguards.

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<sup>7</sup> See Coke *Institutes of the Law of England*, Volume IV, at 176 where Coke expressed the opinion that the broad writs were contrary to common law.

<sup>8</sup> See generally Reynard “Freedom from Unreasonable Search and Seizure – A Second Class Constitutional Right?” (1950) 25 *Indiana Law Journal* 259, at 271 – 272; Polyviou *Search and Seizure: Constitutional and Common Law* (Duckworth 1982) at 10-11.

<sup>9</sup> Hale, *History of the Pleas of the Crown*, at 149-152.

<sup>10</sup> (1765) 2 Wils 275, 19 State Tr 1029; [1558-1774] All ER Rep 41.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

**(4) United States Constitution: Fourth Amendment ban on unreasonable search and seizures**

1.07 The decision in *Entick v Carrington* also resolved the issue of the use of general warrants in the United States. In 1789, the Fourth Amendment to the US federal Constitution effectively codified the decision in *Entick v Carrington* by providing:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

1.08 The English rejection of the general warrant was also relied on as an authority to end the use of the writ. In 1886, in *Boyd v United States*<sup>14</sup> the US Supreme Court commented that the ruling in *Entick* was “welcomed and applauded by the lovers of liberty in the colonies, as well as in the mother country.” Delivering the judgment of the Supreme Court, Bradley J added that *Entick* was “regarded as one of the permanent monuments of the British Constitution.”<sup>15</sup>

**(5) Evolution of search warrants in English and Irish law to the 20<sup>th</sup> century**

1.09 By the 19<sup>th</sup> century, the search warrant system based on procedural safeguards had become established in both England and the United States. In addition, an increasing number of Acts were enacted in the 19<sup>th</sup> century providing for specific search warrant powers. Further Acts were enacted in the 20<sup>th</sup> century which contained specific provisions governing search warrants.

1.10 The approach adopted in Ireland reflected these developments. In discussing the rejection of general warrants in 1842, Hayes noted the acceptance that “[a] general warrant to search all suspected places is decidedly illegal.”<sup>16</sup> Similarly, a number of procedural rules consistent with those advocated by Sir Matthew Hale and implemented in *Entick v Carrington*<sup>17</sup> had been applied in Irish law in the 19<sup>th</sup> century. For example, the law in Ireland required that a justice receive sworn information of suspicion during the making an application for a warrant,<sup>18</sup> that the place intended to be searched “be stated with convenient certainty”,<sup>19</sup> that no search could be made beyond the premises specified in the warrant,<sup>20</sup> and that in executing a warrant of search and seizure the officer(s) “should strictly obey its directions.”<sup>21</sup> Further rules were also set out concerning issues such as the time at which the warrant should be executed, the use of force, the person to whom the warrant should be addressed and the procedure to be carried out once execution was completed.<sup>22</sup> The approach that developed in 19<sup>th</sup> century Ireland formed

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<sup>14</sup> 116 US 616 (1886).

<sup>15</sup> 116 US 616, at 626 (1886).

<sup>16</sup> Hayes *A Digest of the Criminal Statute Law in Ireland, Volume II* (Hodges and Smith 1842) at 788.

<sup>17</sup> (1765) 2 Wils 275, 19 State Tr 1029.

<sup>18</sup> Thus, “a mere surmise without oath will not suffice”: Hayes *A Digest of the Criminal Statute Law in Ireland, Volume II* (Hodges and Smith 1842) at 788. See also Humphreys *The Justice of the Peace for Ireland* (Hodges, Figgis and Co Ltd 1897) at 759; Supple *The Irish Justice of the Peace* (William McGee Publishing 1899) at 559; O’Connor *The Irish Justice of the Peace* (E Ponsonby Ltd 1911) at 144.

<sup>19</sup> Hayes *A Digest of the Criminal Statute Law in Ireland, Volume II* (Hodges and Smith 1842) at 788.

<sup>20</sup> O’Connor *The Irish Justice of the Peace* (E Ponsonby Ltd 1911) at 145.

<sup>21</sup> Hayes *A Digest of the Criminal Statute Law in Ireland, Volume II* (Hodges and Smith 1842) at 789. See also O’Connor *The Irish Justice of the Peace* (E Ponsonby Ltd 1911) at 145.

<sup>22</sup> See generally: Hayes *A Digest of the Criminal Statute Law in Ireland, Volume II* (Hodges and Smith 1842) at 788-791; O’Connor *The Irish Justice of the Peace* (E Ponsonby Ltd 1911) at 144-146.

the basis of the law as it stood on the foundation of the State in 1922. Since then, over 100 Acts and almost 200 statutory Regulations conferring powers of search and seizure pursuant to warrant have been enacted (a thematic list of which is contained in Appendix A). The content of these statutory powers has, broadly, followed the procedural requirements developed at common law. In addition, such legislative powers must now also be considered in light of the relevant fundamental rights in the Constitution of Ireland and the European Convention on Human Rights (ECHR).

## **B The Constitution and International Human Rights Standards Applicable to Search Warrants**

1.11 The 18<sup>th</sup> century decision *Entick v Carrington* emphasised the importance at common law of the privacy of the dwelling. This principle is reinforced by the constitutional protection of the dwelling under Article 40 of the Constitution and the related constitutional right to privacy. Moreover, the right to respect for private life is also protected under Article 8 of the ECHR.

1.12 The use of a search warrant involves an interference with the right to privacy, be it in the context of a dwelling, workplace, vehicle, documents, or otherwise. The right to privacy is not, however, absolute. While it exists as a safeguard which may be relied upon to prevent or challenge an undue interference with one's privacy, it does not necessarily prevent all interferences.<sup>23</sup>

### **(1) Protection of privacy**

1.13 Although there is no express reference to a general right to personal privacy in the Irish Constitution, the courts have recognised it as one of the unenumerated personal rights under Article 40.3 of the Constitution. In *Kennedy v Ireland*,<sup>24</sup> the High Court held that the "nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely a sovereign, independent and democratic society."<sup>25</sup> The High Court also held that the right was not absolute in nature and that "its exercise may be restricted by the constitutional rights of others, by the requirements of the common good and is subject to the requirements of public order and morality."<sup>26</sup>

1.14 This general approach also reflects the specific recognition of privacy in the ECHR. Article 8 of the ECHR expressly recognises the right to respect for private and family life.<sup>27</sup> Although Article 8.1 is broad in scope, and relates to a person's privacy, family life, home and correspondence, Article 8.2 qualifies it by providing that the rights afforded by Article 8 are not absolute. It lists the interests and requirements which may justify an interference with the right, provided that the interference is "in accordance with law" and "necessary" to protect the interest(s) concerned.<sup>28</sup>

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<sup>23</sup> *Kennedy v Ireland* [1987] IR 587.

<sup>24</sup> [1987] IR 587.

<sup>25</sup> *Ibid* at 593.

<sup>26</sup> *Ibid* at 592. This general approach has been applied in subsequent case law: see Hogan and Whyte (eds) *Kelly: The Irish Constitution* 4th ed (LexisNexis, 2003), at paragraphs 7.3.115-7.3.129.

<sup>27</sup> Velu has commented that Article 8 was "to a great extent inspired by" Article 12 of the Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations in 1948. Velu, "The European Convention on Human Rights and the right to respect for private life, home and communications" in Robertson (ed) *Privacy and Human Rights* (Manchester University Press 1973) at 14.

<sup>28</sup> In *Olsson v Sweden (No.1)* 10465/83 [1988] ECHR 2 the European Court of Human Rights identified the interests and requirements flowing from the phrases "in accordance with law" and "necessary in a democratic society".

- 1.15 As the right to privacy is well established in Ireland, both in terms of the Constitution and under the ECHR, the State is obliged to respect this right in exercising its powers and functions. The right, however, is limited, and the State is permitted to restrict the privacy of a person in certain circumstances.
- 1.16 Search warrants are relied upon for purposes such as the detection or prevention of crime, obtaining evidence which can ground a prosecution, or to ensure compliance with legal requirements. These purposes are generally considered to be in the interests of the State and the common good. Therefore, while the use of a search warrant may interfere with a person's right to privacy, in some circumstances the intrusion may be justified. The essential requirement is that the interference is necessary and does not go beyond what is justified and permissible. When these constraints are not complied with, however, or when a search warrant is itself invalid, the person whose premises are subjected to the search may establish that his or her constitutional and/or ECHR right to privacy has been breached by the State. This approach has influenced the detailed content of the statutory provisions concerning search warrants discussed in Chapters 2 to 6, below.

**(2) Protection of the dwelling**

- 1.17 Long before the decision in *Entick v Carrington*,<sup>29</sup> the common law recognised that a man's home was his castle and that there should be no undue interference with it.<sup>30</sup> Article 40.5 of the Constitution of Ireland expressly enshrines this traditional protection of the dwelling<sup>31</sup> as one of the fundamental rights of citizens. Article 40.5 states:

“The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with the law.”

- 1.18 In *The People (DPP) v Barnes*<sup>32</sup> the Court of Criminal Appeal held that Article 40.5:

“is a modern formulation of a principle deeply felt throughout historical time and in every area to which the common law has penetrated. This is that a person's dwellinghouse is far more than bricks and mortar; it is the home of a person and his or her family, dependents or guests (if any) and is entitled to a very high degree of protection at law for this reason.”<sup>33</sup>

**(a) Requirement to be in occupation of the dwelling**

- 1.19 In *The People (Attorney General) v O'Brien*<sup>34</sup> the Supreme Court discussed the requirement that a person be in occupation of a premises to benefit from the constitutional right and what class of occupants benefit from it. The Court observed that the persons affected by the search warrant in that case were members of a family living in the family home, with each of them having their own separate bedrooms. The Court concluded that each of them would have a constitutional right to the inviolability of the dwelling as a whole.<sup>35</sup>

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<sup>29</sup> (1765) 2 Wils 275, 19 State Tr 1029; [1558-1774] All ER Rep 41.

<sup>30</sup> *Seymane's Case* (1604) 5 Co. Rep 91a; 77.

<sup>31</sup> For discussions of what constitutes a “dwelling” see *The People (Attorney General) v O'Brien* [1965] IR 142 at 169; *The People (DPP) v Corrigan* [1986] IR 290 at 296; *The People (DPP) v Forbes* [1994] 2 IR 542.

<sup>32</sup> [2006] IECCA 165, [2007] 3 IR 130.

<sup>33</sup> [2006] IECCA 165, [2007] 3 IR 130, paragraph 42.

<sup>34</sup> [1965] IR 142. See also *The People (DPP) v Lawless* (1984) 3 Frewen 30; *The People (DPP) v Delaney* [2003] 1 IR 363.

<sup>35</sup> [1965] IR at 169.

1.20 Occupation of a dwelling must also be personal in nature, so that the protection does not extend to commercial premises. Thus, in *The People (DPP) v McMahon*<sup>36</sup> members of An Garda Síochána entered a licensed premises to carry out a search. The Supreme Court observed that the area entered was “the public portion of a licensed premises which is open for trade”, and therefore the constitutional protection of Article 40.5 did not apply.<sup>37</sup>

**(b) Scope of the protection of dwelling**

1.21 It is clear from Article 40.5 itself that the protection it offers to the dwelling is not absolute; forcible entry is prohibited “save in accordance with the law.” The Court of Criminal Appeal in *The People (Attorney General) v Hogan*<sup>38</sup> held that the guarantee is:

“not against forcible entry only. The meaning of the Article is that the dwelling of every citizen is inviolable except to the extent that entry is permitted by law which may permit forcible entry.”<sup>39</sup>

1.22 The High Court in *Ryan v O’Callaghan*<sup>40</sup> considered what was meant by the phrase “save in accordance with law”. It followed the explanation provided by Henchy J in the Supreme Court in *King v Attorney General*<sup>41</sup> that the phrase means “without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution.”<sup>42</sup>

1.23 Where a search is to be carried out in a dwelling, a balancing of rights and interests is required. On the one hand is the person’s constitutional right to the inviolability of the dwelling. The importance of upholding this constitutional right was clearly noted by the Supreme Court in *The People (Attorney General) v O’Brien*.<sup>43</sup> Walsh J observed that “[t]he vindication and the protection of constitutional rights is a fundamental matter for all courts established under the Constitution... [and they] must recognise the paramount position of constitutional rights.”<sup>44</sup> On the other hand is the interest of the State to prevent, detect and prosecute criminal offences, or to ensure adherence to the law.

1.24 Although Article 40.5 of the Constitution protects the inviolability of the dwelling, this protection is not absolute. There may be occasions where it is justifiable to set this right aside. The courts have made it equally clear, however, that the constitutional right under Article 40.5 should not be set aside easily. This must be done in accordance with law so that the constitutional right is not offended and, furthermore, the invasion of the right must not go beyond what is necessary.

**(3) Damache v Director of Public Prosecutions**

1.25 In *Damache v Director of Public Prosecutions*,<sup>45</sup> the Supreme Court held that section 29(1) of the *Offences Against the State Act 1939*, as inserted by section 5 of the *Criminal*

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<sup>36</sup> [1986] IR 393.

<sup>37</sup> *Ibid* at 398.

<sup>38</sup> (1972) 1 Frewen 360.

<sup>39</sup> This aspect of Article 40.5 was also considered by the Supreme Court in *The People (Attorney General) v O’Brien* [1965] IR 142, at 169. Walsh J expressed the view that the reference to forcible entry “is an intimation that forcible entry may be permitted by law but that in any event the dwelling of every citizen is inviolable save where entry is permitted by law and that, if necessary, such law may permit forcible entry.”

<sup>40</sup> High Court 22 July 1987.

<sup>41</sup> [1981] IR 233.

<sup>42</sup> *Ibid*, at 5.

<sup>43</sup> [1965] IR 142.

<sup>44</sup> *Ibid* at 170.

<sup>45</sup> [2011] IEHC 197, [2012] IESC 11; [2012] 2 IR 266.

*Law Act 1976*, was unconstitutional. The decision in *Damache* was based primarily on the ground that section 29(1) of the 1939 Act, as amended, permitted a member of An Garda Síochána to issue a search warrant in circumstances which were not urgent where that member was directly involved in the criminal investigation in respect of which the search warrant was issued. The decision reinforced the widely-held view (discussed further in Chapter 4 of this Report) that a search warrant may only be issued by an authority that is independent of the investigation to which the search warrant relates.

**(i) Circumstances in Damache**

- 1.26 In 2009, An Garda Síochána commenced an investigation into an alleged conspiracy to murder a Swedish cartoonist Lars Vilks, who had depicted the prophet Mohammad with the body of a dog. The Gardaí suspected that the applicant was involved in this alleged conspiracy and that he had sent threatening messages to the United States. As a result of intelligence received, the detective in charge of the investigation issued a search warrant to a detective sergeant authorising him to search the applicant's home under section 29(1) of the *Offences Against the State Act 1939*, as inserted by section 5 of the *Criminal Law Act 1976*. During the course of the search, Gardaí seized a number of items from the applicant's home, including a mobile phone. The applicant was later charged with sending a menacing message by telephone under section 13 of the *Post Office (Amendment) Act 1951* (as amended by the *Communications Regulation (Amendment) Act 2007*).
- 1.27 The applicant brought judicial review proceedings challenging the constitutionality of section 29(1) of the 1939 Act, as amended. His challenge was rejected by the High Court but, on appeal, the Supreme Court declared section 29(1) unconstitutional.

**(ii) Legislative Context of Damache**

- 1.28 Section 29 of the *Offences Against the State Act 1939*, as substituted by section 5 of the *Criminal Law Act 1976*, provided:

“Where a member of the Garda Síochána *not below the rank of superintendent* is satisfied that there is reasonable ground for believing that documentary evidence of or relating to the commission of an offence under this Act or the Criminal Law Act, 1976, or an offence which is for the time being a scheduled offence for the purposes of Part V of this Act, or evidence relating to the commission or intended commission of treason, is to be found in any building or part of a building or in any vehicle, vessel, aircraft or hovercraft or in any other place whatsoever, he may issue to a member of the Garda Síochána not below the rank of sergeant a search warrant under this section in relation to such place.”<sup>46</sup>

- 1.29 As originally enacted, and as amended by the 1976 Act, section 29(1) of the 1939 Act authorised a member of An Garda Síochána to issue a search warrant to another member of An Garda Síochána. Prior to its amendment by the 1976 Act, section 29(1) of the 1939 Act empowered a member of An Garda Síochána not below the rank of chief superintendent to issue a search warrant to a member not below the rank of Inspector. The key change effected by the 1976 Act was to reduce both the rank of the issuing member and of the member to whom such a warrant might be issued.
- 1.30 The applicant applied for judicial review seeking a declaration that section 29(1) of the 1939 Act, as inserted by section 5 of the 1976 Act, was unconstitutional on the grounds that it authorised a search of the his home on foot of a search warrant which was not issued by an independent person.

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<sup>46</sup> Emphasis added.

**(iii) Decision of the Supreme Court**

- 1.31 In support of its decision that section 29(1) of the 1939 Act as amended was unconstitutional, the Supreme Court referred to statements in previous Irish decisions that a search warrant should be issued by an independent person. The Court referred to the High Court decision in *Ryan v O'Callaghan*,<sup>47</sup> where Barr J considered the constitutionality of section 42(1) of the *Larceny Act 1916* ("the 1916 Act"). That provision authorised a peace commissioner to issue a warrant in certain circumstances. Barr J was of the view that the requirement under section 42(1) of the 1916 Act that the investigating police officer applying for a warrant must "satisfy a peace commissioner who is an independent person unconnected with criminal investigation"<sup>48</sup> was an important procedural element for the protection of the public.
- 1.32 The Supreme Court also referred to relevant case law of the European Court of Human Rights (ECtHR). In *Camezind v Switzerland*,<sup>49</sup> the ECtHR rejected the argument that a search of the applicant's home carried out by officials from the Swiss Post and Telecommunications Authority violated his right to private life under Article 8 of the ECHR. The ECtHR noted that under the relevant Swiss legislation a search could, subject to exceptions, only be effected under a written warrant issued by a limited number of designated senior public servants and carried out by officials specially trained for the purpose.<sup>50</sup> The ECtHR held that these citizens "each have an obligation to stand down if circumstances exist which could affect their impartiality."<sup>51</sup> The ECtHR concluded:
- "Having regard to the safeguards provided by Swiss legislation and especially to the limited scope of the search, the Court accepts that the interference with the applicant's right to respect for his home can be considered to have been proportionate to the aim pursued and thus 'necessary in a democratic society' within the meaning of Article 8. Consequently, there has not been a violation of that provision."<sup>52</sup>
- 1.33 The Supreme Court in *Damache* also cited<sup>53</sup> the decision of the Supreme Court of Canada in *Hunter v Southam Inc.*<sup>54</sup> In *Hunter*, the Court held that a search executed under a warrant issued by members of the Restrictive Trade Practices Commission infringed section 8 of the *Canadian Charter of Rights and Freedoms*, which protects "the right to be secure against unreasonable search and seizure." The Court was of the view that "for the authorization procedure to be meaningful, it is necessary for the person authorizing the search to be able to assess the conflicting interests of the state and the individual in an entirely neutral and impartial manner."<sup>55</sup>
- 1.34 The Supreme Court of Canada considered that, while the person considering the prior authorisation need not be a judge, "he must nevertheless, at a minimum, be capable of acting judicially" and "must not be someone charged with investigative or prosecutorial functions under the relevant statutory scheme."<sup>56</sup> It held that a member of the Restrictive

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<sup>47</sup> High Court 22 July 1987.

<sup>48</sup> *Ibid* at 5

<sup>49</sup> (1999) 28 EHRR 458.

<sup>50</sup> *Ibid* at paragraph 46.

<sup>51</sup> *Ibid*.

<sup>52</sup> *Ibid* at paragraph 44.

<sup>53</sup> [2012] IESC 11, [2012] 2 IR 266 at paragraph 50.

<sup>54</sup> [1984] 2 SCR 145.

<sup>55</sup> *Ibid* at 146.

<sup>56</sup> *Ibid*.



Trade Practices Commission “simply [could] not be the impartial arbiter necessary to grant an effective authorisation.”<sup>57</sup>

- 1.35 In *Damache*, the Supreme Court reiterated that the issuing of a search warrant is an administrative act and does not constitute the administration of justice.<sup>58</sup> Thus a search warrant need not be issued by a judge; it is however an action that must be exercised judicially. The Court quoted with approval the following view of Keane J in *Simple Imports Ltd v Revenue Commisisoners*:<sup>59</sup>

“The [judge of the District Court] is no doubt performing a purely ministerial act in issuing the warrant. He or she does not purport to adjudicate on any *lis* in issuing the warrant. He or she would clearly be entitled to rely on material, such as hearsay, which would not be admissible in legal proceedings.”<sup>60</sup>

- 1.36 The Court noted in the *Damache* case that the place for which the search warrant was issued, and the place searched, was the applicant’s home.<sup>61</sup> It pointed out that the dwelling is regarded as a place of importance which is protected under Article 40.5 of the Constitution, so that “at the core of this case is to be found the principle of the constitutional protection of the home.”<sup>62</sup> The Court expressly approved the view of Henchy J in *King v Attorney General*,<sup>63</sup> when striking down as unconstitutional an offence created by section 4 of the *Vagrancy Act 1824*, for reasons including: “that it violates the guarantee in Article 40.4.1<sup>o</sup> that no citizen shall be deprived of personal liberty save in accordance with law – which means without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution.” The Supreme Court set out the following principles applicable to the search warrant process:

“The procedure for obtaining a search warrant should adhere to fundamental principles encapsulating an independent decision maker, in a process which may be reviewed. The process should achieve the proportionate balance between the requirements of the common good and the protection of an individual’s rights. To these fundamental principles as to the process there may be exceptions, for example when there is an urgent matter.”<sup>64</sup>

- 1.37 It applied the proportionality principle and approved the following analysis of Costello J in *Heaney v Ireland*:

“The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:

- (i) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- (ii) impair the right as little as possible;

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<sup>57</sup> *Ibid* at 164.

<sup>58</sup> [2012] IESC 11 at paragraph 34.

<sup>59</sup> [2000] 2 IR 243.

<sup>60</sup> *Ibid* at 251.

<sup>61</sup> [2012] IESC 11 at paragraph 39.

<sup>62</sup> *Ibid*.

<sup>63</sup> [1981] IR 233, 257.

<sup>64</sup> [2012] IESC 11 at paragraph 47.

(iii) be such that their effects on rights are proportionate to the objective.”<sup>65</sup>

1.38 The Supreme Court also cited with approval a passage from the 2006 *Report of the Tribunal of Inquiry into Certain Gardaí in the Donegal Division* (the Morris Tribunal Report) concerning the proportionality of section 29(1) of the 1939 Act. The Morris Tribunal Report stated that “the power to issue a warrant should be vested in a judge”<sup>66</sup> and that with modern technology “there is no reason why a judge cannot be easily contacted by telephone, facsimile or e-mail or personally for the purpose of making an application to him or her for a search warrant.”<sup>67</sup> It noted that a decision to issue a search warrant involved striking a balance between the interests of An Garda Síochána in the investigation of the criminal offence and the constitutional or legal rights of the person whose premises are the subject of the search warrant. Thus, it stated that there are “very limited occasions upon which time would be so pressing as to make it impossible to follow such a procedure.”<sup>68</sup> The Morris Tribunal Report recommended that urgent consideration be given to vesting the power to issue search warrants under section 29 of the 1939 Act to judges of the District Court or Circuit Court.

**(iv) Conclusions of the Supreme Court**

1.39 Two circumstances were “at the kernel”<sup>69</sup> of the Supreme Court’s decision in *Damache* to strike down section 29(1) of the 1939 Act, as amended. The first was that “the warrant was issued by a member of the Garda Síochána investigating team which was investigating the matters.”<sup>70</sup> The Court was of the view that the person authorising the warrant was not independent and held that “[i]n the circumstances of this case a person issuing the search warrant should be independent of the Garda Síochána, to provide effective independence.”<sup>71</sup>

1.40 The second relevant circumstance was “that the place for which the search warrant was issued, and which was searched, was the appellant’s dwelling house”<sup>72</sup> and was therefore expressly protected under Article 40.5 of the Constitution. The Court noted that “[n]o issue of urgency arose in this case, and the Court has not considered or addressed situations of urgency.”<sup>73</sup> It stated that, although it was not directly relevant to the outcome in the case, “it is best practice to keep a record of the basis upon which a search warrant is granted.”<sup>74</sup> The Court concluded by declaring that section 29(1) of the *Offences against the State Act 1939*, as inserted by section 5 of the *Criminal Law Act 1976*, was repugnant to the Constitution as it permitted a search of the applicant’s home on foot of a warrant that was not issued by an independent person.<sup>75</sup>

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<sup>65</sup> [1994] 3 IR 593 at 607.

<sup>66</sup> Fifth Report of the Morris Tribunal *Report of the Tribunal of Inquiry into Certain Gardaí in the Donegal Division* (Government Publications 2006) paragraphs 623-624, quoted in *Damache v Director of Public Prosecutions* [2012] IESC 11 at paragraph 53.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> [2011] IESC 11 at paragraph 56.

<sup>70</sup> [2011] IESC 11 at paragraph 54.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid* at paragraph 55.

<sup>73</sup> *Ibid* at paragraph 57.

<sup>74</sup> *Ibid* at paragraph 58.

<sup>75</sup> *Ibid* at paragraph 59. The courts have subsequently considered the effect of the decision of the Supreme Court in *Damache* on other cases where evidence was gathered pursuant to a search warrant issued under

#### (4) **Legislative response to the *Damache* case**

- 1.41 The legislative response to the Supreme Court decision in *Damache* was the enactment of the *Criminal Justice (Search Warrants) Act 2012* (“the 2012 Act”), which inserted a new section 29 into the 1939 Act. The amended section 29 contains the following key elements:
- i. It identifies the offences to which section 29 applies. These are: an offence under the 1939 Act or the *Criminal Law Act 1976*; a scheduled offence for the purposes of Part V of the 1939 Act (that is, offences that may be tried before the Special Criminal Court), treason and the related inchoate offences of attempting, conspiring or inciting.<sup>76</sup>
  - ii. It provides that a judge of the District Court may issue a warrant for the search of a place. In order to do so the judge must be satisfied by information on oath of a member of An Garda Síochána of the rank of sergeant (or above) that there are reasonable grounds for suspecting that evidence of or relating to the commission of an offence to which the section applies is to be found in that place.<sup>77</sup>
  - iii. It empowers a member of An Garda Síochána of the rank of superintendent (or above) to issue a search warrant under the section to a member of An Garda Síochána of the rank of sergeant (or above).<sup>78</sup>
  - iv. It provides that a superintendent may only issue a warrant under this section if: (i) he or she is satisfied that the warrant is necessary for the proper investigation of an offence to which the section applies and (ii) he or she is satisfied that circumstances of urgency giving rise to the need for the immediate issue of the warrant would render it impracticable to apply to a judge of the District Court.<sup>79</sup>
  - v. It adds a further qualification to the power of a superintendent to issue a warrant under this section: the issuing officer must be independent of the investigation concerned.<sup>80</sup> “Independent of” is defined as not being in charge or involved in the investigation concerned.
  - vi. It provides for the information to be set out in the warrant and the actions that may be carried out pursuant to the warrant. The actions are those of entry, search (of both the place and any person found there), and seizure of anything found at the place or in the possession of a person present at the place. The seizure power relates to items that the member of An Garda Síochána (or, where relevant, member of the Defence Forces) reasonably believes to be evidence of, or, related to the commission of an offence to which the section applies. The right to enter is subject to the obligation to produce the warrant or a copy of it, if requested. The entry may be achieved by use of reasonable force, if necessary. A warrant issued by a judge of the District Court permits multiple entries within 1 week of the date of issue of the warrant.<sup>81</sup>

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section 29(1) of the *Offences Against the State Act 1939*. See *The People (DPP) v Cunningham* [2012] IECCA 64; *The People (DPP) v Kavanagh* [2012] IECCA 65; *The People (DPP) v O'Brien* [2012] IECCA 68; *The People (DPP) v Bolger* [2013] IECCA 6.

<sup>76</sup> Section 29(1) of the 1939 Act, as inserted by the 2012 Act.

<sup>77</sup> Section 29(2).

<sup>78</sup> Section 29(3).

<sup>79</sup> Section 29(4).

<sup>80</sup> Section 29(5).

<sup>81</sup> Section 29(6).

- vii. It specifies a maximum duration of 48 hours for warrants issued by a Garda superintendent from the time of the issue of such a warrant.<sup>82</sup>
  - viii. It provides that a member of An Garda Síochána (or, where relevant, the Defence Forces) acting under the authority of a warrant under the section may require any person present at the place where the search is being carried out to give to the member his or her name and address. It provides an arrest power in the event that any person: obstructs or attempts to obstruct a member in the carrying out of his or her duties, fails to give a member his or her name and address, or gives a false or misleading name or address.<sup>83</sup>
  - ix. It provides that a person commits an offence where he or she obstructs or attempts to obstruct a member acting under the authority of a warrant, fails to comply with a requirement to provide their name and address when requested, or who gives a false or misleading name or address. The maximum penalties on conviction are a class A fine (currently, in accordance with the *Fines Act 2010*, a fine not exceeding €5,000) or imprisonment for a term not exceeding 12 months, or both.<sup>84</sup>
  - x. It provides that the power to issue a warrant under this section is without prejudice to any other power conferred by statute to issue a warrant for the search of any place or person.<sup>85</sup>
  - xi. It requires that a member of An Garda Síochána of the rank of superintendent (or above) who issues a warrant under this section must record the grounds on which he or she issued the warrant, either at the time, or, as soon as reasonably practicable after issuing the warrant.<sup>86</sup>
- 1.42 The 2012 Act also amended section 26 of the *Misuse of Drugs Act 1977*, which authorises a Garda Superintendent to issue a search warrant. Section 26(1) of the 1977 Act, as amended by section 8 of the *Criminal Justice (Drug Trafficking) Act 1996* already provided that a Garda not below the rank of Superintendent could only issue a search warrant under that provision if he or she was satisfied that the urgency of the situation meant that it was impracticable to apply to a District Court judge or Peace Commissioner, and that such a warrant would cease to have effect 24 hours after it was issued.
- 1.43 Section 3 of the 2012 Act inserted two additional safeguards into section 8 of the 1996 Act:
- i. Section 8(2A) of the 1996 Act provides that only a Garda superintendent who is independent of the investigation concerned may issue a warrant under section 26 of the 1977 Act. “Independent of” is defined as not being in charge of, or involved in the investigation concerned.
  - ii. Section 8(2B) of the 1996 Act, inserted by the 2012 Act, requires a Garda superintendent who issues a warrant under section 26 of the 1977 Act to record the grounds on which he or she issued the warrant, either at the time, or as soon as reasonably practicable after issuing the warrant.
- 1.44 The 2012 Act addresses the principal matter dealt with by the Supreme Court in the *Damache* case by ensuring that decisions authorising the search of any place, including a dwelling, are taken by persons who are independent of the investigation. Section 29(1) of the 1939 Act, as amended by the 2012 Act, now provides that a warrant should be issued

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<sup>82</sup> Section 29(7).

<sup>83</sup> Section 29(8).

<sup>84</sup> Section 29(9).

<sup>85</sup> Section 29(10).

<sup>86</sup> Section 29(11).

by a judge of the District Court. However, it also provides that, in urgent circumstances, a member of An Garda Síochána not connected with the investigation may issue such a warrant. The amended powers in the 1939 Act are without prejudice to other statutory search warrant powers. These include section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended by section 6 of the *Criminal Justice Act 2006*, which allows a member of An Garda Síochána to apply to a judge of the District Court for a search warrant in relation to any arrestable offence, that is, an offence attracting a sentence of 5 years or more on conviction.

**(5) Conclusions on constitutional and ECHR standards applicable to search warrants**

1.45 Having regard to both the Supreme Court decision in *Damache* and the review above of the domestic and international case law concerning the right to privacy and the protection of the dwelling, the Commission considers that the following principles should inform its proposals for reform in the succeeding Chapters of this Report:

1. The law on search warrants must respect the right to privacy and property in Article 40.3 of the Constitution and the protection of the dwelling under Article 40.5, and the right to respect for private life under Article 8 of the European Convention on Human Rights.
2. The law on search warrants may encroach on these rights, but only to the extent necessary in a democratic state and only in a proportionate manner.
3. Search warrants authorising the search of a dwelling where a person resides should be subject to additional scrutiny to ensure that they comply with constitutional requirements.
4. The person authorising the search should be in a position to assess the conflicting interests of the State and the person to whom the search warrant is addressed in an impartial manner. Thus, the person authorising the search should be independent of the investigation requiring the search warrant and must act judicially.
5. Although the issuing of a search warrant does not involve the administration of justice and does not, therefore, have to be issued by a court, it is in general preferable that a search warrant be issued by a court.
6. There should be reasonable grounds established that an offence has been committed and that there may be evidence to be found at the place of the search.
7. There should be a record of the grounds on which the warrant was issued.



**A      A Generally Applicable Search Warrants Act**

**(1)      *Relationship between law on search warrants and general law on entry, search and seizure, including powers of entry and search without warrant***

2.01 This Report focuses on the law concerning search warrants (and, in Chapter 7, on bench and committal warrants). It does not deal directly with the powers of An Garda Síochána – and increasingly those of virtually all regulatory bodies – of entry, search and seizure that apply without the need to obtain a search warrant; or with their (more limited) powers of stop and search without the need for a search warrant. While these “warrantless powers” fall outside the scope of this Report, it is nonetheless important to discuss them because the law on search warrants forms part of the general law on entry, search and seizure. It would therefore not be possible to complete a review the law on search warrants without acknowledging these warrantless powers. The Commission therefore discusses immediately below these related powers before proceeding to discuss the law on search warrants.

**(a)      *Limited common law powers to enter private property, including without a warrant***

2.02 At common law, members of An Garda Síochána do not have any general authority to enter onto or remain on private property for the purpose of investigating a criminal offence.<sup>1</sup> A Garda may, however, enter private property without a warrant with the consent of the owner or occupier. This consent may be implied but the implication of consent is rebuttable. However, given the express constitutional protection of the dwelling in Article 40.5 of the Constitution, discussed in Chapter 1, consent to enter a dwelling will not readily be implied.<sup>2</sup>

2.03 A Garda may also enter private property without a search warrant in other limited circumstances, such as to terminate an actual affray, to prevent an occupant from causing serious injury to another person on the premises or to prevent the destruction of evidence.<sup>3</sup>

**(b)      *Statutory powers to enter and search without warrant***

2.04 A large number of statutory powers exist which authorise An Garda Síochána – and officers of various regulatory authorities, such as the Competition and Consumer Protection Commission, the Environmental Protection Agency, the Food Safety Authority of Ireland and the Health and Safety Authority – to enter, search and inspect premises without a warrant. The Commission does not propose to list all of these powers here, but their wide scope may be seen from the examples set out in Appendix B to this Report.

2.05 Warrantless powers of entry are provided for in legislation governing a wide range of areas such as animal health and welfare,<sup>4</sup> broadcasting,<sup>5</sup> child protection<sup>6</sup> company law

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<sup>1</sup> Walsh *Criminal Procedure* (Thomson Round Hall 2002) at paragraph 8-03.

<sup>2</sup> *Ibid* at paragraph 8-03.

<sup>3</sup> *Ibid* at paragraph 8-04.

<sup>4</sup> Section 38 of the *Animal Health and Welfare Act 2013*; section 16(1)(d) of the *Control of Dogs Act 1986*, as substituted by section 7 of the *Control of Dogs (Amendment) Act 1992*; section 34 of the *Control of Horses Act 1996*; section 19 of the *Dog Breeding Establishments Act 2010*; section 18 of the *Welfare of Greyhounds Act*

enforcement,<sup>7</sup> competition law,<sup>8</sup> customs and excise,<sup>9</sup> and safety and health at work.<sup>10</sup> For example, section 50(4)(b) of the *Broadcasting Act 2009* allows a Broadcasting Authority of Ireland investigator to enter the premises of a broadcasting contractor to conduct inspections and examine broadcasting equipment. Section 23T of the *Child Care Act 1991*, as inserted by section 16 of the *Children Act 2001*, empowers an authorised officer of the Child and Family Agency to enter any premises (including a private dwelling) in which a child who is the subject of a private foster care arrangement resides. Sections 36 and 37 of the *Competition and Consumer Protection Act 2014* authorise officers of the Competition and Consumer Protection Commission to enter premises for the purposes of inspecting compliance with the *Competition Act 2002* and the *Consumer Protection Act 2007*. Section 12 of the *Criminal Justice (Psychoactive Substances) Act 2010* authorises a member of An Garda Síochána to enter without warrant any place other than a dwelling where he or she believes activity in relation to the sale, importation or advertisement of psychoactive substances and carry out examinations, take samples and seize items of evidence. Under section 64(1) of the *Safety, Health and Welfare at Work Act 2005* an inspector of the Health and Safety Authority has the power to enter any place which he or she has reasonable grounds for believing is a place of work and conduct searches, examinations and inspections to assess compliance with the relevant statutory provisions concerning safety and health at work.

- 2.06 The majority of these Acts provide that the powers to enter and search without a warrant may not be exercised in respect of a private dwelling (the provisions of the *Child Care Act 1991*, above, being a notable exception). Some Acts also provide that, even in the case of commercial premises, a regulatory authority may apply to the District Court for a search warrant. It is common for such legislative provisions to provide that the officer may be accompanied by a member of An Garda Síochána; this may be used if it is anticipated that entry and inspection might be resisted. In both respects, these statutory powers are linked to, and overlap with, the law on search warrants.

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2011. Comparable powers are contained in Regulations that implement EU Directives: see, for example, Regulation 31 of the *European Communities (Welfare of Farmed Animals) Regulations 2010* (SI No.311 of 2010).

<sup>5</sup> Section 50(4) of the *Broadcasting Act 2009*.

<sup>6</sup> Section 23T of the *Child Care Act 1991*, as inserted by section 16 of the *Children Act 2001*; section 58J of the *Child Care Act 1991*, as inserted by section 92 of the *Child and Family Agency Act 2013*; section 254 of the *Children Act 2001*, as amended by section 75 and schedule 7, part 11, item 19 of the *Health Act 2004* (Garda power of arrest without warrant; and section 354(5) allows search also); sections 10(2)(e) and 13(3)(a)(i) of the *Education Act 1998*.

<sup>7</sup> Section 787 and 788 of the *Companies Act 2014*, which replaced section 20 of the *Companies Act 1990*, as amended by section 30 of the *Company Law Enforcement Act 2001* and section 5 of the *Companies (Amendment) Act 2009*.

<sup>8</sup> Sections 36 and 37 of the *Competition and Consumer Protection Act 2014*.

<sup>9</sup> Sections 25 to 35 of the *Customs Act 2015*. These provisions (not commenced at the time of writing) will replace powers set out in a wide range of pre-2015 provisions. Customs and excise: section 205 of the *Customs Consolidation Act 1876*, as amended by section 19 of the *Finance Act 1936*; section 5 of the *Customs and Excise (Miscellaneous Provisions) Act 1988* (restricted to customs by schedule 3 of the *Finance Act 2001*); Excise: section 136 of the *Finance Act 2001*, as amended by section 87 of the *Finance Act 2002*, section 90 of the *Finance Act 2003*, section 9 of the *Finance Act 2005* and section 73 of the *Finance Act 2012*.

<sup>10</sup> Section 64(1) of the *Safety, Health and Welfare at Work Act 2005*.



**(c) Power of arrest without warrant in the Criminal Law Act 1997: arrestable offences**

- 2.07 The *Criminal Law Act 1997* contains a power of arrest without warrant in respect of an arrestable offence, that is, an offence that carries, on conviction, a sentence of imprisonment of 5 years or more.<sup>11</sup>
- 2.08 The power of arrest without warrant in respect of “arrestable offences” is a key feature of the 1997 Act. Section 4(1) of the 1997 Act provides for a citizen’s arrest, namely that any person may arrest without warrant anyone who is, or whom he or she, with reasonable cause, suspects to be in the act of committing an arrestable offence. As well as applying only where an arrestable offence is being committed, this power is further limited by section 4(4), which provides that the power may only be exercised where the person effecting the arrest suspects, with reasonable cause, that the person to be arrested by him or her would otherwise attempt to avoid, or is avoiding, arrest by a member of An Garda Síochána.
- 2.09 A more wide-ranging power of arrest without warrant is conferred on members of An Garda Síochána by section 4(3) of the 1997 Act, which provides that, where, with reasonable cause, a Garda suspects that an arrestable offence has been or is being committed, he or she may arrest without warrant anyone whom he or she, with reasonable cause, suspects to be guilty of the offence.

**(d) Powers of entry and search for purpose of arrest in the Criminal Law Act 1997: with and without warrant**

- 2.10 Sections 5 and 6 of the *Criminal Law Act 1997* concern the powers of An Garda Síochána operating under a warrant. Section 5 of the 1997 Act provides that a warrant for the arrest of a person or an order of committal (which are discussed in Chapter 7 of this Report) may be executed by a member of An Garda Síochána notwithstanding that it is not in the possession of the Garda at the time. In addition it provides that the warrant or order must be shown to the person in question as soon as practicable. Section 6(1) of the 1997 Act provides that, for the purpose of arresting a person on foot of an arrest warrant or a committal order, a member of An Garda Síochána may enter (by use of reasonable force if necessary) and search any premises (including a dwelling) where the person is or where the member, with reasonable cause, suspects that person to be. Such a warrant or order may be executed in accordance with section 5 of the 1997 Act.
- 2.11 Section 6(2) of the 1997 Act provides that, for the purpose of arresting a person without a warrant for an arrestable offence, a member of An Garda Síochána may enter (if need be, by use of reasonable force) and search any premises (including a dwelling) where that person is or where the member, with reasonable cause, suspects that person to be. It also provides that, where the premises is a dwelling the member shall not, unless acting with the consent of an occupier of the dwelling or other person who appears to the member to be in charge of the dwelling, enter that dwelling unless: (a) he or she or another such member has observed the person within or entering the dwelling, or (b) he or she, with reasonable cause, suspects that before a warrant of arrest could be obtained the person will either abscond for the purpose of avoiding justice or will obstruct the course of justice, or (c) he or she, with reasonable cause, suspects that before a warrant of arrest could be obtained the person would commit an arrestable offence, or (d) the person ordinarily resides at that dwelling.
- 2.12 Section 6(3) of the 1997 Act provides that, without prejudice to any express amendment or repeal made by the 1997 Act, section 6 “shall not affect the operation of any enactment or rule of law relating to powers of search or powers of arrest.”

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<sup>11</sup> Section 2 of the *Criminal Law Act 1997*.

**(e) Stop and search powers**

- 2.13 An Garda Síochána do not have any general common law power to stop and search persons who are not under arrest.<sup>12</sup> As Walsh notes, by contrast the US Supreme Court held in *Terry v Ohio*<sup>13</sup> that a police officer could lawfully stop and search a person where he or she had reasonable grounds to suspect, as in that case, that the person might be armed and about to commit a robbery.<sup>14</sup>
- 2.14 Nonetheless, considerable stop and search powers have been conferred by legislation on An Garda Síochána. These include a wide power to stop and search a vehicle under section 8 of the *Criminal Law Act 1976*, as amended, where a member of An Garda Síochána with reasonable cause suspects that a specified list of offences is being, or is about to be, committed.<sup>15</sup> Section 30 of the *Offences against the State Act 1939* empowers a member of An Garda Síochána to “stop and interrogate” a person that he or she suspects has committed, or is about to commit, an offence under the 1939 Act or any scheduled offence under the 1939 Act.
- 2.15 The *Road Traffic Acts 1961 to 2014* also confer considerable Garda powers of stop and search in connection with the enforcement of these Acts. In particular, these include provision for mandatory roadside breath testing of drivers related to drink and drug driving offences.<sup>16</sup>
- 2.16 In addition, and mirroring the statutory powers to search commercial premises without a warrant discussed above, a large number of statutory powers exist which authorise members of An Garda Síochána and officers of various regulatory authorities to stop and search persons.<sup>17</sup> For example, legislative powers of stop and search exist in connection

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<sup>12</sup> Walsh *Criminal Procedure* (Thomson Round Hall 2002) at paragraph 7-13.

<sup>13</sup> 392 US 1 (1968).

<sup>14</sup> Walsh *Criminal Procedure* (Thomson Round Hall 2002) at paragraph 8-03.

<sup>15</sup> Section 8 of the *Criminal Law Act 1976*, as amended most recently by section 6 of the *Illegal Immigrants (Trafficking) Act 2000*, applies to: (a) an offence under the *Offences against the State Act 1939* or any scheduled offence under Part 5 of the 1939 Act; (b) an offence under section 2 or 3 of the *Criminal Law (Jurisdiction) Act 1976*; (c) murder, manslaughter or an offence under section 18 of the *Offences against the Person Act 1861* (since repealed by section 31 and the Schedule to the *Non-Fatal Offences Against the Person Act 1997*); (d) an offence under section 23, 23A or 23B of the *Larceny Act 1916* (since replaced by the *Criminal Justice (Theft and Fraud Offences) Act 2001*); (e) an offence of malicious damage to property involving the use of fire or of any explosive substance (within the meaning of section 7(1)(e) of the *Criminal Law Act 1976*); (f) an offence under the *Firearms Acts 1925 to 2006*; (g) escape from lawful custody; (h) an offence under section 11 of the *Air Navigation and Transport Act 1973*, or under section 10 of the *Criminal Law (Jurisdiction) Act 1976*; (i) any offence under the *Criminal Law Act 1976* itself; (j) an offence under section 12(1) of the *Firearms and Offensive Weapons Act 1990*; (k) an offence under section 112(2) of the *Road Traffic Act 1961* (substituted by section 3(7) of the *Road Traffic (Amendment) Act 1984* and subsequently amended by section 18 and Table, Part 1 reference numbers 21 and 22 of the *Road Traffic Act 2006*); and (l) an offence under section 2 of the *Illegal Immigrants (Trafficking) Act 2000*.

<sup>16</sup> See generally Pierson *Road Traffic Law: The 1961-2011 Road Traffic Acts: Annotated Legislation* (Bloomsbury Professional 2012).

<sup>17</sup> See Walsh *Criminal Procedure* (Thomson Round Hall 2002), at paragraph 7-21, for the position in 2002.

with animal health and welfare,<sup>18</sup> customs and excise (including illicit alcohol distillation),<sup>19</sup> drugs,<sup>20</sup> explosives<sup>21</sup> and wildlife protection.<sup>22</sup>

**(2) Over 300 existing search warrant provisions**

2.17 A large number of statutory provisions on search warrants currently exist in Ireland. Appendix A to this Report contains a list of 300 separate legislative provisions (143 Acts and 159 Statutory Instruments) that, as of 2015, confer powers to issue search warrants. As the Commission noted in the Consultation Paper, while the majority of these statutory provisions share common features, notably that the application for a search warrant is usually made on oath to a judge of the District Court, they also contain differences relevant to their own statutory context.<sup>23</sup> Walsh has commented:

“[T]he current statutory powers to issue search warrants constitute an unwieldy collection of disparate provisions which have been developed in a piecemeal fashion over the past two centuries. Each authorises the issue of a search warrant only when its own peculiar requirements have been satisfied.”<sup>24</sup>

2.18 The Commission agrees with this criticism and accepts that, since many of the existing statutory provisions on search warrants overlap with each other and contain sometimes small but significant differences, there is a need for overarching reform.

2.19 The common law power to issue search warrants was limited to searches for stolen goods.<sup>25</sup> This power was placed on a statutory footing in section 103 of the *Larceny Act 1861*.<sup>26</sup> Since then, the list of statutory provisions that authorise the issuing and execution of search warrants has grown enormously and has a wide scope, as the list of over 300 provisions in Appendix A of this Report clearly indicates.

2.20 Areas in which current legislation provides powers of entry and search on foot of a search warrant include: all arrestable offences,<sup>27</sup> animal health and welfare,<sup>28</sup> broadcasting,<sup>29</sup> child

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<sup>18</sup> Section 40 of the *Animal Health and Welfare Act 2013*.

<sup>19</sup> Sections 25 to 35 of the *Customs Act 2015*. These provisions (not commenced at the time of writing) will replace powers set out in a wide range of pre-2015 provisions.

<sup>20</sup> Section 23 of the *Misuse of Drugs Act 1977* as amended by section 12 of the *Misuse of Drugs Act 1984*.

<sup>21</sup> Section 73 of the *Explosives Act 1875*, as amended (licensed civil use of explosives), and section 8(1) of the *Explosive Substances Act 1883*, as amended (criminal offences concerning explosives).

<sup>22</sup> Section 72 of the *Wildlife Act 1976* as amended.

<sup>23</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 2.02.

<sup>24</sup> Walsh *Criminal Procedure* (Thomson Round Hall 2002) at paragraph 8-09.

<sup>25</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 1.04.

<sup>26</sup> This was replaced, in turn, by section 42 of the *Larceny Act 1916* and section 48 of the *Criminal Justice (Theft and Fraud) Offences Act 2001*, subsequently amended by section 192 of the *Criminal Justice Act 2006*. See Ryan and Magee *The Irish Criminal Process* (Mercier 1983) at 147-148; McCutcheon *The Larceny Act 1916* (Round Hall Press 1988) at 129-30; and Walsh *Criminal Procedure* (Thomson Round Hall 2002) at paragraph 8-10.

<sup>27</sup> Section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997* as enacted was confined to a specified list of offences against the person, notably murder and sexual offences. Section 10 of the 1997 Act, as inserted by section 6 of the *Criminal Justice Act 2006*, now applies to all arrestable offences, that is, offences for which on conviction a penalty of 5 years imprisonment or more applies. As a result, section 10 of the 1997 Act now overlaps with a number of offences dealt with in the other Acts discussed in the footnotes immediately following below and in the more extensive list in Appendix A.

protection,<sup>30</sup> company law enforcement,<sup>31</sup> competition law,<sup>32</sup> customs and excise,<sup>33</sup> drugs (including drug trafficking),<sup>34</sup> immigration<sup>35</sup> and safety and health at work.<sup>36</sup>

2.21 These statutory powers invariably form a small element of the Acts or Statutory Instruments in which they appear. In the Consultation Paper, the Commission noted that a number of other jurisdictions had enacted generally applicable legislation on search warrants. Such a general Search Warrants Act sets out, in a single piece of legislation (which sometimes comprises part of a legislative code on criminal procedure),<sup>37</sup> common provisions relating to each element of the search warrant process (including application, issuing and execution) and also relevant procedural safeguards.

### (3) **Search Warrant Acts in other jurisdictions**

2.22 In the Consultation Paper, the Commission discussed the generally applicable legislative provisions on search warrants operating in Australia (the Australian Commonwealth,<sup>38</sup> New South Wales,<sup>39</sup> Tasmania<sup>40</sup> and Western Australia<sup>41</sup>), Canada,<sup>42</sup> England and Wales<sup>43</sup>

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<sup>28</sup> Section 38 of the *Animal Health and Welfare Act 2013*; section 16(1) of the *Control of Dogs Act 1986*, as substituted by section 7 of the *Control of Dogs (Amendment) Act 1992*; section 34 of the *Control of Horses Act 1996*; section 19 of the *Dog Breeding Establishments Act 2010*; section 18 of the *Welfare of Greyhounds Act 2011*. Comparable powers are contained in Regulations that implement EU Directives: see, for example, Regulation 31 of the *European Communities (Welfare of Farmed Animals) Regulations 2010* (SI No.311 of 2010).

<sup>29</sup> Section 50(4) of the *Broadcasting Act 2009*.

<sup>30</sup> Section 23T of the *Child Care Act 1991*, as inserted by section 16 of the *Children Act 2001*.

<sup>31</sup> Section 787 and 788 of the *Companies Act 2014*, which replaced section 20 of the *Companies Act 1990*, as amended by section 30 of the *Company Law Enforcement Act 2001* and section 5 of the *Companies (Amendment) Act 2009*.

<sup>32</sup> Sections 36 and 37 of the *Competition and Consumer Protection Act 2014*.

<sup>33</sup> Sections 25 to 35 of the *Customs Act 2015*. These provisions (not commenced at the time of writing) will replace powers set out in a wide range of pre-2015 provisions. Customs and excise: section 205 of the *Customs Consolidation Act 1876*, as amended by section 19 of the *Finance Act 1936*; section 5 of the *Customs and Excise (Miscellaneous Provisions) Act 1988* (restricted to customs by schedule 3 of the *Finance Act 2001*); Excise: section 136 of the *Finance Act 2001*, as amended by section 87 of the *Finance Act 2002*, section 90 of the *Finance Act 2003*, section 9 of the *Finance Act 2005* and section 73 of the *Finance Act 2012*.

<sup>34</sup> Section 26 of the *Misuse of Dugs Act 1977*, as amended by section 13 of the *Misuse of Drugs Act 1984* and section 8 the *Criminal Justice (Drug Trafficking) Act 1996*; section 55 of the *Criminal Justice Act 1994*, as amended by section 35 of the *Criminal Justice (Terrorist Offences) Act 2005* and section 15 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*; section 8 of the *Criminal Justice (Drug Trafficking) Act 1996*, as amended by section 3 of the *Criminal Justice (Search Warrants) Act 2012*. These provisions supplement the powers to search persons and vehicles (not premises) in section 23 of the 1977 Act (as amended), which do not require a warrant from the District Court.

<sup>35</sup> Section 7 of the *Aliens Act 1935*, as substituted by section 4 of the *Immigration Act 2003*; section 1 of the *Immigration Act 2004*.

<sup>36</sup> Section 64(1) of the *Safety, Health and Welfare at Work Act 2005*.

<sup>37</sup> In the common law jurisdictions that have enacted statutory codes of criminal law and procedure, such as Australia and New Zealand, the relevant Search Warrant Acts form part of those general legislative codes.

<sup>38</sup> *Crimes Act 1914*, as amended.

<sup>39</sup> *Law Enforcement (Powers and Responsibilities) Act 2002*.

<sup>40</sup> *Search Warrants Act 1997*.

<sup>41</sup> *Criminal Investigation Act 2006*.

and New Zealand.<sup>44</sup> The Commission identified the following core provisions in almost all of these Acts:<sup>45</sup>

- the application procedure;
- the process for issuing search warrants;
- the authority conferred by search warrants;
- the validity period of an issued warrant;
- execution of warrants;
- the use of force during execution;
- the use of equipment during a search;
- the attendance of assistants at a search warrant execution;
- obstruction of searches;
- seizing and retaining material found during the course of a search;
- rights of occupiers;
- giving copies of search warrants or inventories of items seized to occupiers; and
- procedures regarding privileged materials.

2.23 The legislation in those jurisdictions also prescribe the threshold of offence to which they apply, with many providing that a warrant may be applied for, issued and executed either: (a) where it is believed that evidence may be found relating to a specific category of criminal offence, such as an arrestable offence or an indictable offence (or, in some instances, any offence); or (b) that an item intended for use in the commission of an offence may be found. It is clear that the scope of these Acts is usually broad, and therefore they can be relied upon generally in cases where a search warrant is required. In some jurisdictions, a generally applicable Search Warrants Act operates alongside existing specific statutory powers concerning search warrants, such as in the field of child protection, corporate enforcement and in other contexts where state regulatory bodies are also given extensive related inspection powers, including warrantless powers of entry, search and seizure.

2.24 The specific forms of search warrant documents are sometimes set out in these Acts but are more often set out in separate Regulations. Part 6 of the England and Wales *Criminal Procedure Rules 2013* contain search warrant application forms with guidance notes on completing the forms in respect of the search warrant powers in the *Police and Criminal Evidence Act 1984*, as amended. A Schedule to Canada's *Criminal Code 1985* contains an application form, a standard search warrant form and report forms relating to property seized. In New South Wales the *Law Enforcement (Powers and Responsibilities) Regulation 2005* contains the forms required in respect of the *Law Enforcement (Powers and Responsibilities) Act 2002*. These include a search warrant application form, an issuing officer's record of application form (to record his or her receipt of the application), a standard search warrant form and an occupier's notice form. In Western Australia the *Criminal Investigation Act 2006* is supplemented by the *Crimes (Search Warrant) Regulations 2004*, which contain the search warrant form to be used when a warrant is

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<sup>42</sup> *Canadian Criminal Code 1985*.

<sup>43</sup> *Police and Criminal Evidence Act 1984*.

<sup>44</sup> *Search and Surveillance Act 2012* (discussed in the Consultation Paper as the *Search and Surveillance Bill 2009*).

<sup>45</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 2.06–2.17.

issued under the 2006 Act. In Victoria the *Crimes (Search Warrant) Regulations 2004* provide the search warrant form to be used where a warrant is issued under the *Crimes Act 1958*, as amended.

**(4) Conclusion on the enactment of a generally applicable Search Warrants Act**

2.25 In the Consultation Paper, the Commission identified a number of significant advantages of a generally applicable Search Warrants Act, and the disadvantages of the current position in this jurisdiction which has led to the creation of over 300 statutory search warrant provisions. The Commission therefore provisionally recommended the enactment of a single generally applicable Search Warrants Act.<sup>46</sup> The submissions received by the Commission since the publication of the Consultation Paper supported this analysis. For the purposes of this Report, it is worth reiterating these arguments.

2.26 Firstly, the enactment of a generally applicable Search Warrants Act would mean that those concerned with applying for, issuing and executing search warrants would have a single set of consistent and standard criteria for each stage of the process, by contrast with the varying standards that are a feature of the 300 existing legislative provisions. This result would also be consistent with one of the general purposes of law reform, to consolidate and simplify the law. Secondly, it would have the consequential advantage that those involved in the process would no longer be required to determine, as is the position at present, which specific statutory power to apply for a specific search, or to consider any specific case law that may have arisen from that provision. Thirdly, it would no longer be necessary to insert into every relevant Act or Statutory Instrument a new search warrant power: a reference to the general Search Warrants Act would be sufficient (subject only to the need for specific additional powers in certain regulatory contexts). This would therefore avoid inefficient, time consuming, and wasteful use of resources in preparing legislation, as well as reducing its length. For these reasons, the Commission confirms the view in favour of the enactment of a generally applicable Search Warrants Act.

<b>2.27 The Commission recommends the enactment of a generally applicable Search Warrants Act.</b>
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**B Scope of offences to which the Act should apply**

2.28 The Commission is of the view that the proposed generally applicable Search Warrants Act should define the scope of offences to which it applies. Other jurisdictions with generally applicable Search Warrant Acts specify the scope of the power to issue search warrants.<sup>47</sup>

2.29 The execution of a search warrant involves an interference with certain rights and it is important that any such interference be appropriate and proportionate. Therefore, the applicable constitutional and ECHR rights standards determine what the statutory threshold for issuing a search warrant should be. The constitutional rights of the owner or occupier of the premises which are the subject of a search must be weighed against the interest of the State to prevent, detect and prosecute offences and ensure adherence to the law.

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<sup>46</sup> Consultation Paper on Search Warrants and Bench Warrants (LRC CP 58-2009) at paragraph 2.23.

<sup>47</sup> See section 8 of the *Police and Criminal Evidence Act 1984*, as amended by the *Serious Organised Crime and Police Act 2005* (England and Wales), section 3E of the *Crimes Act 1914* (Commonwealth of Australia), section 5 of the *Search Warrants Act 1997* (Tasmania), section 47 and section 46A of the *Law Enforcement (Powers and Responsibilities) Act 2002* (New South Wales), section 6 of the *Search and Surveillance Act 2012* (New Zealand) and section 487(1) of the *Criminal Code 1985* (Canada).

2.30 In the Issues Paper, the Commission sought views of interested parties as to which of the following three approaches, or what other approach, should be adopted when specifying what the scope of the proposed generally applicable Search Warrants Act should be, having regard to the relevant constitutional and ECHR rights.

**(1) Option 1: Search Warrants Act could apply to arrestable offences**

2.31 The Commission has been advised that one of the most commonly-used provisions concerning a search warrant is section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended.<sup>48</sup> This provides that a judge of the District Court may issue a search warrant where satisfied by information on oath that evidence of, or relating to, the commission of an arrestable offence is to be found at any place. As discussed earlier, an arrestable offence is an offence that carries a sentence of imprisonment of 5 years or more.<sup>49</sup> In the Issues Paper, the Commission suggested that a Search Warrants Act could provide for the issuing of search warrants where the judge is satisfied that evidence of or relating to an arrestable offence is to be found at any place. This would largely replicate the scope of section 10 of the 1997 Act. The Commission noted that there is other legislation which provides for the issuing of search warrants even where the offences carry a maximum sentence of less than 5 years' imprisonment on conviction (that is, are not arrestable offences). For this reason, the Issues Paper suggested that the proposed Search Warrants Act could be applied without prejudice to search warrant powers in respect of non-arrestable offences contained in other legislation, thereby leaving them in force.

**(2) Option 2: Search Warrants Act could apply to all criminal offences**

2.32 A second option suggested in the Issues Paper was the application of the proposed Search Warrants Act to all criminal offences. Such an approach would result in the application of the proposed Act to both summary and indictable offences. A number of other jurisdictions include all criminal offences within the scope of their generally applicable Search Warrant Acts. For example, section 3E of the Australian Commonwealth *Crimes Act 1914*, as amended, provides that a search warrant may be issued for the search of any evidential material which may be at a premises. The Act defines "evidential material" as "a thing relevant to an indictable offence or a thing relevant to a summary offence, including such a thing in electronic form."<sup>50</sup>

**(3) Option 3: Search Warrants Act could apply to indictable offences**

2.33 A third option suggested in the Issues Paper was that the proposed Search Warrants Act could apply in relation to the issuing of warrants to search for material relating to indictable offences, including indictable offences which may be tried summarily ("also known as "hybrid" or "either way" offences). Such an approach would be broader than that in section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997* but narrower than defining the scope to include all criminal offences. An example of such an approach is section 8 of the England and Wales *Police and Criminal Evidence Act 1984*, as amended, which provides for the issuing of search warrants in relation to indictable offences.

**(4) Discussion**

**(a) Threshold of offence**

2.34 The advantage of defining the scope of a Search Warrants Act to include all criminal offences is that it would result in a single piece of primary legislation that could be used in

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<sup>48</sup> Section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended by section 6 of the *Criminal Justice Act 2006*.

<sup>49</sup> Section 2 of the *Criminal Law Act 1997*, as amended by section 8 of the *Criminal Justice Act 2006*.

<sup>50</sup> Section 3C of the *Crimes Act 1914*. See also section 5 of *Search Warrants Act 1997* (Tasmania) and section 487(1) of the *Criminal Code* (Canada).

respect of any criminal offence, whether it is a summary offence or an indictable offence (or a "hybrid offence" that can be tried either summarily or on indictment). This would promote standardisation and uniformity in search warrant law, and be one method of overcoming the current unsatisfactory position of having 143 Acts and 159 Statutory Instruments containing search warrant provisions.

- 2.35 Feedback noted that defining the scope of a Search Warrants Act to cover all criminal offences would be useful to persons and organisations who engage with legislation governing search and seizure, as all of the relevant law would be located in one Act. However, other submissions asserted that the inclusion of all criminal offences in the scope of a Search Warrants Act would be a disproportionate interference with constitutional rights as it could result in the existence of a power to issue search warrants to enter and search private dwellings in respect of offences considered to be minor and therefore summary only, such as assault under section 2 of the *Non Fatal Offences Against the Person Act 1997*. It was also submitted that it is unnecessary to have a search warrant power in respect of every offence. For example, it would never be necessary to obtain a search warrant for the investigation of intoxication in a public place under section 4 of the *Criminal Justice (Public Order) Act 1994*.
- 2.36 A number of submissions agreed that defining the scope of a Search Warrants Act to include arrestable offences would not involve any fundamental change in the existing law, as the *Criminal Justice (Miscellaneous Provision) Act 1997* already allows a search warrant to be issued for arrestable offences. In addition, defining the scope of a Search Warrants Act to include arrestable offences only would not encompass a large number of Acts and Statutory Instruments that contain search warrant provisions for indictable offences that fall short of being arrestable offences. These include many offences that are included in legislation that have established regulatory bodies, such as the *Safety, Health and Welfare at Work Act 2005*, and other legislation of public importance such as the *Commissions of Investigation Act 2004*.
- 2.37 A high proportion of persons who responded to the Issues Paper submitted that a Search Warrants Act should apply to all indictable offences. One advantage of defining the scope of a Search Warrant Act to include indictable offences is that it would cover a wider range of offences than under section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*.
- 2.38 A number of respondents were of the view that defining the scope of the Act to include indictable offences, without prejudice to provisions under which search warrants authorise Gardaí and other officials to enter and search premises in respect of summary offences (that is, offences which cannot lead to a prosecution on indictment), would constitute meaningful reform and proportionate extension of powers of search. Such an approach, it was suggested, would strike an appropriate balance between the interests of society in the detection and investigation of crime and the rights of citizens to privacy and inviolability of the dwelling. Feedback also suggested that a general threshold of indictable offences is one that is easily identifiable.
- 2.39 In light of feedback received on the Issues Paper and the fundamental rights principles which inform the recommendations in this Report, the Commission is of the view that a Search Warrants Act should apply to indictable offences and to those summary offences for which existing legislation provides for search warrant powers (subject to the recommendation in paragraph 2.54, below). Such an approach would, in general, limit the circumstances in which a warrant could be issued to offences which are considered to be sufficiently serious to merit being indictable, but would also include those summary offences that, on a case-by-case basis, have been designated as requiring search warrant powers. There would, therefore, be an appropriate balance between the social interest in the investigation of crime by affording authorities sufficient powers of search and seizure, and the interest in ensuring respect for the relevant constitutional and ECHR rights discussed in Chapter 1, above.



**2.40 The Commission recommends that the proposed Search Warrants Act should apply to all indictable offences and (in accordance with the recommendation in paragraph 2.55) to those summary offences for which existing legislation provides for search warrant powers.**

**(b) Consequences of Search Warrants Act for existing search warrant provisions applicable to indictable offences**

2.41 Appendix A to this Report contains a list of legislative powers that authorise the issuing of a search warrant for offences or circumstances set out in each individual provision. Most of these apply to indictable offences, but as discussed below a number of them apply to summary offences and some of the search powers apply where regulatory authorities are engaged in "routine" inspections that may not lead to any criminal prosecution.

2.42 As noted above, section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997* provides that a search warrant may be issued in respect of any arrestable offence, that is, an offence punishable by imprisonment of at least 5 years on conviction. Similarly, section 48 of the *Criminal Justice (Theft and Fraud Offences) Act 2001* provides for a search warrant power in respect of any arrestable offence to which the 2001 Act, which is clearly no longer necessary in view of the general scope of section 10 of the 1997 Act. By way of example of the legislative provisions that authorise the issuing of search warrants for indictable offences, section 26 of the *Misuse of Drugs Act 1977*, as amended, provides that a search warrant may be issued where there are reasonable grounds for suspecting that the following types of indictable offences are being committed, not all of which are arrestable offences:

- (a) a person is in possession in contravention of the 1977 Act on any premises [or other land] of a controlled drug, a forged prescription or a duly issued prescription which has been wrongfully altered and that such drug is on a particular premises or land; or
- (b) opium poppy, a plant of the genus *Cannabis* or a plant of the genus *Erythroxylon* is being cultivated contrary to section 17 of the 1977 Act on any premises or land; or
- (c) a document directly or indirectly relating to, or connected with, a transaction or dealing which was, or an intended transaction or dealing which would if carried out be, an offence under the 1977 Act, or in the case of a transaction or dealing carried out or intended to be carried out in a place outside the State, an offence against a provision of a corresponding law is in the possession of a person on the premises.

2.43 Those involved in seeking search warrants may choose to apply for search warrants under specific provisions such as section 26 of the *Misuse of Drugs Act 1977* rather than under the widely applicable section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended. If the proposed Search Warrants Act was enacted, separate statutory provisions providing for the issuing of search warrants for indictable offences would no longer be necessary.

2.44 The removal of existing search warrant provisions applicable to indictable offences could be achieved by either a textual amendment or a blanket non-textual amendment. A blanket non-textual amendment would involve, for example, the inclusion of a provision in the generally applicable Search Warrants Act stating that each time a provision authorises the issuing of a search warrant for the investigation of an indictable offence, it shall be construed as providing for the issuing of a search warrant under the generally applicable Act. There is a general drafting policy against the use of non-textual amendments, other than in exceptional circumstances.<sup>51</sup> However, blanket non-textual amendments are frequently used to clarify or change the way a particular provision, term or phrase should

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<sup>51</sup> Office of Parliamentary Counsel, *Drafting Manual* (2001), at 72.

be read across a range of Acts or Statutory Instruments or across the whole Statute book. For example, section 9(2) of the *Local Government and Reform Act 2014* states that a reference, however expressed, in any enactment to a county council or a city council shall, if the context permits, be read as a reference to a county council, a city council or a city and county council.

- 2.45 A textual amendment is a specific insertion, substitution or deletion of words, paragraphs, sections or subsections from a piece of legislation and is the preferable method to use. In respect of search warrant provisions applicable to indictable offences, the list of legislation in Appendix A consists primarily of search warrant provisions that apply to indictable offences, but also contains some that apply to summary offences. For this reason, it would be necessary to engage in a careful exercise to identify for repeal only those provisions that clearly apply to indictable offences. The Commission has included in the draft Bill in Appendix C a Schedule that contains a number of provisions, such as section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, that are clearly suitable for repeal. Further analysis of the list of legislation would be required in the preparation of a final Bill. As discussed below, where a piece of legislation in Appendix A also provides for search warrants in respect of summary offences, this would need to be retained and located in a separate Schedule to the Bill; and the Commission also includes in the draft Bill a sample of such provisions that should be retained.
- 2.46 The need to engage in careful analysis of the existing legislation is illustrated by section 13 of the *Criminal Damage Act 1991*, which provides:
- “If a judge of the District Court is satisfied by information on oath of a member of the Garda Síochána that there is reasonable cause to believe that any person has in his custody or under his control or on his premises any thing and that it has been used, or is intended for use, without lawful excuse —
- (a) to damage property belonging to another,
- (b) to damage any property in a way likely to endanger the life of another or with intent to defraud, or
- (c) to access, or with intent to access, data,
- the judge may issue a search warrant...”
- 2.47 Under the 1991 Act, to establish whether this provision applies to indictable offences or summary offences, it is necessary to refer to sections 2 and 5 of the 1991 Act, which provide for the offences of damaging property and unauthorised accessing of data and the associated penalties. This shows that section 13 of the 1991 Act applies to: (a) the indictable offences of damaging property belonging to another and damaging property in a way likely to endanger the life of another or with intent to defraud; and (b) the summary offence of unauthorised accessing of data. In many provisions, a number of steps are therefore involved in identifying whether the power to issue a search warrant applies to an indictable or summary offence.
- 2.48 The Commission is of the view that the removal of provisions authorising the issuing of search warrants for indictable offences should be achieved by repealing each of these provisions by way of textual amendment and not by a non-textual blanket amendment. The use of non-textual amendment would create difficulties, as it would require the person engaging with a search warrant provision to interpret the provision to see whether it should be construed under the terms of the generally applicable Search Warrants Act. The optimal approach is for the Search Warrants Act to include a Schedule of legislative provisions applicable to indictable offences that would be repealed on the enactment of the Act. Such an approach would better facilitate codification and standardisation of the law relating to search warrants.
- 2.49 If the Commission’s recommendation for the enactment of a generally applicable Search Warrants Act was implemented, any new legislation that provides for search warrants

would be able to provide simply that the Search Warrants Act applies to that new legislation. In order to ensure that the Search Warrants Act remains a comprehensive statutory code on search warrants that contains a complete list of the legislation to which it applies into the future, the new legislation should also provide that it is contained in a Schedule to the Search Warrants Act for this purpose.

- 2.50 The Commission recommends that existing legislative provisions which authorise search warrants to be issued for the investigation of specific indictable offences should be repealed.**
- 2.51 The Commission recommends that the repeal of these legislative provisions should be achieved by way of textual amendment and not a blanket non-textual amendment.**
- 2.52 The Commission recommends that, in the future, where new legislation is enacted or made that provides for search warrants, the legislation should provide that the generally applicable Search Warrants Act should apply to that legislation and that the new legislation should also expressly amend a Schedule to the Search Warrants Act to include a reference to the new legislation.**

**(c) *Consequences of Search Warrants Act for existing search warrant provisions applicable to summary offences***

- 2.53 In the Issues Paper, the Commission noted that if a Search Warrants Act applies to arrestable or indictable offences, it might be necessary to provide that it is without prejudice to provisions under which search warrants authorise Gardaí and other officials to enter and search premises in respect of summary offences, that is, offences which cannot lead to a prosecution on indictment. A number of the provisions listed in Appendix A to this Report fall into this category. For example, section 7 of the *Aliens Act 1935*, as amended by section 4 of the *Immigration Act 2003*, allows a judge of the District Court to issue a warrant if satisfied that evidence of or relating to a summary offence under sections 3, 4, 5 or 8 of the *Immigration Act 1999* is to be found at a specified place.<sup>52</sup> More generally, section 3 of the *European Communities Act 1972* empowers Ministers to make Regulations for the purposes of implementing EU law. Prior to the enactment of the *European Communities Act 2007*, the 1972 Act prohibited the creation of indictable offences by way of section 3 Regulations. A large number of pre-2007 Regulations made under section 3 of the 1972 Act contain search warrant powers and they therefore apply to summary offences only. For example, Regulation 7 of the *European Communities (Trade in Animals and Animal Products) Regulations 1994* empowers a judge to issue a search warrant in relation to evidence of an offence under the Regulations, all of which are summary criminal offences.<sup>53</sup>
- 2.54 It is important to note, however, that provision for a search warrant power is not included in every piece of legislation that has created a summary criminal offence. It is therefore clear that this is done on a selective, case-by-case, basis. Because of this selective approach, the Commission has concluded that it should not therefore make any recommendation concerning the repeal of these existing provisions, even though it could be said that they constitute an exception to the general recommendation made above that the proposed Search Warrants Act should apply to indictable offences. To ensure a consistency of approach to search warrants, however, the Commission recommends that the generally applicable Search Warrants Act should also apply to those existing search warrant provisions that refer to summary only offences, and that these should be listed in

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<sup>52</sup> Section 9 of the *Immigration Act 1999* contains summary penalties in respect of all offences under the Act.

<sup>53</sup> Regulation 14 of the *European Communities (Trade in Animals and Animal Products) Regulations 1994* (SI No. 289 of 1994), as amended by Regulation 15(1)(a) of the *European Communities (Animal By-Products) Regulations 2003* (SI No.248 of 2003).

a Schedule to the proposed Search Warrants Act. The benefit of this approach is that a person involved with a search warrant process would be subject to one Act, whether dealing with indictable offences or with the specific summary offences to which a search warrant power applies.

**2.55 The Commission recommends that the Search Warrants Act should apply to existing search warrant provisions that apply to summary offences, and that these provisions should be listed in a Schedule to the Act.**

**(d) Provisions authorising entry and search or inspection where suspicion or belief that evidence of or relating to an offence is not a requirement for issuing a warrant (regulatory entry and inspection powers)**

2.56 The application of a Search Warrants Act to indictable offences would allow for the repeal of existing provisions authorising search warrants for the investigation of specific indictable offences. However, the repeal of separate statutory provisions applicable to indictable offences would still leave a considerable number of legislative provisions authorising the issuing of a search warrants in a regulatory setting, where the use of a search warrant is not necessarily linked to the investigation of an offence.

2.57 Many of the statutory provisions in Appendix A fall into this category. Typically, they authorise the issuing of a search warrant where a specified officer or inspector believes that either (a) evidence of an offence (whether indictable and/or summary only) is at a location or that a statutory provision has been contravened and/or (b) that other circumstances exist, for example, that a certain activity is being carried out or that certain material is on the premises. For example, section 40 of the *Communications Regulation Act 2002* provides for the issuing of a search warrant where “there are reasonable grounds for suspecting that information required by an authorised officer for the purpose of the Commission [for Communications Regulation] exercising its functions under the Act” is to be found at a location.

2.58 In the same vein, section 64(7) of the *Safety, Health and Welfare at Work Act 2005* provides that a judge of the District Court may issue a search warrant to an inspector of the Health and Safety Authority if the Court is satisfied on the sworn information of an inspector that there are reasonable grounds for believing that: (a) there are any articles or substances being used in a place of work or any records (including documents stored in a non-legible form) or information, relating to a place of work, that the inspector requires to inspect for the purposes of the relevant statutory provisions, held in, at or on any place or any part of any place, or (b) there is, or such an inspection is likely to disclose, evidence of a contravention of the relevant statutory provisions.

2.59 Similarly, section 45(1) of the *Animal Health and Welfare Act 2013* provides that a judge of the District Court may issue a search warrant where he or she is satisfied by information on oath of an authorised officer that there are reasonable grounds for believing that:

- (a) evidence of or relating to the commission or intended commission of an offence under this Act relating to an animal, animal product or animal feed is to be found on land or premises,
- (b) there is or was an animal, animal product, animal feed, machinery, equipment or other thing made, used or adapted for use (including manufacture and transport) in connection with an animal, animal product or animal feed on land or premises,
- (c) a record related to a thing to which *paragraph (a) or (b)* refers is or may be on the land or premises.

2.60 Section 45(2) of the 2013 Act provides that a search warrant issued under the section authorises a named officer, accompanied by such other authorised officers as necessary, to enter the place named in the warrant and exercise any of the functions conferred on the

officer under the 2013 Act. These functions are set out in section 38 of the 2013 Act and are specific to animal health and welfare.

- 2.61 Section 38(5) prohibits an authorised officer from entering a private dwelling without the consent of the occupier unless he or she has obtained a search warrant under section 45. Sections 38 and 45 of the *Animal Welfare Act 2013* are typical examples of the types of search warrant provisions which operate in regulatory settings.
- 2.62 The proposed Search Warrants Act would apply to an application for a search warrant for the investigation of an offence under the 2013 Act and similar Acts, such as the *Communications Regulation Act 2002* or the *Safety, Health and Welfare at Work Act 2005*. Thus, if an authorised officer under the *Animal Health and Welfare Act 2013* had reasonable grounds to suspect that evidence of the commission of an indictable offence under the 2013 Act is to be found at a premises, the application for a search warrant would be brought under the proposed Search Warrants Act. However, it would be necessary to retain paragraphs (b) and (c) of section 45 of the 2013 Act, otherwise no warrant could issue on foot of those grounds which relate to the regulation of activities concerning animal health and welfare rather than the narrower issue of the investigation of an offence under the 2013 Act.
- 2.63 A less common example of a statutory search power is contained in section 29 of the *Commissions of Investigation Act 2004*, which provides that a judge of the District Court may issue a warrant authorising a named person to enter any premises, including a private dwelling, if satisfied that there are any documents or information in any form relating to a matter within a commission of investigation's terms of reference and required by a commission for the purposes of its investigation.
- 2.64 A number of submissions in response to the *Issues Paper* noted the need for a Search Warrants Act to take regulatory search warrant powers into account, and those less common examples such as found in the *Commissions of Investigation Act 2004*. It was suggested that the proposed legislation would need to preserve these powers by either including them in the generally applicable Search Warrants Act or be expressed to be without prejudice to them.
- 2.65 One possible approach would be to provide that the Search Warrants Act is without prejudice to provisions authorising entry and search or inspection where there is no prerequisite of suspicion or belief that evidence relating to an offence is at a location. However, this would leave a considerable number of such legislative provisions in place and would not alleviate the difficulty of having a large number of disparate search warrant provisions.
- 2.66 An alternative option would be to apply the key elements of the recommended Search Warrants Act to existing legislation authorising the issuing of a search warrant in regulatory settings. This would leave the functions which may be exercised by authorised officers pursuant to search warrants intact, but would apply the suite of powers and obligations in the generally applicable Search Warrants Act to them. In this respect, the main elements that the Commission recommends should be included in the Search Warrants Act would apply to search warrants that are connected with regulatory supervision and oversight, such as the use of a standard application form, the time or times at which the search is to be carried out, the use of reasonable force and the obligation to provide the owner or occupier with a copy of the search warrant.
- 2.67 The New Zealand *Search and Surveillance Act 2012* is an example of an approach that applies the key elements of a generally applicable Search and Surveillance Act to a list of enactments that contain powers to issue search warrants in particular settings. Section 6 of the 2012 Act allows for the issuing of a search warrant to a constable who suspects that an offence has been, is being or will be committed or evidential material is at a location. In addition, section 89(2) of the 2012 Act provides that Part 4 of the Act:

“also applies in respect of powers conferred by:

(a) the enactments listed in column 2 of the Schedule, to the extent identified in column 4 of the Schedule:

(b) any other enactment, to the extent that the other enactment expressly applies any provisions of this Part.”

- 2.68 Part 4 of the 2012 Act outlines the elements of the search warrant process, such as the mode of application, requirement that documents be retained and time during which a search warrant can be executed. The Schedule specifies: (a) the Act to which Part 4 applies; (b) the specific section; and (c) a brief description of the power contained in that section. It also specifies which provisions of Part 4 apply in the case of each enactment. Therefore, the elements of the search warrant process apply in whole or in part to the list of powers in enactments outlined in the schedule. Each of the individual Acts specified in the Schedule contains a provision stating that some or all of the provisions of Part 4 of the *Search and Surveillance Act 2012* apply. Section 89(3) of the 2012 Act provides that, where there is inconsistency between the Schedule and any other enactments, the other enactment prevails.
- 2.69 The New Zealand *Search and Surveillance Act 2012* is broader than the Search Warrants Act proposed in this Report, as it deals with all aspects of the law of search, seizure and surveillance. However, the application of the New Zealand Act to a scheduled list of regulatory powers provides a useful example of an approach which could be used to incorporate such powers into a single Act in this jurisdiction. This would promote uniformity and standardisation by ensuring that persons engage with the generally applicable Search Warrants Act as far as possible. It would mean that each time the Oireachtas enacts a piece of legislation that confers functions on certain officers who may require a search warrant to exercise those functions, it could refer to the generally applicable Search Warrants Act and provide that specified elements of it applies to the new legislation, which would also be added to the relevant Schedule in the Search Warrants Act. Apart from this, it would not be necessary to enact a new specific search warrant provision.
- 2.70 The Commission therefore envisages that the enactment of the proposed Search Warrants Act would, in general, remove the need for the Oireachtas to supplement its provisions or to enact separate search warrant provisions. It may, however, be necessary to provide for some exceptions to the generality of the Search Warrants Act. For example, section 787(9) of the *Companies Act 2014*<sup>54</sup> provides for a validity period of 30 days for search warrants issued under its terms, which is longer than the standard 7 days period which the Commission has recommended should be included in the generally applicable Act.<sup>55</sup> This longer validity period, and related additional powers in the 2014 Act, reflect issues that may only arise in the context of a search of commercial premises related to suspected complex financial fraud or other corporate offences. The Commission has therefore concluded that it is necessary to provide that the generally applicable Search Warrants Act is without prejudice to such specific provisions.

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<sup>54</sup> Section 787(9) replaced section 20 of the *Companies Act 1990*, as amended by section 30 of the *Company Law Enforcement Act 2001* and section 5 of the *Companies (Amendment) Act 2009*, which provided for a validity period of one month.

<sup>55</sup> See Chapter 5, below.

**2.71 The Commission recommends that the Search Warrants Act (other than provisions relating to the use in any subsequent criminal proceedings of material seized during a search) should apply to a scheduled list of Acts and Statutory Instruments which authorise the issuing of a search warrant where suspicion or belief that evidence relating to an offence is not a requirement or not the only requirement for the issuing of a warrant (in particular, Acts and Statutory Instruments that authorise the issuing of search warrants to regulatory authorities for purposes of regulatory supervision and inspection).**

**2.72 The Commission recommends that the key elements of the Search Warrants Act should be supplemented by elements in other legislation only where there is a particular need to do so, such as the need for a longer validity period in the *Companies Act 2014*.<sup>56</sup>**

**(e) *Consequences of generally applicable Act for powers to enter property without warrant***

2.73 In Part A of this Chapter, the Commission referred to a number of powers of entry and search which do not involve search warrants, but form part of the general law of entry, search and seizure. These include:

- i) limited circumstances at common law which authorise Gardaí to enter private property, such as to terminate an actual affray or prevent injury being caused to another occupant;
- ii) powers of entry and search for the purpose of arrest with and without warrant in section 6 of the *Criminal Law Act 1997*; and
- iii) statutory powers of entry and search without warrant, such as the examples in Appendix B to this Report.

2.74 The Commission does not propose that the generally applicable Search Warrants Act should alter or affect these powers which provide for entry onto property without a warrant and the Act should therefore be without prejudice to these powers.

**2.75 The Commission recommends that the Search Warrants Act should not alter or affect any common law rule or statutory provision that authorises a person to enter property without a search warrant.**

**(f) *Transitional arrangements***

2.76 The enactment of a generally applicable Act would involve the repeal or amendment of existing legislation concerning search warrants. It is therefore necessary to consider how the proposed Act should provide for the transition from current search warrant law. Search warrants issued under a legislative provision prior to the commencement of a new Search Warrants Act should not be open to challenge due to the repeal or amendment of existing search warrant provisions. Proceedings pending at the time of the repeal should not be affected by the introduction of the new legislation.

2.77 It is common for legislation containing provisions which substantively amend or repeal other enactments to contain transitional or saving provisions, which “regulate the coming into operation of those enactments and modify their effect during the period of transition.”<sup>57</sup> Dodd notes that it “is not uncommon for the legislature to omit transitional provisions or to provide incomplete transitional provisions”, which often results in “avoidable difficulty for the interpreter” of the legislation.<sup>58</sup> Transitional provisions are a

<sup>56</sup> Section 787(9) of the *Companies Act 2014*.

<sup>57</sup> Bennion, *Bennion on Statutory Interpretation* 6<sup>th</sup> ed (LexisNexis 2013) at 289. See also Hunt, *The Irish Statute Book: a Guide to Irish Legislation* (First Law 2007); Dodd, *Statutory Interpretation in Ireland* (Tottel 2008).

<sup>58</sup> Dodd, *Statutory Interpretation in Ireland* (Tottel 2008) at 97.

way of allowing for the continued application of legislative provisions despite their repeal. They may either supplement or replace the transitional provisions in the *Interpretation Act 2005*.<sup>59</sup> A saving provision is the term used to describe a provision which “narrow[s] the effect of the enactment to which it refers so as to preserve some existing legal rule or right from its operation.”<sup>60</sup> For example, section 3(3) of the *Criminal Justice (Theft and Fraud Offences) Act 2001* provides that the abolition of common law offences in the Act shall not affect proceedings for any such offence prior to their abolition.

- 2.78 Where an Act does not include transitional provisions, a court may infer such transitional arrangements it considers the legislature to have had in mind.<sup>61</sup> However, the power of a court to infer transitional provisions is limited and there must be an indication in the legislation that the legislature intended to provide for transitional arrangements.
- 2.79 The problems that can arise from failing to include transitional measures in legislation are demonstrated by the decision of *Grealis v Director of Public Prosecutions*.<sup>62</sup> The Supreme Court considered the absence of transitional provisions in the *Non-Fatal Offences Against the Person Act 1997*. The 1997 Act abolished a number of offences, including the common law offences of assault and battery. However, it did not contain transitional provisions for offences alleged to have been committed but not yet prosecuted prior to the coming into force of the 1997 Act. The *Interpretation Act 1937* included such transitional provisions in respect of statutory offences, but contained no saving provisions for common law offences. The *Interpretation (Amendment) Act 1997* contained transitional provisions which aimed to address the lacuna regarding common law offences which were alleged to have been committed prior to their repeal. Section 1(4) of the *Interpretation (Amendment) Act 1997* provided that the Act would be “subject to such limitations as are necessary” to ensure that it did not “conflict with the constitutional rights of any person.”
- 2.80 The first applicant was charged with common law assault on foot of two summonses and assault causing actual bodily harm contrary to section 47 of the *Offences Against the Person Act 1861*. The *Non-Fatal Offences Against the Person Act 1997* was in force on the date of the issuing of the summonses, but had not been in force on the date of the alleged offences. The *Interpretation (Amendment) Act 1997* came into force after the proceedings were instituted.
- 2.81 The Supreme Court granted orders of prohibition and held that the *Non-Fatal Offences Against the Person Act 1997* was clear and unambiguous and provided for the abolition of the common law offence of assault and battery. Where a common law offence was repealed by statute, it ceased and no prosecution in respect of the repealed common law offence could proceed after the coming into effect of the repealing enactment. In respect of a submission by the Director of Public Prosecutions that the Court should draw reasonable inferences as to the intention of legislature to provide for transitional arrangements, the Court stated that it is inappropriate to “seek or make a determination that if the Oireachtas had thought about it they would have introduced transitional provisions providing for the time of transition as the functions of the three organs of government are separate and one should not interfere with another”.<sup>63</sup> The Supreme Court was unwilling to infer transitional provisions. The Court held that in order for the

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<sup>59</sup> *Ibid.*

<sup>60</sup> Bennion, *Bennion on Statutory Interpretation* 6<sup>th</sup> ed (LexisNexis 2013) at 676.

<sup>61</sup> See *Minister for Education and Science v Information Commissioner*, High Court, 31 July 2001, where the High Court stated that even if the legislative provision at issue did not include transitional provisions expressly, the Court “is required to draw such inferences as to the intended transitional arrangements as, in light of the interpretative criteria, it considers the Oireachtas to have intended.”

<sup>62</sup> [2001] IESC 50; [2001] 3 IR 144.

<sup>63</sup> [2001] IESC 50; [2001] 3 IR 144 at 178.



*Interpretation (Amendment) Act 1997* to be constitutional, it must be interpreted as having prospective effect. Therefore, it did not apply to prosecutions for repealed common law offences initiated prior to its commencement.

- 2.82 Section 27 of the *Interpretation Act 2005* specifically addresses the effect of the repeal of an enactment by stating that the repeal does not: “(a) revive anything in force or not existing immediately before the repeal, (b) affect the previous operation of the enactment or anything duly done or suffered under the enactment, (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment, (d) affect any penalty, forfeiture or punishment incurred in respect of any offence against or contravention of the enactment which was committed before the repeal, or (e) prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention.”
- 2.83 Section 27 of the 2005 Act may ensure that the repeal of any enactments by the generally applicable Search Warrants Act does not affect search warrants issued under those Acts or prejudice any proceedings pending at the time of the repeal. However, the Commission notes that it is common for legislation to contain transitional or saving provisions to deal with specific situations. An example of a saver in the context of search warrants can be found in the *Criminal Justice Act 2006*. Section 6 of the 2006 Act substituted section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997* (discussed in detail below), thus extending the power to issue a search warrant for specified offences to all arrestable offences. Section 6(2) of the *Criminal Justice Act 2006* provides that it does not affect the validity of a warrant issued under section 10 of the 1997 Act before the commencement of section 6 of the 2006 Act, and that such a warrant shall continue in force in accordance with its terms. The Commission is of the view that a similar provision should be included in the proposed Search Warrants Act to safeguard the validity of search warrants issued under legislative provisions repealed or significantly altered by its introduction, and to ensure that proceedings issued under repealed enactments are not affected.

<p><b>2.84 The Commission recommends that the proposed Search Warrants Act should contain transitional provisions to safeguard the validity of search warrants issued under any prior legislative provisions.</b></p>
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## **C Main elements of a generally applicable Search Warrants Act**

### **(1) Section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997: origins and subsequent amendments**

- 2.85 The Commission has concluded that, in order to consider the main elements that should be included in the proposed Search Warrants Act, it would be suitable to examine the main elements of the search warrants power in section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as substituted by section 6 of the *Criminal Justice Act 2006*. Section 10 of the 1997 Act is not confined to a specific category of offences, such as drugs offences, and applies to all arrestable offences. It is therefore suitable for this purpose, including in light of its origins, significant subsequent amendment and its detailed provisions.
- 2.86 The origins of section 10 of the 1997 Act can be traced to the 1960s, when it was recognised that no authority existed to search premises and seize evidence in connection with serious crimes such as murder and rape. This gap was to be filled by section 15 of the *Criminal Justice Bill 1967*, which proposed to provide authority to issue search warrants in respect of indictable offences involving death or grievous bodily harm and/or rape.
- 2.87 The *Criminal Justice Bill 1967* was a major legislative proposal that (had it been enacted) would have abolished the distinction between felonies and misdemeanours, whilst also introducing significant changes to powers of arrest, updating the law of evidence and

abolishing suicide as a crime. In this respect, it would have produced significant and, largely, uncontroversial reforms.<sup>64</sup> But the 1967 Bill also contained many controversial provisions, including extensive Garda powers to control public meetings.<sup>65</sup> As a result, the debates on the 1967 Bill in Dáil Éireann were protracted. The Committee Stage debate in the Dáil had not been completed when the 1969 General Election was called, and the Bill therefore lapsed.<sup>66</sup> Due to many of the controversial aspects, the 1967 Bill was never re-introduced as a single legislative proposal, although a number of provisions have since been enacted.<sup>67</sup> The relevance to this Report was the proposal in section 15 of the 1967 Bill concerning search warrants, which was ultimately enacted with some textual changes as section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*.

- 2.88 Reflecting its roots in the 1967 Bill, section 10 of the 1997 Act, as originally enacted, was limited in scope to authorising searches and seizure of evidence in connection with a defined list of serious offences: (a) an indictable offence involving the death of or serious bodily injury to any person, (b) an offence of false imprisonment, (c) an offence of rape, or (d) an offence under an enactment set out in the First Schedule to the 1997 Act. The First Schedule to the 1997 Act listed the following provisions, all of which involved sexual offences: section 1 of the *Punishment of Incest Act 1908*; sections 1 and 2 of the *Criminal Law Amendment Act 1935*; sections 3 and 4 of the *Criminal Law (Rape) (Amendment) Act 1990*; and sections 3 and 5 of the *Criminal Law (Sexual Offences) Act 1993*.
- 2.89 Shortly after the 1997 Act was enacted, the *Report of the Steering Group on the Efficiency and Effectiveness of the Garda Síochána* (the Garda SMI Report)<sup>68</sup> recommended, among other matters, that section 10 of the 1997 Act be extended to any “serious offences.” The Garda SMI Report defined “serious offences” as (a) arrestable offences, that is, offences carrying, on conviction, a sentence of 5 years’ imprisonment; and (b) other serious offences which, although not arrestable offences “are of such gravity as to warrant consideration for inclusion, in particular serious offences against the person or property which do not at present attract a sentence of five years’ imprisonment or more.”<sup>69</sup>

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<sup>64</sup> It was acknowledged during the Oireachtas debates on the 1967 Bill that many of its provisions derived from the recommendations of the English Criminal Law Revision Committee, notably, its *Second Report: Suicide* (Cmnd 1187) (1960), *Seventh Report: Felonies and Misdemeanours* (Cmnd 2659) (1966) and *Ninth Report: Evidence: Written Statements, Formal Admissions, Notice of Alibi* (1966).

<sup>65</sup> See O’Hanlon “The Criminal Justice Bill 1967” (1968) 3 *Irish Jurist* (n) 101 at 103,104.

<sup>66</sup> There were 4 days of debate on the Second Stage of the 1967 Bill in Dáil Éireann (4, 12, 13 and 18 February 1969) and 5 days of debate on the Committee Stage of the 1967 Bill in Dáil Éireann (22, 23, 29 and 30 April 1969, and 7 May 1969). The Committee Stage debates had not completed discussion of section 12 of the 1967 Bill (which concerned the proposed Garda powers of arrest without warrant, and were regarded as closely connected to the proposed powers concerning public meetings) when the 1969 General Election was called. The 1967 Bill, as initiated, contained 62 sections in total.

<sup>67</sup> By way of examples: the *Criminal Law (Suicide) Act 1993* provided that suicide ceased to be a crime (proposed in section 51 of the 1967 Bill); the *Criminal Evidence Act 1992* reformed the law of evidence concerning proof by written and formal statements (proposed in sections 24 and 25 of the 1967 Bill); and the *Criminal Law Act 1997* abolished the distinction between felonies and misdemeanours and also introduced the concept of arrestable offence (proposed in sections 5 to 11 of the 1967 Bill).

<sup>68</sup> *Report of the Steering Group on the Efficiency and Effectiveness of the Garda Síochána* (Department of Justice, Equality and Law Reform, Government Publications 1997). The Report is also referred to as the Garda SMI Report, because it was one of a series of similar Reports published at that time which formed part of a government-wide Strategic Management Initiative (SMI) aimed at improving the efficiency and effectiveness of Government Departments and State bodies.

<sup>69</sup> *Ibid* at 18.

- 2.90 The Garda SMI Report was followed by the 1998 *Report of the Expert Group to Consider Changes in the Criminal Law Recommended in the Garda SMI Report* (the Leahy Group Report).<sup>70</sup> The Leahy Group Report accepted the proposal in the Garda SMI Report to extend section 10 of the 1997 Act to all arrestable offences. The Report also noted the opinion in the Garda SMI Report that some offences which were at that time not punishable by 5 years' imprisonment should be considered for inclusion in any reforms under consideration. The Leahy Group Report considered that an individual assessment of the adequacy of sentences for particular offences was beyond its remit however, and as a result, its recommendation was confined to the extension of section 10 of the 1997 Act to arrestable offences.<sup>71</sup>
- 2.91 The recommendation of the Leahy Group Report was enacted by the Oireachtas as section 6 of the *Criminal Justice Act 2006*, which replaced the original text of section 10 of the 1997 Act in its entirety, substituting it with an entirely new section. This had the effect of extending its scope to all arrestable offences.
- 2.92 The Commission will proceed to discuss the key elements of section 10 of the 1997 Act, as amended, because it contains the type of key procedural elements in virtually all other statutory provisions in this area, including the process for applying for, issuing and executing a search warrant. Section 10 of the 1997 Act is also worthy of analysis because it does not contain what, in the view of the Commission, are comprehensive provisions, to ensure compliance with the constitutional and international human rights standards discussed in Chapter 1. In this respect, while section 10 of the 1997 Act contains important elements that would be included in a generally applicable Search Warrants Act, its limitations also suggest what additional provisions should be included in such an Act.
- 2.93 Section 10 of the 1997 Act, as substituted in its entirety by section 6 of the *Criminal Justice Act 2006*, provides:
- “(1) If a judge of the District Court is satisfied by information on oath of a member [of An Garda Síochána] not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an arrestable offence is to be found in any place, the judge may issue a warrant for the search of that place and any persons found at that place.
- (2) A search warrant under this section shall be expressed, and shall operate, to authorise a named member, accompanied by such other members or persons or both as the member thinks necessary—
- (a) to enter, at any time or times within one week of the date of issue of the warrant, on production if so requested of the warrant, and if necessary by the use of reasonable force, the place named in the warrant,
- (b) to search it and any persons found at that place, and
- (c) to seize anything found at that place, or anything found in the possession of a person present at that place at the time of the search, that that member reasonably believes to be evidence of, or relating to, the commission of an arrestable offence.
- (3) A member acting under the authority of a search warrant under this section may—

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<sup>70</sup> The full title is *Report of the Expert Group Appointed to Consider Changes in the Criminal Law Which Were Recommended in the Garda SMI Report* (Department of Justice, Equality and Law Reform, Government Publications 1998). The Expert Group was chaired by (the late) Eamon Leahy SC, and is also often referred to as the Leahy Group Report.

<sup>71</sup> *Ibid* at 3 (arrestable offence) and 9-13 (Recommendation 2).

- (a) require any person present at the place where the search is being carried out to give to the member his or her name and address, and
  - (b) arrest without warrant any person who—
    - (i) obstructs or attempts to obstruct the member in the carrying out of his or her duties,
    - (ii) fails to comply with a requirement under paragraph (a), or
    - (iii) gives a name or address which the member has reasonable cause for believing is false or misleading.
- (4) A person who obstructs or attempts to obstruct a member acting under the authority of a search warrant under this section, who fails to comply with a requirement under subsection (3)(a) or who gives a false or misleading name or address to a member shall be guilty of an offence and shall be liable on summary conviction to a [Class B fine]<sup>72</sup> or imprisonment for a term not exceeding 6 months or both.
- (5) The power to issue a warrant under this section is without prejudice to any other power conferred by statute to issue a warrant for the search of any place or person.
- (6) In this section—
- ‘arrestable offence’ has the meaning it has in section 2 (as amended by *section 8* of the *Criminal Justice Act 2006*) of the Criminal Law Act 1997;
- ‘place’ means a physical location and includes—
- (a) a dwelling, residence, building or abode,
  - (b) a vehicle, whether mechanically propelled or not,
  - (c) a vessel, whether sea-going or not,
  - (d) an aircraft, whether capable of operation or not, and
  - (e) a hovercraft.”

**(2) Main elements of section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997, as amended**

2.94 Section 10 contains the following elements concerning the application for, the issuing of and executing of a search warrant:

- 1. Applying for the search warrant:** (a) the applicant must be a member of An Garda Síochána not below the rank of sergeant; (b) the basis for the application must be reasonable grounds for suspecting; and (c) the application must be based on information on oath.
- 2. Issuing the search warrant:** (a) the issuing authority is a judge of the District Court; (b) the offences to which it applies are arrestable offences; and (c) the scope of the search is limited by reference to named places and any persons found at those places.
- 3. Executing the search warrant:** (a) those authorised to execute the search are a named member of An Garda Síochána, accompanied by such other members or persons or both as the member thinks necessary; (b) entry is permitted at any time or times; (c) the warrant is valid for one week from date of issue; (d) the scope of power to seize material includes material found at the place, or found in the possession of a person present at that place, that the member reasonably believes to be evidence of,

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<sup>72</sup> Section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as inserted by section 6 of the *Criminal Justice Act 2006*, refers to “a fine not exceeding €3,000.” The effect of section 5 of the *Fines Act 2010* is to convert this to a Class B fine, currently a fine not exceeding €4,000 (see section 3 of the 2010 Act).

or relating to, the commission of an arrestable offence; (e) the scope of power of the executing officer to deal with persons present includes: (i) requiring any person present to give his or her name and address; (ii) arresting any person who obstructs or attempts to obstruct the member in the carrying out of his or her duties; (iii) arresting any person who fails to give his or her name and address; and (iv) arresting any person who gives a name or address which the member has reasonable cause for believing is false or misleading; and (f) there are offences for obstructing or attempting to obstruct the execution of the search warrant.

2.95 The generally applicable Search Warrants Act should contain at the very least the three main elements outlined above. Such elements should be subject to scrutiny to ensure that they comply with the constitutional and international human rights principles discussed in Chapter 1. In addition, they should be supplemented with any additional provisions that are required by such principles.

2.96 Building on the useful elements of section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, the Commission in the following chapters considers the key elements that should be contained in a generally applicable Search Warrants Act, notably those dealing with applying for, issuing and executing a search warrant.



**A Reference to the Applicant**

- 3.01 Currently, each legislative provision specifies the person or persons who have the authority to apply for a search warrant under its terms. Generally, a search warrant will be applied for by a member of An Garda Síochána; however this varies depending on the type of investigation concerned. While some Acts permit a Garda of any rank to apply for a search warrant, others specify that the Garda applicant must be of a specified minimum rank.<sup>1</sup> Certain provisions enable persons who are not members of An Garda Síochána, but who hold a particular office, to apply for a search warrant. For example, the *Aviation Regulation Act 2001* provides that an “authorised officer” may apply.<sup>2</sup> Section 787 of the *Companies Act 2014*<sup>3</sup> refers to a “designated officer” as a suitable applicant. Both the *Adventure Activities Standards Authority Act 2001* and the *Railway Safety Act 2005*<sup>5</sup> state that a person appointed as an “inspector” under their provisions can make an application. The *Sea-Fisheries and Maritime Jurisdictions Act 2006* authorises “sea-fisheries protection officers” to apply.<sup>6</sup>
- 3.02 In light of the Commission’s recommendation that a single Search Warrants Act should be implemented in Ireland, the Commission is of the view that it would be necessary for such an Act to contain a generic term referencing those that may apply for a search warrant. Thus, the Commission recommends that the term “applicant” should be used. The term “applicant” should be interpreted as either: (a) a member of An Garda Síochána not below the rank of sergeant; or (b) a person who is authorised to apply for a search warrant under an enactment specified in the schedule of enactments which contains provisions authorising persons who hold a particular office to apply for a search warrant.

**3.03 The Commission recommends that the proposed Search Warrants Act should use the term “applicant” to refer to the person applying for a search warrant.**

**B The Evidential Threshold to be Met by Applicants**

- 3.04 Applications for search warrants generally involve the applicant appearing personally before the issuing authority (usually a judge of the District Court) and making an *ex parte* application in the chambers of a judge of the District Court. Most legislative provisions which provide for the issuing of a search warrant require the applicant to satisfy two

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<sup>1</sup> See for example section 9 of the *Prohibition of Incitement to Hatred Act 1989*; section 25 of the *Video Recordings Act 1989*; section 10 of the *Criminal Law (Sexual Offences) Act 1993*; section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997* (as amended); and section 15 of the *Immigration Act 2004*. All of the above require that a Garda member not below the rank of sergeant apply.

<sup>2</sup> Section 43 of the *Aviation Regulation Act 2001*.

<sup>3</sup> Section 787 of the 2014 Act replaced section 20 of the *Companies Act 1990*, as amended by section 30 of the *Company Law Enforcement Act*.

<sup>4</sup> Section 37 of the *Adventure Activities Standards Authority Act 2001*.

<sup>5</sup> Section 73 of the *Railway Safety Act 2005*.

<sup>6</sup> Section 17 of the *Sea-Fisheries and Maritime Jurisdiction Act 2006*, as amended by section 44 of the *Criminal Justice Act 2007*.

procedural requirements. The first is that he or she holds an opinion. In cases where the applicant is a member of An Garda Síochána, he or she must usually state that he or she holds the opinion that evidence of, or relating to, a particular offence may be found at a certain location. In cases where the applicant is an authorised officer exercising his or her powers in a regulatory setting, the applicant must usually state that he or she is of the opinion that: 1. evidence of, or relating to, a particular offence is at a location or an enactment has been contravened; and/or 2. other circumstances exist, such as the presence of certain material or the carrying out of particular activity at a location.

3.05 Secondly, the applicant must usually affirm the opinion under a suitable form of oath.<sup>7</sup>

3.06 Currently, the specific requirements of the application procedure are set out in the terms of the particular legislative provision under which the applicant is applying for a search warrant. In the Consultation Paper, the Commission observed that variations as to the precise requirements in respect of the opinion of the applicant and the manner in which it is affirmed can be found throughout Irish legislative provisions.<sup>8</sup>

**(1) Reasonableness of the applicant's suspicion**

3.07 In the Consultation Paper, the Commission noted that some provisions require the applicant to have “reasonable grounds for suspecting” that evidence relating to an offence is to be found at a specified location, while other provisions set the requirement at “reasonable grounds for believing” that evidence is to be found.<sup>9</sup> The *Criminal Damage Act 1991* refers to a “reasonable cause to believe”.<sup>10</sup>

3.08 The Commission has been informed that many search warrant applications are made under section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended by section 6 of the *Criminal Justice Act 2006*, which provides:

“If a judge of the District Court is satisfied by information on oath of a member not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an arrestable offence is to be found in any place, the judge may issue a warrant for the search of that place and any persons found at that place.”

3.09 Beyond the requirement for reasonableness, there is a lack of uniformity in Irish provisions as to the standard of the applicant's opinion. Legislation varies as to whether the applicant holds a suspicion or belief regarding the presence of evidence.

3.10 The element of reasonableness, however, is common to all search warrant provisions. This imposes an objective test as to the opinion of the applicant. Thus, the opinion of the applicant must not be subjective, rather it should be the opinion that a reasonable person with the same experience and level of understanding as the applicant would hold on the basis of the facts. The Commission has looked to other jurisdictions in respect of the standard of opinion required in similar search warrant applications. The standard of “reasonable grounds for suspecting” is found in the Australian Commonwealth, under section 3E of the *Crimes Act 1914*, as amended, and in Tasmania under section 5 of the *Search Warrants Act 1997*. Jurisdictions where the law requires “reasonable grounds for

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<sup>7</sup> A small number of provisions do not contain a requirement for the application to be accompanied by a formal affirmation.

<sup>8</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 3.06.

<sup>9</sup> Examples of the phrasing “reasonable grounds for suspecting” can be found in the *Criminal Assets Bureau Act 1996*, *Illegal Immigrants (Trafficking) Act 2000*, *Aviation Regulation Act 2001* and *Sea Fisheries and Maritime Jurisdiction Act 2006*. Examples of the phrasing “reasonable grounds for believing” can be found in the *Control of Dogs Act 1986*, *Sexual Offences (Jurisdiction) Act 1996* and *Safety, Health and Welfare at Work Act 2005*.

<sup>10</sup> Section 13 of the *Criminal Damage Act 1991*.



believing” include England and Wales under section 8 of the *Police and Criminal Evidence Act 1984*; New South Wales, under section 47 of the *Law Enforcement (Powers and Responsibilities) Act 2002*; Victoria, under section 341 of the *Crimes Act 1958*; and Canada, under section 117.04 of the *Criminal Code*. Unlike in Ireland, a single standard is found in each of these jurisdictions.

- 3.11 The Commission is of the view that the proposed Search Warrants Act should provide for a single standard as to the opinion of an applicant. The Commission notes that this would not only lead to greater consistency but it would also enable applicants to be certain as to the standard of opinion they are required to have when making an application. Greater consistency and certainty as to this requirement may also help to avoid errors being made at this stage of the process. For example, if an applicant were to establish that he or she has a reasonable suspicion, when in fact the provision under which the application is made requires him or her to have a reasonable belief, a search warrant issued on the basis of that application may be subject to challenge.

**3.12 The Commission recommends that a single, standard requirement should be used to describe the opinion required by the search warrant applicant.**

**(a) Suspicion v Belief**

- 3.13 The Commission has considered whether or not there is a substantial difference between the standards of suspicion and belief, and consequently whether one should be favoured over the other for the purpose of establishing a single standard. O’Malley has considered the “conceptual distinction” between the two with regard to search warrant applications.<sup>11</sup> He details the dictionary meanings of both words, which he outlines is “in keeping with the interpretive principle that words in a statute be given their plain meaning, unless the context otherwise requires.”<sup>12</sup> On this basis belief is defined as a:

“mental acceptance of a proposition, statement or fact, as true, on the ground of authority, or evidence; assent of the mind to a statement, or to the truth of a fact beyond observation, on the testimony of another, to the fact or truth on the evidence.”<sup>13</sup>

- 3.14 By contrast, he notes that suspicion is defined, among other things, as “apprehension of guilt or fault on slight grounds or without clear evidence.”<sup>14</sup> Thus, O’Malley explains that a suspicion does not require clear proof, evidence or knowledge, whereas a belief is grounded by authority or evidence. O’Malley refers to a case of the ECtHR, *Fox v United Kingdom*<sup>15</sup>, as one of the more commonly quoted authorities which examines the definition of “reasonable suspicion” in the context of Article 5 of the ECHR (right to liberty and security). Here, the Court observed that “having a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer” that an offence had been committed.<sup>16</sup> O’Malley concludes that there is an accepted distinction between suspicion and belief “to the extent that belief imports a greater degree of certainty.”<sup>17</sup> The New Zealand Law Commission in its *Report on Search and Surveillance Powers*<sup>18</sup> also focused on certainty and likelihood when distinguishing between belief and

<sup>11</sup> See generally O’Malley *The Criminal Process* (Round Hall 2009) at 361.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> (1991) 13 EHRR 157.

<sup>16</sup> *Ibid* at paragraph 32.

<sup>17</sup> O’Malley *The Criminal Process* (Round Hall 2009) at 362.

<sup>18</sup> New Zealand Law Commission *Report on Search and Surveillance Powers* (NZLC R97-2007).

suspicion. The Commission expressed the view that “belief requires something akin to a high or substantial likelihood, while suspicion may require no more than medium or moderate likelihood.”<sup>19</sup>

**(b) Reasonable suspicion and search warrant applications**

- 3.15 These interpretations of the terms suggest that belief is more objective and concrete in nature and that suspicion may be more subjective and vague. However, suspicion is quite often sufficient to ground the commencement of a criminal investigation; for example Gardaí may arrest and question a person on suspicion that he or she has committed an offence.<sup>20</sup> It would, therefore, be consistent to provide that reasonable suspicion of an applicant is sufficient to ground a search warrant application. Furthermore, it is notable that the search warrant process forms part of the investigation and the application for or execution of a search warrant is by no means indicative of unlawful conduct on the part of the person to whom the warrant is directed. If these interpretations, that suspicion is concerned with apprehension and belief is concerned with acceptance of something as the truth, are accurate it would seem unnecessary to require the applicant to believe that evidence may be found. A requirement of suspicion should therefore be sufficient to ground a search warrant application.
- 3.16 Moreover, suspicion may be broader in that it may involve and enable consideration of an extensive range of issues. To this end, the discussion of the concept of suspicion by the High Court (Charleton J) in *Director of Public Prosecutions (Walsh) v Cash*<sup>21</sup> is instructive. The Court observed that a reasonable suspicion in law is not required “to be based on the kind of evidence that would be admissible under the rules of evidence during the hearing of a criminal trial.”<sup>22</sup> The Court outlined that unlike *prima facie* evidence<sup>23</sup>, which must consist of admissible evidence relevant to a case, suspicion could take account of matters that could not be admitted in evidence at all, or matters which although admissible could not form part of the *prima facie* case. Therefore, a reasonable suspicion could be based, for example, on hearsay evidence or could be inferred from discovering that an alibi put forward by an accused is in fact false. The comments of Charleton J in the High Court in *Cash* regarding the essence of a “reasonable suspicion” were quoted with approval by the Supreme Court.<sup>24</sup>
- 3.17 Archbold discusses the phrase “reasonable grounds for suspicion” in the context of the *Police and Criminal Evidence Act 1984* and the codes of practice which supplement the 1984 Act.<sup>25</sup> He comments that, while an arresting officer must have a genuine suspicion that the person being arrested is guilty of an offence, there must be reasonable grounds for forming such a suspicion. This outlines the dual nature of such a test, in that it is partly subjective and partly objective. Archbold also notes that the reasonable grounds for forming a suspicion could arise from information received from another. This can be the case even if such information subsequently proves to be false, “provided that a

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<sup>19</sup> *Ibid* at 57.

<sup>20</sup> See for example O'Malley *The Criminal Process* (Round Hall 2009) at 287 and 292-294; Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 149-150.

<sup>21</sup> [2007] IEHC 108, [2008] 1 ILRM 443.

<sup>22</sup> [2007] IEHC 108 at paragraph 12.

<sup>23</sup> See Garner (ed) *Black's Law Dictionary* (7<sup>th</sup> ed, West Group 1999) at 578 which defines “prima facie evidence” as “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.”

<sup>24</sup> [2010] IESC 1, [2010] 1 IR 609 at paragraphs 73 – 75.

<sup>25</sup> Richardson (ed) *Archbold Criminal Pleading, Evidence and Practice 2010* (Sweet and Maxwell 2013).

reasonable person, having regard to all the circumstances, would regard them as reasonable grounds for suspicion.”<sup>26</sup>

- 3.18 Regarding search warrants which are relied upon for purposes of investigation, it would be appropriate that officers could take account of a broad range of factors, even though they may not be admissible at trial stage. This approach would be consistent with the decision of the Supreme Court in *Director of Public Prosecutions v Cash*<sup>27</sup> where the Court held that the accused had failed to establish that there was an onus on the prosecution to prove the lawful provenance of material relied upon by a member of An Garda Síochána or that such material was obtained without breaching fundamental constitutional rights to form reasonable cause justifying an arrest. The Court noted that the lawfulness of an arrest and the admissibility of evidence at trial are “different matters which will normally be considered in distinct contexts.”<sup>28</sup>
- 3.19 The British *Police and Criminal Evidence Act 1984 Code of Practice A* also discusses the concept of reasonable suspicion and offers guidelines as to its scope.<sup>29</sup> Code A is concerned with police powers to stop and search rather than with search warrants specifically. However, the interpretation of reasonable suspicion should nonetheless be applicable regardless of the search context. The Code states that “reasonable grounds for suspicion depend on the circumstances in each case. There must be an objective basis for that suspicion based on facts, information, and/or intelligence which are relevant to the likelihood of finding” a particular thing.<sup>30</sup> The Code further specifies that reasonable suspicion can never be supported on the basis of personal factors, nor can it be based on “generalisations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity.”<sup>31</sup> The Code notes that reasonable suspicion can sometimes arise on the basis of the behaviour of a person without specific information or intelligence; for example, where a person is observed attempting to conceal something whilst walking along a public street. Overall, the Code acknowledges that suspicion can arise in a variety of circumstances and may be the result of information provided by a third party. Nonetheless the Code clearly sets out the requirement that the suspicion is in fact objective and based on accurate and current intelligence or information.<sup>32</sup>
- 3.20 As section 10 of the section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended by section 6 of the *Criminal Justice Act 2006*, is one of the main provisions under which search warrant applications are made, it is notable that its terms refer to “reasonable grounds for suspecting” and not to “belief”. Reliance on the term suspicion as the standard requirement for search warrant applicants would therefore also be in line with this commonly used procedure and the Commission has concluded that this phrase should be used in the proposed Search Warrants Act.

**3.21 The Commission recommends that “reasonable grounds for suspicion” should be the standard requirement in respect of an application for a search warrant.**

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<sup>26</sup> *Ibid* at 1625.

<sup>27</sup> [2010] IESC 1, [2010] 1 IR 609.

<sup>28</sup> [2010] 1 IR 609 at paragraph 75?

<sup>29</sup> See generally *Police and Criminal Evidence Act 1984 Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search*, at 2.3-2.3.

<sup>30</sup> *Police and Criminal Evidence Act 1984 Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search*, at paragraph 2.2. See Zander *The Police and Criminal Evidence Act 1984* 4<sup>th</sup> ed (Sweet and Maxwell 2005) at 585.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid*.

## (2) **Affirmation of the applicant's opinion**

- 3.22 The second element of the search warrant application procedure to be satisfied by an applicant is that he or she must formally affirm his or her submitted opinion. In the Consultation Paper the Commission observed that varying specifications can be found in Irish search warrant provisions as to the manner in which the opinion is affirmed.<sup>33</sup> Some Acts require the applicant to provide "information on oath" when making the application,<sup>34</sup> while other Acts state that the applicant should provide "sworn information".<sup>35</sup>
- 3.23 A limited number of Acts, however, contain no requirement for the applicant to formally affirm the information upon which the search warrant application is based. Within this category, two sub-categories can be identified. The first sub-category is comprised of Acts which enable members of An Garda Síochána of a certain minimum rank to issue a search warrant rather than applying to the District Court. These Acts include section 29(3) of the *Offences Against the State Act 1939*, as amended,<sup>36</sup> the *Official Secrets Act 1963*,<sup>37</sup> the *Criminal Assets Bureau Act 1996*, as amended,<sup>38</sup> and the *Prevention of Corruption (Amendment) Act 2001*.<sup>39</sup> None of these provisions require the member of An Garda Síochána seeking the search warrant to swear an information or to take an oath.
- 3.24 The second sub-category includes Acts under which an application must be made to a judge of the District Court, but where there is no requirement within the provision for the applicant to provide sworn information or to take an oath. These provisions are contained within the *Official Secrets Act 1963*,<sup>40</sup> the *Criminal Justice Act 1994*<sup>41</sup> and the *Sexual Offences (Jurisdiction) Act 1996*.<sup>42</sup> The latter two Acts in this category are concerned with offences of an extra-territorial nature.
- 3.25 The Commission is of the view that a single standard phrase should be used in Irish legislation in respect of the wording contained in search warrant provisions regarding affirmation of the applicant's opinion. The Commission acknowledges that there may be little practical difference between providing sworn information and providing information on oath. Essentially, the effect of either of these approaches amounts to the same thing – the applicant formally affirming his or her opinion.<sup>43</sup> Nonetheless, the Commission

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<sup>33</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 3.21.

<sup>34</sup> See section 29(2) of the *Offences Against the State Act 1939*, as amended by section 1 of the *Criminal Justice (Search Warrants) Act 2012*.

<sup>35</sup> See section 19 of the *Welfare of Greyhounds Act 2011*.

<sup>36</sup> Section 29(3) of the *Offences Against the State Act 1939*, as inserted by section 1 of the *Criminal Justice (Search Warrants) Act 2012*.

<sup>37</sup> Section 16(2) of the *Official Secrets Act 1963*.

<sup>38</sup> Section 14(2) of the *Criminal Assets Bureau Act 1996*, as amended by section 16 of the *Proceeds of Crime (Amendment) Act 2005*.

<sup>39</sup> Section 5 of the *Prevention of Corruption (Amendment) Act 2001*, as amended by section 191 of the *Criminal Justice Act 2006*.

<sup>40</sup> Section 16(1) of the *Official Secrets Act 1963*.

<sup>41</sup> Sections 55 and 64 of the *Criminal Justice Act 1994*, as amended.

<sup>42</sup> Section 10 of the *Sexual Offences (Jurisdiction) Act 1996*.

<sup>43</sup> The Commission recommended in its 1990 *Report on Oaths and Affirmations* (LRC 34-1990), p.50 that the swearing of the oath as should be abolished for witnesses, jurors and deponents and replaced with a solemn statutory affirmation. The recommendations of the 1990 Report have not been implemented, but they will be considered in the context of the Commission's forthcoming *Report on Evidence*. The Commission notes that six members of the President's Council of State acting in their individual capacities made a submission to the Constitutional Convention (which sat between 2012 and 2014) requesting the Convention to consider the

recommends that for the sake of consistency and clarity a standard term should be employed.

- 3.26 The Commission is of the view that the term “information on oath and in writing” should be implemented as the standard requirement. It is notable that search warrant provisions in a number of other jurisdictions rely solely on the phrase “information on oath”: for example the *Criminal Code*<sup>44</sup> in Canada; the *Crimes Act 1914*, as amended,<sup>45</sup> in the Australian Commonwealth; the *Search Warrants Act 1997*<sup>46</sup> in Tasmania; and the *Criminal Investigation Act 2006*<sup>47</sup> in Western Australia. In England and Wales the *Police and Criminal Evidence Act 1984* does not specify that an applicant must provide information on oath when he or she makes an application. However, the *Police and Criminal Evidence Act 1984* provides that the applicant “shall answer on oath any question that the justice of the peace or judge hearing the application asks him.”<sup>48</sup>
- 3.27 The term “provide information on oath”, as opposed to swearing information, can be found in a number of bench warrant provisions in Ireland. Order 21, Rules 1(5) and 1(6) of the *District Court Rules 1997*, which relate to the issuing of a bench warrant for a witness in criminal proceedings, require information on oath to be provided to the issuing judge. Where an accused is believed to be evading service of a summons or is believed to be about to abscond or has absconded, an application may be made to the District Court for a bench warrant to arrest the person. The request for this must be made by use of a Form 22.1, as contained in Schedule B of the *District Court Rules 1997*, and the applicant must provide information on oath. Relying on “information on oath” as the standard term would therefore coincide the search warrant application requirement with the wording contained in bench warrant provisions.
- 3.28 Furthermore, evidence given at trial is generally given under oath.<sup>49</sup> As search warrants are concerned with obtaining evidence, it would be consistent with the process for giving evidence before a court under oath to require a search warrant applicant to provide information in the same manner.
- 3.29 The Commission is of the view that the recommended Search Warrants Act should expressly provide that the information grounding a search warrant application must be in writing. Section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended by section 6 of the *Criminal Justice Act 2006*, requires an application for a search warrant under that provision to be by “information on oath”. Order 34, rule 17 of the *District Court Rules* provides that such an application must be by “information on oath and in writing.” In *The People (DPP) v Jakubowski*<sup>50</sup> the Court of Criminal Appeal held that the term “information on oath” in section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997* does not mean that a written information is required.<sup>51</sup> In *Jakubowski* the appellant challenged the validity of a search warrant issued under section

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reference to religious beliefs in the oaths and declarations requirement to taking public office in Article 31.4 of the Constitution. The submission is available at [constitution.ie](http://constitution.ie).

<sup>44</sup> Sections 117.04(1) and 487(1) of the Canadian *Criminal Code*.

<sup>45</sup> Section 3E(1) of the *Crimes Act 1914*.

<sup>46</sup> Section 5 of the *Search Warrants Act 1997*.

<sup>47</sup> Section 13(6) of the *Criminal Investigation Act 2006*.

<sup>48</sup> Section 15(4) of the *Police and Criminal Evidence Act 1984*.

<sup>49</sup> See generally McGrath *Evidence* (Thomson Round Hall 2005) at 62; Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 900.

<sup>50</sup> [2014] IECCA 28.

<sup>51</sup> *Ibid* at paragraph 22.

10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended. The search warrant stated on its face that it had been issued by the judge who was satisfied “as a result of hearing evidence on oath” that there were sufficient grounds for doing so. The term “evidence on oath” was the requirement originally specified in section 10 of the 1997 Act. However, when section 10 of the 1997 Act was substituted by the 2006 Act the wording changed to “information on oath”. Although the Garda who applied for the search warrant had in fact provided a written information form, this was not recorded on the search warrant. The appellant submitted the change from “evidence on oath” to “information on oath” tightened the requirements by requiring the basis upon which a search warrant was issued to be in a permanent form which would be available should there be any dispute regarding the grounds on which the warrant was issued.<sup>52</sup> He also argued that even if the 1997 Act did not require information in writing, Order 34, rule 17 of the *District Court (Search Warrant) Rules 2008*,<sup>53</sup> which uses the term “information on oath and in writing”, creates such an obligation.

- 3.30 The Court of Criminal appeal held that, under *Simple Imports Ltd v Revenue Commissioners & Ors*,<sup>54</sup> if the warrant stated that it was issued on a basis that was not justified by the statute creating the power, the invalidity of the search warrant could not be cured by evidence that there was in fact before the issuing authority evidence which entitled it to issue the warrant.<sup>55</sup> A warrant must show jurisdiction on its face to be valid. In considering what is required by section 10 of the 1997 Act when it refers to “information on oath”, the Court stated that in ordinary terms, information “simply means some material, knowledge or news which is communicated” and may be given “orally, in writing, electronically or possibly by gesture.”<sup>56</sup> The Court was of the view that “whatever the logic and good sense of providing that material upon which a warrant is based should be recorded in permanent form, it seems unlikely that the 2006 Act in general, or section 6 in particular, was intended to make more restrictive the requirements for obtaining a valid warrant.”<sup>57</sup> The Court concluded that there is nothing in the structure or terms of the Act to suggest that information was intended only to mean a written document.<sup>58</sup>
- 3.31 The Court accepted that the warrant was inconsistent with the relevant District Court Rule and the form prescribed under the Rule.<sup>59</sup> However, applying the case of *The State (O’Flaherty) v Floinn*,<sup>60</sup> the Court held that the jurisdiction to issue a search warrant was derived from primary legislation which also set the limits of such jurisdiction.<sup>61</sup> Order 12 Rule 23 of the *District Court Rules 1997*<sup>62</sup> and section 12 of the *Interpretation Act 2005* provide that a departure from a form in the Schedule to the Rules or a deviation from a form in an enactment does not automatically invalidate the proceedings. Thus, the Court held that the search warrant was not invalid.

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<sup>52</sup> *Ibid.*

<sup>53</sup> *District Court (Search Warrant) Rules 2008* (SI No.322 of 2008).

<sup>54</sup> [2000] 2 IR 243.

<sup>55</sup> [2014] IECCA 28, at paragraph 15.

<sup>56</sup> *Ibid* at paragraph 18.

<sup>57</sup> *Ibid* at paragraph 19.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid* at paragraph 24.

<sup>60</sup> [1954] IR 295.

<sup>61</sup> *Ibid.*

<sup>62</sup> *District Court Rules 1997* (SI No.93 of 1997).

- 3.32 The Commission is aware that, in practice, persons applying for search warrants lay a written information form before the issuing authority. Requiring the information grounding a search warrant application to be in writing ensures that there is a written record of the information on which the application is based which is useful if an issue regarding the grounds for the application arises during proceedings. In addition, it requires the applicant to carefully consider the grounds upon which he or she is basing the application. It also gives the issuing authority an opportunity to scrutinise the written form and satisfy himself or herself that there is an adequate basis for issuing the warrant. In *Damache v Director of Public Prosecutions*,<sup>63</sup> the Supreme Court pointed out that “it is best practice to keep a record of the basis upon which a search warrant is granted.”<sup>64</sup>
- 3.33 The Oireachtas debates on the *Criminal Justice Bill 2004*, enacted as the *Criminal Justice Act 2006*, which changed the terminology in section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997* from “evidence on oath” to “information on oath”, indicates that the intention of the legislature was to clarify that the traditional practice of swearing an information in writing applies. When introducing the 2004 Bill the Minister for Justice, Equality and Law Reform stated (as Gaeilge) that “information on oath” was the formula traditionally used in search warrant provisions and operates so that the officer of An Garda Síochána swears an affidavit, upon which he or she may be questioned by the judge.<sup>65</sup> He stated that the formula was changed to “the hearing of evidence on oath” in section 10 of the 1997 Act.<sup>66</sup> However, the new formula created some uncertainty regarding the practice and procedure that should be followed when making a search warrant application.<sup>67</sup> To avoid uncertainty, the legislature returned to the tried and tested formula, “information on oath”.
- 3.34 The Commission recommends below in this Chapter (paragraph 3.88) that as a general rule a person applying for a search warrant should be required to appear personally before the issuing authority to affirm his or her opinion under oath. However, legislation should permit the requirement for the applicant to appear personally before the issuing authority to be dispensed with in urgent situations. The requirement to provide information in writing should not be insisted upon in such situations, but the applicant should be required to file a written record of the application within a certain timeframe following the issuing of the search warrant.
- 3.35 As noted, a small number of provisions do not include any requirement for the applicant to affirm his or her opinion, whether on oath or by swearing the information. There is no rationale included within these provisions as to why there is no such requirement. The Commission is of the view that it would be appropriate for search warrant applications and subsequently issued search warrants to generally be based on information which has been formally sworn or provided on oath. Affirming the applicant’s opinion is an important means of safeguarding fundamental rights because it encourages the applicant to appreciate the gravity of the interference with constitutional and other rights as he or she could be charged with perjury if the evidence given on oath is untrue.<sup>68</sup>

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<sup>63</sup> [2012] IESC 11, [2012] 2 IR 266.

<sup>64</sup> *Ibid.*

<sup>65</sup> Dáil Éireann Debates, Vol 597 No 5, 15 February 2005.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> Garner (ed) *Black’s Law Dictionary* (7<sup>th</sup> ed, West Group 1999) at 1099 states that “[t]he person making the oath implicitly invites punishment if the statement is untrue or if the promise is broken. The legal effect of an oath is to subject a person to penalties for perjury if the testimony is false.”

**3.36 The Commission recommends that “information on oath and in writing” should be the standard requirement for an applicant to affirm his or her opinion.**

**C Anticipatory Search Warrants**

- 3.37 In the Consultation Paper, the Commission invited submissions on whether the recommended generally applicable Search Warrants Act should provide for the issuing of a search warrant on the basis of a belief that evidence will or is likely to be found at a place at some time in the near future.<sup>69</sup> In Ireland, legislative provisions allow for the issuing of a search warrant where there are reasonable grounds to suspect or believe that evidence of or relating to the commission of an offence is to be found at a named location.
- 3.38 In the Consultation Paper, the Commission noted that legislation in a number of other jurisdictions provides for anticipatory search warrants. For example, in Australia, the Commonwealth *Crimes Act 1914*, as amended, allows an applicant to apply for a search warrant where there are reasonable grounds for suspecting that “there is, or there will be within the next 72 hours, any evidential material at the premises.”<sup>70</sup> In the United States, rule 41(a)(1) of the *Federal Rules of Criminal Procedure* permits anticipatory warrants. The constitutional validity of anticipatory search warrants was upheld by the Supreme Court in *United States v Grubb*.<sup>71</sup> In *Grubb*, the applicant claimed that the issuing of a search warrant on the basis of an affidavit that police had organised the controlled delivery of a package to his home violated the Fourth Amendment to the United States Constitution which provides that no warrant shall issue but upon probable cause. The Supreme Court stated that, as the issuing of all search warrants depends on evidence being found when the search is conducted, all search warrants are in a sense anticipatory, and therefore anticipatory warrants are “no different in principle from ordinary warrants.”<sup>72</sup> The Supreme Court held that three elements must be present in an application for an anticipatory search warrant:
- (i) that it is now probable,
  - (ii) that contraband, evidence of a crime, or a fugitive will be on the described premises,
  - (ii) when the warrant is executed.
- 3.39 The Court stated that two requirements must be satisfied. The first is that if the triggering condition occurs, there is a fair probability that contraband or evidence will be found at a particular location. Secondly, there must be probable cause to believe that the triggering condition will in fact occur.
- 3.40 In the Consultation Paper, the Commission suggested that, if provision were made for anticipatory warrants, a corresponding set of procedural rules and safeguards would be required, such as a time limit as to the anticipation and validity of such a warrant. Otherwise, there is a danger that law enforcement officials could engage in a “fishing expedition” by applying for an anticipatory warrant and keeping it on file until the expected circumstances occur. The Commission also suggested additional safeguards such as

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<sup>69</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 3.68 to 3.78.

<sup>70</sup> Section 3E(1) of the *Crimes Act 1914*, as amended by the *Crimes (Search Warrants and Powers of Arrest Amendment Act 1994*. Similar provisions can be found in legislative provisions in other Australian jurisdictions, such as section 5(1) of the *Search Warrants Act 1997* (Tasmania) and section 47 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (New South Wales).

<sup>71</sup> 547 US 90 (2006).

<sup>72</sup> 547 US 90 (2006) at Part II of the judgment.



confining the authority who could issue such warrants to a judge of the District Court and implementing a high standard of information required to support the application.

- 3.41 The Commission received feedback highlighting some advantages that anticipatory search warrants would have during investigations. It was suggested that such a procedure would be of assistance where, for example, Gardaí are aware that controlled drugs are going to be on a premises at a particular time. Gardaí could obtain a search warrant prior to the drugs being on the premises. Currently, in such a situation Gardaí must wait until the drugs are actually located on the premises before an application for a search warrant can be made. The New Zealand Law Commission recommended the introduction of anticipatory warrants in its report on *Search and Surveillance Powers*;<sup>73</sup> but its recommendation was not incorporated into the subsequently enacted *Search and Surveillance Act 2012*.
- 3.42 The main reason for the New Zealand Commission's recommendation was the view that it would result in greater time efficiency and would assist in avoiding the delay of waiting to confirm the existence of an object at a location before applying for a search warrant.<sup>74</sup> This would be of benefit where there is a risk of evidence being destroyed or moved to another location, or where the material in question is intangible, such as emails or text messages, which are easily destroyed or altered.<sup>75</sup>
- 3.43 Notwithstanding the potential advantages that anticipatory search warrants may have in the investigation of offences, such warrants may confer an overly expansive discretion on law enforcement officials. Arguably, where the location of material at a premises is dependent upon the occurrence of some future event, such as delivery of drugs to the premises, any grounds put forward in a search warrant application would be too remote to satisfy a threshold for granting the search warrant application. Even where the validity of an anticipatory warrant were triggered by a future event, so that the warrant could not be executed until, for example, a consignment of controlled drugs was delivered to a location, the power to decide if and when the triggering event has occurred would be vested in law enforcement officials.
- 3.44 The Commission has recommended the introduction of a limited electronic search warrant application and issuing process, whereby the requirement for the applicant to appear personally before the issuing authority could be dispensed with in urgent circumstances. In such circumstances, an application to the High Court could be made and a search warrant issued and transmitted quickly, thereby reducing the risk of any material being moved to another location or destroyed before a premises could be searched.
- 3.45 The Commission is of the view that the present position which requires the applicant to have a reasonable suspicion or belief that evidence is at a place should remain.
- 3.46 Having considered feedback received, the position in other jurisdictions and the potential advantages and disadvantages of anticipatory warrants, the Commission is also therefore of the view that the proposed Search Warrants Act should not provide for anticipatory search warrants.

**3.47 The Commission recommends that the proposed Search Warrants Act should retain the current requirement that a search warrant may be issued where material in respect of an offence is to be found at a specified location, and that the recommended Search Warrants Act should not therefore provide for anticipatory warrants.**

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<sup>73</sup> New Zealand Law Commission, *Search and Surveillance Powers* (Report 97 2007) at 119.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid* at 119.

## D Requests for Additional Information

- 3.48 In Ireland, search warrant provisions do not contain any express stipulation that an issuing authority must request further information from the applicant in addition to that included in the application itself. On the other hand, there is no express stipulation prohibiting a request for further information from an applicant. In *The People (DPP) v Kenny*,<sup>76</sup> the Supreme Court inferred that the issuing authority concerned did have the power to make further enquiries. The Court went further, however, and suggested that issuing authorities had a duty to do so in order to satisfy themselves that there were grounds to issue a search warrant.<sup>77</sup> In *Hanahoe v Hussey*,<sup>78</sup> the High Court observed that the issuing District Court judge did not rely solely on the information submitted to her in the application. Rather, she independently “probed and put questions to the Gardaí” for the purpose of gaining additional information, so that she could make a fully informed decision on the matter.<sup>79</sup> Therefore, the power and duty of the issuing authority to request further information is a corollary of the condition that the applicant must satisfy the issuing authority of the need for a search warrant. In turn, the issuing authority must be satisfied that a search warrant is necessary and should be issued.
- 3.49 In the Consultation Paper, the Commission referred to legislation in other jurisdictions which includes express provisions regarding requests for additional information. In England and Wales, the *Police and Criminal Evidence Act 1984* provides that an applicant “shall answer on oath any question that the justice of the peace or judge hearing the application asks him.”<sup>80</sup> The New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002* states that the applicant “must provide (either orally or in writing) such further information as the eligible issuing officer requires concerning the grounds on which the warrant is being sought.”<sup>81</sup> In Victoria, the *Confiscation Act 1997* states that a search warrant must not be issued unless the applicant has given the magistrate or judge “any further information that he or she requires concerning the grounds on which the warrant is being sought.”<sup>82</sup> Similarly, in Queensland the *Crime and Misconduct Act 2001* provides that the magistrate or judge may refuse to consider an application until the applicant gives “all the information the issuer requires about the application in the way the issuer requires.”<sup>83</sup>
- 3.50 Expressly setting out a power to request further information within legislation may have certain advantages. It would provide a clear legislative recognition of the power and practice of issuing authorities to seek further details so applications are sufficiently informative. Secondly, such a provision would assist an applicant in being fully prepared by ensuring that they provide as much relevant information as possible when making an application. Greater preparation on the part of the applicant may in turn result in a more efficient and timely application process. This would be particularly beneficial where an applicant does not have a great deal of experience in making such applications. Thirdly, this type of legislative provision may also serve to remind issuing authorities of the duty to request further information where the information initially provided by the applicant is not sufficient to justify issuing a warrant.

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<sup>76</sup> [1990] 2 IR 110.

<sup>77</sup> *Ibid* at 140.

<sup>78</sup> [1998] 3 IR 69.

<sup>79</sup> *Ibid* at 89-90.

<sup>80</sup> Section 15(4) of the *Police and Criminal Evidence Act 1984*.

<sup>81</sup> Section 62 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

<sup>82</sup> Section 80(2)(b) of the *Confiscation Act 1997*.

<sup>83</sup> Section 86(6) of the *Crime and Misconduct Act 2001*.

3.51 The Commission recommends that the power of issuing authorities to request further information of an applicant should be acknowledged in legislation. However, the Commission does not recommend that such requests should be obligatory in every case. Thus, the legislation should not create a positive obligation, as to do so may provide a basis on which to challenge the validity of a search warrant in cases where additional information was not requested. Rather, it would be a matter for the issuing authority in each case to determine whether additional information is required to ground the application. The Commission is of the view that it would be appropriate to incorporate such a provision in the Search Warrants Act recommended in this Report.

**3.52 The Commission recommends that the power of an authority considering whether to issue a search warrant to request further information from an applicant should be placed on a statutory footing in the Search Warrants Act. Such a provision should not create a positive obligation but should simply acknowledge the power to request additional information where it is necessary and appropriate to do so.**

## E Form of Search Warrant Applications

3.53 In the Consultation Paper, the Commission noted that although the majority of search warrant provisions do not specify the manner in which applications should be presented,<sup>84</sup> legislation generally refers to corresponding “information forms” which are to be completed by the applicant and submitted to the issuing authority.<sup>85</sup> In practice, therefore, search warrant applications are typically presented in writing. The Commission has recommended at paragraph 3.366 that a generally applicable Search Warrants Act should require a person applying for a search warrant to affirm his or her opinion “on oath and in writing”.

3.54 A number of these information forms are contained in the *District Court Rules 1997*,<sup>86</sup> for example, in relation to the *Gaming and Lotteries Act 1956*,<sup>87</sup> the *Control of Dogs Act 1986*,<sup>88</sup> the *Prohibition of Incitement to Hatred Act 1989*,<sup>89</sup> the *Video Recordings Act 1989*,<sup>90</sup> the *Firearms and Offensive Weapons Act 1990*,<sup>91</sup> the *Criminal Damage Act 1991*<sup>92</sup> and the *Criminal Law (Sexual Offences) Act 1993*.<sup>93</sup> The *District Court (Search Warrant Rules) 2008* amended the *District Court Rules 1997* by substituting new information forms in respect of the *Criminal Assets Bureau Act 1996*,<sup>94</sup> the *Criminal Justice (Miscellaneous Provisions) Act 1997*,<sup>95</sup> the *Criminal Justice (Theft and Fraud) Act 2001*<sup>96</sup> and the *Prevention of Corruption (Amendment) Act 2001*.<sup>97</sup>

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<sup>84</sup> An exception to this can be found in section 22 of the *National Monuments (Amendment) Act 1987*, which states that the information on oath which grounds a search warrant application is to be presented in writing.

<sup>85</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 3.31.

<sup>86</sup> *District Court Rules 1997* (SI No.93 of 1997).

<sup>87</sup> Form 66.7, Schedule C, *District Court Rules 1997*.

<sup>88</sup> Form 91.4, Schedule C, *District Court Rules 1997*.

<sup>89</sup> Form 34.5, Schedule B, *District Court Rules 1997*.

<sup>90</sup> Form 34.9, Schedule B, *District Court Rules 1997*.

<sup>91</sup> Form 34.11, Schedule B, *District Court Rules 1997*.

<sup>92</sup> Form 34.17, Schedule B, *District Court Rules 1997*.

<sup>93</sup> Form 34.20, Schedule B, *District Court Rules 1997*.

<sup>94</sup> Form 34.39, Schedule 1, *District Court (Search Warrant) Rules 2008* (SI No.322 of 2008).

<sup>95</sup> Form 34.37, Schedule 1, *District Court (Search Warrant) Rules 2008*.

3.55 In the Consultation Paper, the Commission expressed the view that having a large number of information forms, from which the relevant form must be selected and completed by the applicant, is inefficient.<sup>98</sup> The Commission also noted that the legislature's task of amending existing provisions so as to incorporate new information forms corresponding with each new search warrant provision is inefficient and time-consuming.<sup>99</sup> The Commission therefore examined the possibility of implementing a single information form to be used when applying for search warrants. In this regard, the Commission examined the approach in other jurisdictions where standard search warrant forms are issued when applying for search warrants.<sup>100</sup> For example, in England and Wales, the search warrant provisions under sections 8, 15 and 16 of the *Police and Criminal Evidence Act 1984* are supplemented by the *Criminal Procedure Rules 2014*.<sup>101</sup> The *Criminal Practice Directions*<sup>102</sup> set out the forms to be used in connection with the parts of the 2014 Rules which relate to search warrant applications. Rule 6.30 sets out detailed requirements about what must be included in such forms. The 2014 Rules are accompanied by guidance notes on completing the forms.

**(1) Format of "information for search warrant" forms in Ireland**

3.56 With regard to the current approach in Ireland it has been noted that, generally, each search warrant provision has a corresponding 'information for search warrant' form which is completed by the applicant and submitted to the issuing authority. The typical format of such forms is as follows:

- (a) the name and section of the legislative provision under which the application is made is printed on the document;
- (b) the applicant is required to complete the name of the District Court area and district number where the application is being made;
- (c) the applicant must state his or her name on the form;
- (d) a statement as to the status of the applicant, for example, whether he or she is a member of An Garda Síochána, a member of An Garda Síochána of a certain rank, or an officer of another authority entitled to make an application;
- (e) a statement that the informant has reasonable grounds for suspecting or believing that certain material, which may include evidence of or relating to an offence or other material relevant to the enactment containing the provision, is likely to be found at a location named by the applicant;
- (f) the applicant must specify the address of the location concerned;
- (g) the applicant must set out the basis for the grounds of the suspicion or belief;
- (h) a statement that a search warrant is being sought on the basis of the information form;
- (i) the signature of the informant or applicant;

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<sup>96</sup> Form 34.1, Schedule 1, *District Court (Search Warrant) Rules 2008*.

<sup>97</sup> Form 34.41, Schedule 1, *District Court (Search Warrant) Rules 2008*.

<sup>98</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 3.32.

<sup>99</sup> *Ibid.*

<sup>100</sup> For example: section 487(1) and Form 1 of the *Criminal Code 1985* (Canada); section 60(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* and schedule 1, part 1 of the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (New Zealand); Part 6, section 7 of the *Criminal Procedure Rules 2014* (SI 2014 No.1610) and *Criminal Practice Directions 2014* (England and Wales).

<sup>101</sup> *Criminal Procedure Rules 2014* (SI 2014 No.1610) (England and Wales).

<sup>102</sup> *Criminal Practice Directions* [2014] EWCA Crim 1569.

- (j) the signature of the potential issuing authority to whom it has been presented and the date upon which the information was presented and sworn.

**(2) Implementing a standard search warrant application form**

3.57 The major benefit of having a standard information form in place of the array of forms which currently exist in Ireland is that it would lead to greater efficiency in respect of the search warrant application procedure. An applicant would no longer need to obtain the particular information form corresponding to the relevant search warrant provision, but would simply need to complete a standard form with the necessary details. Furthermore, the legislature would no longer need to draft a new information form corresponding to each new search warrant provision as the standard form would be used for applications made under any and all provisions.

3.58 A standard form would not deviate greatly in substance from the information forms which are currently relied upon. Many of the features noted above would remain the same, including:

- a section of the form where the applicant specifies the relevant District Court area and district number;
- a section where the applicant states his or her name, office and position;
- a section where the applicant identifies the location to be searched;
- a requirement to state the information upon which the application is based, and
- a section for the signatures of the applicant and the authority who accepts the application.

3.59 Many information for search warrant forms contain a printed statement that the informant has reasonable grounds for suspecting or believing that evidence of, or relating to, an offence is to be found. This is not, however, a requirement for all information for search warrant forms and even where it is a requirement the terms of the statement may vary. For example, Form 34.15 is the information form associated with section 20(1) of the *Companies Act 1990*, as amended. It contains the following statement concerning the belief of the officer applying for a search warrant:

“I believe that there are reasonable grounds for suspecting that there are on the premises at ....., in the court (area and) district aforesaid, material information within the meaning of the said section 20, namely

(\*books \*documents of which production has been required under section \*14 \*15 \*19 of the above-mentioned Act on the .... day of ..... 20.... and which have not been produced in compliance with that requirement)

(\*books \*documents \*other things which I have reasonable grounds for believing may provide evidence of or relating to the commission of an offence under the Companies Acts).

The basis for my so believing is as follows...”<sup>103</sup>

Therefore, the officer’s stated belief does not always relate to a suspected offence.

3.60 The Commission has already discussed the variations within Irish search warrant provisions dealing with the opinion of the applicant. The Commission has recommended that a single term (“reasonable grounds for suspecting”), outlining the opinion required of

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<sup>103</sup> Form 34.15, Schedule B to the *District Court Rules 1997* (SI No. 93 of 1997), as substituted by the *District Court (Company Law) Enforcement) Rules 2002* (SI No. 207 of 2002). Section 20 of the *Companies Act 1990* was replaced by sections 787 to 789 of the *Companies Act 2014*. It is likely that a similar search warrant form will be implemented to accompany the new search warrant provisions in the 2014 Act but at the time of writing (October 2015) these have not been published.

an applicant, should be used in legislation. This standardisation would be equally appropriate for search warrant application forms. Where an applicant is applying for a search warrant based on reasonable grounds for suspecting that evidence of or relating to an indictable offence is at a location, a statement to that effect should be included on the form. Currently, information for search warrant forms vary depending on the search warrant provision to which they relate and the title of the legislative provision under which the application is being made is printed at the top of each form. By contrast, the proposed standard information form would simply include a section whereby the applicant would, himself or herself, state the suspected offence with which the investigation, and consequently the search warrant application, is concerned.

- 3.61 Where the person applying for a search warrant does not suspect that evidence of or relating to an offence is at a place, but is applying pursuant to a power in an enactment in the schedule, the standard of belief should still be “reasonable grounds for suspecting”. However, the information form should state that the applicant has reasonable grounds for suspecting that a search warrant is necessary to facilitate a person in carrying out his or her powers or functions under one of the enactments specified in the schedule of Acts and Statutory Instruments which authorise the issuing of a search warrant where suspicion or belief that evidence relating to an offence is at a location is not a requirement or the only requirement for the issuing of a warrant. The information form should then leave room for the applicant to describe the basis for this suspicion.
- 3.62 Overall, a standard form would be more open and, in practice, would require the applicant to complete a greater portion of the form rather than these details being printed on the particular corresponding form, as is currently the case.

**3.63 The Commission recommends that the proposed Search Warrants Act should provide for a standard search warrant information form to be used when applying for a search warrant, which should replace the array of “information for search warrant” forms that currently exist.**

## **F An Electronic Search Warrant Application Process**

- 3.64 In the Consultation Paper, the Commission examined the issue of whether a Search Warrants Act should provide for electronic procedures for applying for and issuing search warrants, and discussed legislation providing for electronic processes in other jurisdictions.<sup>104</sup> Irish legislation does not provide for the use of information and communication technology (ICT) in the search warrant application process. The Commission also published an *Issues Paper on Search Warrants* in which it sought the views of interested parties in respect of electronic search warrant procedures.<sup>105</sup>

### **(1) Electronic filing of search warrant forms**

- 3.65 In the Issues Paper, the Commission discussed the option of introducing a system under which all search warrant information forms could be filed electronically. This approach would involve the applicant saving an “information for search warrant” form to a database. Such a system would mean that there would be a record of every search warrant information form stored electronically. An e-filing system would be a natural development of the current practice of An Garda Síochána, which involves the completion of the information form on the Garda Síochána PULSE database before printing the form and bringing it to the issuing authority to make the search warrant application. A record of the warrant application is retained on PULSE. If a search warrant is issued, the Garda notes this on the relevant PULSE file. The Commission understands that this electronic

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<sup>104</sup> See generally *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 3.39-3.56.

<sup>105</sup> *Issues Paper on Search Warrants* (LRC IP 4-2014) at paragraphs 2.01-2.25.

database is accessible only to members of An Garda Síochána. In the Issues paper, the Commission suggested that this practice of having an electronic database could also be open to other bodies that apply for search warrants such as the Office of the Director of Corporate Enforcement or the Revenue Commissioners, and all of these electronic databases could be combined to form a central repository.<sup>106</sup>

- 3.66 A significant majority of the submissions which the Commission received in response to this aspect of the Issues Paper favoured the introduction of a system whereby it would be possible to file search warrant information forms electronically. Feedback suggested that the filing and automatic recording of search warrant information forms in a central repository would be a useful development, as information forming the basis of a search warrant application could be accessed without delay if an issue arose in respect of the search warrant application during proceedings. It was also suggested to the Commission that an e-filing system would allow for greater flexibility than the current system as information forms could be filed at any time. Submissions also agreed with the observation in the Issues Paper that an e-filing system would complement current developments in the Courts Service in relation to the use of ICT and would be consistent with eGovernment strategy in Ireland.<sup>107</sup> The Commission's 2010 *Report on Consolidation and Reform of the Courts Acts*<sup>108</sup> includes a provision in the draft *Courts (Consolidation and Reform) Bill* appended to that Report to the effect that "[r]ules of court shall, where practicable and appropriate, support the efficient use of information and communications technology in the conduct of proceedings before the Courts."<sup>109</sup> Electronic procedures have been introduced in small claims civil proceedings, in personal insolvency proceedings and in the High Court Commercial List.<sup>110</sup>
- 3.67 At paragraphs 3.722 to 3.90 the Commission discusses the possibility of dispensing with the requirement for the individual applying for a search warrant to appear personally before the issuing authority in limited, exceptional circumstances. If such a system were implemented, it would be useful to have all documents associated with the search warrant process, including the information form and the search warrant itself, readily accessible from one central repository.
- 3.68 The Commission recommends at paragraph 3.633 that a standard search warrant information form should be implemented in Ireland. The use of one standard form when applying for a search warrant would make an electronic filing system relatively easy to implement and operate as there would not be a variety of forms to choose from.
- 3.69 Having regard to the positive nature of the responses to the issue of electronic filing of search warrant information forms and the advantages associated with such procedures, the Commission recommends that it should be possible to file search warrant information forms electronically

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<sup>106</sup> *Ibid* at paragraph 2.02.

<sup>107</sup> See Department of Public Expenditure and Reform, *Supporting Public Service Reform: eGovernment 2012-2015*, available at [egovstrategy.gov.ie](http://egovstrategy.gov.ie); and *Courts Service ICT Strategy Statement 2011-2014*, available at [courts.ie](http://courts.ie).

<sup>108</sup> *Report on Consolidation and Reforms of the Courts Acts* (LRC 97-2010).

<sup>109</sup> *Ibid* at 198 (section 227 of the draft *Courts (Consolidation and Reform) Bill*).

<sup>110</sup> See *District Court (Small Claims) Rules 2009* (SI No.519 of 2009), Order 53A (small claims procedure); section 140 of the *Personal Insolvency Act 2012*, the *Circuit Court Rules (Personal Insolvency) 2013* (SI No.317 of 2013), Order 73; the *Rules of the Superior Courts (Personal Insolvency) 2013* (SI No.316 of 2013), Order 76A (personal insolvency); and *Rules of the Superior Courts (Commercial Proceedings)* (SI No.2 of 2004), Order 63A and 63B (High Court Commercial List) .

3.70 The development and operation of an electronic system for filing search warrants would be a matter for the Courts Service. Submissions which the Commission received stressed the importance of having a suitable ICT infrastructure in place to ensure the efficient operation of an electronic search warrant filing system. In that regard, the successful implementation of such a system would be dependent upon sufficient resources being dedicated to its running and maintenance.

**3.71 The Commission recommends that the proposed Search Warrants Act should allow for search warrant information forms to be filed electronically.**

**(2) Removing the requirement for a personal appearance by the applicant before the issuing authority**

3.72 As noted earlier, applications for search warrants generally involve the applicant appearing personally before the issuing authority (usually a judge of the District Court) and making the application *ex parte* in the chambers of a judge of the District Court by laying the search warrant information form before the judge and affirming his or her opinion on oath. The Issues Paper sought views as to whether the current search warrant application process should continue to require the applicant to appear personally before the issuing authority formally to affirm his or her opinion.<sup>111</sup> It asked whether, if a personal appearance should not generally be required, such a requirement could be dispensed with so that all applications could be made, or permitted to be made electronically.

3.73 The Commission also invited views as to whether the requirement for the applicant to appear personally before the issuing authority could be dispensed with in limited circumstances as an exception to the rule. The Issues Paper suggested that such circumstances could include urgent situations, or where it would be impracticable to appear in person before the issuing authority, or where any delay involved in applying in person would frustrate the effective execution of the warrant.<sup>112</sup>

3.74 In other jurisdictions, the circumstances in which the requirement for the applicant to appear personally before the issuing authority may be dispensed with are limited. For example, in the Commonwealth of Australia, the *Crimes Act 1914*, as amended, provides for search warrant applications by telephone, telex, fax or other electronic means in an urgent case or if any delay in making the application in person would frustrate the effective execution of the warrant.<sup>113</sup> Electronic applications are qualified as the authority to which the application is being made “may require communication by voice to the extent that it is practicable in the circumstances.”<sup>114</sup> The New Zealand *Search and Surveillance Act 2012* provides that an application for a search warrant must be in writing<sup>115</sup> and may be made electronically.<sup>116</sup> The New Zealand 2012 Act requires the applicant to make a personal

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<sup>111</sup> *Issues Paper on Search Warrants* (LRC IP 4-2014) at paragraphs 2.04 - 2.19.

<sup>112</sup> *Ibid.*

<sup>113</sup> Section 3R(1) of the *Crimes Act 1914*, as inserted by section 4 of the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*.

<sup>114</sup> *Ibid.*, section 3R(2).

<sup>115</sup> Section 100(3) of the *Search and Surveillance Act 2012* (New Zealand) contains an exception to the requirement that search warrant applications be in written form. Applications may be made orally (by telephone for example) or by personal appearance and the applicant may be excused from putting all or part of the information in writing where: (a) the issuing officer is satisfied that the delay that would be caused by requiring an applicant to put the application in writing would compromise the effectiveness of the search; and (b) the issuing officer is satisfied that the question of whether the warrant should be issued can properly be determined on the basis of oral appearance; and (c) the information required to make a search warrant application is supplied to the issuing officer.

<sup>116</sup> Section 100(1) of the *Search and Surveillance Act 2012* (New Zealand).



appearance or communicate orally with the issuing officer unless: (a) the issuing officer is satisfied that the question of whether the search warrant should be issued can properly be determined on the basis of any written communication by the applicant; (b) the information forming the basis of the search warrant application has been supplied to the issuing officer; and (c) the issuing officer is satisfied that there is no need to ask any questions of, or seek any further information from the applicant.<sup>117</sup> The Canadian *Criminal Code* states that where a peace officer believes that an indictable offence has been committed and it would be “impracticable to appear personally before a justice to make an application for a warrant”, the peace officer may submit information on oath “by telephone or other means of communication” to a judge.<sup>118</sup>

**(a) Discussion**

**(i) Advantages of a personal appearance**

3.75 A number of submissions which the Commission received in respect of this issue highlighted the importance of a personal appearance by the applicant before the issuing authority. Feedback agreed with the suggestion in the Issues Paper that a personal appearance is more likely to make both the applicant and the issuing authority appreciate the gravity of using a search warrant. One respondent with significant experience issuing search warrants referred to the importance of the issuing authority being able to engage meaningfully with the applicant so that the process is not merely a “rubber-stamping” exercise. An appearance in a formal courtroom setting reminds the applicant of the fundamental rights which the search warrant process engages. It therefore encourages him or her to provide truthful information to ensure that the grounds on which he or she is applying for a search warrant are sufficient. Requiring the search warrant application to take place in a courtroom environment to which the applicant has to travel is likely to reinforce in the mind of both the issuing authority and the applicant the importance and implications of using a search warrant, and therefore encourage the issuing authority thoroughly to consider the information on which the application for the search warrant is based. There may be a danger that removing the requirement for a personal appearance would encourage a casual approach to be taken when applying for a search warrant. Removing the search warrant application process from a courtroom environment might distance all parties from the importance and implications of using a search warrant. The physical presence of the applicant and issuing authority reminds all parties of the solemnity of the occasion.

3.76 Submissions also suggested that requiring the applicant to appear personally before the issuing authority assists in safeguarding the right to privacy and protection of the dwelling by allowing the issuing authority a greater opportunity to assess the merit of the application. Having the applicant personally appear before him or her to satisfy the procedural requirements allows the issuing authority to observe the applicant’s demeanour at first hand thereby improving their capacity to assess the applicant’s veracity. The issuing authority is able to observe what are perceived as “taken to be

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<sup>117</sup> Section 100(4) of the *Search and Surveillance Act 2012* (New Zealand). In the Report whose recommendations led to the enactment of the 2012 Act, the New Zealand Law Commission had recommended that the issuing officer should have the power to dispense with the applicant’s personal appearance where satisfied that “the delay that would be caused by requiring a personal appearance will compromise the effectiveness of the search and “the merits of the warrant application can be adequately determined on this basis.

<sup>118</sup> Section 487.1(1) of the *Canadian Criminal Code 1985*, C-46.

involuntary physical signs of falsehood”<sup>119</sup> such as tone of voice, eye movement, facial gestures and other body language.<sup>120</sup>

- 3.77 In the Issues paper, the Commission noted comments of members of the judiciary suggesting that the weight that experienced observers of witnesses should attach to impressions they form of them in the witness box has been overestimated. Hardiman J has cited with approval the following passage of Atkin LJ in *Société d’Avances Commerciales (Société Anonyme Egyptienne) v Merchants Marine Insurance Co (The Palitana)*:<sup>121</sup>

“As I have said on previous occasions the existence of a lynx-eyed Judge who is capable at a glance of ascertaining whether a witness is telling the truth or not is more common in works of fiction than in fact on the bench, and, for my part, I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour.”

- 3.78 However, one submission that the Commission received noted that the Supreme Court has commented on the benefit that a trial court has in contrast with a court of appeal in being able to draw inferences of fact from assessing the demeanour of a witness giving evidence. In *Director of Public Prosecutions v Mulvey*,<sup>122</sup> the Supreme Court cited the following passage of the Supreme Court in *Hay v O’Grady*:<sup>123</sup>

“Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. (See the judgment of Holmes LJ in *The SS “Gairloch,” Aberdeen Glenline Steamship Co v Macken* [1899] 2 IR 1, cited by O’Higgins CJ in *The People (DPP) v Madden* [1977] IR 336 at p.339). I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge.”

- 3.79 The Commission received some responses to the Issues Paper which asserted that a personal appearance by the applicant is so important that such a practice should not be dispensed with under any circumstances. In that regard, it was suggested that the *ex parte* nature of search warrant applications necessitates a procedural safeguard of a personal appearance by the applicant, and therefore personal appearance is more likely to prevent frivolous or marginal applications given the time, effort and expense of the applicant having to attend at a courthouse. Requiring a personal appearance in every case, it was submitted, would be the best way of maintaining the protecting the rights of the owner or occupier.

**(ii) Removing the requirement for a personal appearance in all circumstances**

- 3.80 In contrast, a number of respondents to the Issues Paper submitted that all applications should be made or be permitted to be made electronically. It was suggested that a procedure that did not require an applicant to appear personally would save considerable time and resources, and may reduce the risk of investigations being compromised if

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<sup>119</sup> Roberts and Zucherman *Criminal Evidence* (Oxford University Press 2004) at 299.

<sup>120</sup> *Ibid.*

<sup>121</sup> (1924) 20 LI L Rep 140 at 152, cited with approval by Hardiman J in *J O’C v Director of Public Prosecutions* [2000] 3 IR 478 at 508 and *O’Callaghan v Mahon* [2006] 2 IR 32 at 60.

<sup>122</sup> [2014] IESC 18.

<sup>123</sup> [1992] IR 210 at 217.

persons applying for search warrants were able to do so electronically while remaining at the location of an investigation. This might promote speed and efficiency in the search warrant application process. It was also suggested that an electronic process would be cost-effective as it would reduce the need to convene court sittings out of normal court hours, such as at the weekend, thereby reducing the need for judges, members of the Gardaí or other regulatory authorities and court staff to travel.

**(iii) Removing the requirement for a personal appearance only in limited circumstances**

- 3.81 A significant proportion of submissions relating to this issue agreed that the requirement for the applicant to appear personally before the issuing authority should only be dispensed with in certain circumstances.
- 3.82 Submissions in favour of this approach suggested that search warrant applications that do not involve a personal appearance before the issuing authority should be an exception to the general rule, as there would otherwise be a danger that an issuing authority would satisfy themselves of the necessity for the warrant without any interaction between the issuing authority and the applicant. It was suggested that the use of electronic procedures in all search warrant applications could result in an increase in the number of challenges to the admissibility of evidence obtained on foot of a search warrant. It was also noted that an electronic system would not be necessary in all situations, and there would be greater need for such a system in a large country, such as Australia, than in Ireland.
- 3.83 The submissions agreed that one benefit of such an approach is that it would facilitate the issuing of search warrants by judges of the District Court in circumstances of urgency. This issue was raised during the parliamentary debates on the *Criminal Justice (Search Warrants) Bill 2012* (enacted as the *Criminal Justice (Search Warrants) Act 2012*), in response to which the Minister for Justice and Equality, referring to the Commission's Consultation Paper, stated that the Commission's "consideration of the extent to which technology could be used to apply for and issue search warrants, thereby possibly overcoming some of the difficulties that arise when a warrant is required immediately" was "of particular interest" in the context of the Bill.<sup>124</sup> It was noted by a senator that developments within the area would allow the legislature to "bring... legislation up to the level of current technology"<sup>125</sup> and it was suggested that if a judge could not be physically present to issue a search warrant, judicial interaction should be made possible through the use of electronic signatures.<sup>126</sup>
- 3.84 Allowing for the removal of a personal appearance by the applicant in circumstances of urgency would decrease the need for legislation providing for members of An Garda Síochána of a certain minimum rank to issue search warrants in urgent circumstances where it is impracticable for a warrant to be issued by a judge. The Issues Paper noted the existence of a small number of such legislative provisions<sup>127</sup> A process enabling the applicant to submit a search warrant application without having personally to appear before the issuing authority would enable members of An Garda Síochána to apply to a judge of the District Court for a search warrant rather than to a member of An Garda Síochána of a certain minimum rank. This would ensure the independence of the issuing

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<sup>124</sup> Seanad Éireann Debates Vol. 771, No. 1, 3 July 2012.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> Examples of such provisions include section 29 of the *Offences Against the State Act 1939*, as inserted by section 1 of the *Criminal Justice (Search Warrants) Act 2012*, section 16 of the *Official Secrets Act 1963*, section 14 of the *Criminal Assets Bureau Act 1996*, section 26 of the *Misuse of Drugs Act 1977*, as amended by the *Criminal Justice (Drug Trafficking) Act 1996* and further amended by section 3 of the *Criminal Justice (Search Warrants) Act 2012*, section 5 of the *Prevention of Corruption (Amendment) Act 2001*, section 7 of the *Criminal Justice (Surveillance) Act 2009*.

authority, the importance of which was highlighted by the Supreme Court in *Damache v Director of Public Prosecutions*.<sup>128</sup>

- 3.85 In *Damache* the Supreme Court declared unconstitutional section 29 of the *Offences Against the State Act 1939*, as amended by section 5 of the *Criminal Law Act 1976*, because it permitted a member of An Garda Síochána who was not independent of the investigation to issue a search warrant. The Supreme Court noted that a number of other Acts provide for members of An Garda Síochána to issue search warrants in exceptional circumstances. The Court stated that “[t]he requirement of urgency is an important factor in determining the proportionality of legislation which may infringe a constitutionally protected right.”<sup>129</sup> Courts in Ireland appear to be satisfied that warrants issued by members of the Gardaí satisfy the requirement that a warrant be issued by a “competent, detached authority exercising an independent jurisdiction”<sup>130</sup> if the Garda is sufficiently independent of the investigation. However, there is a view that the best means of ensuring that the issuing authority is completely independent is to have all search warrants issued by members of the judiciary. The *Report of the Morris Tribunal of Inquiry* states that “the power to issue a warrant should be vested in a judge”<sup>131</sup> and that with modern technology “there is no reason why a judge cannot be easily contacted by telephone, facsimile or e-mail or personally, for the purpose of making an application to him/her for a search warrant.”<sup>132</sup> The Report notes that there are “very limited occasions upon which time could make it so pressing as to make it impossible to follow such a procedure”.<sup>133</sup> Based on these considerations, allowing for electronic applications in limited circumstances would allow for the repeal of legislative powers conferring powers to issue search warrants on members of An Garda Síochána. The Commission discusses this issue in Chapter 4.
- 3.86 Other jurisdictions use ICT in the search warrant application process to vindicate fundamental rights. The New Zealand Law Commission was of the view that allowing the requirement of making a personal appearance to be dispensed with may protect human rights values as it would provide “the enforcement officer with the opportunity, in cases of urgency, to have a search sanctioned by a neutral person, rather than executing a warrantless power if that is available.”<sup>134</sup> Similarly, part of the reasoning of the United States Congress for the introduction of telephonic and electronic warrants was that difficulties in obtaining warrants were encouraging law enforcement officials to carry out warrantless searches.<sup>135</sup> An American academic has commented that a process enabling the issuing of search warrants by telephone or other electronic means promotes greater compliance with the Fourth Amendment to the United States Constitution, which protects against “unreasonable searches and seizures” and balances “the liberty and privacy

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<sup>128</sup> [2012] IESC 11, [2012] 2 IR 266.

<sup>129</sup> [2012] IESC 11, [2012] 2 IR 266 at paragraph 37.

<sup>130</sup> *The People (DPP) v Balfe* [1998] IR 50.

<sup>131</sup> Fifth Report of the Morris Tribunal *Report of the Tribunal of Inquiry into Certain Gardaí in the Donegal Division* (Government Publications 2006) at paragraphs 623-624, quoted in *Damache v Director of Public Prosecutions* [2012] IESC 11, [2012] 2 IR 266 at paragraph 53.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> New Zealand Law Commission *Report on Search and Surveillance Powers* (NZLC 2007) at 103.

<sup>135</sup> See notes of the Advisory Committee of Federal Rules of Criminal Procedure, available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18-app-federalru-dup1-toc.pdf> (last accessed 9 January 2015); and Smith “Press One for Warrant: Reinventing the Fourth Amendment’s Search Warrant Requirement Through Electronic Procedures” (2002) *Vand L Rev* 1591 at 1605.

interests of each citizen and the safety and security needs of the public.”<sup>136</sup> In Ireland, the implementation of an electronic search warrant application process in urgent circumstances would also protect relevant rights by providing for the issuing of all search warrants by a court.

**(b) Conclusion**

- 3.87 The Commission has considered the feedback received in response to the Issues Paper and the advantages and disadvantages of requiring a personal appearance on behalf of the applicant. Removing the requirement for a personal appearance in favour of an entirely electronic application process would have the advantage of creating speed, efficiency and convenience in the process. The Commission is of the view that in the context of search warrant applications, where fundamental rights are engaged, it is important for the issuing authority and the applicant to be able to engage with each other in the fullest possible way. The Commission is of the view that a personal appearance by the applicant is the best way of ensuring that the applicant and the issuing authority appreciate the gravity of the situation, and that the issuing authority can assess the veracity of the application and examine the applicant comprehensively in relation to the grounds for the application. This argument carries particular weight having regard to the *ex parte* nature of search warrant applications.
- 3.88 However, the Commission is of the view that the requirement for the applicant to appear personally before the issuing authority could be dispensed with in limited circumstances. In light of fundamental rights associated with the use of a search warrant, the Commission is of the view that legislation should only permit search warrant applications to be made without a personal appearance in exceptional circumstances. In this regard, ICT could be used to allow law enforcement officials or regulatory officers to apply for a warrant from the location of an investigation in an urgent situation, where the delay involved in applying in person would frustrate the effective execution of the search. The Commission considers that the need to appropriately balance the right to privacy and inviolability of the dwelling with the public interest in the investigation and prosecution of offences requires the imposition of a high threshold to allow for the removal of the requirement for a personal appearance. The Commission received feedback suggesting that legislation permitting the removal of a personal appearance in limited circumstances should not be too prescriptive and should allow an issuing authority to determine on a case by case basis whether it would be appropriate to dispense with the requirement. However, the Commission is of the view that it would be appropriate for legislation to set a high threshold from the outset as to the standard that needs to be met.
- 3.89 The implementation and functioning of a system that allows for the requirement for a personal appearance to be dispensed with in urgent circumstances would be dependent upon the appropriate technology being available. As noted in the Issues Paper, section 26 of the *Criminal Justice (Amendment) Act 2009* provides that applications to a court for a search warrant “shall be heard otherwise than in public” and applications for search warrants are therefore generally held in chambers of judges.<sup>137</sup> The Commission is of the view that any security concerns could be significantly minimised through the use of technological advances to maintain confidentiality in the search warrant application and issuing process. In its *Consultation Paper on Electronic and Documentary Evidence*,<sup>138</sup> the Commission discusses Public Key Infrastructure, a system of cryptography which

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<sup>136</sup> Beci “Fidelity to the Warrant Clause; Using Magistrates, Incentives and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence” (1996) *73 Denv U L Rev* 293 at 294.

<sup>137</sup> *Issues Paper on Search Warrants* (LRC IP 4-2014) at paragraph 2.08.

<sup>138</sup> *Consultation Paper on Documentary and Electronic Evidence* (LRC CP 57-2009).

ensures a high level of security in e-communications and confidentiality in the context of a message sent over an open network such as the internet.<sup>139</sup>

**3.90 The Commission recommends that as a general rule a person applying for a search warrant should be required to appear personally before a judge of the District Court to affirm his or her opinion under oath; but that the proposed Search Warrants Act should also provide that an application may be made without the applicant appearing personally before a judge where circumstances of urgency giving rise to the immediate need for a search warrant means that the delay of appearing in person before a judge would frustrate the effective execution of the search warrant.**

**(3) Issuing authority in urgent electronic applications**

- 3.91 The introduction of a limited electronic search warrant application process depends on the availability of an issuing authority at any time of the day or night and the appropriate technology to hear urgent applications. It is possible that a judge of the District Court assigned to a particular District may not be available. The Commission has therefore considered what type of authority should have the power to hear and issue applications without a personal appearance by the applicant under the generally applicable Act.
- 3.92 One option would be to establish a panel of judges of the District Court to hear urgent electronic search warrant applications. However, the establishment of such a panel would need to comply with the requirement that a District Court judge exercise his or her powers locally in accordance with Article 34.3.4° of the Constitution.<sup>140</sup> The same issue may arise if the power to hear search warrant applications without a personal appearance by the applicant is vested in judges of the Circuit Court, which is also a court of local and limited jurisdiction under Article 34. There may therefore be difficulties in establishing a panel of either judges of the District Court or Circuit Court to hear urgent electronic applications that would be compatible with Article 34.3.4°.
- 3.93 The Commission is of the view that the authority best placed to consider urgent electronic search warrant applications is a judge of the High Court. Under Article 34.3.1° of the Constitution, the High Court has “full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.” There are no geographical limits to the exercise of the jurisdiction of the High Court.
- 3.94 There is invariably a judge of the High Court on duty to hear other forms of emergency applications, such as *habeas corpus* applications pursuant to Article 40.4.2° of the Constitution, applications for urgent injunctions<sup>141</sup> and emergency orders relating to medical procedures.<sup>142</sup>
- 3.95 The electronic issuing of search warrants by the High Court in circumstances of urgency would be consistent with the recommendation in Chapter 4 that all search warrants should be issued by members of the judiciary. Most search warrants are issued by a judge of the District Court. However, the Commission notes at paragraph 4.12 that a small number of legislative provisions allow members of An Garda Síochána of a certain minimum rank to

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<sup>139</sup> *Ibid* Chapter 7. The Commission’s forthcoming *Report on Evidence* will incorporate the material from that Consultation Paper.

<sup>140</sup> See *Creavan v Criminal Assets Bureau* [2004] 4 IR 434.

<sup>141</sup> For example, in *Crotty v An Taoiseach* [1987] IEHC 1; [1987] IESC 4; [1987] IR 713, where the High Court granted the applicant an interim injunction on Christmas Eve, which prevented the government from ratifying the Single European Act.

<sup>142</sup> See for example, *Children’s University Hospital, Temple Street v CD and DF* [2011] IEHC 1, where a judge of the High Court in the early hours of the morning of 27 December 2010 made an order sanctioning the administration of a blood transfusion to a baby who was ill and required the transfusion within a couple of hours.

issue a search warrant in circumstances of urgency. A number of legislative provisions also allow search warrants to be issued by peace commissioners. Such non-judicially issued warrants are an exception to the rule that search warrants should be issued by a judge of the District Court.<sup>143</sup> One of the main advantages of a procedure allowing for a personal appearance to be removed is that technology could allow for greater access to members of the judiciary in urgent circumstances where a search warrant is required. A procedure allowing for the removal of a personal appearance by the applicant would be an exception to the general process, which the Commission considers is the most effective means of allowing the issuing authority to observe the applicant in person and assess his or her demeanour, and encourages a sense of formality in the search warrant application process. If this advantage is eroded in any way, a judge of the High Court should be the authority that considers the search warrant application and communicates with the applicant by video link or telephone.

**3.96 The Commission recommends that in the urgent circumstances allowing for the removal of the requirement for a personal appearance by the applicant, the issuing authority should be a judge of the High Court.**

**(4) Affirmation of the applicant's opinion where requirement for personal appearance removed**

- 3.97 On the assumption that the proposed Search Warrants Act permits the removal of the requirement for an applicant to appear before the issuing authority in urgent situations, consideration must be given to how the applicant would in such circumstances affirm his or her opinion that evidence of or relating to a particular offence may be found at a certain location.
- 3.98 The Issues Paper noted that modern technology provides a number of mechanisms by which the applicant could fulfil such a requirement.<sup>144</sup> The Commission invited submissions on whether a search warrant application system should facilitate the affirmation of the applicant's opinion by: (i) sworn oath via telephone or video link; or (ii) sworn affidavit in writing (or transmitted electronically in exceptional circumstances); or (ii) statutory declaration in writing (or transmitted electronically in exceptional circumstances). If legislation provided for sworn oath via telephone or video link, the applicant could file the information grounding the application electronically and swear an oath over the telephone or by live television link. The definition of telephone could include any means of communication through which the applicant's voice can be heard, such as Skype or Face Time. A second option would be for the applicant to submit an affidavit containing sworn evidence of the information forming the basis of his or her opinion. The third option, statutory declaration, could involve the inclusion of a declaration in the search warrant information form that would render the applicant liable for a criminal prosecution upon making a false declaration.
- 3.99 In the Issues Paper, the Commission noted that different procedures would need to be put in place depending on whether the search warrant application is in a form that produces writing (for example, e-mail or fax) or a form that might not produce writing (for example, telephone or video link).<sup>145</sup> Other jurisdictions have put in place procedures that the issuing authority should follow on receipt of an electronic search warrant application. In general, such procedures require the issuing judge to record the information verbatim, where the information received is in a form that does not produce writing, before filing a

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<sup>143</sup> See *The People (DPP) v Byrne* [2003] 4 IR 423 and *The People (DPP) v Idah* [2014] IECCA 3.

<sup>144</sup> *Issues Paper on Search Warrants* (LRC IP 4-2014) at paragraph 2.20.

<sup>145</sup> *Issues Paper on Search Warrants* (LRC IP 4-2014) at paragraph 2.21.

certified copy with the court clerk.<sup>146</sup> Where the information received is in a form that does not produce writing, the judge must certify the accuracy of the information and file it with the court clerk.<sup>147</sup>

- 3.100 Submissions received by the Commission agreed that a process allowing for the removal of a personal appearance by the applicant would need to facilitate the affirmation of the applicant's opinion under oath to protect the fundamental rights of the person whose premises is the intended subject of the search warrant. Regarding the means of communication that should be used in such circumstances, the Commission recognises that affirmation by affidavit or statutory declaration might be the most convenient way of applying for a search warrant in the limited circumstances in which a personal appearance could be dispensed with. If legislation were to permit an electronic search warrant in exceptional cases, it might seem logical to provide that in the urgent circumstances in which a personal appearance could be dispensed with, the whole application process could be conducted via electronic processing of documents, including the affirmation of the opinion of the applicant.
- 3.101 However, many respondents to the Issues Paper expressed a preference for a method of communication which would allow the issuing authority to see and hear the applicant. Such a method of communication, it was submitted, would be the nearest alternative to a personal appearance by the applicant. The Commission considers that application by video link or telephone would be the most effective way of affording the issuing authority an opportunity to assess the demeanour of the applicant, ensure the veracity of the application and ask the applicant any questions that the issuing authority considers necessary where the applicant is not physically present at the place where the issuing authority is located. In that regard the Commission is of the view that a Search Warrants Acts should provide that where a personal appearance is dispensed with in urgent situations, the applicant should be required to affirm his or her opinion via telephone or video link.
- 3.102 Regarding procedures that would need to be put in place where an applicant has applied for a search warrant by telephone or video link, submissions which the Commission received suggested that such applications should be recorded so that there is a record of the search warrant application. The Commission is of the view that the creation of a record of the search warrant application, where the applicant has not personally appeared before the issuing authority, would be an important safeguard. It would provide a record of the basis on which the search warrant was granted, which could be accessed if a dispute in respect of the issuing of the warrant arose during proceedings. The Commission acknowledges that recording the affirmation of the applicant's opinion would be dependent on both the applicant and the issuing authority having access to video link or telephone facilities.
- 3.103 The *Criminal Justice (Surveillance) Act 2009* provides that members of An Garda Síochána and the Defence Forces may approve surveillance in cases of urgency.<sup>148</sup> The 2009 Act requires a superior officer who approves the carrying out of the surveillance in such circumstances, as soon as practicable and not later than 8 hours after the surveillance has been approved, to prepare a written record of approval of that surveillance.<sup>149</sup> The Commission is of the view that a Search Warrants Act that provides for the affirmation of the applicant's opinion by video link or telephone should include a

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<sup>146</sup> Section 487.1(2) of the Canadian *Criminal Code 1985*; section 100(5) of the *Search and Surveillance Act 2012* (New Zealand).

<sup>147</sup> Section 487.1(2.1) of the *Criminal Code 1985* (Canada).

<sup>148</sup> Section 7 of the *Criminal Justice (Surveillance) Act 2009*.

<sup>149</sup> Section 7(6) of the *Criminal Justice (Surveillance) Act 2009*.



similar safeguard. In that regard, a person who has applied for a search warrant in urgent situations should be required to file a record of the search warrant application as soon as practicable and not later than 24 hours after the issuing of the search warrant. The Commission is of the view that such a record could be filed electronically.

**3.104 The Commission recommends that in cases where the applicant has not appeared personally before a judge, he or she should be required to communicate with the judge of the High Court considering the application by video link or telephone to affirm his or her opinion under oath and answer any questions that the issuing authority deems necessary. Where the applicant has affirmed his or her opinion by video link or telephone, the applicant should be required to file a record of the search warrant application with the High Court as soon as practicable thereafter and not later than 24 hours after the issuing of the search warrant.**

## **G Notice of Previous Search Warrant Applications**

3.105 Currently, Irish search warrant provisions do not specifically require an applicant to inform the issuing authority that an application has previously been made in respect of the same subject matter as the current application.

3.106 In the Consultation Paper, the Commission outlined a number of other jurisdictions where the law requires search warrant applicants to inform the issuing authority of previous applications.<sup>150</sup> Variations between the approaches taken in each jurisdiction can be identified and some legislative provisions are far broader in scope than others. For example, Western Australia's *Criminal Investigations Act 2006* requires that an application for a search warrant must state "to the best of the applicant's knowledge", whether an application for a warrant for the same place has been made within the previous 72 hours, and if so, the outcome.<sup>151</sup> This provision is narrow in scope as it is concerned with a limited time period in respect of previous applications. By contrast, neither *Code B of the Police and Criminal Evidence Act 1984* in England and Wales nor the *Crimes Act 1914*, as amended, in the Australian Commonwealth set any period of limitation. Thus, any previous application must be brought to the attention of the issuing authority.

3.107 In respect of the extent of the information to be afforded by the applicant, *Code B of Police and Criminal Evidence Act 1984* states that the applicant must establish whether the premises have been searched previously. Hence the applicant will only be concerned with previous applications where the warrant was issued and subsequently executed.<sup>152</sup> Similarly, the law in Queensland requires information only where a search warrant has been issued.<sup>153</sup> By contrast, the approach in the Commonwealth,<sup>154</sup> Western Australia,<sup>155</sup>

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<sup>150</sup> See generally *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 3.80-3.87. Provisions requiring the provision of notice of previous search warrant applications can be found in *Code B: Code of Practice for Searches of Premises by Police Officers and the Seizures of Property found by Police Officers on Persons or Premises*, at 3.3(i) (England and Wales); section 487.1(4)(d) of the *Criminal Code* (Canada); section 3E(4) of the *Crimes Act 1914* (Commonwealth of Australia); section 150(6) of the *Police Powers and Responsibilities Act 2000*, and section 86(5) of the *Crime and Misconduct Act 2001* (Queensland); sections 62(1)(f) and 64 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (New South Wales); section 41(3)(h) of the *Criminal Investigations Act 2006* (Western Australia) and section 98(3) of the *Surveillance Act 2012* (New Zealand).

<sup>151</sup> Section 41(3)(h) of the *Criminal Investigations Act 2006*.

<sup>152</sup> Section 3.3(j) of *Code B of the Police and Criminal Evidence Act 1984*

<sup>153</sup> See, for example, section 86(4)(c) of the *Crime and Misconduct Act 2001*.

<sup>154</sup> Section 3E(4) of the *Crimes Act 1914*.

<sup>155</sup> Section 41(3)(h) of the *Criminal Investigations Act 2006*.

and New Zealand is that the applicant must not only inform the issuing authority of applications, but also of their outcome. The issuing authority will therefore be informed of previous applications even if they were unsuccessful. Other, more general, points as to the scope of the law in certain jurisdictions are noteworthy. For example, in New South Wales the *Law Enforcement (Powers and Responsibilities) Act 2002* does not include a general requirement as to notice of previous applications. It limits such notice to cases where an application has been refused and is subsequently resubmitted.<sup>156</sup> The New Zealand *Search and Surveillance Act 2012* requires the applicant to disclose details only of previous applications made by the agency with whom he or she is employed or engaged in particular.<sup>157</sup> In Canada, the requirement for notice is limited to cases where the application is made electronically.<sup>158</sup>

3.108 The Commission has considered whether it would be appropriate to implement a notice of previous applications provision in Ireland. The Commission acknowledges that certain benefits flow from the practice of giving notice of previous applications. For example, the requirement may enable the issuing authority to be more informed when determining whether a warrant should be issued. It may reduce the risk of undue targeting or harassment of a person by applying for a number of search warrants over a short period of time where reasonable grounds for doing so do not exist. In addition, it may prevent applications which have been rejected being resubmitted where there is no new or additional information to justify the subsequent application. However, the making of previous applications in respect of the same person(s), place or things should not necessarily influence an issuing authority in the decision currently before him or her. Furthermore, if previous search warrants have been issued and evidential material has not been found, this should not be taken to mean that material is unlikely to be found in a subsequent search. The Commission notes that if a specific provision as to notice of previous applications was to be implemented, this might result in challenges to the validity of search warrants in cases where the applicant or issuing authority did not expressly refer to the notice requirement.

3.109 On balance, the Commission is of the view that an express notice of previous applications provision should not be enacted because the advantages do not significantly outweigh the disadvantages. The Commission does not seek to prevent such notice being requested or provided during a search warrant application. However, it considers that the power of the issuing authority to request further information from the person making the application would provide sufficient scope for the issuing authority to enquire as to previous applications.

**3.110 The Commission recommends that where a judge wishes to be informed of previous search warrant applications, he or she may enquire as to this matter as part of his or her power to request further information of an applicant, but that the proposed Search Warrants Act should not include a mandatory requirement to inform the court of previous search warrant applications.**

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<sup>156</sup> Section 64(1)(f) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

<sup>157</sup> Section 98(4) of the *Search and Surveillance Act 2012*.

<sup>158</sup> Section 487.1(4)(d) of the *Criminal Code 1985*.

**A Court Should be the Issuing Authority under the Search Warrants Act**

4.01 The proposed Search Warrants Act should specify who may issue a search warrant. Currently, each legislative provision specifies who may issue a search warrant under the relevant piece of legislation. Most search warrant provisions state that a judge of the District Court may issue a search warrant and, in practice, the majority of warrants are issued by judges of the District Court.<sup>1</sup> Some legislative provisions specify limited circumstances in which a member of An Garda Síochána, of a certain minimum rank, may issue a search warrant. A small number of provisions enable a peace commissioner to issue a search warrant.<sup>2</sup>

**(1) Non-judicial search warrants**

**(a) Search warrants issued by members of An Garda Síochána**

4.02 A limited number of search warrant provisions in Ireland enable members of An Garda Síochána of a certain minimum rank (either superintendent or chief-superintendent) to issue search warrants in particular circumstances. However, warrants issued in this way are the exception to the rule that a search warrant must be issued by a judge. Acts which provide for such powers include the *Offences Against the State Act 1939*,<sup>3</sup> the *Official Secrets Act 1963*,<sup>4</sup> the *Criminal Assets Bureau Act 1996*,<sup>5</sup> the *Misuse of Drugs Act 1977*, as amended,<sup>6</sup> and the *Prevention of Corruption (Amendment) Act 2001*.<sup>7</sup>

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<sup>1</sup> See *Consultation Paper on Search Warrants and Bench Warrants* (LRC-CP 58-2009) at paragraphs 4.04-4.06, where the Commission notes that the jurisdiction to issue search warrants was transferred from justices of the peace to judges of the District Court under section 77 of the *Courts of Justice Act 1924*.

<sup>2</sup> See, for example, section 9 of the *Prohibition of Incitement To Hatred Act 1989*.

<sup>3</sup> Section 29 of the *Offences Against the State Act 1939*, as inserted by section 1 of the *Criminal Justice (Search Warrants) Act 2012*. Section 29 of the 1939 Act was originally amended by section 5 of the *Criminal Law Act 1976*. The 1939 Act had provided that a search warrant could be issued under its authority by a member of An Garda Síochána not below the rank of chief superintendent. However, the 1976 amendment reduced the ranking to be met by the issuing Garda and provided that a search warrant could be issued under the terms of the 1939 Act by a superintendent. Section 1 of the 2012 Act was inserted in response to the Supreme Court decision *Damache v Director of Public Prosecutions* [2012] IESC 11; [2012] 2 IR 2 66, which declared section 29 of the 1939 Act, as amended, unconstitutional. Section 29 now provides that a search warrant under the Act should be issued by a judge of the District Court. However, a Garda not below the rank of superintendent who is independent of the investigation may issue a warrant if the warrant is necessary for the proper investigation of the offence and circumstances of urgency render it impracticable to apply to a District Court judge.

<sup>4</sup> Section 16 of the *Official Secrets Act 1963*.

<sup>5</sup> Section 14 of the *Criminal Assets Bureau Act 1996*. This Act provides that only a superintendent who is a “bureau officer” member may issue a search warrant.

<sup>6</sup> Section 26 of the *Misuse of Drugs Act 1977*, as amended by *Criminal Justice (Drug Trafficking) Act 1996* and further amended by section 3 of the *Criminal Justice (Search Warrants) Act 2012*.

<sup>7</sup> Section 5 of the *Prevention of Corruption (Amendment) Act 2001*.

- 4.03 Under these provisions it is permissible for a search warrant to be issued by a member of the Gardaí where the immediate need for a search warrant means that it would be impracticable to apply to a judge. Garda issued search warrants are therefore intended to be relied upon in circumstances where it is not possible to have the warrant issued by a judge. The relevant validity periods in respect of such warrants are much shorter than if they were to be issued by a judge.<sup>8</sup> These time limits further reinforce the rule that such warrants are only intended to be relied upon in emergency circumstances.
- 4.04 In *The People (DPP) v Byrne*,<sup>9</sup> the accused was convicted of an offence under section 15A of the *Misuse of Drugs Act 1977*, as amended, in relation to drugs discovered on foot of a search warrant issued by a superintendent under section 8(2) of the *Criminal Justice (Drug Trafficking) Act 1996*. The Court of Criminal Appeal referred to the decision of *Ryan v O'Callaghan*,<sup>10</sup> which upheld the constitutionality of a peace commissioner being empowered to issue a search warrant. The Court stated that *Ryan*:
- “stresses a particular way of supporting the constitutionality of the peace commissioner’s power – that he is an independent person unconnected with the criminal investigation as such who must himself be satisfied of the necessary matters by the information on oath of another person. It is therefore clear, secondly, that the power of a Garda chief superintendent or superintendent to issue a warrant is by way of further exception and is an emergency provision, and cannot be regarded as anything other than an emergency provision.”<sup>11</sup>
- 4.05 The Court emphasised that “there is an obligation to apply to a district judge or a peace commissioner before seeking a warrant elsewhere”<sup>12</sup> and that permitting a circumstance of urgency to arise before applying to a superintendent was unacceptable.
- 4.06 The decision of *Byrne* was applied in respect of surveillance approvals issued by senior members of the Gardaí in *The People (DPP) v Idah*.<sup>13</sup> Undercover Gardaí had obtained a surveillance approval from a judge of the District Court under the *Criminal Justice (Surveillance) Act 2009* to conduct surveillance from the 14 to 18 September 2010. However, the relevant communications concerning the applicant had not taken place over those dates. A senior member of An Garda Síochána granted an approval to continue using the surveillance device on 19 September 2010. The Court held that under section 7(2) of the 2009 Act, the approval could only have been granted if the senior Garda had been satisfied that at least one of the circumstances of urgency provided for in the subsection applied. However, as there was no note as to which of the conditions of urgency applied and there had been no evidence of this nature given by Gardaí at trial, the Court held that the surveillance approval under which the evidence had been obtained was invalid.

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<sup>8</sup> Under section 14 of *Criminal Assets Bureau Act 1996*, a search warrant issued by a Criminal Assets Bureau officer who is a member of An Garda Síochána remains valid for 24 hours, whereas a warrant issued by a judge of the District Court under the same Act is valid for one week. Under section 5 of the *Prevention of Corruption (Amendment) Act 2001*, a Garda issued search warrant is valid for 24 hours while a warrant issued by a judge of the District Court is valid for one month. Similarly, section 8 of the *Criminal Justice (Drug Trafficking) Act 1996*, which amended the *Misuse of Drugs Act 1977* to allow a member of An Garda Síochána to issue a search warrant in certain circumstances, provides that a warrant issued by a Garda will cease to have effect after 24 hours; by contrast a judicially issued warrant remains valid for a period of one month.

<sup>9</sup> [2003] 4 IR 423.

<sup>10</sup> High Court 22 July 1987.

<sup>11</sup> [2003] 4 IR 423 at 427.

<sup>12</sup> *Ibid.*

<sup>13</sup> [2014] IECCA 3.

**(b) Search warrants issued by Peace Commissioner**

4.07 The power of Peace Commissioners to issue search warrant is usually exercised where it is not possible to apply to a judge of the District Court, such as where no court is sitting or in urgent circumstances. Acts providing for such a power include the *Road Traffic Act 1961*,<sup>14</sup> the *Misuse of Drugs Act 1977*,<sup>15</sup> the *Control of Dogs Act 1986*,<sup>16</sup> the *Customs and Excise (Miscellaneous Provisions) Act 1988*,<sup>17</sup> the *Prohibition of Incitement to Hatred Act 1989*,<sup>18</sup> the *Video Recordings Act 1989*<sup>19</sup> and the *Firearms and Offensive Weapons Act 1990*.<sup>20</sup> Notwithstanding the High Court decision in *Ryan v O'Callaghan*, above, no legislative provision enacted or made since 1990 has authorised the issuing of a search warrant by a Peace Commissioner.

**(2) Administrative nature of power to issue search warrants**

4.08 The issuing of a search warrant is an administrative function, and it is therefore unnecessary for the issuing authority to be a member of the judiciary. In *Ryan v O'Callaghan*,<sup>21</sup> the High Court found that the function of issuing a search warrant was “executive rather than judicial in nature”; hence it could be carried out by a non-judicial authority. The Court in *Berkeley v Edwards*<sup>22</sup> expressly approved the decision in *Ryan* and held that issuing a search warrant did not amount to an administration of justice that could only be performed by a judge.<sup>23</sup> In *Farrell v Farrelly*<sup>24</sup> the decision in *Ryan*, namely that issuing search warrants was not an act that could solely be performed by a member of the judiciary, was again accepted and applied.<sup>25</sup> In *Simple Imports v Revenue Commissioners*<sup>26</sup>, the Supreme Court also noted that issuing a search warrant was a “purely ministerial act.”<sup>27</sup> In light of this and in stark contrast to the normal rules of evidence, the Court further outlined that an issuing officer would be “entitled to rely on material, such as hearsay, which would not be admissible in legal proceedings.”<sup>28</sup> Although the issuing officer is entitled to rely on the information submitted by the search warrant applicant,<sup>29</sup> he or she must be satisfied that a warrant is required and justified.

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<sup>14</sup> Section 106(6) of the *Road Traffic Act 1961*.

<sup>15</sup> Section 26 (1) of the *Misuse of Drugs Act 1977*, as amended by section 8 of the *Criminal Justice (Drug Trafficking) Act 1996* and section 2 of the *Criminal Justice (Search Warrants) Act 2012*.

<sup>16</sup> Section 26(1) of the *Control of Dogs Act 1986*.

<sup>17</sup> Section 3(2) of the *Customs and Excise (Miscellaneous Provisions) Act 1988*.

<sup>18</sup> Section 9(1) of the *Prohibition of Incitement to Hatred Act 1989*.

<sup>19</sup> Section 25(1) of the *Video Recordings Act 1989*.

<sup>20</sup> Section 15 of the *Firearms and Offensive Weapons Act 1990*.

<sup>21</sup> High Court 22 July 1987.

<sup>22</sup> [1988] IR 217.

<sup>23</sup> *Ibid* at 224.

<sup>24</sup> [1988] IR 201.

<sup>25</sup> *Ibid* at 203.

<sup>26</sup> [2000] 2 IR 243.

<sup>27</sup> *Ibid* at 250.

<sup>28</sup> *Ibid* at 251.

<sup>29</sup> See generally *The People (DPP) v McEnery* Court of Criminal Appeal 15 February 1999; *The People (DPP) v Tallant* [2003] 4 IR 343; *The People (DPP) v McGartland* Court of Criminal Appeal 20 January 2003.

The issuing officer must consider and assess the information provided by the applicant and determine whether he or she is satisfied of the need to issue a warrant.

- 4.09 It is vital that the issuing authority does not simply “rubber stamp” the application, but makes an informed and considered decision in his or her own mind. This principle has been enunciated, for example, in *Byrne v Grey*,<sup>30</sup> *The People (DPP) v Kenny*,<sup>31</sup> *The People (DPP) v Balfe*<sup>32</sup> and *The People (DPP) v Tallant*.<sup>33</sup> In *Damache v Director of Public Prosecutions*<sup>34</sup>, the Supreme Court noted that, although the issuing of a search warrant is an administrative act, “it must be exercised judicially.”<sup>35</sup> In Chapter 3, Part G, above, the Commission observed that if an issuing authority is not sufficiently satisfied by the information provided by the applicant, he or she may request further information to ground the search warrant application. This helps to ensure that the issuing authority is completely satisfied in issuing the warrant and is not relying solely on the opinion of the applicant. The issuing authority is not obliged to issue a search warrant, and if not satisfied by the application, he or she may refuse to do so.<sup>36</sup>

**(3) Requirement that issuing authority be neutral and detached**

- 4.10 In the Consultation Paper, the Commission discussed the concept of “neutral and detached” issuing authorities.<sup>37</sup> O’Malley comments that in order to control the exercise of State power to intrude upon a person’s rights:

“the law continues to insist that there be interposed between the person seeking a warrant and the person whose property is liable to be searched an impartial decision-maker who must be satisfied that there are credible and rational grounds for issuing the warrant.”<sup>38</sup>

- 4.11 The issuing authority should be impartial “in the sense of having no personal or institutional connections with the applicant.”<sup>39</sup>
- 4.12 In the Consultation Paper, the Commission noted that the issue of the neutrality of the issuing authority arose in the context of a small number of Irish provisions that permit members of An Garda Síochána of a certain minimum rank to issue search warrants.<sup>40</sup> At the time the Consultation Paper was published, none of these legislative provisions specifically required the member who issued the search warrant to be independent of the investigation. The Commission therefore invited submissions as to whether only a

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<sup>30</sup> [1988] IR 31.

<sup>31</sup> [1990] 2 IR 110.

<sup>32</sup> [1998] 4 IR 50.

<sup>33</sup> [2003] 4 IR 343.

<sup>34</sup> [2012] IESC 11; [2012] 2 IR 2 66.

<sup>35</sup> [2012] IESC 11; [2012] 2 IR 2 66 at paragraphs 17 and 34.

<sup>36</sup> See *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 4.28.

<sup>37</sup> *Ibid* at paragraphs 4.29ff.

<sup>38</sup> O’Malley *The Criminal Process* (Round Hall 2009) at 353.

<sup>39</sup> *Ibid*.

<sup>40</sup> Section 29 of the *Offences Against the State Act 1939*, as inserted by section 1 of the *Criminal Justice (Search Warrants) Act 2012*, section 16 of the *Official Secrets Act 1963*, section 14 of the *Criminal Assets Bureau Act 1996*, section 26 of the *Misuse of Drugs Act 1977*, as amended by the *Criminal Justice (Drug Trafficking) Act 1996* and further amended by section 3 of the *Criminal Justice (Search Warrants) Act 2012*, section 5 of the *Prevention of Corruption (Amendment) Act 2001*, section 7 of the *Criminal Justice (Surveillance) Act 2009*.

member of An Garda Síochána who is independent of an investigation should be authorised to issue a search warrant relating to that investigation.

- 4.13 Since the publication of the Consultation Paper, the Supreme Court in *Damache v Director of Public Prosecutions*,<sup>41</sup> discussed in detail in Chapter 1 above, declared unconstitutional section 29 of the *Offences Against the State Act 1939*, as amended,<sup>42</sup> because it permitted a member of An Garda Síochána who was not independent of the investigation to issue a search warrant in the absence of circumstances of urgency. The Supreme Court accepted, however, that there may be an urgent situation where a member of the Garda Síochána who is not independent of the investigation may issue a search warrant.
- 4.14 The Supreme Court has, therefore, adjudicated on the issue of whether only a member of An Garda Síochána who is independent of an investigation should can issue a search warrant in relation to that investigation in circumstances which are not urgent. Other legislative provisions still provide for members of An Garda Síochána of a certain minimum rank to issue search warrants in circumstances of urgency without containing a specific safeguard requiring the member to be independent of the investigation. For example, the *Official Secrets Act 1963*,<sup>43</sup> the *Criminal Assets Bureau Act 1996*<sup>44</sup> and the *Prevention of Corruption (Amendment) Act 2001*,<sup>45</sup> which authorise members of An Garda Síochána of a certain minimum rank to issue search warrants in exceptional circumstances, do not expressly require the member to be independent of the investigation. However, unlike section 29(1) of the *Offences Against the State Act 1939*, which the Supreme Court in *Damache* found to be unconstitutional, these other provisions require circumstances of urgency to be present before a member of An Garda Síochána may issue a search warrant. In *Damache*, the Supreme Court noted:
- “In exceptional circumstances, such as urgent situations, provision has been made in statutes for a member of An Garda Síochána to issue a warrant, which usually has a short duration. The requirement of urgency is an important factor in determining the proportionality of legislation which may infringe a constitutionally protected right.”<sup>46</sup>
- 4.15 However, no issue of urgency arose in *Damache* and the Court stated that it had not “considered or addressed situations of urgency.”<sup>47</sup> The legislation enacted following *Damache* provides that, even in urgent circumstances, a warrant in respect of section 26 of the *Misuse of Drugs Act 1977* or section 29 of the *Offences Against the State Act 1939* must be issued by a member of An Garda Síochána who is independent of the investigation.<sup>48</sup>
- 4.16 Legislative provisions authorising members of An Garda Síochána, who are of a certain minimum rank and independent of the investigation, to issue search warrants in circumstances of urgency are compatible with the Constitution. The comments of the Supreme Court in *Damache* suggest that a search warrant issued by a member of An

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<sup>41</sup> [2012] IESC 11; [2012] 2 IR 266.

<sup>42</sup> Section 29 of the *Offences Against the State Act 1939*, as amended by section 5 of the *Criminal Law Act 1976*.

<sup>43</sup> Section 16 of the *Official Secrets Act 1963*.

<sup>44</sup> Section 14 of the *Criminal Assets Bureau Act 1996*.

<sup>45</sup> Section 5 of the *Prevention of Corruption (Amendment) Act 2001*.

<sup>46</sup> [2012] IESC 11; [2012] 2 IR 266 at paragraph 37.

<sup>47</sup> *Ibid* at paragraph 57.

<sup>48</sup> See Chapter 1, above, for a discussion of the *Criminal Justice (Search Warrants) Act 2012*, the legislative response to *Damache*.

Garda Síochána who is not independent of the investigation might be constitutionally permissible where circumstances of urgency are present. However, the Commission is of the view that it is necessary to consider how best the requirement for a neutral and detached issuing authority can be achieved in light of: (a) the need for the issuing authority to be able to assess the conflicting interests of the State and the person affected by the search warrant in an impartial manner as emphasised in *Damache*; and (b) the recommendation of the Commission in Chapter 3, above, that an electronic search warrant application process should be available in circumstances of urgency. The Commission has therefore considered whether legislative provisions permitting members of An Garda Síochána of a certain minimum rank to issue a search warrant should remain. The concept of a neutral and detached issuing authority is commonly discussed in United States case law concerned with search warrants.<sup>49</sup> Irish courts have, in case law prior to *Damache*, also emphasised the importance of the independence of the issuing authority.

**(a) Irish case law concerning neutrality and detachment of issuing authority**

- 4.17 In *The People (DPP) v Balfe*,<sup>50</sup> the Court of Criminal Appeal held, with regard to issuing search warrants, that the “protection and vindication of constitutional rights in this area is achieved by the introduction of a competent, detached authority exercising an independent jurisdiction.”<sup>51</sup> In *Director of Public Prosecutions v Sweeney*<sup>52</sup> a Chief Superintendent of An Garda Síochána was involved in the investigation into the provision of funding for illegal organisations and terrorism. Another member of the force, an inspector, was appointed to carry out the investigation and report back to the Chief Superintendent. The Chief Superintendent was regularly informed by the inspector of the progress of his enquiries. A conference was held in respect of the investigation where it was decided to carry out raids. Based on the information supplied by the inspector, the Chief Superintendent issued a search warrant under the *Offences Against the State Act 1939*. Subsequently, the applicant submitted that the Chief Superintendent did not have sufficient evidence available to him, and therefore did not have reasonable grounds upon which to issue a warrant.
- 4.18 In its assessment of the circumstances in which the warrant was issued, the High Court observed that the Chief Superintendent had “kept closely in touch with the information which he was being given” by the inspector and that as a result of what he was told he formed his own view as regards the grounds for issuing the warrant.<sup>53</sup> On this basis the Court concluded that the warrant issued by the Chief Superintendent was valid. It held that, although the issuing authority had been quite involved in the investigations and had been receiving regular information on the matter from a colleague, the Court did not question his detachment or neutrality from the matter in respect of issuing the search warrant.
- 4.19 Similarly, in *The People (DPP) v Birney*<sup>54</sup> the first applicant challenged the validity of a search warrant authorising a search of his residence. The applicant submitted that the warrant was invalid as it had been issued by a member of An Garda Síochána holding the rank of superintendent who was not independent of the investigation. On this basis the applicant claimed that there had been a breach of the principle *nemo iudex in causa sua*

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<sup>49</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 4.31 – 4.34.

<sup>50</sup> [1998] 4 IR 50.

<sup>51</sup> *Ibid* at 61.

<sup>52</sup> [1996] 2 IR 313.

<sup>53</sup> *Ibid*, at 318-319.

<sup>54</sup> [2007] 1 IR 337; [2006] IECCA 58.



(no one should be a judge in their own cause), which is concerned with impartial and unbiased decision-making. The applicant further submitted that, because a Garda member involved in the investigation at hand issued the search warrant (the issuing superintendent was in charge of the investigation), the guarantee of a fair trial enshrined in Article 38 of the Constitution had been offended. The Court of Criminal Appeal did not have jurisdiction to adjudicate on the constitutionality of section 29(1) of the *Offences Against the State Act 1939*, as amended by section 5 of the *Criminal Law Act 1976*, which empowered a member of An Garda Síochána to issue a search warrant. However, the Court stated that the wording of section 29(1) of the 1939 Act, which empowered a member of An Garda Síochána to issue a search warrant, was “clear and unambiguous.” In its assessment of this provision the Court could “see no basis” for holding that the issuing Garda should not be one involved in the particular investigation concerned.<sup>55</sup>

- 4.20 However, the Supreme Court subsequently adjudicated upon the constitutionality of section 29 of the 1939 Act in *Damache v Director of Public Prosecutions*.<sup>56</sup> The applicant challenged the constitutionality of section 29(1) of the 1939 Act, as amended by section 5 of the *Criminal Law Act 1976*. The circumstances were similar to those put forward by the applicant in *The People (DPP) v Birney & Ors*<sup>57</sup>, in that the search warrant in *Damache* was issued by a Garda superintendent in charge of the investigation. The applicant argued that the search of his home on foot of a search warrant that was issued by a Garda Superintendent who was not independent of the investigation was unconstitutional, as it violated the protection of the dwelling in Article 40.5 of the Constitution. The Supreme Court agreed with the decision of the Court of Criminal Appeal in *Birney* that section 29 of the 1939 Act did not prohibit a Garda Superintendent from issuing a search warrant. However, the Court held that section 29 of the 1939 Act, as amended, was unconstitutional. The Court noted that “the principle that the person issuing a search warrant should be an independent person is well-established.”<sup>58</sup> The Supreme Court cited with approval the following views of the High Court (Barr J) in *Ryan v O’Callaghan*,<sup>59</sup> in which the constitutionality of section 42(1) of the *Larceny Act 1916* was considered:

“The investigating police officer must swear an information that he has reasonable cause for suspecting that stolen property is to be found at the premises to be searched and he must satisfy a peace commissioner, who is an independent person unconnected with criminal investigation per se, that it is right and proper to issue a warrant.”<sup>60</sup>

- 4.21 The Court also relied on jurisprudence of other jurisdictions to illustrate the importance of having an independent issuing authority.<sup>61</sup> It acknowledged the existence of statutory provisions allowing members of An Garda Síochána to issue search warrants, but noted that these powers were to be used in circumstances of urgency only. The Court noted the constitutional protection of the dwelling under Article 40.5 and considered whether the power under section 29 of the 1939 Act constituted an interference with the protection of the dwelling which came within the “in accordance with law” exception specified in Article 40.5 and stated that:

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<sup>55</sup> [2007] 1 IR 337, 372.

<sup>56</sup> [2012] IESC 11; [2012] 2 IR 266

<sup>57</sup> [2007] 1 IR 337; [2006] IECCA 58.

<sup>58</sup> [2012] IESC 11; [2012] 2 IR 266 at paragraph 27.

<sup>59</sup> High Court 22 July 1987.

<sup>60</sup> *Ibid*, cited in *Damache v Director of Public Prosecutions* [2012] IESC 11; [2012] 2 IR 266 paragraph 28.

<sup>61</sup> *Camezind v Switzerland* (1999) 28 EHHR 458; *Hunter v Southam Inc* [1984] 2 SCR 145.

“[t]he procedure for obtaining a search warrant should adhere to fundamental principles encapsulating the independent decision maker, in a process which may be reviewed. The process should achieve the proportionate balance between the requirements of the common good and the protection of an individual’s rights. To these fundamental principles as to the process there may be exceptions, for example when there is an urgent matter.”<sup>62</sup>

4.22 The Court was of the view that the person authorising the search should “be able to assess the conflicting interests of the State and the individual in an impartial manner.”<sup>63</sup> Therefore, the issuing authority should be “independent of the issue and act judicially”.<sup>64</sup> As these principles were not satisfied in *Damache*, the Court held that section 29(1) was unconstitutional.

**(b) United States**

4.23 In *Johnson v United States*<sup>65</sup> the United States Supreme Court held that a person involved in the process of law enforcement would not be sufficiently detached for the purposes of determining a search warrant application.<sup>66</sup> Similarly, in *Coolidge v New Hampshire*<sup>67</sup> the US Supreme Court commented, with regard to issuing search warrants, that “prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations.”<sup>68</sup>

**(c) European Convention on Human Rights**

4.24 The issue of search and seizure by State authorities has come before the European Court of Human Rights (ECtHR) on numerous occasions. Quite often these cases have been based, or at least partly based, on the assertion that the search has offended the rights of a person to respect for private and family life, home and correspondence under Article 8 of the European Convention on Human Rights (ECHR). The protection offered by Article 8 is by no means absolute. Article 8(2) provides that a State may interfere with the rights of a person where it is “in accordance with the law” and “necessary in a democratic society”.<sup>69</sup> The ECtHR has held that the exception provided for in Article 8(2) must be interpreted narrowly, however, and the need for same in any given case must be convincingly established.<sup>70</sup> In addition to the requirement that an interference must be necessary and justified, the ECtHR has also clearly stated that the relevant search and seizure law and practice in a State must afford adequate and effective safeguards against abuse.<sup>71</sup>

4.25 Although the lack of judicial assessment and authorisation of a search warrant application may not in itself amount to a violation of the Convention, the Court may consider this fact in determining whether sufficient safeguards are in place to protect the rights of the

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<sup>62</sup> [2012] IESC 11; [2012] 2 IR 266 at paragraph 47.

<sup>63</sup> *Ibid* at paragraph 51.

<sup>64</sup> *Ibid*.

<sup>65</sup> 333 US 10 (1948).

<sup>66</sup> *Ibid*, at 13.

<sup>67</sup> 403 US 443 (1971).

<sup>68</sup> *Ibid* at 450.

<sup>69</sup> Article 8 of the European Convention on Human Rights.

<sup>70</sup> *Klass v Germany* [1978] 2 ECHR 5029/71; *Funke v France* [1993] ECHR 10828/84.

<sup>71</sup> See, for example, *Funke v France* [1993] ECHR 10828/84; *Mialthe v France* [1993] 8 ECHR 12661/87; *Buck v Germany* [2005] 267 ECHR 41604/98; *Camezind v Switzerland* [1999] ECHR; *Aleksanyan v Russia* [2008] 46468/06.

person concerned and to prevent an abuse of the law.<sup>72</sup> As the Court in *Stefanov v Bulgaria* stated:<sup>73</sup>

“the mere fact that an application for a warrant has been subject to judicial scrutiny will not in itself necessarily amount to a sufficient safeguard against abuse. The court must rather examine the particular circumstances and evaluate whether the legal framework and the limits on the powers exercised were an adequate protection against arbitrary interference by the authorities.”<sup>74</sup>

**(d) Report of the Committee to Review the Offences Against the State Acts 1939-1998**

4.26 In the *Report of the Committee to Review the Offences Against the State Acts 1939-1998 and Related Matters*<sup>75</sup> (the Hederman Report) the Committee considered the power of a Superintendent of An Garda Síochána to issue a search warrant under section 29(1) of the *Offences Against the State Act 1939* (“the 1939 Act”), as amended. The Report was published prior to *Damache v Director of Public Prosecutions*<sup>76</sup> and section 29(1) of the 1939 Act had not yet been amended by the *Criminal Justice (Search Warrants) Act 2012*. The Hederman Report recognised:

“There is no doubt but that the power to issue a warrant under section 29 is a vital weapon in the armoury of the Gardaí in their fight against the activities of illegal organisations.... Given the utility and importance of this power, the Committee does not wish to make any recommendation that would undermine its effectiveness. Nevertheless, section 29, as presently drafted, raises some issues of principle which call for further consideration.”<sup>77</sup>

4.27 The Report considered whether it would be desirable if a section 29 search warrant could only be issued by a court where a search of a private dwelling was proposed. On this matter the Report stated:

“While some members of the Committee would favour this limitation in view of Article 40.5 of the Constitution and Article 8 of the European Convention of Human Rights, the Committee, on balance, does not consider that this additional limitation should form part of its recommendations on this section.”<sup>78</sup>

A majority of the Committee recommended that warrants under section 29 of the 1939 Act should have a maximum validity period of 24 hours (as there was no such maximum validity period at that time).<sup>79</sup> However, it did not recommend that a section 29 warrant should be issued only by a Court.

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<sup>72</sup> *Funke v France* 10828/84 [1993] ECHR 7; *Mialhe v France* 12661/87 [1993] ECHR 8.

<sup>73</sup> 65755/01 [2008] ECHR 426.

<sup>74</sup> *Ibid* at paragraph 39.

<sup>75</sup> *Report of the Committee to Review the Offences Against the State Acts 1939-1998 and Related Matters* (Stationary Office, Dublin, 2002), available at justice.ie.

<sup>76</sup> [2012] IESC 11; [2012] 2 IR 266.

<sup>77</sup> *Report of the Committee to Review the Offences Against the State Acts 1939-1998 and Related Matters* (Stationary Office, Dublin, 2002) at paragraph 6.141.

<sup>78</sup> *Ibid* at paragraph 6.142.

<sup>79</sup> *Ibid*.

**(e) Report of the Morris Tribunal of Inquiry**

- 4.28 *The Report on the Arrest and Detention of Seven Persons at Burnfoot, County Donegal on the 23rd of May 1998*<sup>80</sup> (the Morris Tribunal Report) also considered the power of Garda officers to issue search warrants under section 29 of the *Offences Against the State Act 1939*. As with the Hederman Report, the Morris Tribunal Report concerned section 29 of the 1939 Act prior to its amendment by the *Criminal Justice (Search Warrants) Act 2012*. The Report noted that the power under section 29 was a serious one and was an exception to the general position of the law, that a search warrant to search the home of a citizen may only be issued by a judge.<sup>81</sup> The Report referred to the first section of the Hederman Report quoted above, stating that it “wholeheartedly agrees with [the] statement”<sup>82</sup> that the power to issue search warrants under section 29 of the 1939 Act “is a vital weapon in the armoury of the Gardaí.” The Morris Tribunal Report stated that the vesting by the Oireachtas of the power under section 29 in a senior officer of An Garda Síochána “was calculated to ensure that there is a measure of objectivity maintained in the decision as to whether a search warrant will be issued.”<sup>83</sup> However, on the other hand it observed that on the basis of the experience of the Tribunal and the evidence available to it, the level of objectivity and independence of mind required for the exercise of this power “is demonstrably eroded if the superintendent concerned in the investigation is also the authority to whom the application is made for the warrant.”<sup>84</sup> The Tribunal was of the view that in cases where the issuing authority is a Garda member with some involvement in an investigation, “it seems likely that greater weight will be afforded by [him or her] as to the needs of the Garda operation or investigation, and somewhat lesser consideration to the rights of the citizen under Article 40.5 of the Constitution and Article 8 of the European Convention of Human Rights concerning the protection of their residence.”<sup>85</sup>
- 4.29 With regard to protecting rights, the Report highlighted the importance of ensuring the fair exercise of the power to issue search warrants under section 29. In particular, it considered that the power should be exercised by a person capable of acting in a judicial and independent way, and the interest in the investigation of crime should be balanced with the protection of the rights of the person affected.<sup>86</sup> The Tribunal identified certain risks which may be associated with the power of members of An Garda Síochána to issue search warrants. For example, it noted the danger that a warrant would be issued almost automatically and without proper consideration of the application or the grounds to issue a warrant.<sup>87</sup> Similarly, the danger that the power under section 29 becomes a “mere formality in which the investigating sergeant may as well be empowered to issue a search warrant to himself [or herself].”<sup>88</sup>

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<sup>80</sup> *Report of the Tribunal of Inquiry Set Up Pursuant to the Tribunal Of Inquiry (Evidence) Acts 1921-2002 into Certain Gardaí in the Donegal Division: Report on the arrest and detention of seven persons at Burnfoot, County Donegal on the 23rd of May 1998 and the investigation relating to same* (Government Publications 2006).

<sup>81</sup> *Ibid* at paragraph 6.16.

<sup>82</sup> *Ibid* at paragraph 6.19.

<sup>83</sup> *Ibid* at paragraph 6.20.

<sup>84</sup> *Ibid* at paragraph 6.20.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Ibid* at paragraph 6.21.

<sup>87</sup> *Ibid* at paragraph 6.22.

<sup>88</sup> *Ibid*.

- 4.30 Having regard to all the issues involved, the Tribunal concluded that it would be preferable that the power to issue a search warrant be vested in a judge.<sup>89</sup> The Tribunal further noted that, in light of modern technology and rapid communications, there was no reason why a judge could not be easily contacted for the purpose of determining a search warrant application. The view of the Tribunal was that there were “very limited occasions upon which time would be so pressing as to make it impossible to follow such a procedure.”<sup>90</sup> Nonetheless, the Tribunal recognised that in certain, albeit limited, cases it may not be viable to contact a judicial authority and that “a residual power for such eventuality could still be vested in a senior officer of the Garda Síochána to be used in exceptional circumstances.” The recommendation of the Tribunal was that urgent consideration should be given to vesting the power to issue search warrants under section 29 of the *Offences Against the State Act 1939* in judges of the District or Circuit Court, as this would be in keeping with best modern practice on the matter.<sup>91</sup> The Morris Tribunal Report goes further than the Hederman Report in its recommendations as it recommends that the power of Gardaí to issue search warrants should be limited to a greater degree.
- 4.31 Notably, in *Damache v Director of Public Prosecutions*<sup>92</sup> the Supreme Court had regard to the recommendations of the Morris Tribunal Report in striking down as unconstitutional section 29 of the 1939 Act. Although the Morris Report was concerned with the power of members of the Garda Síochána to issue search warrants under a particular provision, the risks identified and issues discussed in this section of the Report apply to all search warrants issued by members of the Garda Síochána.

**(4) Conclusion: Garda warrants**

- 4.32 The Commission has considered whether the powers of members of the Gardaí to issue search warrants should remain. The Hederman Report recognised that the integrity of search warrants issued by members of An Garda Síochána may be questioned but did not recommend any change to the power. By contrast, the Morris Tribunal Report strongly favoured the limitation of this power and a greater involvement by the courts in issuing search warrants. Both of these Reports were narrow in scope, as they were solely concerned with the power of Gardaí to issue search warrants under section 29 of the *Offences Against the State Act 1939*. Similarly, the decision of the Supreme Court in *Damache v Director of Public Prosecutions*<sup>93</sup> concerned only section 29 of the *Offences Against the State Act 1939*, as amended. However, the concerns identified regarding a potential lack of independence in the issuing process apply in all cases where a member of An Garda Síochána can issue a search warrant, regardless of the legislative provision under which it is issued.
- 4.33 One commentator notes that the decision of *Damache v Director of Public Prosecutions*<sup>94</sup> affirms “at the level of constitutional doctrine the general value of pre-screening by independent adjudicators as a safeguard for domestic privacy.”<sup>95</sup> The issue under consideration by the Supreme Court in *Damache* was narrow, but the decision demonstrates a preference for judicially issued warrants. Case law of the ECtHR has identified the need for adequate and effective safeguards to balance the power of State

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<sup>89</sup> *Ibid* at paragraph 6.23.

<sup>90</sup> *Ibid*.

<sup>91</sup> *Ibid* at paragraph 6.24.

<sup>92</sup> [2012] IESC 11; [2012] 2 IR 266 at paragraph 53.

<sup>93</sup> [2012] IESC 11; [2012] 2 IR 266.

<sup>94</sup> [2012] IESC 11; [2012] 2 IR 266.

<sup>95</sup> McMahon “Self-service Search Warrants and International Terrorism: Lessons from *Damache v Director of Public Prosecutions*” (2012) 1 *Irish Law Journal* 2 at 4.

authorities to carry out search and seizures. As a search warrant provides the written authority enabling the entry and search of a location, it is necessary to ensure that the power to grant that authority is not misused.

- 4.34 The Commission agrees with the view of the Morris Tribunal Report that it is preferable that the power to issue a search warrant should be conferred on a judge as the authority best placed to assess the conflicting interests of the State and the rights of a person affected by the search warrant. The Commission has recommended in Chapter 3 that an application for a search warrant should be permitted to be made to the High Court without an applicant having to appear personally before a judge, where circumstances of urgency giving rise to the immediate need for a search warrant means that the delay of appearing in person before a judge would frustrate the effective execution of the search warrant. The introduction of a limited electronic search warrant application procedure in urgent circumstances would ensure greater access to members of the judiciary. The observations of the Morris Tribunal Report in 2006 regarding the ability of modern technology to provide easy access to members of the judiciary are particularly relevant in light of the growing use of online audiovisual communication methods such as Skype and FaceTime. If appropriate technology were made available to enable persons to apply to a judge for a search warrant in urgent circumstances, there should be no need for legislative provisions providing for members of An Garda Síochána to issue search warrants in such circumstances. The Commission has therefore concluded that these legislative provisions should be repealed and that no provision should be made in the proposed Search Warrants Act for Gardaí to issue search warrants.

**(5) Conclusion: Peace Commissioner warrants**

- 4.35 The Commission has identified a very small number of search warrant provisions which provide that either a judge of the District Court or a peace commissioner may issue search warrants. These include the *Misuse of Drugs Act 1977*, as amended, the *Control of Dogs Act 1986*, the *Customs and Excise (Miscellaneous Provisions) Act 1988*, the *Video Recordings Act 1989*, the *Prohibition of Incitement to Hatred Act 1989*, and the *Firearms and Offensive Weapons Act 1990*.
- 4.36 The Commission acknowledges that the effect of recommending that a judge of the District Court should be the sole authority for issuing search warrants (subject only to the exception of High Court issued warrants in cases of urgency) would narrow the scope of those who can issue search warrants. However, as all of the above Acts provide that either a judge of the District Court or a peace commissioner may issue a search warrant, limiting the power to issue warrants to judges would not involve a significant change. Furthermore, the Commission has been advised that in practice search warrant applications under the relevant Acts are most often made to judges rather than to a peace commissioner.
- 4.37 The benefit for the prosecution of judicially issued warrants has been noted. Orange notes that a judge of the District Court who has issued a warrant is presumed to have acted in accordance with the requirements of the relevant legislation.<sup>96</sup> The District Court is a court of record. However, in *The People (DPP) v Owens*,<sup>97</sup> the Supreme Court observed that “[t]he peace commissioner, is a public officer but he is not a court of record.”<sup>98</sup> Therefore, a warrant issued by a judge of the District Court “speaks for itself”<sup>99</sup> but a warrant issued by a peace commissioner does not. Where the validity of a search warrant that was issued by a judge of the District Court is challenged, it is for the person

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<sup>96</sup> Orange, *Police Powers in Ireland* (Bloomsbury Professional 2014) at 178.

<sup>97</sup> *The People (DPP) v Owens* [1999] 2 IR 16 at 23.

<sup>98</sup> *Ibid.*

<sup>99</sup> *The People (DPP) v Owens* [1999] 2 IR 16 at 23; *The People (DPP) v Tallant* [2003] 4 IR 343.

who is bringing the challenge to prove that the judge has not acted in accordance with legislation.<sup>100</sup> Consequently, where the search warrant at issue has been issued by a judge of the District Court, the prosecution does not need to call the judge to give evidence that he was satisfied that the Garda applying for the warrant had reasonable grounds to believe evidence relating to an offence was at a location.<sup>101</sup>

4.38 The Commission has recommended at paragraph 3.90 that the requirement for the applicant to appear personally before the issuing authority to affirm his or her opinion under oath could be dispensed with in urgent circumstances, where the delay in appearing before a judge of the District Court would frustrate the effective execution of the search. The Commission has been advised that an application before a peace commissioner usually takes place where no District Court judge is available. The Commission is of the view that the introduction of the limited telephonic or video link search warrant application process would obviate the need to apply to a peace commissioner for a warrant and that the legislation providing for the issuing of search warrants by a peace commissioner should be repealed.

**4.39 The Commission recommends that the proposed Search Warrants Act should provide that the proposed Search Warrants Act should provide that search warrants should only be issued by a court, and that this should ordinarily be a judge of the District Court. This should be subject to an exception that search warrants may be issued by the High Court where circumstances of urgency exist giving rise to the immediate need for a search warrant which would be frustrated by the general requirement for the applicant to appear in person before a judge of the District Court.**

**4.40 The Commission recommends the repeal of legislative provisions empowering members of An Garda Síochána and peace commissioners to issue search warrants.**

## **B The Contents of a Standard Search Warrant Form**

4.41 In the Consultation Paper, the Commission observed that a system of individualised search warrant forms exists in Ireland.<sup>102</sup> This means that each search warrant provision has a corresponding search warrant form which is completed by the issuing authority when he or she issues a warrant. The Commission expressed the view that this approach is inefficient and an uneconomical use of resources.

4.42 In the previous Chapter, the Commission discussed search warrant information forms which applicants complete and bring to the issuing authority when applying for a search warrant. A comparable system exists with regard to information forms, as each search warrant provision has a separate corresponding information form. In place of the current approach of corresponding forms, the Commission has recommended that a standard search warrant information form be implemented. The same form should be used in all search warrant applications and the relevant information should be completed within its content.

4.43 The Commission is of the view that for the purposes of consistency and convenience, a standard search warrant form should also be introduced in place of the array of forms which currently exist. This standard form should be used by the issuing authority for issuing a search warrant in all cases. A number of benefits would result from this

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<sup>100</sup> Orange, *Police Powers in Ireland* (Bloomsbury Professional 2014) at 179, referring to comments of the Supreme Court in *Simple Imports Limited v Revenue Commissioners* [2000] 2 IR 243, at 251-253.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 4.75.

approach. It would be more efficient to have a standard form rather than different forms for each search warrant provision. The requirement for drafting new forms corresponding to new search warrant provisions would be eliminated as the standard form could simply be used to issue a warrant under the new provision. The issuing authority would not need to obtain or be provided with the specific corresponding form so as to issue a warrant; rather he or she would simply issue the warrant by means of the standard form. The risk of using the incorrect form when issuing a warrant would also be eliminated.

**(1) Current format and content of a search warrant form**

4.44 Although each provision provides for its own search warrant form, warrant forms are similar in their format. The typical format is as follows:

- i) A search warrant form has the name of the Act and the section under which the warrant is issued printed at the top of the form.
- ii) The issuing authority must specify the District Court area and the District number to which the warrant relates on the form.
- iii) The form generally contain a printed statement to the effect that information in writing has been provided and sworn, and that on the basis of this the issuing officer is satisfied that there are reasonable grounds for suspecting or believing that certain material, including evidence of or relating to an offence or other material relevant to the enactment containing the provision, is likely to be found at a location named by the applicant;
- iv) The issuing authority is required to specify the location to which the search warrant relates and the officer authorised to execute the search.
- v) The search warrant form generally states that the executing officer may be accompanied by a member of An Garda Síochána and/or any other person. The scope as to who may accompany the executing officer is dictated by the terms of the search warrant provision.
- vi) With regard to execution of the warrant, the warrant form usually includes an authorisation to use force, or reasonable force, to enter the premises (where such is necessary) so as to execute the search.
- vii) It may state the time period during which the execution must occur (for example within one week or one month).
- viii) Generally a search warrant form states that material found during the search which is believed to be evidence may be seized.
- ix) Some search warrant provisions state that when a warrant is being executed persons present at the location may: a) be searched by executing officers and/or; b) be requested by executing officers to give their name and address. Where there is such an authority to search and request the personal details of a person present at the location, this is noted in the warrant form.
- x) The issuing authority is required to sign and date the warrant form, and is usually required to specify who the issued warrant is addressed to, for example the superintendent of a named Garda station.

**(2) Discussion**

**(a) Layout and title of a standard search warrant form**

4.45 The implementation of a single search warrant form to be used by judges in all circumstances would require a certain amount of standardisation in respect of the format and content of the form. However, the Commission envisages that the overall layout of a standard search warrant form would not be significantly different to the forms currently in use.



4.46 As regards the title of the document, currently a search warrant has a reference to the Act and section under which it is issued, and the words “search warrant” are printed at the top of the warrant form. A standard search warrant form would simply have the words “search warrant” printed at the top of the document and the issuing authority would be required to specify the suspected offence or grounds under a scheduled enactment. The current practice whereby the issuing authority specifies the District Court area and number would continue.

**(b) Information provided to the issuing authority**

4.47 A standard search warrant form should contain a statement that information on oath and in writing has been provided to the issuing authority.

**(c) Confirmation of the issuing authority’s satisfaction to issue a warrant**

4.48 The Commission is of the view that a standard form should contain a printed statement to the effect that the authority is satisfied that there are reasonable grounds for suspecting that: (a) evidence of or relating to an indictable offence; or (b) material relevant to a scheduled enactment under the generally applicable Search Warrants Act is to be found at the named location. Currently, search warrant forms refer to the legislative provision in respect of which the issuing authority is satisfied that there are grounds to suspect that evidence may be found. The Commission proposes that a standard form would simply include a blank section after the statement of satisfaction for the issuing authority to complete as to the relevant legislative provision.

**(d) Specification of assistants at the execution of a search**

4.49 Each search warrant provision specifies who, if anyone, may accompany the executing officer. Examples include: members of An Garda Síochána, other persons from the same office as the executing officer, or any person who may be of assistance during the execution of the search. This authority is consequently reflected on the face of the corresponding search warrant form. In the next Chapter, Execution of Search Warrants, the Commission discusses the presence of assistants at the execution of a search. The Commission has observed that as it is the primary function of members of An Garda Síochána to prevent and investigate criminal offences, it is appropriate that there should be a broad authority for Garda members to assist in the execution of a search warrant. However, the Commission has formed the view that the same breadth of authority should not apply to non-Garda members. The Commission therefore recommends, at paragraph 5.67 that, where a non-Garda member is required to attend and assist at the execution of a search, specific authority for this must be sought by the applicant and granted by the issuing authority. Thus, the Commission is of the view that, while it would be appropriate for a standard search warrant form to include a general statement that Garda members may attend at the search warrant execution, a general statement to this effect should not be included in respect of non-Garda members. Rather, a standard form should include a dedicated section where the issuing authority would specify whether a non-Garda member is permitted to assist, and if so, what persons are so permitted.

**(e) Use of reasonable force**

4.50 Search warrant forms contain a statement that force, or reasonable force, may be used for the purpose of gaining entry in order to execute a search warrant. In the next Chapter the Commission recommends, at paragraph 5.44, that the term “reasonable force” should be employed as the standard provision in search warrant legislation in Ireland. A standard search warrant form, which should state that the warrant authorises entry to the named location, “if necessary by the use of reasonable force.”

**(f) Period of validity of the warrant**

4.51 In respect of the execution of the warrant, the relevant period of validity is also referred to on the warrant form. Currently, the validity period during which the execution of the warrant must occur varies from one provision to another. However, in the next Chapter the

Commission recommends, at paragraph 5.05, that a standard validity period of seven days should apply to all search warrants. The Commission is of the view that this should also be reflected within the terms of a standard search warrant form.

**(g) Seizure of incidentally found material**

4.52 Search warrant forms generally contain a statement that material found during the execution of the search, which is believed to be evidence or other material relevant to a particular enactment, may be seized. A similar statement is usually included in the application forms used to apply for warrants.

**(h) Details of persons present at the search location**

4.53 As noted earlier, some search warrant provisions provide that persons present at the location being searched under warrant may be searched or be requested to provide personal details, such as their name and address, by executing officers. Where this element is included in a search warrant provision, it will be reflected on the search warrant form. In the next Chapter, the Commission considers this issue in the context of a standard Search Warrant Act. The Commission recommends that a generic provision should be included in the legislation, stating that where it is necessary and justified an executing officer may request personal details or, where the executing officer is a member of An Garda Síochána, search persons present. These powers may be relied upon only to the extent that it is reasonable. A standard search warrant form should acknowledge the authority of executing officers to deal with persons present at a search location, where this is necessary and reasonable.

**(i) Reference to the addressee**

4.54 As a search warrant will be addressed to a certain person once issued, the warrant form refers to the addressee. Each form contains a printed reference to the office of the addressee in accordance with the terms and requirements of the particular search warrant provision. Many warrant forms state that it is addressed to a member of An Garda Síochána of a certain rank, such as inspector or superintendent. Warrants issued under some provisions must be addressed to an officer of the relevant investigating office. For example, a warrant issued under section 787 of the *Companies Act 2014*<sup>103</sup> is addressed to a designated officer of the Director of Corporate Enforcement, while warrants issued under sections 36 and 37 of the *Competition and Consumer Protection Act 2014* are addressed to an authorised officer of the Competition and Consumer Protection Commission.<sup>104</sup> For the purpose of a standard search warrant form, the Commission is of the view that it should simply include an open and general addressee section so that the issuing authority may state who the addressee is, as well as his or her office and/or rank.

**(j) Particularised statements**

4.55 Some other, more particularised statements can be found in a small number of search warrant forms. For example, warrants issued under the *Criminal Justice (Theft and Fraud Offences) Act 2001* and section 20 of the *Companies Act 1990*, as amended,<sup>105</sup> state that the executing officer may “take any other steps which appear to him/her to be necessary”

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<sup>103</sup> Section 787(2) of the *Companies Act 2014* replaced section 20 of the *Companies Act 1990*, as amended by section 30 of the *Company Law Enforcement Act 2001* and section 5 of the *Companies (Amendment) Act 2009*.

<sup>104</sup> The search warrant provisions in the *Competition and Consumer Protection Act 2014* replaced those contained in the *Competition Act 2002* and the *Consumer Protection Act 2007*.

<sup>105</sup> Section 20 of the *Companies Act 1990*, as replaced and inserted by section 30 of the *Company Law Enforcement Act 2001*, and further amended by section 5 of the *Companies (Amendment) Act 2009*. This provision has been replaced by sections 787 to 789 of the *Companies Act 2014*, which came into force on 1 June 2015. At the time of writing, related rules of court have not yet been published.

to preserve or prevent interference with evidence found. Similarly, warrants issued under the *Criminal Assets Bureau Act 1996* expressly state that seizure of material is permitted only where it is not subject to legal professional privilege. The Commission has considered whether the recommended standard search warrant form should include similar statements. In Chapter 6, below, the Commission discusses *The People (Attorney General) v O'Brien*<sup>106</sup> in which the Supreme Court held that unconstitutionally obtained evidence should generally be absolutely inadmissible<sup>107</sup> unless extraordinary excusing circumstances exist.<sup>108</sup> In that regard, Walsh J identified two specific excusing circumstances in his judgment, namely the imminent destruction of vital evidence or the need to rescue a victim in peril. Thus, case law has recognised that an executing officer may, in extraordinary excusing circumstances such as where vital evidence may be destroyed, take steps to preserve such evidence. The Commission is of the view that a particularised statement permitting the executing officer to take any other steps which appear to him/her to be necessary to prevent the imminent destruction of vital evidence or to rescue a victim in peril should be included in the standard search warrant form.

**4.56 The Commission recommends that the proposed Search Warrants Act should provide for a standard search warrant form to be used when issuing a search warrant, which should replace the array of search warrant forms that currently exist.**

### C Records of Issued Search Warrants

- 4.57 There is no express requirement in Irish search warrant law, nor is there a practice in the District Courts, to keep a record of issued search warrants. However, the Commission has been advised that where the applicant is a member of An Garda Síochána, he or she often completes the warrant form of the Garda Síochána PULSE system before printing it and bringing it to the issuing authority. Records are therefore often kept on the PULSE system.
- 4.58 Legislation in other jurisdictions specifically require records to be made of issued search warrants. Examples of legislative provisions providing for retention of records of issued search warrants can be seen in England and Wales,<sup>109</sup> New South Wales,<sup>110</sup> Western Australia,<sup>111</sup> Victoria,<sup>112</sup> Canada,<sup>113</sup> and the United States.<sup>114</sup>

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<sup>106</sup> [1965] IR 142.

<sup>107</sup> *Ibid* at 170.

<sup>108</sup> *Ibid*.

<sup>109</sup> Section 16(9) to (12) of the *Police and Criminal Evidence Act 1984* and paragraph 8.1 to 8.3 and 9.1 of Code B: *Code of Practice for Searches of Premises by Police Officers and the Seizures of Property found by Police Officers on Persons or Premises*. See generally Zander *The Police and Criminal Evidence Act 1984* 6<sup>th</sup> ed (Thomson Sweet and Maxwell 2013) at 86 to 89.

<sup>110</sup> Section 65 of the *Law Enforcement (Powers and Responsibilities) Act 2002*. The form to be used by an issuing officer to comply with the requirement to retain a record of a search warrant is set out in schedule 1 to the *Law Enforcement (Powers and Responsibilities) Regulation 2005*.

<sup>111</sup> Section 45(3) of the *Criminal Investigations Act 2006*.

<sup>112</sup> Sections 82 and 89 of the *Confiscation Act 1997*.

<sup>113</sup> Section 117.04(3) of the *Criminal Code 1985*. The requirement to return a document showing things or documents seized and the date of execution of a warrant relates to warrants in respect of firearms and other weapons offences only. There is no equivalent requirement to return information to the issuing authority where a standard warrant under section 487 of the Code is executed.

<sup>114</sup> Rule 41(f)(1)(d) of the *Federal Rules of Criminal Procedure*.

- 4.59 The Commission has considered whether a requirement to keep records of issued search warrants should be introduced in Ireland. The authority afforded by a search warrant to enter and search a location and to seize materials from that place is substantial. In light of this, the issuing of a search warrant in respect of a person's property is a serious matter. The Commission is therefore of the view that records should be kept of issued search warrants. The Commission notes that this would enable the examination of an issued warrant at a later date should this be required.
- 4.60 The Commission has examined the approach in a number of other jurisdictions on this matter and it has considered whether it would be appropriate to implement the approach of returning the original search warrant to the issuing authority along with a report detailing its execution, or an explanation as to why it was not executed. This manner of record keeping is employed, for example, in England and Wales, New South Wales, Western Australia, Victoria and Canada. However, the Commission has formed the view that, as there is currently no requirement in Ireland in this regard, it may be too onerous (particularly for executing officers) to implement a record requirement of this extent from the outset. Rather, the Commission is of the view that it would be appropriate to introduce a record requirement which simply involves keeping a copy of the issued search warrant on file. As a search warrant specifies on its face the time and date when it issued, as well as the authority who issued it, filing a copy of the warrant would keep a record of these matters. Nonetheless, the Commission notes that it may be suitable to introduce such a requirement in the future.
- 4.61 The Commission has recommended at paragraph 4.39 that, with the exception of search warrants applied for and issued by the High Court electronically in exceptional circumstances, all search warrants should be issued by a judge of the District Court. Retaining records of issued search warrants would therefore involve filing a copy of the warrant on the court's database. In circumstances where a search warrant is issued by a judge at a time when he or she is not physically present within the court, the judge should be required to cause a copy of the warrant to be filed on the database. In the event that a photocopier or scanner or other such device is not available at the time of issuing so as to make a copy of the search warrant, a copy of it should be produced as soon as practicable so that it may be filed.
- 4.62 In paragraphs 4.64 to 4.789, the Commission discusses the possibility of electronically issuing search warrants. This process would apply where a person applies electronically to the High Court for a search warrant in urgent circumstances. The Commission recommends later in this Chapter that where the applicant has not personally appeared before the High Court in such urgent circumstances, that is, where the delay applying in person would frustrate the effective execution of the search, it should be possible for the search warrant to be transmitted to him or her electronically so that he or she can show the owner or occupier the search warrant on a device or a printed copy of the electronically transmitted warrant. The Commission envisages that in such circumstances, the search warrant would be completed by the High Court using an electronic process, and recommends that it should therefore be retained by saving it on a central electronic database.

**4.63 The Commission recommends that a copy of each issued search warrant, supplied by the applicant, should be retained on file by the District Court; and in the case of urgent applications, by the High Court, and where the search warrant has been transmitted to the applicant electronically by the High Court, a copy shall be saved on an electronic database.**

## D Electronic Issuing of Search Warrants

- 4.64 In Chapter 3, above, the Commission has recommended the introduction of a limited electronic search warrant application process. It should be possible for search warrant information forms to be filed electronically. As a general rule a person applying for a search warrant should continue to be required to appear personally before the issuing authority to affirm his or her opinion under oath. However, the Commission recommends that legislation should permit the requirement for the applicant to appear personally before the issuing authority to be dispensed with, but only in urgent circumstances, where any delay involved in applying in person would frustrate the effective execution of the search. In such circumstances, the applicant would need to affirm his or her opinion by telephone or video link and would need to file a record of the application as soon as practicable or no later than 24 hours after the issuing of the search warrant.
- 4.65 In the Issues Paper, the Commission discussed the electronic issuing of search warrants.<sup>115</sup> The Commission examined a number of jurisdictions where search warrants may be issued electronically. In other jurisdictions, legislative provisions permitting the electronic issuing of search warrants generally relate to electronic, telephonic or video link search warrant applications, which are usually only permitted in limited circumstances. The Commission sought views on whether the executing authority, usually a Garda, should generally possess the original search warrant so that he or she can show it to the occupier when executing a search.<sup>116</sup> The Issues Paper also invited submissions as to whether, if it is not practicable for the executing authority to obtain the original search warrant from the issuing authority, he or she should be in possession of a signed copy of the search warrant that the issuing authority transmitted to him or her by facsimile or other electronic means.

### (1) Possession of the search warrant to show the owner or occupier

- 4.66 It has been indicated to the Commission that when an applicant, usually a Garda, intends to apply for a search warrant, he or she completes the proposed terms of the warrant on a computer system. The applicant prints this and brings it to the issuing authority. If satisfied that there are sufficient grounds to issue a search warrant, the issuing authority issues a paper warrant, signs it and gives it to the applicant. The Gardaí input a record on the PULSE system noting that a warrant has been issued and outlining the terms of the warrant. However, no record or copy of the search warrant is retained in the court of issue. Therefore, under the current process, a search warrant is a hard copy, paper document that the issuing authority provides to the applicant. Many search warrant provisions in Ireland provide that the search warrant must be produced at the search location upon request by the owner or occupier.<sup>117</sup>
- 4.67 Submissions which the Commission received agreed that it is important for the executing authority to physically show the owner or occupier the search warrant to inform them of the authority of the search. They also suggested that the owner or occupier should have an opportunity to inspect the warrant to see what is expected of him or her. In *The People (DPP) v Gormley and White*<sup>118</sup> the Supreme Court held that a warrant must clearly state the authorisation which the warrant gives and must indicate a sufficient legal basis. The

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<sup>115</sup> *Issues Paper on Search Warrants* (LRC IP 4-2014) at paragraphs 2.22 - 2.25.

<sup>116</sup> *Issues Paper on Search Warrants* (LRC IP 4-2014) at paragraphs 2.22 - 2.25.

<sup>117</sup> For example, section 15 of the *Firearms and Offensive Weapons Act 1990*, section 35 of the *Control of Horses Act 1996*, section 16A of the *Road Transport Act 1986*, as amended, section 43 of the *Aviation Regulation Act 2001*, section 70 of the *Industrial Designs Act 2001*, section 37 of the *Adventure Activities Standards Authority Act 2001*, section 23 of the *Disability Act 2005*, and section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended by the *Criminal Justice Act 2006*.

<sup>118</sup> *The People (DPP) v Gormley and White* [2014] IESC 17, paragraph 11.8.

Court stated that such a requirement is necessary as “a person whose rights are affected is entitled to know with some reasonable level of precision what it is exactly that the warrant authorises.”<sup>119</sup> The Court was of the view that a person is “entitled to know the legal basis on which it is said that the warrant was issued because it is that legal basis which requires them to submit to something which would otherwise be unlawful.” To safeguard fully the fundamental rights to privacy and protection of the dwelling, it is appropriate for the executing authority to be in possession of the search warrant to show the owner or occupier.

- 4.68 The Commission has considered whether the search warrant document, which authorises a named Garda to enter and search a premises, should be a hard copy, paper document or whether the definition of “search warrant” could also include an electronically transmitted document containing the electronic signature of the issuing authority. The 2014 *General Scheme of a Criminal Procedure Bill* provides for the electronic transmission of warrants. It is not confined to a particular type of warrant, and therefore includes search warrants. However, the notes accompanying Head 5, which provides for electronic transmission of warrants, states that the provision aims to address a problem identified by the Working Group to Identify and Report on Efficiencies in the Criminal Justice System which concerns video link hearings where the court is located at a distance from where the prisoner is held. The notes state that “efficiency is then undermined where the Irish Prison Service has to despatch a prison officer to the court to receive a committal warrant.”<sup>120</sup> The accompanying notes state that providing for the electronic issuing and transmission of warrants in criminal cases would “remove any doubt as to whether such issuing and transmission is permissible.” Head 5(1) provides that “[n]otwithstanding 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.”<sup>121</sup> The Scheme allows for provision in the Rules of Court for matters relevant to the issuing, transmission and authentication of warrants.<sup>122</sup> “Electronic means” has the same definition as that contained in the *Taxes Consolidation Act 1997* and the *Personal Insolvency Act 2012*, which 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.”<sup>123</sup> The Scheme defines “legible record” as “such a record produced by a person, other than an officer of the court or Courts staff member to whom the warrant has been transmitted by the court.”<sup>124</sup>
- 4.69 If this provision were enacted in relation to all warrants, it could have the effect of allowing for all search warrants to be issued electronically. This would mean that in all cases, whether or not the applicant has personally appeared before the issuing authority to affirm his or her opinion under oath, the search warrant could be issued and transmitted by electronic means. One benefit of electronic issuing in such circumstances would be the creation of an electronic repository of search warrants. The Commission has recommended at paragraph 4.63 that a record should be retained of all issued search warrants. If search warrants were electronically issued, the search warrant could be created by the issuing authority on a computer system and transmitted to the executing authority. A digital record of the search warrant could then be retained on a centralised database. Providing for electronically issued and transmitted search warrants in all cases

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<sup>119</sup> *Ibid* at paragraph 11.9.

<sup>120</sup> *General Scheme of a Criminal Procedure Bill*, Head 5, explanatory note, available at justice.ie.

<sup>121</sup> Head 5(1) of the *General Scheme of the Criminal Procedure Bill 2014*.

<sup>122</sup> Head 5(2) of the *General Scheme of the Criminal Procedure Bill 2014*.

<sup>123</sup> Head 5(3) of the *General Scheme of the Criminal Procedure Bill 2014*.

<sup>124</sup> *Ibid*.

would encourage the use of ICT in the search warrant issuing process. It might also eventually be more cost effective than using paper warrants as fewer warrants would need to be printed.

- 4.70 A consultee suggested to the Commission in feedback that owners or occupiers whose premises are the subject of a search may not be satisfied of the authority for the search if shown an electronic document. Owners or occupiers might feel more confident if shown a paper document than, for example, a search warrant on a tablet or similar device. One way of overcoming this would be to require the electronically issued and transmitted warrant to be printed to show the owner or occupier. However, this would contradict the benefit of using ICT to reduce the number of paper issued warrants. Moreover, the Commission has recommended that the person applying for a search warrant should generally be required to appear personally before the issuing authority to affirm his or her opinion under oath. If this recommendation were implemented, electronically issued and transmitted search warrants would not be of significant benefit, as in almost all cases the applicant would be required to attend court and would therefore be in a position to obtain a paper version of the search warrant. Although the Commission would not object to allowing for electronic issuing of search warrants in all cases, it does not consider that a recommendation to that effect is necessary at present.

**(2) *Electronically issuing of search warrants in limited circumstances***

- 4.71 The Commission has recommended that legislation should permit the requirement for the applicant to appear personally before the issuing authority to be dispensed with, but only in urgent situations, where any delay involved in applying in person would frustrate the effective execution of the warrant. In such exceptional circumstances, it would be impracticable for the applicant to attend the District Court to obtain a search warrant from the issuing authority. In that regard, the Issues Paper invited submissions on whether in such circumstances the executing authority should be in possession of a signed copy of the search warrant that the issuing authority has transmitted to him or her by facsimile or electronic means. The Commission recognises that facsimile is not as popular a form of communication as it was previously and therefore, any exception to paper issued search warrants should provide for electronic transmission by, for example, encrypted email, rather than fax.
- 4.72 In the Issues Paper, the Commission examined the approach used in other jurisdictions, where a person applies for a search warrant without personally appearing before the issuing authority. In the United States, the *Federal Rules of Criminal Procedure* provide that a judge may transmit the warrant “by reliable electronic means to the applicant”<sup>125</sup> or “direct the applicant to sign the judge’s name and enter the date and time on the duplicate original.”<sup>126</sup> In the limited circumstances in which legislation governing the Commonwealth of Australia permits electronic search warrant applications, the issuing officer must inform the applicant “by telephone, telex, facsimile or other electronic means” of the terms of the warrant.<sup>127</sup> The applicant must then complete a form of warrant “in terms substantially corresponding to those given by the issuing office”<sup>128</sup> and record the name of the issuing officer and day and time when the warrant was issued.<sup>129</sup> The Canadian *Criminal Code* provides that a judge may issue a warrant by electronic means. Different procedures apply depending on whether the electronic means produces a written

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<sup>125</sup> Rule 4.1(b)(6)(C) of the *Federal Rules of Criminal Procedure* (USA).

<sup>126</sup> *Ibid.*

<sup>127</sup> Section 3R(5) of the *Crimes Act 1914*, as amended by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* (Australia).

<sup>128</sup> *Ibid*, section 3R(6).

<sup>129</sup> *Ibid.*

document or not. Where the means of communication does not produce a written form, the judge must complete and sign the warrant and direct the applicant to “complete, in duplicate, a facsimile of the warrant.” The judge must also file a copy of the warrant with the court clerk.<sup>130</sup> Where the means of telecommunication produces a written document, the judge must complete and sign the warrant and transmit the warrant to the applicant electronically.<sup>131</sup> The New Zealand *Search and Surveillance Act 2012* provides that if it is “not possible or not practicable” for the executing authority to have it in his or her possession at the time of execution of the warrant, one of two documents, which are “deemed for all legal purposes to constitute the warrant” may be executed.<sup>132</sup> These documents include: (a) a facsimile or a printout of an electronically generated copy of a warrant issued by the issuing officer; or (b) a copy made by the person to whom the warrant is directed, at the direction of the issuing authority and endorsed to that effect.

- 4.73 The Issues Paper identified two options which are used in other jurisdictions that can be used when the executing authority does not physically possess the original search warrant to show the owner or occupier:
- (a) the judge completes the warrant and transmits it electronically to the applicant;
  - (b) the applicant completes the warrant setting out the terms specified by the judge. The applicant later returns the warrant to the court: this requirement acts as a safeguard as it allows the court to inspect the warrant to ensure that the terms are in fact the terms that the judge specified.
- 4.74 The Commission received considerable feedback suggesting that a search warrant should clearly show the signature of the issuing judge. It was submitted that permitting the applicant to fill out a blank search warrant in the terms set by the judge would be inappropriate, even if there was a requirement for the warrant to be returned to the court of issue so that the issuing authority could inspect it. Such an approach would be open to misinterpretation and would not safeguard the fundamental rights engaged in the search warrant process. Difficulties might arise if the executing authority possessed a form of search warrant that he or she had prepared that did not contain a signature of an issuing authority (usually, the District Court). It is important that an issuing authority be able to see the search warrant document before its execution to ensure there is independent judicial scrutiny at every stage of the process. Therefore, the Commission is of the view that the executing authority should not be permitted to complete the warrant setting out the terms specified by the issuing authority.
- 4.75 However, most respondents to the Issues Paper were of the view that, where it was not practicable for the executing authority to obtain the original, hard copy search warrant from the executing authority, should be in possession of a signed copy of the search warrant that had been transmitted to him or her electronically. It was suggested that if the requirement for a personal appearance by the applicant could be dispensed with in exceptional circumstances, a successful application should logically result in a search warrant being issued and transmitted electronically in such circumstances. This would mean that where a search warrant was applied for remotely, it could be transmitted to the location of the applicant.
- 4.76 It is a matter for practical consideration as to whether the applicant would show the owner or occupier a version of the search warrant on a tablet or similar device, or whether the applicant would need to print a copy of the electronically transmitted warrant. Whichever of these approaches is used, legislation would need to provide that “search warrant” in

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<sup>130</sup> Section 487.1(6) of the *Criminal Code* (Canada).

<sup>131</sup> *Ibid.*

<sup>132</sup> Section 105 of the *Search and Surveillance Act 2012* (New Zealand).



such circumstances includes an electronically transmitted search warrant or a printed copy of an electronically transmitted search warrant.

- 4.77 Safeguards would need to be put in place to ensure that search warrants transmitted electronically are secure and cannot be interfered with. Technological advances would need to be used to maintain confidentiality in the search warrant process. The Commission has discussed elsewhere Public Key Infrastructure, a system of cryptography which ensures a high level of security in e-communications and confidentiality in the context of a message sent over an open network such as the internet.<sup>133</sup> A system allowing for electronic issuing of search warrants would need to facilitate the use of electronic signatures to authenticate the warrant.

**4.78 The Commission recommends that the executing authority should possess the search warrant so that he or she can show it to the owner or occupier.**

**4.79 The Commission also recommends that where, in urgent circumstances, the applicant has not personally appeared before the issuing authority, it should be possible for the search warrant to be transmitted to him or her electronically so that he or she can show the owner or occupier of the premises being searched the search warrant on a device or a printed copy of the electronically transmitted warrant.**

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<sup>133</sup> See Chapter 7 of the Commission's *Consultation Paper on Documentary and Electronic Evidence* (LRC CP 57-2009). The Commission's forthcoming *Report on Evidence* will incorporate the material on documentary and electronic evidence discussed in that Consultation Paper.



**A The Validity Period for Search Warrants**

5.01 In the Consultation Paper, the Commission noted that an Act or Statutory Instrument under which a search warrant is issued usually specifies the period of validity for such a warrant. The lengths of validity periods vary.<sup>1</sup> Thus, some Acts provide for a validity period of one week,<sup>2</sup> others for a period of one month<sup>3</sup> and some for a period of 28 days.<sup>4</sup> Others contain variable terms. For example, section 14(4) of the *Criminal Assets Bureau Act 1996*, as amended by section 16(b) of the *Proceeds of Crime Act 2005*, provides that the warrant must be executed “within a period to be specified in the warrant” but that period “shall be one week, unless it appears to the [issuing] judge that another period, not exceeding 14 days, would be appropriate in the particular circumstances of the case.”

**(1) General validity period of 7 days**

5.02 An examination of the law in a number of other jurisdictions shows that standard and generally applicable validity periods in respect of search warrants are usually set out in legislation. The time periods themselves, as well as other requirements and regulations, vary from one jurisdiction to another. Periods varying from 24 hours,<sup>5</sup> 72 hours,<sup>6</sup> 7 days,<sup>7</sup> 14 days,<sup>8</sup> one month<sup>9</sup> and three months<sup>10</sup> have been provided for in legislation. Certain

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<sup>1</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 5.06.

<sup>2</sup> Examples of this period can be found in section 10(2) of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended by section 6(1)(a) of the *Criminal Justice Act 2006*, section 7(2) of the *Illegal Immigrants (Trafficking) Act 2000* and section 48(3) of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

<sup>3</sup> Examples of this can be found in section 9(1) of the *Prohibition of Incitement to Hatred Act 1989*, section 13(2) of the *Criminal Damage Act 1991*, section 35(2) of the *Control of Horses Act 1996* and section 5(3) of the *Prevention of Corruption (Amendment) Act 2001*.

<sup>4</sup> In particular section 261(1) of the *Copyright and Related Rights Act 2000* and section 48(2) of the *National Oil Reserves Agency Act 2007*.

<sup>5</sup> Section 73(1)(b) of the New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002*. However, this relates only to telephone warrants.

<sup>6</sup> Section 155(2) of the Queensland *Police Powers and Responsibilities Act 2000*. However, this validity period only applies to a warrant for evidence that is likely to be taken to a place within the next 72 hours. Section 73(3) of the New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002* provides for a general expiry period of 72 hours, but this may be extended to up to 6 days under section 73(4) and 73(6)(a).

<sup>7</sup> Section 3E(5A) of the Commonwealth of Australia *Crimes Act 1914*, as amended, provides that the warrant must state how long it is valid for and that this period must not exceed 7 days. Section 155(1) of the Queensland *Police Powers and Responsibilities Act 2000* also provides for a maximum validity period of 7 days.

<sup>8</sup> Section 103(4)(h) of the New Zealand *Search and Surveillance Act 2012* provides that a search warrant should be valid for a period not exceeding 14 days from the date of issue, or if the issuing authority is satisfied that a period longer than this is required, he or she may specify a validity period not exceeding 30 days. The *Federal Rules of Criminal Procedure* (United States) provide, at Rule 41(e)(2), that a search warrant must specify the validity period and that this period must exceed 14 days.

provisions also enable the extension of the standard period where a term longer than the standard term is required.<sup>11</sup>

- 5.03 The Commission has concluded that the proposed Search Warrants Act should provide for a standard validity period in respect of issued search warrants. This would be appropriate in light of the general purpose of ensuring consistency in the legislation on search warrants.
- 5.04 The Commission recommends a validity period of 7 days. Section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended by the *Criminal Justice Act 2006*, provides for a validity period of one week in respect of search warrants issued under its terms. A standard period of 7 days would therefore be in line with this provision; and specifying 7 days would bring clarity in this respect. The Commission is concerned that a longer standard period, for example one month, would afford too broad an authority to executing officers and may infringe disproportionately on the rights discussed in Chapter 1. In cases where a search warrant is not executed within a 7 day period it would be more appropriate for executing officers to return to the issuing authority for a new search warrant rather than to provide for an extensive validity period from the outset. In any event, the Commission has been advised that in practice search warrants are executed shortly after they are issued; it is uncommon for the warrant to remain unexecuted for the entire duration of its validity period.

<b>5.05 The Commission recommends that the Search Warrants Act should provide for a standard validity period for search warrants of 7 days.</b>
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**(2) Exception for urgent electronic search warrants**

- 5.06 The Commission has recommended at paragraph 3.90 that as a general rule a person applying for a search warrant should be required to appear personally before the issuing authority to affirm his or her opinion under oath. However, legislation should permit the requirement for the applicant to appear personally before the issuing authority to be dispensed with in urgent situations, where any delay involved in applying in person would frustrate the effective execution of the warrant. The Commission is of the view that a validity period of 24 hours, rather than 7 days, should apply to these urgently issued search warrants.
- 5.07 Electronic search warrant applications are intended to be the exception to the general rule that a person should appear personally before a judge of District Court, and therefore the Commission is of the view that they should only be relied on in cases of urgency. This should be reflected in the validity period applicable so that a search warrant should be executed shortly after it has been issued. If it is not necessary to execute the warrant within a short space of time (that is, 24 hours) then it is most likely the case that it could be issued following a personal appearance by the applicant before a judge of the District Court in the ordinary way.
- 5.08 The Commission observed at paragraph 4.12 that a small number of search warrant provisions currently enable members of An Garda Síochána of certain minimum rank to issue search warrants in limited circumstances. Such warrants are only intended to be

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<sup>9</sup> Section 42(2) of the *Criminal Investigation Act 2006* (Western Australia) provides that a search warrant must set out the time period for its execution, which may not exceed 30 days. Section 5(2) of the *Search Warrants Act 1997* (Tasmania) also requires the issuing authority to outline on the warrant how long it remains valid for and this period may not exceed 28 days.

<sup>10</sup> Section 16 of the *Police and Criminal Evidence Act 1984*, as amended by section 114(8) of the *Serious Organised Crime and Police Act 2005* (England and Wales).

<sup>11</sup> Section 73(4) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (New South Wales), section 103(4)(h) of the *Search and Surveillance Act 2012* (New Zealand).

used in cases of urgency, and are therefore subject to more restrictive validity periods. Validity periods of 24 hours apply to Garda issued search warrants under section 26 of the *Misuse of Drugs Act 1977*, as amended by the *Criminal Justice (Drug Trafficking) Act 1996*, section 14 of the *Criminal Assets Bureau Act 1996*, as amended by the *Proceeds of Crime Act 2005*, and section 5 of the *Prevention of Corruption (Amendment) Act 2001*, as amended by the *Criminal Justice Act 2006*. It is proposed that the electronic search warrant process which the Commission recommends in the Report would apply in these types of urgent situations, although, as discussed in Chapter 4, above, the Commission recommends that such urgent applications should be made to the High Court and that the current provisions which permit members of An Garda Síochána of a certain rank to issue search warrants in urgent situations should be repealed. The Commission is of the view that a similar, shorter, validity period should apply in respect of search warrants which are applied for and issued electronically by the High Court in situations of urgency.

**5.09 The Commission recommends that where an applicant has applied to the High Court for a search warrant in urgent circumstances without appearing personally before a judge of the District Court, the validity period of the warrant should be 24 hours. The Commission recommends that the Search Warrants Act should provide that this is an exception to the general standard period of 7 days.**

**(3) Extension of the validity period**

- 5.10 In complex cases, it may not be possible to execute the search warrant within the period of 7 days that has been recommended. Therefore, the Commission recommends that a procedure should be provided for under which the validity period of a search warrant may be extended.
- 5.11 An example of a provision permitting an extension of a search warrant validity period is contained in section 787 of the *Companies Act 2014*. Section 787(9) provides that the validity period of a warrant shall be 30 days. This, however, may be extended if, during the period of validity, an application is made by the executing officer to a judge of the District Court seeking an extension of the period and such an application is accompanied by information on oath, stating the reasons why this extension is considered necessary.<sup>12</sup> If the judge is satisfied by the grounds put forward, he or she may extend the period of validity “by such period as, in the opinion of the judge, is appropriate and just.”<sup>13</sup> Where an extension order is made the judge “shall cause the warrant to be suitably endorsed to indicate its extended period of validity.”<sup>14</sup>
- 5.12 The Commission is of the view that such a procedure should be set out in the proposed Search Warrants Act. It should be possible in any search warrant case to apply to the District Court during the 7 day validity period of the initial warrant for an extension of the expiration date on the basis of sworn information as to why the extension is necessary. It would then be a matter for the judge of the District Court to determine whether an extension of the validity period is justified. However, the Commission is of the view that this procedure should not apply once the warrant has expired. In such circumstances, a new search warrant application would be necessary. Furthermore, the Commission proposes that it would be inappropriate for an application for the extension of a warrant to be heard side by side with the original search warrant application. This practice would be speculative in nature and would undermine the concept of having a standard validity period. Rather, execution of the search warrant should commence and only then should an assessment be made as to whether an extension of the validity period is required. The case for an extension should be presented to a judge of the District Court. The validity

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<sup>12</sup> Section 787(10) of the *Companies Act 2014*.

<sup>13</sup> Section 787(11) of the *Companies Act 2014*.

<sup>14</sup> Section 787(11) of the *Companies Act 2014*.

period should only be extended for a maximum of 7 days. Where a further extension period is deemed necessary, the executing officer should be required to return to a judge of the District Court and set out the reasons why a subsequent extension is necessary.

- 5.13 The Commission is of the view that the Search Warrants Act should specify the maximum number of times an applicant should be allowed to return to a judge of the District Court to seek to extend the validity period of a search warrant. This would be necessary to protect the rights discussed in Chapter 1 by ensuring that law enforcement authorities and other officers would not be permitted to make an unlimited amount of applications for an extension of the validity period of a search warrant. Thus the Commission recommends that an applicant should only be permitted to return to a judge of the District Court and apply to extend the validity period of a warrant for a period of 7 days on three occasions. This would mean that after a period of 28 days during which the applicant has satisfied a judge of the District Court on three separate occasions that an extension of the warrant period is necessary, the applicant would no longer be able to apply for an extension of the same warrant, but would have to apply for a new search warrant in respect of the premises.

**(4) Effect on legislation providing for longer validity periods**

- 5.14 Some of the statutory provisions on search warrants listed in Appendix A to this Report provide for much longer validity periods than the general 7 day period which the Commission has concluded is appropriate for the proposed Search Warrants Act. For example, in the context of issuing of search warrants for investigation into matters of enforcement of financial services legislation or company law, section 28(2) of the *Central Bank (Supervision and Enforcement) Act 2013* and section 787(9) of the *Companies Act 2014*<sup>15</sup> provide for a validity period of 30 days and 1 month, respectively, and also provide that such a validity period may be extended upon application to a judge of the District Court if necessary. The Commission notes that such provisions do not specify a maximum number of extensions. The lengthy validity period and failure to specify a maximum number of extensions reflect a need, in such circumstances, for more time in such investigations which can involve entry, search or inspection and seizure of a large quantity of documents and/or electronic material. The Commission is of the view that it would be inappropriate for the generally applicable Search Warrants Act to specify a 7 day validity period in respect of such investigations and to require the applicant to apply for an extension of the validity period every 7 days. The Commission has therefore concluded that the Search Warrants Act should provide that the standard 7 day validity period and maximum number of extensions is without prejudice to specific legislative provisions, such as those in the *Central Bank (Supervision and Enforcement) Act 2013* and the *Companies Act 2014* (and which are not intended as an exhaustive list of such provisions) that specify longer validity periods where these are necessary for investigations under, for example, financial services legislation or company law.

**5.15 The Commission recommends that the Search Warrants Act should provide for the extension of the search warrant validity period of 7 days where this is deemed necessary; and the executing officer should be required to provide information on oath as to the reasons why an extension is considered necessary.**

**5.16 The Commission recommends that extension of the validity period should not be permitted at the time of the initial search warrant application nor once the warrant expiration date has passed.**

**5.17 The Commission recommends that the extension period should be no more than 7 days, but that a subsequent application for an extension should be permitted where a further extension is required.**

<sup>15</sup> This replaced section 20(2) of the *Companies Act 1990*, as amended by section 5(a) of the *Companies (Amendment) Act 2009*.

- 5.18 The Commission recommends that the Search Warrants Act should permit no more than three orders to be made extending the validity period of a search warrant.**
- 5.19 The Commission recommends that the provisions in the Search Warrants Act concerning the 7 day validity period and extension of the validity period should be without prejudice to specific legislative provisions, including those in the *Central Bank (Supervision and Enforcement) Act 2013* and the *Companies Act 2014*, which specify longer validity periods where these are necessary for investigations under, for example, financial services legislation or company law.**

## **B Time of Execution of Search Warrant**

- 5.20 In the Consultation Paper, the Commission observed that the law in many jurisdictions includes specific provisions as to the time when a search warrant can be executed<sup>16</sup> but that no such provision exists in Irish law. Some Acts permit entry within a specified validity period.<sup>17</sup> Other Acts allow for the execution of the warrant “at any time or times.”<sup>18</sup> The Commonwealth of Australia *Crimes Act 1914*, as amended by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*, requires the issuing authority to state on the face of the warrant “whether the warrant may be executed at any time or only during particular hours.”<sup>19</sup>
- 5.21 Provisions in other jurisdictions restricting the time of search warrant executions generally either require the warrant to be executed between certain hours during the day<sup>20</sup> or at “a reasonable hour.”<sup>21</sup> The New Zealand *Search and Surveillance Act 2012* provides that the execution of a warrant may be subject to any conditions specified in the warrant by the issuing officer, including “any restriction on the time of execution that is reasonable.”<sup>22</sup>
- 5.22 Such provisions generally permit search warrant executions outside of the permitted hours in certain circumstances. For example, in England and Wales, the *Police and Criminal Evidence Act 1984* provides that entry and search under a warrant “must be at a reasonable hour unless it appears to the constable executing it that the purpose of a search may be frustrated on entry at a reasonable hour.”<sup>23</sup> The Canadian *Criminal Code*

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<sup>16</sup> See generally *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 5.13-5.29.

<sup>17</sup> For example, section 7(2)(a) of the *Child Trafficking and Pornography Act 1998* and section 48(3)(a) of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

<sup>18</sup> For example, section 13(2) of the *Criminal Damage Act 1991* and section 40 of the *Communications Regulation Act 2002*.

<sup>19</sup> Section 3E(5) of the *Crimes Act 1914*.

<sup>20</sup> The Western Australia *Criminal Investigation Act 2006* provides that a search warrant must be executed between 6am and 9pm unless the executing officer reasonably suspects that execution outside of those hours would endanger the safety of any person, including the officer or jeopardise the effectiveness of the proposed search. Section 72(1) of the New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002* provides that a warrant (other than a covert warrant) may be executed by day but must not be executed by night unless the issuing officer so authorises. The Act defines day time hours as those between 6 am and 9 pm on any day, and night time as being the period between 9 pm on any day and 6 am on the following day.

<sup>21</sup> In England and Wales, the *Police and Criminal Evidence Act 1984* provides that entry and search under a warrant “must be at a reasonable hour unless it appears to the constable executing it that the purpose of a search may be frustrated on entry at a reasonable hour.”

<sup>22</sup> Section 103(3)(b) of the *Search and Surveillance Act 2012*.

<sup>23</sup> Section 16(4) of the *Police and Criminal Evidence Act 1984*.

1985 provides that a search warrant issued under its terms “shall be executed by day”, unless:

- a) the court is satisfied that there are reasonable grounds for it to be executed by night;
- b) the reasonable grounds are included in the information; and
- c) the warrant authorises that it be executed by night.<sup>24</sup>

5.23 In New South Wales, the *Law Enforcement (Powers and Responsibilities) Act 2002* provides that a search warrant may be executed by day “but must not be executed by night unless the eligible issuing officer, by the warrant, authorises its execution by night.”<sup>25</sup> The 2002 Act provides that the issuing authority must not authorise the execution of a warrant by night unless satisfied that there are reasonable grounds for doing so. These grounds are stated by the 2002 Act to include, but are not limited to, the following:

- a) the execution of the warrant by day is unlikely to be successful because, for example, it is issued to search for a thing which is likely to be on the premises only at night or other relevant circumstances will only exist at night,
- b) there is likely to be less risk to the safety of any person if it is executed at night, or
- c) an occupier is likely to be on the premises only at night to allow entry without the use of force.

5.24 Restricting the time at which search warrants may be executed would safeguard the rights to privacy and inviolability of the dwelling by minimising the intrusiveness of the powers of search and seizure which already constitute an interference with such rights. One submission which the Commission received suggested that a search warrant provision requiring the execution of warrants during specified daytime hours except for in urgent circumstances would be appropriate. It noted that in the Supreme Court decision *The People (DPP) v Gormley and White*<sup>26</sup> Hardiman J was critical of the practice of arresting persons early in the morning where it would be fairly certain that a solicitor would not be in a position to attend. The submission suggested that although the Court did not directly address the issue of searches, the same circumstances outlined by Hardiman J of “unnecessarily heightened drama, sirens, breaking of doors, disturbance and trauma to spouses and children”<sup>27</sup> are relevant to the execution of search warrants.

5.25 The Commission has been advised that, in practice, many searches are carried out during daytime hours so as not to disrupt those affected at night time. However, cases can arise when a search must be carried out either late at night or very early in the morning, for example where there is a danger of the destruction or removal of evidence or where the investigation is urgent in nature. Furthermore, it may be preferable in some circumstances for searches to be carried out at particularly late or early hours because it results in fewer members of the general public becoming aware of the execution of a search warrant at a location. There is also a risk that if the execution of a warrant was limited to certain hours, unlawful activities might be carried out at particular times during the day or night with less possibility of discovery. It is evident therefore that flexibility as to the time at which a search may be carried out is an important element of the execution process. Following consideration of this matter, the Commission has concluded that it is appropriate to include in the proposed Search Warrants Act a presumption, which reflects general practice, that a search warrant will be executed at a reasonable time unless there are specific reasons why this should not be the case. If the search warrant is not to be

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<sup>24</sup> Section 488 of the *Criminal Code 1985*. “Day” is defined as between 6am and 9pm.

<sup>25</sup> Section 72(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

<sup>26</sup> [2014] IESC 17.

<sup>27</sup> *Ibid* at paragraph 5.



executed at a reasonable time, the reasons for this should be provided when the application for the search warrant is being made and should form part of the sworn basis for the application. The Commission considers that “reasonable” in this context will ordinarily be during daylight hours, or as some jurisdictions discussed above have provided between 6 am and 9 pm. The Commission has concluded that, bearing in mind that what is reasonable may vary from case to case, it is sufficient to refer to “reasonable” in the proposed Search Warrants Act, and that any reference to specific times that might be regarded as reasonable for this purpose are better left for consideration in the statutory Code of Practice on Search Warrants, which the Commission discusses elsewhere in this Report.<sup>28</sup> This approach provides appropriate respect for the rights that are at issue in the use of search warrants while also taking account of the need for flexibility in the execution process in specific cases.

**5.26 The Commission recommends that the proposed Search Warrants Act should include a presumption that a search warrant will be executed at a reasonable time unless there are specific reasons why this should not be the case; and that if the search warrant is not to be executed at a reasonable time, the reasons for this should be provided when the application for the search warrant is being made and should form part of the sworn basis for the application. The Commission also recommends that any reference to what specific times are to be regarded as reasonable for this purpose should be a matter for consideration in the statutory Code of Practice on Search Warrants recommended in paragraph 6.70 of this Report.**

### **C Scope of Authority to Enter and Search**

- 5.27 As the fundamental function of a search warrant is to authorise entry and search of a specified location, the scope of the authority is set out in the relevant legislative provision, as well as the terms of the warrant. It is notable that the scope of authority varies between search warrant provisions currently in place in Ireland. While some provisions authorise entry “at any time”, others provide that entry is permitted “at any time or times.” This raises the issue of multiple entry and execution, which the Commission discussed in the Consultation Paper.<sup>29</sup>
- 5.28 As to the distinction between the phrases “at any time” and “at any time or times”, Walsh has explained that the phrase, “at any time or times” has the effect that the warrant “can be used to search the specified premises for the specified items on several occasions” within the validity period.<sup>30</sup> By contrast, the phrase, “at any time” appears to permit a single entry under the warrant during its validity period. There is no clear reason why some provisions confer an authority to enter and search which is broader in scope than other provisions.
- 5.29 In practical terms, the authority to enter a search location on more than one occasion is both functional and, in many cases, necessary. Where an investigation is complex in nature it may be impossible to complete the search within a short period of time, thus necessitating a power for executing officers to return to the location on more than one occasion. The Commission has been advised that another practical benefit of such powers authorising more than one entry is that the function of the warrant is not frustrated if the members of the search team leave the boundaries of the search location. For example, if only a single entry is permitted under the scope of the search warrant and the

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<sup>28</sup> See paragraphs 6.60ff, below.

<sup>29</sup> See generally *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 5.75-5.87.

<sup>30</sup> Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 415.

only member of the search team currently within the location steps outside of the boundaries, even for a brief moment, it may be argued that executing officers cannot re-enter the location again. By contrast, a search warrant that authorises more than one physical entry would permit executing officers to re-enter the location boundaries in such circumstances.

**(1) Multiple entry search warrants in other jurisdictions**

- 5.30 In England and Wales, the *Police and Criminal Evidence Act 1984*, as amended by the *Serious Organised Crime and Police Act 2005*, expressly permits multiple execution warrants. Section 15(2)(a)(iii) provides that when a search warrant application is made, the applicant must explicitly state if the application is for a warrant authorising entry and search on more than one occasion, and if so the ground(s) upon which he or she is applying for such a warrant. The applicant must also state whether he or she seeks a warrant authorising an unlimited number of entries or, if not, the maximum number of entries desired under the warrant. Section 15(5) further distinguishes between a multiple execution search warrant and a single execution warrant, and provides that “a warrant shall authorise an entry on one occasion only unless it specifies that it authorises multiple entries.” As to the execution of this type of search warrant, section 16(3)(B) provides that “no premises may be entered or searched for the second or any subsequent time under a warrant which authorises multiple entries *unless* a police officer of at least the rank of inspector has in writing authorised that entry to those premises”. The fact that the warrant form authorises multiple executions is not, in itself, sufficient to enable executing officers to do so; they must also obtain the written authority of an officer not below the rank of inspector. This provision was introduced to act as a safeguard against arbitrary or excessive multiple executions of a search warrant.
- 5.31 In its 2007 Report *Search and Surveillance Powers*,<sup>31</sup> the New Zealand Law Commission expressed the view that, given the intrusive and coercive nature of search warrants, they should usually only be executed once.<sup>32</sup> Nonetheless, the Commission acknowledged that there may be occasions where multiple executions should be permitted and was of the view that it would be “administratively burdensome, and could prejudice ongoing investigations, if the police were required to make multiple warrant applications” in such cases.<sup>33</sup> The Law Commission therefore recommended that where an applicant satisfies an issuing authority that more than one execution of the warrant may be necessary, the authority should be permitted to authorise multiple executions and endorse the warrant to that effect.<sup>34</sup> Arising from the implementation of that 2007 Report, section 98(1)(g) of the New Zealand *Search and Surveillance Act 2012* provides that, where an applicant requires a search warrant to be executed on more than one occasion, the application must set out the grounds as to why execution on more than one occasion is believed to be necessary. Section 98(5) of the 2012 Act provides that the issuing authority may authorise the search warrant to be executed on more than one occasion during the period for which the warrant is in force if satisfied that this is required for the purposes for which the warrant is being issued. With regard to the content of the search warrant, section 103(4)(j) requires a warrant that may be executed more than once to state the number of executions authorised. Section 103(3)(b)(ii) provides that all search warrants may only be executed once, unless execution on more than one occasion has been specifically authorised.

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<sup>31</sup> New Zealand Law Commission *Report on Search and Surveillance Powers* (NZLC R97 2007).

<sup>32</sup> *Ibid* at paragraph 4.149.

<sup>33</sup> *Ibid* at 123.

<sup>34</sup> *Ibid*.

**(2) “Break from search” provisions in other jurisdictions**

- 5.32 A particular “break from search” type provision can be found in the Commonwealth of Australia *Crimes Act 1914*, as amended, and in Tasmania’s *Search Warrants Act 1997*. Neither Act contains an express provision in respect of the multiple executions of search warrants. However, both Acts contain a provision allowing for executing officers temporarily to leave the search location. The 1914 Act provides that during the execution of a warrant, the executing officer and persons assisting him or her may, provided that the warrant is still in force, complete the execution of the warrant after all of them temporarily cease its execution and leave the warrant premises: (a) for not more than one hour; (b) if there is an emergency situation, for not more than 12 hours or such longer period as allowed by an issuing authority, or (c) for a longer period if the occupier of the premises consents in writing. The 1914 Act defines “emergency situation” as a situation that the executing officer “believes, on reasonable grounds, involves a serious and imminent threat to a person’s life, health or safety that requires the executing officer and constables assisting to leave the premises.”<sup>35</sup> The 1914 Act requires an officer seeking an extension of time of longer than 12 hours to re-enter the premises other than in an emergency situation to apply to an issuing authority for such an extension. The issuing authority may extend the period during which the executing officer(s) may be away from the premises if: (a) he or she is satisfied, by information on oath, that there are exceptional circumstances that justify the extension; and (b) the extension would not result in the period ending after the expiry of the warrant.<sup>36</sup>
- 5.33 Section 9(2) of Tasmania’s *Search Warrants Act 1997* is in similar terms. It does not, however, permit a break of 12 hours or longer on application to an issuing authority in an emergency situation as provided for in the Australian Commonwealth’s *Crimes Act 1914*. Although the 1997 Act also requires the consent of the occupier if the execution officer and assistants are to leave the search location for more than one hour, such consent is not required in writing.
- 5.34 These provisions enable executing officers to take a short break from the search location, without the danger that they will be refused re-entry on the ground that they have expended the authority to enter the location. The provisions also enable executing officers to take longer breaks, perhaps, for example overnight, if the owner consents or in an emergency situation under the Commonwealth of Australia *Crimes Act 1914*.

**(3) Discussion as to the scope of the authority to be set out in the Search Warrants Act**

- 5.35 The Commission has considered whether the Search Warrants Act should provide that entry under a search warrant is permitted “at any time”, or “at any times.” The Commission notes that employing “at any times” as the generally applicable term would extend this broader scope of authority to all search warrants.
- 5.36 The Commission has examined the approach in other jurisdictions where multiple execution search warrants are employed and has considered whether a procedure for multiple execution search warrants should be introduced in Ireland. Feedback which the Commission received suggested that the introduction of a requirement to state whether multiple executions will be necessary could lead to applicants in all cases stating that multiple executions are required, as it may be unknown at that stage whether a search will take more than one day.
- 5.37 However, the Commission notes that it would be impractical for a generally applicable Search Warrants Act to prevent an executing authority from taking breaks during the execution of a search warrant. An officer may need to leave the search location for a meal or for an overnight break. In many cases, the amount of material being searched

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<sup>35</sup> Section 3C of the *Crimes Act 1914*.

<sup>36</sup> Section 3JA of the *Crimes Act 1914*.

means that it is impossible to complete the search in one day, and the executing authority must enter a search location a number of times during the validity period to complete the execution. In such circumstances, entry on more than one occasion is justified.

5.38 The most generally applicable search warrant provision, section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended by the *Criminal Justice Act 2006*, provides for entry under a warrant “at any time or times”. The Commission is aware of cases in which members of An Garda Síochána have used search warrants issued under section 10 of the 1997 Act to conduct searches over the course of a number of days where necessary. The Commission is therefore of the view that, bearing in mind the recommendation paragraph 5.26 above that there should be a presumption that a search will be carried out at a reasonable time, the proposed Search Warrants Act should provide for entry “at any reasonable time or times” within the validity period. It would still be open to a person who is affected by the entry to challenge any misuse of the power to enter on more than one occasion. It would be unnecessary for the Act to include a “break from search” provision similar to those found in the Commonwealth of Australia and Tasmania, as the use of the phrase “at any reasonable time or times” would allow executing officers to vacate the search location for a short period during the search to have a break without subsequently being prevented from returning to the search location.

**5.39 The Commission recommends that the Search Warrants Act should provide that the scope of the authority to enter a location should be “at any reasonable time or times.”**

**5.40 The Commission recommends that the Search Warrants Act should not require the applicant to state at the time of the search warrant application how many entries are required.**

#### **D The Use of Force in Executing a Search Warrant**

5.41 In the Consultation Paper, the Commission discussed the use of force when executing a search warrant and provisionally recommended that the power to use force when executing a search warrant should always be accompanied by a requirement for reasonableness.<sup>37</sup> The fact that a search warrant authorises entry and search of a location without the consent of the owner or occupier may necessarily imply the right to use force, if required. The authority granted by the warrant overrides the requirement for the consent of the owner or occupier to enter and search the location. Where the owner or occupier is unwilling to grant entry to executing officers, force may be used for the purpose of executing the warrant. It may also be the case that force is required to gain entry where no person is available to grant access, for example in the case of a derelict building.

5.42 Currently, the power to use force to gain entry to a location is generally expressly recognised within the provision under which the warrant is issued, as well as on the face of the search warrant itself.<sup>38</sup> It is notable that Irish search warrant provisions provide that force may be used where it is necessary, and therefore force may not be used in a gratuitous manner. Determining whether force is necessary will depend on the facts of each case. For example, it may be deemed necessary to use force if the owner or occupier refuses a request by the executing officer to enter the location, or if the executing officer believes that evidence will be destroyed should the owner or occupier become aware that a search is about to be carried out.

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<sup>37</sup> Consultation Paper on Search Warrants and Bench Warrants (LRC CP 58-2009) at paragraph 5.38.

<sup>38</sup> See, for example, section 18(7) of the *Welfare of Greyhounds Act 2011*, which provides that a welfare officer or Garda may use “reasonable force” if necessary to enter a premises to exercise his/her powers under the Act.

5.43 As to the level of force which may be used, while some legislative provisions require that force be “reasonable”, others do not refer to such a requirement and simply state that force may be used where necessary, without limiting the degree of force in any way.<sup>39</sup> The use of the word “reasonable” essentially requires that any force used is proportionate and not excessive in the circumstances. Because the use of force may lead to the damage of, or interference with, a person’s rights (whether an individual or a commercial entity), the Commission is of the view that where force is used during the execution of a search warrant, that force should be reasonable in the circumstances. The Commission has therefore concluded that this should be provided for in the Search Warrants Act.

**5.44 The Commission recommends that the Search Warrants Act should provide that where it is necessary to use force during the execution of a search warrant, any force used must be reasonable.**

## **E Giving a Copy of the Search Warrant to the Owner or Occupier**

5.45 In the Consultation Paper, the Commission examined the law in a number of jurisdictions where the executing authority is required to give a copy of the search warrant to the owner or occupier of the property being searched.<sup>40</sup> This requirement is included, for example, in the Commonwealth of Australia *Crimes Act 1914*, as amended,<sup>41</sup> in Queensland in the *Police Powers and Responsibilities Act 2000*,<sup>42</sup> and the *Crime and Misconduct Act 2001*<sup>43</sup>, in Western Australia in the *Criminal Investigation Act 2006*<sup>44</sup> and in New Zealand in the *Search and Surveillance Act 2012*.<sup>45</sup> The Commission notes that a comparable requirement does not exist in Irish law.

5.46 The Commission has observed that many search warrant provisions in Ireland provide that the search warrant will be produced upon request by the owner or occupier.<sup>46</sup> Thus, the owner or occupier is entitled to be shown the warrant at the time of execution. However, such provisions do not go so far as to require the executing authority to furnish the owner or occupier with a copy of the warrant so that he or she (or in the case of a commercial entity, it) can retain the copy. The Commission has been advised that in practice many executing officers afford the owner or occupier an opportunity to examine the warrant even though the relevant legislation does not require this, or where the owner or occupier does not request to see the document. This practice is again limited to an opportunity to see the warrant, however, and not keep it.

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<sup>39</sup> See, for example, section 7(2) of the *Aliens Act 1935*, which can be contrasted with section 18(7) of the *Welfare of Greyhounds Act 2011*.

<sup>40</sup> *Ibid* at paragraphs 5.48-5.52.

<sup>41</sup> Section 3H of the *Crimes Act 1914*, as amended, which also provides that the copy of the warrant need not include the signature of the issuing officer or the seal of the relevant court (section 3H(5)).

<sup>42</sup> Section 158 of the *Police Powers and Responsibilities Act 2000*.

<sup>43</sup> Section 93 of the *Crime and Misconduct Act 2001*.

<sup>44</sup> Section 31 of the *Criminal Investigation Act 2006*.

<sup>45</sup> Section 131 of the *Search and Surveillance Act 2012*.

<sup>46</sup> For example, section 15 of the *Firearms and Offensive Weapons Act 1990*, section 35 of the *Control of Horses Act 1996*, section 16A of the *Road Transport Act 1986*, as amended, section 43 of the *Aviation Regulation Act 2001*, section 70 of the *Industrial Designs Act 2001*, section 37 of the *Adventure Activities Standards Authority Act 2001*, section 23 of the *Disability Act 2005*, section 64 of the *Safety, Health and Welfare at Work Act 2005* and section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended by the *Criminal Justice Act 2006*.

**(1) General requirement to provide copy of search warrant to owner or occupier**

- 5.47 In the Consultation Paper, the Commission expressed the view that giving a copy of the search warrant to the person(s) concerned would lead to greater transparency and accountability with regard to the execution process.<sup>47</sup> Furthermore, this would enable person(s) to identify the authority afforded to executing officers by the warrant in respect of their property. Thus, the Commission provisionally recommended that the practice of giving a copy of the warrant to the owner or occupier should be provided for in legislation.<sup>48</sup>
- 5.48 The Commission remains of the view that a copy of the search warrant should be given to the owner or occupier of the property concerned. It is important in this respect to distinguish between a copy of the search warrant and the information which grounds the application. An application for a search warrant may identify information sources or include other such information which, in the interests of the investigation, or perhaps the safety of persons concerned, should remain confidential to the investigating authority and the issuing authority. The Commission does not recommend that such information should be afforded to the owner or occupier. Rather, the requirement would be limited to a copy of the search warrant itself, as this is the legal authority for the entry and search of the location.
- 5.49 In the Consultation Paper, the Commission suggested that a copy of the warrant should generally be given at the commencement of the search warrant execution.<sup>49</sup> However, following further consideration and consultation, the Commission now recommends that the warrant copy should be given upon completion of the search. Furnishing a person with a copy of the warrant at the commencement of the execution may afford that person, or any other person at the location concerned or another location, the opportunity to remove or destroy evidence. Giving a copy of the search warrant upon completion of the search would retain the benefits of accountability and transparency, while the risk of removal or destruction of evidence or frustration of the search would be reduced.
- 5.50 On a practical level, the copy of a search warrant should be clearly certified as a copy and not the original search warrant so that it may not be used in a manner that implies that it is the original.
- 5.51 In some instances the owner or occupier may not be present at the search location. In some jurisdictions a copy of the warrant is left at the location to be found on their return. For example, in England and Wales the *Police and Criminal Evidence Act 1984* provides that if there is no person who appears to be in charge of the premises at the time of the execution of the search warrant, the officer must leave a copy of the warrant in a prominent place on the premises.<sup>50</sup> Code of Practice B, which supplements the 1984 Act, requires a copy of the search warrant to be left in a prominent place on the premises or appropriate part of the premises, and endorsed with the name of the officer in charge of the search if the occupier is not present.<sup>51</sup> In Queensland, the *Police Powers and Responsibilities Act 2000* and the *Crime and Misconduct Act 2001* provide that if the

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<sup>47</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 5.55.

<sup>48</sup> *Ibid* at paragraph 5.60.

<sup>49</sup> *Ibid* at paragraph 5.58.

<sup>50</sup> Section 16(7) of the *Police and Criminal Evidence Act 1984*.

<sup>51</sup> Provision 6.8 of *Code B: Code of Practice for Searches of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises*. The requirement for an officer to give his or her name is subject to the limitation set out in provision 2.9 of the Code, which explains that the identity of an officer need not be recorded or disclosed in (a) the case of enquiries linked to the investigation of terrorism, or (b) where an officer reasonably believes that disclosure of his or her name might put him or her in danger. In such circumstances police identification numbers should be used.

occupier is not present a copy of the search warrant should be left in a “conspicuous place”. Similarly, in Western Australia section 31 of the *Criminal Investigation Act 2006* states that in the event of an occupier not being present, the executing officer must leave the following in a prominent position on the premises: (i) a notice stating that the place has been entered and stating the officer’s official details, and (ii) a copy of the search warrant.<sup>52</sup>

5.52 The Commission was made aware that it is generally the practice of An Garda Síochána to wait for a period of time before executing the search warrant where no-one is present at a premises and the matter is not urgent. If on returning to the premises there is still no-one present, the Gardaí may decide then to carry out the search. In such a situation, once the search has been completed, the executing authority (whether Gardaí or other authorised person) should leave a copy of the search warrant in a prominent place on the premises indicating that a search has been carried out.

**5.53 The Commission recommends that a copy of the search warrant should be given to the owner or occupier of the property upon the completion of the warrant execution.**

**5.54 The Commission recommends that when the owner or occupier is not present at the place at the time of the execution of the warrant the executing authority should leave a copy of the search warrant in a prominent location at the place.**

**(2) Exceptional cases**

5.55 The Commission acknowledges that in some cases it may not be advisable to give a copy of the search warrant to the owner or occupier, for example where it is believed that this may jeopardise the investigation concerned, or any other investigation. However the Commission considers that the corollary to this exception should be to enable the person to make an application requesting that a copy of the warrant be provided (whether directly to the person or to a legal representative). In this respect, section 56 of the *Criminal Justice Act 2007* provides that where a person is before a court charged with an offence, “a copy of any recording of the questioning of the person by a member of the Garda Síochána while he or she was detained in a Garda Síochána station, or such questioning elsewhere, in connection with the investigation of the offence shall be given to the person or his or her legal representative only if the court so directs and subject to such conditions (if any) as the court may specify.” The Commission considers that a similar provision may be suitable in respect of withheld copies of search warrants. Thus when a copy of the warrant is withheld on the basis of a belief that giving a copy could be detrimental to an investigation, the person could apply to the District Court to obtain a copy of the search warrant. Upon assessing the case, the court could either direct that a copy of the warrant be given to the person or to a legal representative (subject to such conditions as the court sees fit), or refuse the application.

5.56 An application under section 56 of the *Criminal Justice Act 2007* is usually made when a person is before the court charged with a criminal offence. Indeed, the accused person will be entitled to a copy of the search warrant prior to trial as part of the disclosure process.<sup>53</sup> However, the Commission is of the opinion that an owner or occupier should be able to apply for a copy of a search warrant where it has been withheld regardless of whether or not he or she has been charged with a criminal offence.

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<sup>52</sup> Section 31 of the Western Australia *Criminal Investigation Act 2006*.

<sup>53</sup> See further the Commission’s *Report on Disclosure and Discovery in Criminal Cases* (LRC 112-2014).

**5.57 The Commission recommends that the requirement to give a copy of the search warrant to the owner or occupier should not be absolute and that the Search Warrants Act should provide for an exception that where an executing officer believes that it is not advisable to give a copy of the warrant it may be withheld from the owner or occupier.**

**5.58 The Commission recommends that there should be an appeal from a decision to withhold the search warrant copy from the owner or occupier to a judge of the District Court.**

## **F Occupier's Notice**

5.59 An occupier's notice is to be distinguished from the search warrant itself. An occupier's notice aims to provide the occupier of a location searched under the warrant with additional and practical information. There is currently no requirement to provide such a notice in this jurisdiction. In the Consultation Paper, the Commission examined a number of other jurisdictions where there is a requirement that the occupier be given such a notice.<sup>54</sup> Such a requirement typically provides that the occupier should be given a standard form notice at the time of the execution of the search, containing information such as the rights and obligations of the occupier and the powers and procedures relating to the search.<sup>55</sup>

5.60 During the consultation process the Commission received positive feedback regarding the implementation of an occupier's notice. An advantage of such a notice would be that, if simple language were used, an occupier's notice would be easier to understand than the terms of the search warrant itself. In addition, the Commission is of the view that an occupier's notice should contain information not contained in the actual search warrant, such as the rights and duties of occupiers, an explanation of the concept of privilege and rules regarding seizure of materials. The Commission received submissions suggesting that an occupier's notice should take the form of a standard notice similar to the standard notice of rights provided for under the *Criminal Justice Act 1984 (Treatment of persons in Custody in Garda Síochána Stations) Regulations 1987*. The standard notice of rights is provided to individuals who have been arrested and brought to a Garda station.

5.61 The Commission recommends that an occupier's notice should be provided to the occupier when a warrant is being executed, and should include the following information:

- i) a summary of the powers of search and seizure in the Search Warrants Act;
- ii) an explanation of the rights and obligations of the occupier and owner of any property seized;
- iii) an outline of the procedure for seizing material under the search warrant;
- iv) an explanation that reasonable force may be used, if necessary, during the course of the search warrant execution;
- v) a statement that any material seized will be securely wrapped and labelled and securely stored when removed from the location; and

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<sup>54</sup> See *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 5.62-5.66.

<sup>55</sup> *Code B: Code of Practice for Searches of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises* (England and Wales) at 6.7, section 67(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (New South Wales), section 83(2) of the *Confiscation Act 1997* (Victoria), section 158 of the *Police Powers and Responsibilities Act 2000* (Queensland) and section 93 of the *Crime and Misconduct Act 2001* (Queensland).



- vi) an explanation as to what privilege is and that material which is privileged may not be seized, or that if it is seized the owner of the material may challenge this.
- 5.62 It may be impossible to provide the occupier with a notice if he or she is not present at the location when the search is being executed. Provisions in some other jurisdictions specify what should occur in such a case. In England and Wales, for example, Code of Practice B, which supplements the *Police and Criminal Evidence Act 1984* states that if an occupier is not present, copies of the search warrant and the occupier's notice should be left in a prominent place on the premises or appropriate part of the premises and endorsed with the name of the officer in charge of the search and date and time of the search.<sup>56</sup> In New South Wales, if there is no occupier at the premises, the notice must be served on him or her within 48 hours after the execution of the warrant.<sup>57</sup> At paragraph 5.53, the Commission recommended that a copy of the search warrant should be given to the owner or occupier and that, if no such person is present, it should be left in a prominent place on the premises. The Commission is of the view the same requirement should apply to the occupier's notice.

- 5.63 The Commission recommends that the occupier of a location which is the subject of a search should be provided with an occupier's notice outlining the nature of the authority afforded to executing officers, the procedure for seizing material under the warrant and the rights and obligations of the occupier.**
- 5.64 The Commission recommends that when the occupier is not present at the premises at the time of the execution of the warrant the executing authority should leave the occupier's notice in a prominent place on the premises.**

## **G Persons Accompanying Execution of Search Warrants**

- 5.65 In the Consultation Paper, the Commission observed that many Irish search warrant provisions provide for the named executing officer to be accompanied by other officers or persons.<sup>58</sup> A number provide that where a warrant is to be executed by a named member of An Garda Síochána, he or she may be assisted by other members of An Garda Síochána.<sup>59</sup> In addition, some Acts provide for a Garda to be accompanied by "other persons as may be necessary." Under such provisions the executing Garda may benefit from the assistance of persons outside of An Garda Síochána.<sup>60</sup> This may be particularly useful where a technical or other knowledge-specific matter is likely to arise during the course of a search. Similarly, provisions that direct an executing officer who is not a member of An Garda Síochána but who holds another office may also provide that the

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<sup>56</sup> *Code B: Code of Practice for Searches of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises* at 6.8. Similarly, in Queensland, section 158 of the *Police Powers and Responsibilities Act 2000* and section 93 of the *Crime and Misconduct Act 2001* provide that, if the occupier is not present, the notice may be left in a "conspicuous place."

<sup>57</sup> Section 67(4) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

<sup>58</sup> See generally *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 5.03-5.04.

<sup>59</sup> Examples of this are included in section 26 of the *Misuse of Drugs Act 1977*, as amended, section 26 of the *Control of Dogs Act 1986*, section 19 of the *Criminal Law Amendment Act 1935*, as amended, and section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended.

<sup>60</sup> Examples of provisions allowing for the attendance of "other persons" are found in section 7 of the *Child Trafficking and Pornography Act 1998*, section 143 of the *Copyright and Related Rights Act 2000*, section 7 of the *Illegal Immigrants (Trafficking) Act 2000*, section 48 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*, section 5 of the *Prevention of Corruption (Amendment) Act 2001*, section 7 of the *Aliens Act 1935* and section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*.

person executing the warrant can be accompanied and assisted by other parties. Such provisions enable a member of An Garda Síochána, another officer in the same role as the executing officer or any other person, to accompany the named person during the execution of the warrant.<sup>61</sup>

5.66 Members of An Garda Síochána have broad powers and responsibilities with regard to crime prevention and criminal investigation. The Commission is therefore of the view that it is sufficient for the law to provide that such Garda members as are necessary may attend and assist at the execution of a search warrant. However, the Commission is of the view that a general provision of similar breadth should not apply to persons who are not Garda members. With a view to protecting the privacy rights of persons, it would not be appropriate to provide in the proposed Search Warrants Act that any person as may be requested can attend at the execution of the warrant. Rather, the Commission is of the view that the Act should require the search warrant applicant to inform the court at the time of the application that a particular person will be required to assist in the execution and detail the reason(s) why. It will be a matter for the court, at that stage, to give specific authorisation for any such person to be involved in the execution, and this should be stated on the face of the issued search warrant. As a result, there would not be a broad and open-ended power permitting the attendance of any person or persons whom the executing officer wishes to have present. This approach would act as a control mechanism in respect of the persons who may enter and search a person's property.

**5.67 The Commission recommends that, where a person who is not a member of An Garda Síochána is required to assist with the execution of a search warrant, specific permission should be sought from the court issuing the search warrant and that where such permission is granted this must be stated on the issued search warrant. The Commission therefore also recommends that the Search Warrants Act should not contain a broad provision to the effect that any person whose assistance is deemed to be necessary may accompany the executing officer.**

## H Persons Present at Location Being Searched

5.68 In the Consultation Paper, the Commission noted that many Irish search warrant provisions empower executing authorities not only to search the specified location, but also to search persons present at the location at the time of execution. A number of legislative provisions confer additional powers, such as the power to ask for personal details or the power to request assistance from a person present at the premises being searched. These provisions do not distinguish between occupiers and non-occupiers, and therefore a person may be subject to these powers simply by being present when a search warrant is executed. It is unnecessary for the person to have control over the property.<sup>62</sup>

### (1) *Searching persons present during the execution of a search warrant*

5.69 A number of legislative provisions contain powers to search persons present at a location in addition to the power to search the premises.<sup>63</sup> This power is of particular assistance

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<sup>61</sup> Such provisions can be found in section 3 of the *Customs and Excise (Miscellaneous Provisions) Act 1988*, section 87 of the *Finance Act 1995*, section 787 of the *Companies Act 2014* (which replaces section 20 of the *Companies Act 1990*, section 40 of the *Communications Regulation Act 2002*, section 64 of the *Safety, Health and Welfare at Work Act 2005*, section 23 of the *Disability Act 2005*, section 18(4) of the *Sea-Fisheries and Maritime Jurisdiction Act 2006* and section 67 of the *Pharmacy Act 2007*.

<sup>62</sup> See generally *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 5.70-5.74.

<sup>63</sup> Examples of these powers include: section 22(2) of the *National Monuments (Amendment) Act 1987*, section 13(2) of the *Criminal Damage Act 1991*, section 14(4) of the *Criminal Assets Bureau Act 1996*, section 10(2)

where item(s) being searched for can be easily concealed on the body of a person, although the power to search persons is not exclusive to such situations.

**(2) Requesting personal details**

5.70 A number of Acts provide that an executing officer may, while acting under the authority of a search warrant, request that a person present at the premises being searched provide him or her with their name and address.<sup>64</sup> This power enables an officer to keep a record of all persons present at a premises being searched, and may be of benefit to an ongoing investigation where, for example, it is believed that the person present may have some connection to or knowledge of the matter being investigated. This power is additional to, and not a substitution for, the power to search persons present. A number of Acts provide for both. In addition to a person's name and address, section 787(2) of the *Companies Act 2014* provides that an officer may enquire as to a person's occupation.<sup>65</sup>

**(3) Requesting assistance**

5.71 In certain circumstances executing officers may require assistance in order to gain access to material, for example where passwords are needed to access electronic data. Some Acts contain specific provisions which entitle executing officers to request assistance, and subsequently oblige persons capable of offering that assistance to comply. Section 787(7)(b) of the *Companies Act 2014*<sup>66</sup> provides that where an officer seeks to search a computer, he or she may require any person at that place who appears to be in a position to facilitate access to the information held in any such computer or which can be assessed by the use of that computer: (a) to give any password necessary to operate it; (b) otherwise enable the officer to examine information accessible by the computer in a form in which the information is visible and legible; or (c) to produce the information in a form in which it can be removed and in which it is, or can, be made visible and legible. Provisions to the same effect can be found in section 48(5) of the *Criminal Justice (Theft and Fraud Offences) Act 2001*, section 14(6A) of the *Criminal Assets Bureau Act 1996* and section 17A(5) of the *Sea Fisheries and Maritime Jurisdiction Act 2006*, as inserted by the *Criminal Justice Act 2007*.

**(4) Discussion**

5.72 As the Commission has recommended the enactment of a single Search Warrant Act in this Report, it is necessary to set out the provisions concerning persons present at the premises in place of the current varied statutory schemes.

5.73 The inclusion of standard provisions in the Search Warrants Act regarding persons present at the search premises would broaden the scope of many search powers as such

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of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended by *Criminal Justice Act 2006*, section 7(2) of the *Child Trafficking and Pornography Act 1998*, section 7(2) of the *Illegal Immigrants (Trafficking) Act 2000*, section 48(3) of the *Criminal Justice (Theft and Fraud Offences) Act 2001* and section 15(2) of the *Immigration Act 2004*.

<sup>64</sup> Acts which authorise a request for personal details of persons present include: section 22(3) of the *National Monuments (Amendment) Act 1987*, section 9(1) of the *Prohibition of Incitement to Hatred Act 1989*, section 25(1) of the *Video Recording Act 1989*, Section 14(6) of the *Criminal Assets Bureau Act 1996*, section 7(3) of the *Child Trafficking and Pornography Act 1998*, section 143(1) of the *Copyright and Related Rights Act 2000*, section 7(3) of the *Illegal Immigrants (Trafficking) Act 2000*, section 5(5) of the *Prevention of Corruption (Amendment) Act 2001* and section 15(3) of the *Immigration Act 2004*.

<sup>65</sup> Section 787(2)(c) of the *Companies Act 2014* replaced section 20 of the *Companies Act 1990*, as amended by section 30 of the *Company Law Enforcement Act 2001* and section 5 of the *Companies (Amendment) Act 2009*.

<sup>66</sup> This replaces section 20(4) of the *Companies Act 1990*, as amended by section 30 of the *Company Law Enforcement Act 2001* and section 5 of the *Companies (Amendment) Act 2009*.

powers are not currently provided for in every provision. Having regard to this, the Commission has considered whether it would be appropriate to require a search applicant to seek authorisation from the court to exercise any of the above mentioned powers. The Commission has decided that any such requirement could be obstructive in nature. It would require the applicant to speculate as to whether or not persons would be present at the search location and whether or not it would be necessary to search those persons or request their assistance. In cases where the power(s) had not been sought and expressly afforded by the court and it subsequently transpired, during the execution, that it was necessary to deal with persons present, the effective execution of the search warrant would be hindered. Furthermore, the carrying out of such functions by an executing officer without express authorisation could result in a challenge to the validity of the search warrant execution and the admissibility of evidence found during the search.

- 5.74 The Commission has therefore formed the view that it would be more suitable to include in the proposed Search Warrants Act provisions to the effect that such powers can be relied upon where they are necessary and justified. Such powers should only be used to an extent that is reasonable. In respect of searching persons present, while it may be necessary and reasonable to search a person where the search warrant is concerned with finding drugs, it may not be reasonable to search a person where the sole purpose of the warrant is to search for a stolen car. With regard to requesting personal details from a person, a clear distinction must be drawn between seeking basic information (such as a person's name and address) and carrying out an interrogation. For example, it should never be permissible to require a person to give an explanation as to why a certain material is in his or her possession or to give an account of his or her whereabouts at a particular time. This type of questioning is a matter to be dealt with formally and in accordance with proper procedure and due process.<sup>67</sup>
- 5.75 Regarding the requesting of assistance from a person present at a search location, the Commission has been advised that it is often unnecessary to do so. To access electronic files, for example, the Commission has been advised that technological advances enable an external device to be connected to a computer so that data contained within can be copied and removed for examination without the need to turn on the computer or use passwords to access the data. Nonetheless, the majority of transactions are carried out electronically, and therefore electronic storage of information has become the norm. The potential has been noted for the absence of "a general power to compel the provision of password information or encryption keys on seizure of computer equipment or other digital storage device" to cause delays to an investigation.<sup>68</sup> If electronic storage of data is the norm, circumstances may arise where assistance is required in order to gain access to material sought under the search warrant, whether electronic data or otherwise.
- 5.76 The Commission recommends that the Search Warrants Act should assist, not hinder, the effective execution of a search warrant, while respecting constitutional rights. Where it is necessary to rely on a power, for example to request assistance for the purpose of executing the search warrant, this should be permissible. Regarding the power to search persons present at the search location, such a power is generally only conferred on members of An Garda Síochána. The Commission does not recommend extending the power to officers of other bodies that exercise search warrant powers. The power to search persons present at the search locations should only apply to members of An Garda Síochána.

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<sup>67</sup> For further discussion on questioning persons in connection with the investigation of an offence see generally Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 283-338.

<sup>68</sup> More O'Ferrall (presented by Ní Raifeartaigh) "Electronic Evidence Gathering and Use in Criminal Proceedings" Irish Rule of Law International *Criminal Law and Evidence Update*, 8 November 2014.

**5.77 The Commission recommends that the Search Warrants Act should, where it is necessary and justified in the circumstances, authorise executing officers:**

- (a) where a person acting under the authority of a warrant is a member of An Garda Síochána, to search persons present at a search location;**
- (b) to request basic personal details from persons present at a search location;**
- (c) to request assistance from persons present so as to gain access to materials sought under the search warrant; and**
- (d) to require any person that appears to be in a position to facilitate access to information held in a computer to take certain steps to assist the executing officer to access that information, and that the executing officer may copy any document, use any equipment to copy electronically stored information and to seize and retain any computer or storage medium in which material is kept.**

**(5) *Persons present who fail to comply or obstruct the search warrant execution***

5.78 In addition to the above noted powers, the relevant legislative provisions usually contain a corollary that a failure to comply with any such request is an offence. Some Acts provide that a person who obstructs or impedes a search is also guilty of an offence, and the provisions vary. For example section 10(4) of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended by *Criminal Justice Act 2006*, section 7(4) of the *Child Trafficking and Pornography Act 1998*, section 7(4) of the *Illegal Immigrants (Trafficking) Act 2000* and section 15(4) of the *Immigration Act 2004* each provide that it is an offence to: (a) obstruct or attempt to obstruct the exercise of powers authorised by a search warrant; (b) fail or refuse to comply with a request to give one's name and address; or (c) give a false or misleading name or address. Section 787(1) of the *Companies Act 2014* is broader and provides that a person shall be guilty of a category 2 offence<sup>69</sup> if he or she: (a) obstructs the exercise of a right of entry or search conferred by a search warrant; (b) obstructs the exercise of a power under a warrant to seize and retain material information; (c) fails to give his or her name, address or occupation when requested, or gives false or misleading information in this regard; or (d) fails to comply with a request to facilitate an executing officer to gain access to information stored on a computer. Section 14(6) of the *Criminal Assets Bureau Act 1996* provides that where a person obstructs or attempts to obstruct the execution of a warrant, fails to comply with a request to give his or her name and address, or gives a name or address which an officer has reasonable cause for believing is false or misleading, he or she may be arrested without warrant. Obstruction or failure to comply provisions can also be found in section 9(2) of the *Prohibition of Incitement to Hatred Act 1989*, section 13(4) of the *Criminal Damage Act 1991*, section 143(3) of the *Copyright and Related Rights Act 2000*, section 49(1) of the *Criminal Justice (Theft and Fraud Offences) Act 2001* and section 5(6) of the *Prevention of Corruption (Amendment) Act 2001*.

**(6) *Discussion***

5.79 The Commission is of the view that the proposed Search Warrants Act should provide that refusal by a person to comply with permissible requests by executing officers or obstruction or attempted obstruction of the execution of a search warrant should amount to an offence.

5.80 The Commission observes that similar provisions can be found in general search warrant legislation in other jurisdictions. For example, the Tasmanian *Search Warrants Act 1997* provides that it is an offence for a person to refuse, delay or obstruct the admission of the executing officer or person assisting to the premises for such time that it may reasonably

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<sup>69</sup> Under section 871(2), a category 2 offence is punishable on summary conviction to a class A fine or imprisonment for a term not exceeding 12 months or, on conviction on indictment, a fine not exceeding €50,000 or imprisonment of up to 5 years.

be inferred was intentional.<sup>70</sup> In addition, it provides that it is an offence to obstruct a police officer or person assisting a police officer who is conducting a search of premises or a person on such premises.<sup>71</sup>

5.81 Similarly, the New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002* states that a person must not, “without reasonable excuse”, obstruct or hinder a person executing a warrant issued under the Act. Penalties for this offence are also included.<sup>72</sup>

**5.82 The Commission recommends that the Search Warrants Act should provide that refusal of a person to comply with a permissible request by executing officers or obstruction or attempted obstruction of the execution of a search warrant is an offence.**

## I Incidental Findings during the Course of a Search Warrant Execution

### (1) *Seizure of incidentally discovered material*

5.83 In the Consultation Paper the Commission discussed the finding of items during the execution of a search warrant for which the warrant was not issued.<sup>73</sup> Materials which are incidentally found may include items which are related to the offence being investigated, but which were not expected to be found at the location and were therefore not listed in the search warrant. Similarly, items which do not relate to the suspected offence with which the warrant is concerned, but which are evidence of a separate offence, would also fall within this category.

5.84 The position at common law is that there is no prohibition on the seizure of material incidentally found during the execution of a search warrant, provided that the executing officer has reasonable grounds for believing that the item(s) are material evidence of the commission of an offence.<sup>74</sup> Similarly, section 9 of the *Criminal Law Act 1976* provides:

“Where in the course of exercising any powers under this Act or in the course of a search carried out under any other power, a member of the Garda Síochána, a prison officer or a member of the Defence Forces finds or comes into possession of anything which he believes to be evidence of any offence or suspected offence, it may be seized and retained for use as evidence in any criminal proceedings or in any proceedings in relation to a breach of prison discipline, for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings...”

5.85 In *McNulty v Director of Public Prosecutions*,<sup>75</sup> the High Court considered the issue of discovering evidence for which the search warrant was not issued. An Garda Síochána obtained a warrant to search premises for evidence concerning an alleged rape. During the search, officers discovered tablets, which they suspected were MDMA. The applicant sought an order of prohibition in respect of a drugs charge that was brought against him. The respondent referred to section 9 of the *Criminal Law Act 1976*, which the Court noted “gives quite wide powers to the Gardaí in the course of a search to seize evidence which

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<sup>70</sup> Section 21(1) of the *Search Warrants Act 1997*.

<sup>71</sup> Section 21(2) of the *Search Warrants Act 1997*.

<sup>72</sup> Section 52 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

<sup>73</sup> See generally *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 5.100-5.117.

<sup>74</sup> See *McNulty v Director of Public Prosecution* [2006] IEHC 74 and *Chic Fashions (West Wales) Ltd v Jones* [1968] 1 All ER 229.

<sup>75</sup> [2006] IEHC 74.

is believed to be evidence of any offence or suspected offence.”<sup>76</sup> The Court did not give any ruling specifically in relation to section 9 of the 1976 Act, but did refuse to grant the order of prohibition and held that the seizure of the drugs was permissible.

- 5.86 In *The People (DPP) v Balfe*<sup>77</sup> the Court of Criminal Appeal observed that section 9 of the 1976 Act had essentially “eroded and rendered virtually irrelevant” the requirement for specificity regarding the items which were to be sought under a search warrant.<sup>78</sup> The Court was therefore of the view that section 9 of the 1976 Act made it less important to describe the goods to be seized under a search warrant. However, the Court considered that some description of the goods must be provided.
- 5.87 Walsh notes that material seized under section 9 can be totally unrelated to the suspected offence to which the search warrant relates and to the items which the warrant “specifically prescribes” or refers to.<sup>79</sup> However, it is not the case that section 9 of the 1976 Act enables a general or “fishing expedition” type search. The provision does not in itself authorise a search: rather any such authority must stem from another power.
- 5.88 Legislation enabling the seizure of items incidentally found during the execution of a search warrant can also be found in other jurisdictions. In England and Wales, sections 19(2) and 19(3) of the *Police and Criminal Evidence Act 1984* provide that a constable who is lawfully on a premises may seize anything which is on the premises if he or she has reasonable grounds for believing: (a) that it has been obtained in consequence of the commission of an offence or is evidence in relation to an offence which he is investigating or any other offence; and (b) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed. The Commonwealth *Crimes Act 1914*, as amended, provides that an executing officer or assisting constable can seize items found during the course of a search that he or she believes on reasonable grounds to be “evidential material in relation to another offence that is an indictable offence.”<sup>80</sup> The 1914 Act further provides that an executing officer or assisting constable may seize other things found in the course of the search that he or she believes on reasonable grounds to be “seizable items”.<sup>81</sup> Seizable items are defined under the 1914 Act as anything that would present a danger to a person or that could be used to assist a person to escape from lawful custody.
- 5.89 The New Zealand *Search and Surveillance Act 2012* provides that an enforcement officer who exercises a search power,<sup>82</sup> or who is lawfully in any place or in or on a vehicle or is conducting a lawful search of a person as part of his or her duties, may seize any item or items that he or she, or any person assisting him or her, finds in the course of carrying out the search or as a result of observations at that place or in or on that vehicle, if the

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<sup>76</sup> *Ibid.*

<sup>77</sup> [1998] 4 IR 50.

<sup>78</sup> *Ibid* at 61.

<sup>79</sup> Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 423-424.

<sup>80</sup> Section 3F(d)(2) of the *Crimes Act 1914*, as amended.

<sup>81</sup> Section 3F(1)(e) of the *Crimes Act 1914*, as amended. Similar provisions regarding seizure of incidentally found material are contained in section 6(1)(e) and (f) of *Search Warrants Act 1997* (Tasmania), section 49(1)(b) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (New South Wales) and section 146 of the *Criminal Investigation Act 2006* (Western Australia).

<sup>82</sup> Section 3(1) of the *Search and Surveillance Act 2012* defines “search power” as being: “(a) every search warrant issued under this Act or an enactment set out in column 2 of the Schedule to which that provision is applied; and (b) every power, conferred under this Act or an enactment set out in column 2 of the Schedule to which that provision is applied, to enter and search, or enter and inspect or examine (without warrant) any place, vehicle, or other thing, or to search a person.”

enforcement officer has reasonable grounds to believe that he or she could have seized the item or items under: (a) any search warrant that could have been obtained by him or her under this or any other enactment; or (b) any other search power exercisable by him or her under this or any other enactment.<sup>83</sup> If a person exercising a search power is uncertain whether any item found may lawfully be seized, and it is not reasonably practicable to determine whether that item can be seized at the place or vehicle where the search takes place, the person exercising the search power may remove the item for the purpose of examination or analysis to determine whether it may be lawfully seized.<sup>84</sup>

## (2) *Discussion*

- 5.90 In the Consultation Paper the Commission expressed the view that, having regard to the practicalities of searches, as well as the duty of State authorities to protect society and to prevent and detect offences, the power in section 9 of the *Criminal Law Act 1976* is not objectionable.<sup>85</sup> In light of this, the Commission provisionally recommended that the power to seize material found during the execution of a search (but which has not been provided for in the search warrant) should be dealt with in the proposed Search Warrants Act.<sup>86</sup>
- 5.91 The Commission sees no reason to depart from this view and recommends that a provision as to incidental findings should be included in the Search Warrants Act. In some respects, however, the recommended provisions should be more substantial in nature than section 9 of the 1976 Act.<sup>87</sup> Firstly, the terms of section 9 simply require the officer to “believe” that the material is evidence of an offence or suspected offence; there is no requirement for the belief to be a reasonable one. The Commission is of the view that a condition of reasonableness should be established in respect of an officer’s belief that the material incidentally found is evidence of, or relating to, an offence. A requirement of reasonableness would involve a greater degree of objectivity. This would also be in line with the common law position. Secondly, section 9 of the *Criminal Law Act 1976* provides that members of An Garda Síochána, the Defence Forces or prison officers may seize incidentally found material. However, in light of the number of authorities who are now employed in the execution of search warrants, the Commission notes that the recommended provisions should be broader and more general in nature in referencing executing officers. In England and Wales, the *Police Reform Act 2002* extended the power of seizure under section 19 of the *Police and Criminal Evidence Act 1984* to non-police investigating officers.<sup>88</sup> Thus an appropriate, designated official, when lawfully on a premises, is deemed to have the same powers as a constable under section 19 of the *Police and Criminal Evidence Act 1984*.<sup>89</sup>
- 5.92 The Commission has considered whether a provision allowing for seizure of incidentally discovered material should specify to a greater degree than section 9(1) of the *Criminal*

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<sup>83</sup> Section 123(2) of the *Search and Surveillance Act 2012*.

<sup>84</sup> Section 112 of the *Search and Surveillance Act 2012*.

<sup>85</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 5.118.

<sup>86</sup> *Ibid* at paragraph 5.118.

<sup>87</sup> *Ibid* at paragraph 5.119.

<sup>88</sup> *Police Reform Act 2002*, Schedule 4, Part 2.

<sup>89</sup> Zander notes that section 19 of the *Police and Criminal Evidence Act 1984*, as amended, has extended the common law position in that it permits the seizure of fruits of a crime or evidence of a crime “regardless of the crime and of who is implicated”. Zander *The Police and Criminal Evidence Act 1984* 6<sup>th</sup> ed (Thomson, Sweet and Maxwell 2013) at 105. Stone has also commented that “generally the PACE [*Police and Criminal Evidence Act 1984*] power is slightly wider than that under the common law”. Stone *The Law of Entry, Search and Seizure* (Oxford University Press 2009) at 121.



*Law Act 1976*, the reasons for which incidentally discovered material may be seized. Legislative provisions in other common law jurisdictions take such an approach. For example, in England and Wales the executing officer may seize anything where it is “evidence in relation to an offence which he is investigating or any other offence”<sup>90</sup> and where it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed.”<sup>91</sup> In the Commonwealth of Australia, an officer who wishes to seize evidential material in relation to another offence, which is an indictable offence, must believe, on reasonable grounds, that it is necessary to seize the item to prevent its concealment, loss or destruction or use in committing an offence<sup>92</sup> or anything that would present a danger to the person or could be used to assist a person escape from lawful custody.<sup>93</sup> Similar specification of the scope of seizure can be found in the Tasmanian *Search Warrants Act 1997*<sup>94</sup> and the Western Australia *Criminal Investigation Act 2006*.<sup>95</sup> The Commission is of the view that the proposed Search Warrants Act should provide that the executing officer may seize material incidentally found during the execution of a search where he or she has reasonable grounds for believing that: (a) the material is evidence of the offence or suspected offence with which the search warrant is concerned or any other offence or suspected offence, and (b) it is necessary to seize the material in order (i) to prevent it from being concealed lost, altered or destroyed, (ii) to prevent it being used in the commission of any other offence, (iii) to preserve its evidential value, (iv) to conduct a forensic examination of it. The Commission is of the view that section 9 of the *Criminal Law Act 1976* is sufficiently broad as it provides for incidentally found material to be “seized and retained for use in any criminal proceedings, for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings.” The Commission sees no need for a Search Warrants Act to specify to a greater degree than section 9 of the *Criminal Law Act 1976* the reasons for which incidentally found material may be seized.

- 5.93 An executing officer must be acting within the permitted scope of the search when he or she seizes incidentally discovered items. In respect of section 9 of the *Criminal Law Act 1976*, Walsh has observed that an officer may not be able to rely on the provision to seize material which he or she “came across in the course of a search which was conducted in a manner which bore no relation to the power of search in question.”<sup>96</sup> He uses the example of searching for a stolen piano, and notes that if unrelated material was found under cushions or a mattress, the seizure of that material may be challenged, as looking in such places would clearly not be realistic or related to a search for a piano. In such circumstances it would be arguable that the officer had gone beyond the scope of the permissible power and that this is not in line with section 9 of the 1976 Act, which provides that the officer must be “in the course” of exercising an authority. If the officer were to act beyond this authority he or she may no longer be deemed to be exercising it. In line with this interpretation the Commission is of the view that the proposed Search Warrants Act should provide that the executing officer must be in the course of exercising powers under the Act at the time when he or she incidentally finds material for which the warrant has not been issued. This approach would apply a plain view doctrine, that is, that executing

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<sup>90</sup> Section 19(3) of the *Police and Criminal Evidence Act 1984*.

<sup>91</sup> *Ibid.*

<sup>92</sup> Section 3F(1)(d)(ii) of the *Crimes Act 1914*, as amended.

<sup>93</sup> Section 3C of the *Crimes Act 1914*, as amended.

<sup>94</sup> Section 6(1)(e) of the *Search Warrants Act 1997*.

<sup>95</sup> Section 146 of the *Criminal Investigation Act 2006*.

<sup>96</sup> Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 425.

officers may seize items which come into their plain view while carrying out the search, but could not carry out an excessive or disproportionate search of the location in the hope that they may come across material not listed on the warrant but which may be evidence of a further offence. The plain view doctrine is routinely applied in the United States, where the Supreme Court has indicated that the principle would apply where police have a warrant to search an area and in the course of the search encounter other incriminating material.<sup>97</sup> The Court has held that the requirement for probable cause under the United States Constitution was unnecessary to seize evidence for which the warrant was not issued, as the evidence was in “plain view”.<sup>98</sup>

**5.94 The Commission recommends that the Search Warrants Act should provide for the power of an executing officer to seize incidentally discovered material and should provide that where, in the course of exercising any powers under the Act, the executing authority comes into possession of anything which he or she reasonably believes to be evidence of, or relating to an offence or suspected offence, he or she may seize and retain it.**

## **J Finding Privileged Material**

### **(1) Prohibition of seizure and examination of privileged material**

5.95 In the Consultation Paper, the Commission discussed the status and scope of privilege and the conditions which must be met for privilege.<sup>99</sup> A small number of search warrant provisions expressly provide that warrants issued under their terms do not authorise the seizure of any materials found during the execution of a search where such materials are subject to privilege, notably professional legal privilege.<sup>100</sup> However, as it has been established that privilege is a rule of law, seizure under any search warrant provision is subject to such privilege and it is arguable that it is unnecessary expressly to refer to it. Nonetheless, there is considerable case law on the question of the scope of privilege, which can be relied upon to determine whether material found during the execution of a search warrant is privileged.<sup>101</sup>

5.96 In the Consultation Paper, the Commission observed that search warrant legislation in other jurisdictions not only expressly refers to legal professional privilege, but often sets out a specific procedure to be followed by executing officers.<sup>102</sup> The intention of such procedures is to protect privileged materials.

### **(2) Discussion**

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<sup>97</sup> *Coolidge v New Hampshire* 403 US 443 at 465 (1971).

<sup>98</sup> *Ibid.*

<sup>99</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 6.21.

<sup>100</sup> Section 14 of the *Criminal Assets Bureau Act 1996*, as amended by section 16(b)(ii) of the *Proceeds of Crime (Amendment) Act 2005*, section 48(6) of the *Criminal Justice (Theft and Fraud Offences) Act 2001*, section 17A of the *Sea-Fisheries and Maritime Jurisdiction Act 2006*, section 51(9) of the *International Criminal Court Act 2006* and section 74(11) of the *Criminal Justice (Mutual Assistance) Act 2008*.

<sup>101</sup> See, for example, *Smurfit Paribas Bank Ltd v AAB Export Finance Ltd*. [1990] 1 IR 469, *Bula Ltd. v Crowley (No.2)* [1994] 2 IR 54, *Miley v Flood* [2001] IEHC 9, [2001] 2 IR 50, *Fyffes plc v DCC plc* [2005] IESC 3, [2005] 1 IR 59. See generally McGrath “Legal Professional Privilege” (2001) 36 Ir Jur 126, O’Brien “Legal Professional Privilege – How Far Does it Extend?” (2003) 10(3) CLP 63 and *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 6.03 - 6.20.

<sup>102</sup> For a detailed comparison of provisions in other jurisdictions for protection of legally professionally privileged material found during a search, see *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 6.22 - 6.44.

- 5.97 In the Consultation Paper, the Commission provisionally recommended that legislation in Ireland should clearly set out that privilege relates to material found under any search warrant, not just warrants issued under Acts specifically referring to privilege.<sup>103</sup> This would ensure complete certainty that the privilege applies regardless of the provision under which the search warrant has been issued.
- 5.98 The Commission maintains this view and recommends that the Search Warrants Act recommended in this Report should include a provision outlining that privileged material, whether this involves legal privilege or any other recognised form of privilege such as litigation privilege or public interest privilege, found during the execution of a search warrant may generally not be examined or seized.

**5.99 The Commission recommends that the Search Warrants Act should provide that where privileged material is found during the course of a search warrant execution, such material may generally not be examined or seized.**

**(3) Procedure for determining whether material is privileged**

5.100 In the Consultation Paper, the Commission provisionally recommended that a system should be implemented in Ireland whereby if privilege is asserted over material in the course of the execution of a search warrant, that material should be securely sealed and removed from the scope of the search.<sup>104</sup> The secured material should then be assessed to determine whether it is in fact legally privileged, and therefore exempt from examination under the search warrant. The Commission has examined the law in other jurisdictions and has identified that a common approach in many jurisdictions is that material which may be, or is claimed to be, privileged must be secured, sealed and taken to an authority for the purpose of determining its status.

5.101 In the Consultation Paper, the Commission referred to provisions of the *Companies (Amendment) Act 2009*.<sup>105</sup> These have since been replaced by section 795(3) of the *Companies Act 2014*, which provides:

“The disclosure of information may be compelled, or possession of it taken, pursuant to the powers in this Part, notwithstanding that the information is privileged legal material provided the compelling of its disclosure or the taking of its possession is done by means whereby the confidentiality of the information can be maintained (as against the person compelling such disclosure or taking such possession) pending the determination by the court of the issue as to whether the information is privileged material.”<sup>106</sup>

5.102 Section 795 of the 2014 Act provides that where information has been disclosed or taken possession of, an application shall be made to the High Court, within 7 days after the disclosure or the taking of possession, for the purpose of determining whether the material is legally privileged: (a) by the person to whom the material has been disclosed or who has taken possession of it; or (b) by the person who has been compelled to disclose the information, or from whose possession the material has been taken.<sup>107</sup> Where proceedings have been taken for the purpose of such a determination, the Act provides that the court may give such interim or interlocutory directions as it considers appropriate

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<sup>103</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 6.45 - 6.46.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> Section 795(3) of the *Companies Act 2014*. This replaced section 23(1B) of the *Companies Act 1990*, as inserted by section 6 of the *Companies (Amendment) Act 2009*.

<sup>107</sup> Section 795(4) and (5) of the *Companies Act 2014*. This replaced sections 23(1C) and 23(1D) of the *Companies Act 1990*, as inserted by section 6 of the *Companies (Amendment) Act 2009*.

for the purpose of preserving the information “in whole or in part, in a safe and secure place in any manner specified by the court.”<sup>108</sup> Furthermore, the court may appoint such person with suitable legal qualifications, possessing the necessary level of experience and being independent of any interest falling to be determined between the parties concerned, for the purpose of examining the information and preparing a report for the court.<sup>109</sup> Such a report would be compiled with a view to assisting the court’s determination as to the issue of privilege.

5.103 The Commission maintains the view that a specific legislative provision should be enacted in respect of cases where privilege is asserted over material or where the executing authority suspects that material is privileged during the course of the execution of a search warrant. The procedure in the *Companies Act 2014* provides useful legislative guidance. The Commission is of the view that the generally applicable Search Warrants Act should provide that where there is an apprehension that material attracts privilege, whether legal privilege or any other recognised form of privilege such as litigation privilege or public interest privilege, the material should be securely sealed and removed from the location. It should then be assessed by a court to determine whether it is in fact privileged, and therefore exempt from examination. The benefit of this would be that privileged material would not be examined by executing officers during the course of the search, and the protection of privilege would not be undermined as a result.

5.104 This approach does not offer an absolute protection of privileged material, as it requires a court to examine the material in order to determine its status. It is entirely appropriate that a court should carry out such an examination, as opposed to officers of the investigating authority.

5.105 The Commission has considered which court should be designated in respect of assessing material and determining whether it is privileged. The Commission has concluded that the procedure provided for in the *Companies Act 2014* is suitable for this purpose and has concluded therefore that such material, which should be sealed and removed from a search warrant location, should be examined and assessed by a judge of the High Court to determine whether it is privileged.

**5.106 The Commission recommends that the Search Warrants Act should provide for a specific procedure to be applied when material is found during the execution of the search which may attract privilege.**

**5.107 The Commission recommends that the procedure should involve securely sealing any material which the executing officer apprehends is privileged without any examination of it, removing the material from the search location and storing it in a safe and secure place. An application should be made to the High Court by either the executing authority or the person from whom material was taken for a determination as to whether or not the material is to benefit from the protection of legal privilege. Where the material is certified as privileged it should not be examined by the investigating authority. If it is determined not to be privileged, the material should be placed with the investigating authority if it is examinable under the scope of the search warrant.**

**(4) *Extended power of seizure where privileged and non-privileged material mixed***

5.108 In practice, cases arise where both privileged and non-privileged materials are intermixed. This typically occurs with electronic files where part of the file stores privileged material while the remainder of the file does not. Where the non-privileged material is subject to the search warrant it may be necessary to seize the entire block of material in order to

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<sup>108</sup> Section 795(6) of the *Companies Act 2014*. This replaced section 23(1E) of the *Companies Act 1990*, as inserted by section 6 of the *Companies (Amendment) Act 2009*.

<sup>109</sup> *Ibid.*

separate privileged material from non-privileged material. The Commission has been advised that in such cases the investigating authority is careful to only examine the non-privileged material. This issue should be addressed in the Search Warrants Act.

- 5.109 Although the seizure of privileged material is not ideal, there appears to be no real alternative where materials are mixed. If a file containing some privileged material could never be seized, it would be possible to render a block of material unseizable, and therefore unexaminable, simply by mixing in some privileged material.
- 5.110 The *Companies Act 2014* provides for situations where privileged materials are mixed with non-privileged materials during the execution of a warrant under the Act. It provides that where: (a) an executing officer finds seizable material at or in the custody or possession of a person at the search location which he or she would be entitled to seize but for it being comprised in material that he or she has no power to seize; and (b) it is not possible for the seizable and other material to be separated on the premises, “the officer’s power of seizure shall include power to seize both the seizable information and that from which it is not reasonably practicable to separate it.”<sup>110</sup> The Act refers to such power as an “extended power of seizure.”<sup>111</sup> The 2014 Act sets out a list of criteria to be used when an issue arises as to whether or not it is reasonably practicable on particular premises for something to be separated from something else.<sup>112</sup> Procedural safeguards govern the exercise of an “extended power of seizure”. Thus, such a power may not be exercised unless the officer: (a) provides for the appropriate storage of the thing(s) subjected to the power; (b) allows reasonable access from time to time to them by the owner, lawful custodian or possessor (including making copies); and (c) provides for confidentiality to be maintained regarding any confidential matter comprised in them.<sup>113</sup> An executing officer who has exercised an extended power of seizure has a duty to carry out the separation as soon as practicable or within the prescribed period and return anything which is not material as soon as practicable.<sup>114</sup> An additional safeguard is the power of the Director of

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<sup>110</sup> Section 787(4) of the *Companies Act 2014*. This replaced section 20(2B) of the *Companies Act 1990* as inserted by section 5 of the *Companies (Amendment) Act 2009*.

<sup>111</sup> *Ibid.*

<sup>112</sup> Section 787(5)(b) of the *Companies Act 2014* lists the following criteria, which are the same criteria applicable to determining whether or to what extent something found may be seized: (i) how long it would take to carry out the determination or separation on those premises; (ii) the number of persons that would be required to carry out that determination or separation on those premises within a reasonable period; (iii) whether the determination or separation would (or would if carried out on those premises) involve damage to property; iv) the apparatus or equipment that it would be necessary or appropriate to use for the carrying out of the determination or separation; v) the costs of carrying out the determination or separation on those premises as against the costs of carrying out the determination or separation in another place (being a place in which the Director of Corporate Enforcement can show it would be appropriate to do the thing concerned and in which the Director intends to arrange, or does arrange, for the thing to be done), and (vi) in the case of separation, whether the separation would be likely, or if carried out by the only means that are reasonably practicable on those premises, would be likely, to prejudice the use of some or all of the separated seizable information for a purpose for which something seized under the warrant is capable of being used. This replaced section 20(2C) of the *Companies Act 1990* as inserted by section 5 of the *Companies (Amendment) Act 2009*.

<sup>113</sup> Section 788 (2) of the *Companies Act 2014*, which replaced section 20(2D) of the *Companies Act 1990* as inserted by section 5 of the *Companies (Amendment) Act 2009*.

<sup>114</sup> Section 788(6) of the *Companies Act 2014*, which replaces section 20(2F) of the *Companies Act 1990* as inserted by section 5 of the *Companies (Amendment) Act 2009*.

Corporate Enforcement or the person affected by an extended power of seizure to apply to a court for a direction regarding the procedure.<sup>115</sup>

- 5.111 Other jurisdictions have also introduced legislative provisions to deal with situations where privileged material is mixed with material that is not privileged. In England and Wales, the *Criminal Justice and Police Act 2001* gives officers limited powers to seize property from premises or persons, so as to sift through or examine the material elsewhere.<sup>116</sup> The 2001 Act also deals with the situation where material sought under a search warrant is, or is likely to be, contained within a large quantity of material. Rather than having to determine on the spot which elements of the material are relevant, or having to go through it all during the execution period of the search, officers may remove the material in order to deal with it away from the search scene.<sup>117</sup> Stone notes that these “search and sift” provisions are particularly useful in connection with investigations into fraud or pornography, where material may be well “hidden” within computer files or where it might be difficult to determine at first sight whether material is relevant to the search.<sup>118</sup> Provided these powers are confined to such situations “and the police resist the temptation to use them for “fishing” expeditions, then they are probably proportionate to the legitimate objectives of law enforcement.”<sup>119</sup>
- 5.112 Regarding digitally stored material, the Attorney General for England and Wales has introduced guidelines for prosecutors, investigators and defence practitioners to be followed in investigations and prosecutions concerning digitally stored material.<sup>120</sup> The guidelines prohibit the seizure of material which an investigator “has reasonable grounds for believing to be subject to legal privilege” unless it is not reasonably practicable on the search premises to separate legally privileged material from non-legally privileged material.<sup>121</sup> Where legally privileged material or material suspected to contain privileged material is seized, it must be isolated from other material that has been seized during the search.<sup>122</sup> A person independent of the investigation may examine the material to

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<sup>115</sup> Under section 788(7) of the *Companies Act 2014* the court may give: (a) a direction that the doing of an act referred to in subsection (2F)(a) or (b) shall be done within such lesser or greater period of time than that specified in that provision as the court determines; (b) a direction with respect to the making, variation or operation of arrangements referred to in subsection (2D)(a) to (c) in relation to a thing concerned or a direction that such arrangements as the court provides for in the direction shall have effect in place of any such arrangements that have been or were proposed to be made; or (c) a direction of any other kind that the court considers it just to give for the purpose of further securing the rights of any person affected by the exercise of an extended power of seizure, including, if the exceptional circumstances of the case warrant doing so, a direction that a thing seized be returned to its owner or the person appearing to the court to be lawfully entitled to the custody or possession of it, notwithstanding that the determination or separation concerned has not occurred. This replaced section 20(2G) of the *Companies Act 1990* as inserted by section 5 of the *Companies (Amendment) Act 2009*.

<sup>116</sup> See Part 2, sections 50-51 of the *Criminal Justice and Police Act 2001*, and *Code B: Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises* at 7.7.

<sup>117</sup> Stone *The Law of Entry, Search and Seizure* 4<sup>th</sup> ed (Oxford University Press 2005) at 149-151.

<sup>118</sup> *Ibid* at 155.

<sup>119</sup> *Ibid* at 156.

<sup>120</sup> Attorney General for England and Wales *Guidelines on Disclosure: Supplementary Guidelines on Digitally Stored Material* (2011) at paragraphs 28-35.

<sup>121</sup> *Ibid* at paragraph 29.

<sup>122</sup> *Ibid* at paragraph 30.

determine whether it may be privileged.<sup>123</sup> Potentially privileged material may then be examined by an independent lawyer.<sup>124</sup> Persons dealing with privileged material must maintain “proper records showing the way in which the material has been handled and those who have had access to it as well as decisions taken in relation to that material.”<sup>125</sup> The guidelines provide that legally privileged material may only be retained where the property which comprises the privileged material has been lawfully seized and it is not reasonably practicable for the item to be separated from the rest of the property without prejudicing the use of the rest of the property.<sup>126</sup>

5.113 Outside of the context of investigating corporate crime, there is no generally applicable guidance for executing authorities who find privileged material mixed with non-privileged material. In light of the prevalence of electronic stored material in most cases, the Commission is of the view that the proposed Search Warrants Act should set out the procedure to be followed when an executing authority discovers material which he or she would be entitled to seize but for it being mixed with legally privileged material. In such circumstances, the Act should provide for an extended power of seizure similar to that contained in the *Companies Act 2014*.

5.114 Where it is necessary to seize mixed materials, it is vital that proper controls are in place so that the protection afforded to the privileged elements is not compromised. A number of methods could be employed in order to try to ensure this. Thus, the number of people who could access the mixed material should be limited. In addition, there should be strict supervision of those who could access the material. Accountability is also essential. This could be achieved by enabling access audits and tracing whereby it would be possible to determine who has accessed material. This in turn would facilitate the relevant supervising authority to identify whether a person has accessed privileged material. It may be advisable for investigating authorities dealing with mixed material files to have a rule of conduct in place. This would require an examining officer to report to his or her superior where the officer believes that he or she has unintentionally accessed material which might be privileged. This would offer a level of protection for the individual officer in the event that an audit determined that he or she had accessed privileged material. It may also result in the supervising authority paying particular attention to that element of the file in future audits, so as to determine whether the examining officer concerned, or any other officer, returns to the file even though it has been reported as being potentially privileged. It would also be necessary to require strict confidentiality from examining officers, as well as provide sufficient training as to what legally privileged material is and why it may not be accessed or examined. Furthermore, it may be advisable to encourage the person concerned to co-operate with the investigating authority, elements of the material which are privileged and those which are not could be identified.

**5.115 The Commission recommends that the Search Warrants Act should identify that in certain circumstances privileged and non-privileged material may be mixed and contained in one file. It should allow for the seizure of all the material in order to examine the non-privileged material, where necessary. The examination process should be strictly controlled so that the privileged material is not compromised.**

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<sup>123</sup> Attorney General for England and Wales *Guidelines on Disclosure: Supplementary Guidelines on Digitally Stored Material* (2011) at paragraph 31.

<sup>124</sup> *Ibid* at paragraph 32.

<sup>125</sup> *Ibid* at paragraph 34.

<sup>126</sup> *Ibid* at paragraph 35.

## **K Inventories of Seized Materials**

5.116 The Commission has been advised that, in practice, during the execution of a search warrant where materials are seized, a log will be created of all of the items taken by executing officers. This ensures that every item is accounted for. Although this log is primarily created for the executing authority's file, in some circumstances the authority will provide the owner or occupier of the property with a copy of the log. However, there is no statutory requirement in this jurisdiction for this type of inventory to be given to the person concerned. By contrast, the law in a number of other jurisdictions does require this.

### **(1) Requirement for inventories of seized materials in other jurisdictions**

5.117 The England and Wales Code of Practice B, which supplements the *Police and Criminal Evidence Act 1984*, provides that if property is seized and retained, the person who had custody of it immediately before seizure must, on request, be provided with a list or description of the property within a reasonable time.<sup>127</sup> However, the requirement under the Code is based upon a request by the person concerned and is not an automatic characteristic of the seizure process.

5.118 In Australia the Commonwealth *Crimes Act 1914*, as amended, provides that if a thing is seized under a warrant, the executing officer or constable assisting must provide a receipt for the thing. The 1914 Act also provides that where more than one item is seized, all items may be recorded upon one receipt. Similarly, the Tasmanian *Search Warrants Act 1997* provides that where an item is seized under a warrant, the executing officer, or a person assisting, is required to provide a receipt for the item, and if more than one item is seized one receipt will suffice to record these.

5.119 Section 133(1) of the New Zealand *Search and Surveillance Act 2012* provides that the person who carries out the search must, at the time of seizure or as soon as practicable after seizure (but not later than 7 days), provide the occupier or person in charge of the location with a written notice specifying what was seized.

### **(2) Discussion**

5.120 The Commission considers the proposed Search Warrants Act should provide that an inventory of any seized items should be given to the owner or occupier. Such a requirement should also extend to copies made of electronic files. The effect of this approach would be that both the person(s) concerned and the investigating authority would have a matching copy of the log of seized items. This would enable the person(s) concerned to be aware of the items which are in the custody of the relevant authority, which may be particularly useful in cases where commercial premises are searched and materials relevant to the business of the commercial entity are taken. It may also protect investigating authorities from claims that they have taken materials which they have not in fact seized. The inventory should be completed and given to the person at the conclusion of the search.

5.121 In cases where some materials are returned and others remain in the custody of the authority, both the person's inventory and the authority's inventory should be amended to reflect this change. The inventory should be a working document, enabling an accurate and up to date account of the location of all relevant materials to be kept. This approach should also increase the transparency and accountability of the seizure process.

**5.122 The Commission recommends that an inventory of all seized or copied items should be given to the person concerned upon completion of the search and seizure under warrant. The Commission recommends that if some, but not all, of the seized materials are returned the inventory should be amended to reflect this.**

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<sup>127</sup> The *Police and Criminal Evidence Act 1984 Code B: Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises* at 7.16.



## L Electronic Recordings of Execution of Search Warrants

- 5.123 In the Consultation Paper, the Commission discussed whether legislation should permit or require the audio and/or video recording of the execution of a search warrant.<sup>128</sup> The Commission observed that legislation in a number of jurisdictions, including the Commonwealth, Western Australia, Tasmania and New Zealand provides for such an approach. Such legislation varies from providing that visual or audio recordings may be created of the execution of the warrant if the executing authority believes it is desirable to do so<sup>129</sup> to providing that where it is reasonably practicable a recording must be made.<sup>130</sup>
- 5.124 The Commission has considered whether a provision for electronically recording the execution of search warrants should be introduced in this jurisdiction. There are advantages associated with the power to make a visual and audio recording of an execution. Recordings would protect executing authorities from unfounded claims of wrongdoing. They would also protect the occupier from untruths or uncertainties in respect of what was found during the search and excessive use of force or improper exercise of powers of search during the execution of the warrant. Recordings might also be useful as evidence where the search results in a prosecution.
- 5.125 Some consultees suggested that legislation should provide for electronic recording of searches. It was noted that such a practice is used in other EU Member States and that, as the EU envisages free movement of evidence, electronic recording of searches is likely to become the norm. It was suggested that electronic recording of interviews in Garda stations resulted in a decrease in the number of challenges relating to such interviews. It was also contended that electronic recording of searches could result in a reduction in challenges to the admissibility of evidence obtained during searches, resulting in a decrease of the amount of court time devoted to such issues.
- 5.126 In Ireland, body worn cameras have been used by An Garda Síochána during public protests to record demonstrators,<sup>131</sup> and are being reviewed for the purpose of being used more widely, such as during arrests.<sup>132</sup> In England and Wales body worn cameras were introduced as part of a police-led domestic violence enforcement campaign in 2006 and provided a useful way of gathering evidence for prosecutions where a victim of domestic violence was reluctant to give evidence.<sup>133</sup> Body worn cameras have since been piloted in a number of police areas and the Home Office College of Policing have produced guidelines on their use.<sup>134</sup> The English Information Commissioner has also published a data protection code of practice for surveillance cameras and personal information, which deals specifically with body worn cameras.<sup>135</sup> It appears that body worn cameras have

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<sup>128</sup> See generally *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 5.126-5.131.

<sup>129</sup> Section 3J(1) of the *Crimes Act 1914* (Commonwealth of Australia); section 9 of the *Search Warrants Act 1997* (Tasmania); section 110(j) of the *Search and Surveillance Act 2012* (New Zealand).

<sup>130</sup> Section 45(2) of the *Criminal Investigations Act 2006* (Western Australia);

<sup>131</sup> See McIntyre “Body Cameras will give a new perspective on policing, as water meter protests show” *Irish Independent*, 18 October 2014.

<sup>132</sup> See Feehan “Body-cams will allow Gardai to film arrests” *The Herald*, 15 January 2015.

<sup>133</sup> Home Office *Lessons Learned from the Domestic Violence Enforcement Campaigns 2006* (2006).

<sup>134</sup> Police and Crime Standards Directorate *Guidance for the Police Use of Body-Worn Video Devices* (Home Office 2007) and College of Policing, “Body-Worn Video” (2014), both available at [library.college.police.uk](http://library.college.police.uk).

<sup>135</sup> Information Commissioner’s Office *In the Picture: a data protection code of practice for surveillance cameras and personal information* (2014). Available at [ico.org.uk](http://ico.org.uk).

been used in Ireland without any equivalent data protection code being issued by the Data Protection Commissioner under the *Data Protection Acts 1988 and 2003*.<sup>136</sup>

- 5.127 In the United States, some police departments have trialled and introduced body worn cameras. A 2014 United States Department of Justice Report examined research carried out in 2013 on the use of body worn cameras by police departments. It notes the view of the police executives whose departments wore body cameras that the cameras “provide a useful tool for law enforcement.”<sup>137</sup> The benefits cited by the police executives during the study included police accountability and transparency, identification and correction of internal agency problems and evidence documentation.<sup>138</sup> An experiment conducted by the police department in Rialto, California, studied whether the use of body worn cameras by police officers would impact the number of complaints relating to officers, including officers’ use of force. It found that there was a 60% reduction in incidents involving the use of force following the introduction of the cameras.<sup>139</sup> The experiment discovered that there was an 88% reduction in the number of citizen complaints between the year before the introduction of the cameras and the year following their implementation.<sup>140</sup> However, the United States Department of Justice Report also notes the policy considerations that apply to the implementation of body worn cameras, including “significant implications in terms of privacy, community relationships, concerns raised by frontline officers, expectations that cameras create in terms of court proceedings and officer credibility, and the financial considerations that cameras present.”<sup>141</sup>
- 5.128 Privacy considerations arise due to the ability of the officers to “record inside private homes and to film sensitive situations that might emerge during calls for service.”<sup>142</sup> It appears that in the United States, body worn cameras are sometimes used to record search warrant executions. The United States Department of Justice Report notes the view of many law enforcement agencies that “officers have the right to record inside a private home as long as they have a legal right to be there” and therefore if an officer is at a home on foot of a valid search warrant he or she may record inside the home.<sup>143</sup> However it notes the concern that footage from inside a private dwelling may be publicly disclosed.<sup>144</sup>
- 5.129 The College of Policing Guidelines in England and Wales states that, given the right to respect for private and family life under Article 8 of the ECHR, police should not use body worn cameras in private dwellings under normal circumstances. However, “if a user is present at an incident in a private dwelling and is there for a genuine policing purpose,

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<sup>136</sup> McIntyre “Body Cameras will give a new perspective on policing, as water meter protests show” *Irish Independent*, 18 October 2014.

<sup>137</sup> Police Executive Research Forum *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned* (United States Department of Justice 2014) at 5. Available at [policeforum.org](http://policeforum.org).

<sup>138</sup> *Ibid* at 5-10.

<sup>139</sup> Farrar, “Operation Candid Camera: Rialto Police Department’s Body-Worn Camera Experiment” (2014) *The Police Chief* at 20 – 25.

<sup>140</sup> *Ibid*.

<sup>141</sup> Police Executive Research Forum *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned* (United States Department of Justice 2014) at 11. Available at [policeforum.org](http://policeforum.org).

<sup>142</sup> *Ibid* at 11.

<sup>143</sup> *Ibid* at 15.

<sup>144</sup> *Ibid*.

they are entitled to make a [body worn video] recording in the same way as they would record any other incident.”<sup>145</sup>

5.130 In the Consultation Paper, the Commission noted that recording the execution of a search warrant raised issues concerning the right to privacy, particularly where the place being searched is a dwelling. Added to this is the need to ensure that the relevant provisions of the *Data Protection Acts 1988 and 2003* are observed, and it is notable that when body cameras were introduced in England in recent years this was accompanied by a specific data protection code of practice. The Commission also acknowledges the positive benefits identified in other jurisdictions where body cameras have been introduced into policing practice. The introduction of body camera technology is, however, primarily an operational policing matter for the relevant authorities to consider in the light of, in particular, the relevant data protection legislation. The Commission has therefore concluded that this is not a matter that should be included in the Search Warrants Act.

**5.131 The Commission recommends that the Search Warrants Act should not contain any provision on the electronic recording of the execution of search warrants (including the use of body-worn cameras) as this is primarily an operational policing matter for the relevant authorities to consider in the light of, in particular, the *Data Protection Acts 1988 and 2003*.**

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<sup>145</sup> College of Policing “Body–Worn Video” (2014) at 18. Available at [college.police.uk](http://college.police.uk).



## CHAPTER 6      ADMISSIBILITY OF EVIDENCE AND A SEARCH WARRANTS CODE OF PRACTICE

### A      Admissibility of Evidence and the Exclusionary Rule in Ireland

- 6.01 In the Consultation Paper, the Commission considered the effect of evidence obtained illegally or unconstitutionally on foot of a search warrant.<sup>1</sup> The Commission is of the view that the recommended generally applicable Search Warrants Act should provide statutory guidance to be followed when there is a challenge to the validity of a search warrant.
- 6.02 The rule governing the admissibility of evidence obtained illegally or unconstitutionally (the exclusionary rule) seeks to protect the person and respect due process.<sup>2</sup> McGrath outlines three main principles that justify the application of the exclusionary rule.<sup>3</sup> The first is respect for the rule of law which encompasses the theory that the ability of authorities to act unlawfully to bring wrongdoers to justice undermines confidence in and integrity of the criminal justice system. McGrath notes that this approach is prevalent in Canada and some decisions in the United States.<sup>4</sup> The second principle, which primarily forms the basis for the exclusionary rule in the United States, is that police and other authorities are deterred from obtaining evidence by unlawful means if such evidence cannot later be admitted in proceedings.<sup>5</sup> The third principle, which is central to the application of the exclusionary rule in Ireland, is that of vindication of the rights of the accused (or others who have been affected by the unconstitutional action).<sup>6</sup>
- 6.03 The Consultation Paper set out the development of the exclusionary rule in Irish case law, including the Supreme Court decisions in *The People (Attorney General) v O'Brien*<sup>7</sup> and *The People (DPP) v Kenny*.<sup>8</sup> In the 2015 decision *The People (DPP) v JC*<sup>9</sup> the Supreme Court expressly overruled *Kenny* and set out a new test for the admissibility of unconstitutionally obtained evidence.<sup>10</sup> The Commission outlines briefly below the development of the exclusionary rule and the effect of the decision in *JC*.

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<sup>1</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 6.55 to 6.77.

<sup>2</sup> *Ibid* at paragraph 6.56.

<sup>3</sup> McGrath “The Exclusionary Rule in Respect of Unconstitutionally Obtained Evidence” (2004) 11(1) DULJ 108 at 108.

<sup>4</sup> McGrath refers to *section 24(2) of the Canadian Charter of Rights and Freedoms* and the United States Supreme Court decision *Olmstead v United States* 277 US 438 (1928).

<sup>5</sup> *United States v Calandra* 414 US 338 (1974) at 348 and *United States v Leon* 468 US 897 (1983) at 906.

<sup>6</sup> McGrath states that according to the principle of vindication, “the Courts are required to uphold the provisions of the Constitution.” He cites *The People (Attorney General) v O'Brien* [1965] IR 142 and *The People (DPP) v Lynch* [1982] IR 64 at 76.

<sup>7</sup> [1965] IR 142.

<sup>8</sup> [1990] 2 IR 110.

<sup>9</sup> *The People (DPP) v JC* [2015] IESC 31.

<sup>10</sup> Majority judgment of Clarke J (Denham CJ, O'Donnell and MacMenamin JJ concurring), at Part 7 of his judgment.

6.04 In *The People (Attorney General) v O'Brien*,<sup>11</sup> Gardaí intended to search a dwelling at 118 Captain's Road, Crumlin. However, the search warrant they used described the address as 118 Cashel Road. The Supreme Court had to consider whether evidence obtained as a result of the search carried out using the warrant ought to have been excluded at trial on the basis that the search was illegal. Two views emerged from the Court in *O'Brien* as to the admissibility of illegally obtained evidence. The majority view was expressed by Kingsmill Moore J (with whom Budd and Lavery JJ agreed), which favoured the undertaking of a balancing exercise. He stated that, where evidence has been obtained as a result of an illegal action, a determination would have to be made in each individual case as to whether the public interest would be best served by the admission or the exclusion of that evidence. He stated that a "consideration of all the circumstances" should be carried out for the purpose of the determination, including:

- i. the nature and extent of the illegality.
- ii. whether the illegal action was intentional or unintentional.
- iii. if the action was intentional, whether it was the result of an *ad hoc* decision or whether it represented a settled or deliberate policy.
- iv. whether the illegality was one of a trivial and technical nature or a serious invasion of important rights, the recurrence of which would involve a real danger to necessary freedoms.
- v. whether there were circumstances of urgency or emergency which provide some excuse for the action.<sup>12</sup>

6.05 The minority view was expressed by Walsh J (with whom Ó Dálaigh CJ agreed), who was of the view that such evidence "is not rendered inadmissible and there is no discretion to rule it out by reason only of the fact that it was obtained by means of an illegal as distinct from an unconstitutional seizure."<sup>13</sup> Walsh J therefore put forward a more inclusionary approach to the admissibility of illegally obtained evidence. Despite favouring differing approaches to the admissibility of illegally obtained evidence, the Supreme Court concluded that evidence was not automatically rendered inadmissible merely because it had been illegally obtained.<sup>14</sup>

6.06 In *O'Brien* the dwelling of both accused persons was searched and therefore Article 40.5 of the Constitution which guarantees the inviolability of the dwelling was engaged. There was general agreement on the inadmissibility of unconstitutionally obtained evidence. Speaking for the majority, Kingsmill Moore J held that where there has been a deliberate and intentional violation of constitutional rights, "evidence obtained by such violation should in general be excluded."<sup>15</sup> The Court also accepted that there could be extraordinary excusing circumstances which might justify or permit the admission of such evidence, but he preferred "not to attempt to enumerate such circumstances by anticipation and stated that "[t]he facts of individual cases vary so widely that any hard and fast rules of a general nature seem to me to be dangerous and I would again leave the exclusion or non-exclusion to the discretion of the trial judge."<sup>16</sup>

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<sup>11</sup> [1965] IR 142.

<sup>12</sup> *Ibid* at 160.

<sup>13</sup> *Ibid* at 168.

<sup>14</sup> See generally O'Connor "The Admissibility of Unconstitutionally Obtained Evidence in Irish Law" (1982) *Ir Jur* 257, at 259-260; McGrath *Evidence* (Thomson Round Hall 2005) at 356-357.

<sup>15</sup> [1965] IR 142, 162.

<sup>16</sup> *Ibid*.

6.07 A similar view was adopted in the minority judgment delivered by Walsh J, although this judgment discussed the matter in more detail. Walsh J stated that the courts:

“must recognise the paramount position of constitutional rights and must uphold the objection of an accused person to the admissibility at his trial of evidence obtained or procured by the State... as a result of a deliberate and conscious violation of the constitutional rights of the accused person where no extraordinary excusing circumstances exist.”<sup>17</sup>

6.08 Three elements can be identified in this approach. The first is that unconstitutionally obtained evidence should generally be “absolutely inadmissible.”<sup>18</sup> The second is that this rule may be limited and evidence admitted if extraordinary excusing circumstances exist.<sup>19</sup> Walsh J identified two specific extraordinary excusing circumstances in his judgment, namely, the imminent destruction of vital evidence or the need to rescue a victim in peril.<sup>20</sup> The third element is that if the breach is not deliberate and conscious, it may not fall within the scope of the rule. To this end Walsh J expressly noted in his judgment that “without a deliberate and conscious violation [evidence] is not excludable by reason only of the violation” itself.<sup>21</sup>

**(1) Interpretation of “conscious and deliberate”**

6.09 In decisions subsequent to *O’Brien*, courts ruled on the interpretation of “conscious and deliberate”.<sup>22</sup> In *The People (DPP) v Kenny*<sup>23</sup> the Supreme Court strengthened the exclusionary rule in Ireland, without expressly overruling *O’Brien*.

6.10 *Kenny* involved a search warrant for which there was no evidence to satisfy the requirement that the peace commissioner who issued it had satisfied himself that there were reasonable grounds for the suspicion.<sup>24</sup> In the Supreme Court, Finlay CJ (with whom Walsh and Hederman JJ agreed) delivered the decision of the majority of the Court. He held that evidence obtained in violation of the constitutional rights of a person “must be excluded” unless a court is satisfied that the act constituting the violation was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify the admission of evidence at the court’s discretion.<sup>25</sup> Finlay CJ concluded that the forcible entry into the dwelling place “was neither unintentional nor

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<sup>17</sup> [1965] IR 142,170.

<sup>18</sup> *Ibid*, per Walsh J at 170.

<sup>19</sup> *Ibid*. In *Freeman v Director of Public Prosecutions* [1996] 3 IR 569, the High Court held that the “imminent destruction of vital evidence” exception applied, although the Court warned against attributing too wide a scope to the exception. In *The People (DPP) v O’Loughlin* [1979] IR 85, the Court of Criminal Appeal did not agree with the trial judge exercising his discretion to include unconstitutionally obtained evidence on the grounds that it served the public interest in criminal investigation. See also *The People (DPP) v Shaw* [1982] IR 1 and *The People (DPP) v Delaney* [1997] 3 IR 453 where the court applied the “need to rescue a victim in peril” exception and, for a discussion, McGrath “The Exclusionary Rule in Respect of Unconstitutionally Obtained Evidence” (2004) 26 *DULJ* 108.

<sup>20</sup> Walsh J also noted at 170 that “evidence obtained by a search incidental to and contemporaneous with a lawful arrest although made without a valid search warrant” would come within the category of excusable circumstances.

<sup>21</sup> *Ibid*.

<sup>22</sup> See paragraphs 6.64 - 6.66 of the Consultation Paper discussing *The People (DPP) v Madden* [1977] IR 336 and *The People (DPP) v Shaw* [1982] IR 1.

<sup>23</sup> [1990] 2 IR 110.

<sup>24</sup> It appeared that he had relied solely on the information submitted by the applicant Garda.

<sup>25</sup> [1990] 2 IR 110, at 134.

accidental” and that there were no extraordinary circumstances to justify the act.<sup>26</sup> Although Finlay CJ accepted that the Gardaí were not aware that they were transgressing the constitutional rights of the accused, he held that the evidence had been unconstitutionally obtained and was thus inadmissible.<sup>27</sup> The approach of the majority in *Kenny* therefore mirrored Walsh J’s minority view in both *O’Brien* and *Shaw* that an act could amount to a “deliberate and conscious” violation of rights even though the person is unaware of the unlawfulness of the act.

- 6.11 *Kenny* was applied in a number of subsequent decisions, discussed in detail in the Consultation Paper,<sup>28</sup> including *The People (DPP) v Laide and Ryan*<sup>29</sup> and *Competition Authority v Irish Dental Association*,<sup>30</sup> resulting in the exclusion of evidence obtained on foot of search warrants containing fundamental flaws.
- 6.12 The approach of the Supreme Court in *Kenny* to the exclusion of unconstitutionally obtained evidence has been criticised.<sup>31</sup> In 2007, the *Final Report of the Balance in the Criminal Law Review Group* commented that the interpretation of the rule in *Kenny* “has effectively imposed a strict exclusionary rule.”<sup>32</sup> The Report noted that, as the focus of the test is on the physical activity of the official involved, it is completely immaterial whether the official does not know, or indeed could not know, that the action amounts to a constitutional breach.<sup>33</sup> In respect of errors in issued search warrants, the Report noted that the *Kenny* approach does not allow the court to have regard to whether the defect is caused by factors outside the control of the Gardaí.<sup>34</sup> It suggested waiting to see whether new appeal provisions provided for by section 21 of the *Criminal Justice Act 2006*, which inserted a new section 34 into the *Criminal Procedure Act 1967* and had recently come into force, providing a potential “without prejudice” avenue for the Director of Public Prosecutions to “have the issue re-visited by the Supreme Court”,<sup>35</sup> would result in a

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<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 6.71 onward.

<sup>29</sup> [2005] IECCA 24; [2005] 1 IR 209.

<sup>30</sup> [2005] 3 IR 208.

<sup>31</sup> See also the extra-judicial comments of the former Chief Justice, Keane CJ, in the Foreword to McGrath *Evidence* (Thomson Round Hall 2005) at xvii where he states that “there is surely room, in the case of trivial and unintended infringements of a person’s constitutional rights for a process of balancing against the need to uphold the rights of particular individuals the interest of the public in the prosecution of serious crime.”

<sup>32</sup> *Final Report of the Balance in the Criminal Law Review Group* at 154, available at justice.ie. The Criminal Law Review Group was of the view (at 161) that the current exclusionary rule is “too strictly calibrated” and “wished to see a situation develop where the court would have a discretion to admit the evidence or not, having regard to the totality of the circumstances and in particular the rights of the victim. The Report contained a separate dissent from the Chairman of the Group (now Hogan J). He acknowledged (at 287) that “the operation of the exclusionary rule may result in the exclusion, in particular cases, of highly probative evidence” resulting in “what might be thought to be an unmeritorious acquittal of a defendant.” However, the Chairman was of the view that this reason alone does not merit a significant modification of the exclusionary rule.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid* at 156.

<sup>35</sup> *Ibid* at 161.



reconsideration of the exclusionary rule.<sup>36</sup> Failing that, the Report concluded three options would have to be examined:<sup>37</sup>

- i) constitutional amendment providing for a discretionary exclusionary rule;
- ii) statutory regulation providing for a discretionary exclusionary rule; or
- iii) statutory provision of a list of factors which a court may take into account in deciding whether or not to exclude evidence.<sup>38</sup>

6.13 The Report considered it likely that the second option would be found to be unconstitutional.<sup>39</sup> Further, the third option of providing the court with greater flexibility by placing a list of factors which the Court could take into account in deciding whether to admit illegally or unconstitutionally obtained evidence would involve “some important constitutional issues”<sup>40</sup> and could create difficulties if the legislation were not referred to the Supreme Court under Article 26 of the Constitution. Academic commentators and courts also criticised the approach in *Kenny*. Collins has commented that “it must be questioned how a breach of constitutional rights could ever be accidental and unintentional if the one at issue in *Kenny* was not”,<sup>41</sup> and that on the basis of this reasoning, it may be the case that an action will be deemed accidental and unintentional only where it involves “something the Gardaí were not trying to do.”<sup>42</sup> In *Director of Public Prosecutions (Walsh) v Cash*<sup>43</sup> the High Court (Charleton J) criticised the *Kenny* test, stating that:

“a rule which remorselessly excludes evidence obtained through an illegality occurring by mistake does not commend itself to the proper ordering of society which is the purpose of the criminal law.”<sup>44</sup>

6.14 The Court was of the view that the exclusion of improperly obtained evidence should be on the basis of balancing interests.<sup>45</sup> Its view was that the test propounded by the Court in *O’Brien* would have permitted such balancing, whereas the test in *Kenny* removed much of the flexibility of the original test. On appeal in 2010, the Supreme Court concluded that it was unnecessary to consider the submission that the exclusionary rule as set out in *O’Brien* and *Kenny* should be reviewed.

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<sup>36</sup> The 2015 Supreme Court decision in *The People (DPP) v JC* [2015] IESC 31, discussed at paragraphs 6.25-6.34, below, was an appeal by the Director of Public Prosecutions against the acquittal of the respondent brought under section 23 of the *Criminal Procedure Act 2010*, which envisaged the potential for a retrial (although in the event the Supreme Court did not order a retrial in the case). Counsel for the respondent did not raise any objection to the use of section 23, but the dissenting judgments of Hardiman and Murray JJ considered that the “without prejudice” appeal provided for in section 34 of the *Criminal Procedure Act 1967* would have been a more suitable basis for the appeal.

<sup>37</sup> *Final Report of the Balance in the Criminal Law Review Group* at 166.

<sup>38</sup> *Ibid* at 162.

<sup>39</sup> *Ibid* at 164.

<sup>40</sup> *Ibid* at 165.

<sup>41</sup> Collins “The Exclusionary Rule – Back on the Agenda?” (2009) 19(4) *ICLJ* 98, at 104.

<sup>42</sup> *Ibid*.

<sup>43</sup> [2007] IEHC 108, [2010] IESC 1, [2010] IR 609.

<sup>44</sup> [2007] IEHC 108 at paragraph 65.

<sup>45</sup> *Ibid* at paragraph 50.

6.15 In the 2015 Supreme Court decision *The People (DPP) v JC*,<sup>46</sup> the Court by a majority of 4-3, overruled *Kenny* and set out a new balancing test.<sup>47</sup> This decision is discussed in detail at paragraphs 6.25 - 6.34.

**(2) Errors in search warrants**

6.16 The validity of search warrants is regularly challenged by accused persons who argue that evidence obtained as a result of the search warrant should not be admitted as evidence at trial. It has been noted that courts have dealt with challenges to the validity of search warrants by sorting challenged search warrants into three general categories:<sup>48</sup>

- i) warrants with fundamental defects through failure to comply with a statutory regime;
- ii) warrants deemed defective through errors or omissions; and
- iii) oversights, errors or omissions in valid warrants.

6.17 Decisions of the Irish courts have clarified what approach should be taken depending on whether the error in a warrant was one of substance or form and, if the error was one of form, whether it amounted to a fundamental defect or a mere error or misdescription.

**(a) Errors of substance and errors of form**

6.18 In *The People (DPP) v Mallon*<sup>49</sup> the accused sought to have all charges dismissed on the basis that the address contained in the search warrant was incorrect and therefore the search of the premises that had taken place was illegal on the basis that the warrant was invalid. A member of An Garda Síochána had searched and seized drugs at “4 Marrowbone Lane Close, Dublin 8” where the search warrant authorised a search of “4 Marrowbone Close, Dublin 8” which, it transpired, did not exist. The Court of Criminal Appeal was critical of the *Kenny* decision and what was described as the “remorseless logic” employed by the Supreme Court whereby trivial errors were now operating automatically to exclude evidence. It did not accept that *Kenny* overruled *O’Brien* and noted that the headnote of the *Kenny* decision recorded *O’Brien* as having been “followed”, and that *O’Brien* was thus left intact.<sup>50</sup>

6.19 The Court in *Mallon* cited the decision in *The People (DPP) v McCarthy*<sup>51</sup>, where the Court of Criminal Appeal set out the following principles distilled from the case law in relation to search warrants:

- (a) Warrants should be carefully prepared given that they entitle authorised persons to enter the property of a citizen with force, if necessary, and to search and seize on that basis.
- (b) Particular care must be taken when the document authorises a search of a dwelling house, given the constitutional protection afforded to the dwelling.
- (c) Not every error in a warrant will lead to automatic invalidation.
- (d) In particular, where the substance, as opposed to the form, of a warrant is not open to objection, invalidation will not necessarily ensue.

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<sup>46</sup> [2015] IESC 31.

<sup>47</sup> Majority judgment of Clarke J (Denham CJ, O’Donnell and MacMenamin JJ concurring), at Part 7 of his judgment.

<sup>48</sup> See Orange *Police Powers in Ireland* (Bloomsbury 2014) at 9.57 to 9.88.

<sup>49</sup> [2011] IECCA 29, [2011] 2 IR 544.

<sup>50</sup> [2011] IECCA 29, [2011] 2 IR 544 at paragraph 21.

<sup>51</sup> [2010] IECCA 89.

(e) The nature of any error/omission on a warrant must be scrutinised by the court to assess whether it is fundamental or not, including errors pertaining to jurisdiction. Factors to be taken into account include:

- (i) whether the error is a mere misdescription
- (ii) whether it is likely to mislead
- (iii) whether it undermines the apparent jurisdiction to issue the warrant on its face

(f) It is not possible in relation to non-substantive errors (that is those that affect the substance of the legislative requirements pertaining to the warrant) to say that they will never lead to invalidation due to the wide variety of possible errors/omissions that may occur.<sup>52</sup>

6.20 While expressing the view that the outcome of cases concerning search warrants are not easily predictable, the Court in *Mallon* stated that it was possible to detect a broad principle with which such decisions complied. In essence, it clarified that “a mere error will not invalidate a warrant, especially one which is not calculated to mislead, or perhaps just as importantly, does not mislead.”<sup>53</sup> As regards the status of the exclusionary rule generally, the Court was of the view that:

“so long as Irish law maintains an almost absolute exclusionary rule for evidence obtained as a result of an illegal and therefore unconstitutional search of a dwelling house, courts should be slow to invalidate warrants on the grounds of typographical grammatical or transcription errors, which are neither calculated to mislead, nor in truth do mislead, any reasonable reader of the words.”<sup>54</sup>

6.21 In *The People (DPP) v Gormley and White*,<sup>55</sup> Clarke J, giving the judgment of the Supreme Court, explained that a warrant must do two things: it must clearly state the authorisation which the warrant gives<sup>56</sup> and it must indicate a sufficient legal basis.<sup>57</sup> The reasons for these requirements are first that, “a person whose rights are affected is entitled to know with some reasonable level of precision what it is exactly that the warrant authorises.”<sup>58</sup> Secondly, a person is “entitled to know the legal basis on which it is said that the warrant was issued because it is that legal basis which requires them to submit to something which would otherwise be unlawful.”<sup>59</sup>

6.22 The Supreme Court referred to the decisions of the Court of Criminal Appeal in *Mallon* and *McCarthy*, and reiterated the test outlined by O’Donnell J in *Mallon*: “whether the error makes the warrant unintelligible or misleading.” The Supreme Court explained the rationale behind this test as follows:

“What a person is entitled to know is what a warrant authorises. Provided that the warrant does this in sufficiently clear terms to allow a person to understand what is authorised, then the fact that there may be a technical misdescription in matters, such

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<sup>52</sup> [2010] IECCA 89. Cited with approval in *The People (DPP) v Jagutis* [2013] IECCA 4, at paragraph 5.5.

<sup>53</sup> [2011] IECCA 29, [2011] 2 IR 544 at paragraph 44.

<sup>54</sup> *Ibid* at paragraph 54.

<sup>55</sup> [2014] IESC 17.

<sup>56</sup> *Ibid* at paragraph 11.9.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Ibid*.

as the precise formal address of a property to be searched, will not render the warrant concerned invalid.”<sup>60</sup>

6.23 The second type of issue relating to the form of the warrant concerned the necessity to specify a legal basis for the issuing of the warrant and the degree to which a warrant must state that the conditions required for it to be issued have been fulfilled. The Court, relying on *Simple Imports Limited v Revenue Commissioners*,<sup>61</sup> and the position in England and Wales, as set out in *R v Inland Revenue Commissioners ex parte Rossminster*,<sup>62</sup> was of the view that, in general, a warrant issued by a judge is valid if:

“(a) It specifies the legal power which is being exercised by the issuing of the relevant warrant;

(b) It specifies, or it can reasonably be implied from the text, that the relevant judge is satisfied that it should be issued; and

(c) (Having regard to *Simple Imports*) It does not contain on its face any recital or other statement which would reasonably lead to the conclusion that the judge issuing the warrant had approached the question of whether it was appropriate to issue the warrant on an incorrect basis having regard to the relevant statute.”<sup>63</sup>

6.24 The Court concluded that it was not necessary for the warrant specifically to state that the issuing authority was satisfied as to the necessary statutory conditions or was satisfied as to accurate criteria and therefore the warrant of arrest was valid.<sup>64</sup>

### **(3) A revised exclusionary rule: *The People (DPP) v JC***

6.25 Following the criticism and slow erosion of the version of the exclusionary rule in *Kenny*, the Supreme Court reconsidered the exclusionary rule in *The People (DPP) v JC*<sup>65</sup> and by a majority of 4-3 overruled *Kenny* and set out a revised test.<sup>66</sup>

#### **(i) The facts in *JC***

6.26 The particular confluence of events in *JC* was an important factor in the decision of the Supreme Court to reconsider the exclusionary rule. The Gardaí were investigating a number of robberies which took place in the spring of 2011. On 10 May 2011 two Gardaí attended at the home of the accused intending to arrest him for the offences. The Gardaí had a warrant to search the premises issued under section 29 of the *Offences Against the State Act 1939*. The warrant was valid on its face and issued in accordance with the requirements of the section and the general law relating to such warrants. While the search was taking place, the accused was taken to Waterford Garda Station where, having been appropriately cautioned and after receiving legal advice, he made a number of inculpatory statements. By the time the case reached trial in the Circuit Criminal Court, the Supreme Court had, in *Damache v Director of Public Prosecutions*,<sup>67</sup> declared section 29 unconstitutional.

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<sup>60</sup> *Ibid* at paragraph 11.10.

<sup>61</sup> [2000] 2 IR 242.

<sup>62</sup> [1980] AC 952.

<sup>63</sup> *The People (DPP) v Gormley and White* [2014] IESC 17 at paragraph 11.18.

<sup>64</sup> *Ibid* at paragraphs 11.20 – 11.21.

<sup>65</sup> [2015] IESC 31.

<sup>66</sup> Majority judgment of Clarke J (Denham CJ, O’Donnell and MacMenamin JJ concurring), at Part 7 of his judgment.

<sup>67</sup> [2011] IEHC 197, [2012] IESC 11; [2012] 2 IR 266, discussed at paragraph 1.25.

- 6.27 The prosecution accepted that any evidence obtained during the search should be excluded but argued that the admissions made in the Garda station should still be admitted. It was argued on behalf of the accused that the warrant must be treated as invalid, even though issued prior to the decision of the Supreme Court. Accordingly, it was argued, the entry on to the premises and the arrest were a deliberate and conscious breach of his constitutional right to liberty and his constitutional right to inviolability of the dwelling, and the statements were made while in unlawful custody, and thus the court was obliged, applying *Kenny*, to exclude the evidence.
- 6.28 The trial judge considered the matter carefully and accepted the arguments made on behalf of the accused, concluding that the statement made in the Garda station was inadmissible. The prosecution offered no further evidence and the trial judge directed the jury to enter a verdict of not guilty.
- 6.29 The Director of Public Prosecutions appealed the decision to the Supreme Court under section 23 of the *Criminal Procedure Act 2010*. Counsel for the accused did not raise a jurisdictional objection to the bringing of the appeal under section 23.<sup>68</sup>

**(ii) The majority reasoning**

- 6.30 Delivering the majority judgment of the Court, Clarke J (Denham CJ, O'Donnell and MacMenamin JJ concurring) considered the existing case law and concluded that:<sup>69</sup>
- O'Brien* may be seen to be at one end of a spectrum which suggests that evidence should be admitted unless it can be shown that those gathering the evidence in question actually knew that their actions were in breach of constitutional rights. *Kenny* may be seen to be at the other end of the spectrum, where all that it is necessary to show, so that evidence may be excluded, is that there was a breach of constitutional rights, irrespective of the knowledge or level of care of those involved, save in the highly unusual and exceptional circumstances mentioned in the case law.
- 6.31 With regard to the strict exclusionary rule that emerged from *Kenny*, he considered that “[t]he solution to what might be seen by some as an over-generous attitude of trial judges to the admission of evidence... is not to take away the power to admit [it] in its entirety”<sup>70</sup> but rather the proper test is one that balances the competing rights at issue in cases such as this: the rights of the accused to liberty and inviolability of the dwelling, and the right of the public to have all relevant evidence before the court in a criminal trial.
- 6.32 Addressing the concerns of the minority in the case,<sup>71</sup> Clarke J considered the elements of a balancing test for the admission of evidence obtained in breach of constitutional rights and held that:
- “It would truly require exceptional circumstances for the court to admit evidence which is obtained in circumstances where those gathering the evidence knew that they were

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<sup>68</sup> [2015] IESC 31, majority judgment of Clarke J (Denham CJ, O'Donnell and MacMenamin JJ concurring), at paragraph 2.9. Section 23 of the *Criminal Procedure Act 2010* envisages the possibility of a retrial after an appeal (in the event, the Supreme Court did not order a retrial in this case: see *The People (DPP) v JC (No.2)* [2015] IESC 50). The dissenting judgments of Hardiman and Murray JJ considered that the “without prejudice” appeal provided for in section 34 of the *Criminal Procedure Act 1967* would have been a more suitable basis for the appeal.

<sup>69</sup> [2015] IESC 31, majority judgment of Clarke J (Denham CJ, O'Donnell and MacMenamin JJ concurring), at paragraph 4.5.

<sup>70</sup> *Ibid* at paragraph 4.24.

<sup>71</sup> See in particular those expressed by Hardiman J in Part IV of his judgment, raising concerns about the behaviour of certain members of An Garda Síochána and what he referred to as the *force publique* (that is, law enforcement).

acting in breach of constitutional rights. Such a situation has to be viewed by any court in the most serious light...

It is also important to make it clear that the question of whether the taking of evidence is in deliberate and conscious breach of constitutional rights in that sense requires an analysis of the conduct or state of mind not only of any individuals 'at the coal face' but also of any other senior official or officials within the relevant enforcement or investigation authority who were involved in a material way in the process. To take but a simple example, a senior investigating Garda who is well aware that An Garda Síochána does not have authority to carry out a particular search cannot escape the consequences of a finding of a deliberate and conscious breach of rights simply by procuring that a less experienced or less informed member of the force actually carried out the search in question. In addition, where there is a systemic failure in the sense that senior Gardaí are aware of and condone practices which are, to their knowledge, likely to lead to breaches of constitutional rights, then the fact that individual members of An Garda Síochána involved directly in evidence gathering may not have the same knowledge would not justify a finding that there was no deliberate or conscious breach of constitutional rights."<sup>72</sup>

6.33 With regard to the question of "inadvertence" the standard must be higher than that purportedly set in *O'Brien* and does not include instances of recklessness or gross negligence:

"There is one sense in which the word 'inadvertent' simply means that a person did not advert to the problem. On that basis, a person who, even though grossly negligent, might not actually have 'adverted' to the fact that they were acting in breach of constitutional rights might, nonetheless, be said to have acted inadvertently. It is important to emphasise that the term 'inadvertent', in the sense in which it is used in this judgment, could not encompass such actions."<sup>73</sup>

**(iii) The majority test of admissibility in JC**

6.34 Clarke J went on to set out a comprehensive test for the treatment of evidence obtained in breach of constitutional rights:

"In summary, the elements of the test are as follows:-

- (i) The onus rests on the prosecution to establish the admissibility of all evidence. The test which follows is concerned with objections to the admissibility of evidence where the objection relates solely to the circumstances in which the evidence was gathered and does not concern the integrity or probative value of the evidence concerned.
- (ii) Where objection is taken to the admissibility of evidence on the grounds that it was taken in circumstances of unconstitutionality, the onus remains on the prosecution to establish either:-
  - (a) that the evidence was not gathered in circumstances of unconstitutionality; or
  - (b) that, if it was, it remains appropriate for the Court to nonetheless admit the evidence.

The onus in seeking to justify the admission of evidence taken in unconstitutional circumstances places on the prosecution an obligation to explain the basis on which it is said that the evidence should, nonetheless, be admitted AND ALSO to establish any facts necessary to justify such a basis.

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<sup>72</sup> [2015] IESC 31, majority judgment of Clarke J at paragraphs 5.8-5.9.

<sup>73</sup> *Ibid*, at paragraph 5.14.

- (iii) Any facts relied on by the prosecution to establish any of the matters referred to at (ii) must be established beyond reasonable doubt.
- (iv) Where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be excluded save in those exceptional circumstances considered in the existing jurisprudence. In this context deliberate and conscious refers to knowledge of the unconstitutionality of the taking of the relevant evidence rather than applying to the acts concerned. The assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights requires an analysis of the conduct or state of mind not only of the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned.
- (v) Where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate in the sense previously appearing, then a presumption against the admission of the relevant evidence arises. Such evidence should be admitted where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments.
- (vi) Evidence which is obtained or gathered in circumstances where same could not have been constitutionally obtained or gathered should not be admitted even if those involved in the relevant evidence gathering were unaware due to inadvertence of the absence of authority.

## **B Jurisdictional Comparison**

6.35 Many common law jurisdictions have adopted different rules on the admissibility of illegally and unconstitutionally obtained evidence. Nonetheless, some common themes emerge. Broadly speaking, the courts have taken a sliding-scale approach to illegally obtained evidence. Thus, the courts will generally admit evidence obtained under a search warrant that contains small errors (such as a typographical error in the address to be searched) which do not mislead anyone. Where the error is more serious however, the courts often undertake a balancing exercise whereby, for example, the prejudicial effect on the accused is weighed against the probative value of the evidence. In England and Wales, the common law discretion to exclude evidence prejudicial to the accused,<sup>74</sup> upheld in the decision of *R v Sang*,<sup>75</sup> was placed on a statutory footing by section 82(3) of the *Police and Criminal Evidence Act 1984*. Section 82(3) provides that nothing in Part VIII of the Act “shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion.”

6.36 A more expansive provision was enacted under section 78 of the *Police and Criminal Evidence Act 1984*, which provides:

“(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was

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<sup>74</sup> For the common law development of the exclusionary rule in England and Wales, see *R v Leatham* (1861) 8 Cox CC 498, *Kuruma v The Queen* [1955] AC 197 and *R v Sang* [1980] AC 402. See also Dennis *The Law of Evidence* 4<sup>th</sup> ed (Sweet and Maxwell 2010) at 93 to 95 and 311 and Zander *The Police and Criminal Evidence Act 1984* 6<sup>th</sup> ed. (Thomson, Sweet and Maxwell 2013) at 463.

<sup>75</sup> [1980] AC 402.

obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.”

6.37 A number of jurisdictions favour an approach which involves balancing competing rights and interests. The application of the exclusionary rule in Canada involves the consideration of numerous factors including:

“The seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct), the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and society’s interest in the adjudication of the case on its merits.”<sup>76</sup>

6.38 The Canadian approach favours neither the automatic exclusion of evidence nor its general inclusion. Section 24(2) of the Canadian *Charter of Rights and Freedoms* expressly requires a court to have regard to “all the circumstances” when determining whether evidence should be excluded. Although there is a strong emphasis on individual rights, the Canadian approach does not go so far as to be entirely rights-focused or rights-protectionist. Rather, there is an overall consideration of how the admission of evidence obtained in violation of the Charter is likely to affect the reputation of the justice system.

6.39 In New Zealand, a prima facie exclusionary rule previously operated whereby evidence obtained in breach of the New Zealand *Bill of Rights Act 1990* would generally be inadmissible, unless a judge exercised his or her discretion to admit it.<sup>77</sup> However, following the Court of Appeal decision in *R v Shaheed*<sup>78</sup> and the enactment of the *Evidence Act 2006*, the exclusionary rule in New Zealand now facilitates the consideration and balancing of all relevant factors to determine whether the exclusion of evidence is a proportionate response to the breach. Section 30 provides that where the accused or judge raises the issue of whether evidence was improperly obtained, the judge must:

- (a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and
- (b) if the judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice.<sup>79</sup>

Improperly obtained evidence is defined as evidence obtained:

- (a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the *New Zealand Bill of Rights Act 1990* applies<sup>80</sup>; or

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<sup>76</sup> *R v Grant* [2009] SCC 32, paragraph 71. *Grant* radically revised the Canadian approach to the admissibility of illegally obtained evidence by eliminating a “trial fairness” test laid out in the earlier decision of *R v Collins* [1987] 1 SCR 265 and reframing the remaining factors into a three-pronged test. For a more detailed discussion of the Canadian approach to evidence obtained in breach of the Charter, see Paciocco and Stuesser *The Law of Evidence* 5<sup>th</sup> ed (Irwin Law 2008) at 350.

<sup>77</sup> See *R v Butcher* [1992] 2 NZLR 257, *R v Goodwin* [1993] 2 NZLR 153, *R v H* [1994] 2 NZLR 143 and *R v Te Kira* [1993] 3 NZLR 257.

<sup>78</sup> [2002] 2 NZLR 377.

<sup>79</sup> Section 30(2) of the *Evidence Act 2006*.

<sup>80</sup> Section 3 of the *Bill of Rights Act 1990* (New Zealand) provides that the Bill of Rights applies to acts done “(a) by the legislative, executive, or judicial branches of the Government of New Zealand; or (b) by a person or



- (b) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or
- (c) unfairly.<sup>81</sup>

For such determination, the judge may, among other matters, have regard to the following set of factors:

- (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it;
- (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith;
- (c) the nature and quality of the improperly obtained evidence;
- (d) the seriousness of the offence with which the defendant is charged;
- (e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used;
- (f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant;
- (g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others;
- (h) whether there was any urgency in obtaining the improperly obtained evidence.<sup>82</sup>

6.40 A judge must exclude any improperly obtained evidence if its exclusion is proportionate to the impropriety.<sup>83</sup>

6.41 In the United States, the exclusion of unlawfully obtained evidence derives from the protection against unlawful search and seizure in the Fourth Amendment to the United States Constitution.<sup>84</sup> In the 1960s, the US Supreme Court adopted a relatively strict exclusionary rule<sup>85</sup> with the aim of deterring police misconduct.<sup>86</sup> However, a “good faith” defence has emerged which means that evidence obtained in breach of a person’s constitutional rights may be deemed admissible in circumstances where the transgression was inadvertent.<sup>87</sup> Some commentators have suggested that a number of decisions of

body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.”

<sup>81</sup> Section 30(5) of the *Evidence Act 2006*.

<sup>82</sup> Section 30(3) of the *Evidence Act 2006*.

<sup>83</sup> Section 30(4) of the *Evidence Act 2006*. In *R v Williams* [2007] NZCA 52, the Court of Appeal gave guidance on the approach that courts should follow when conducting the balancing exercise put forward by *R v Shaheed* and codified in the *Evidence Act 2006*.

<sup>84</sup> The Fourth Amendment states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” In *Weeks v United States* 232 US 383 (1914), the United States Supreme Court held that seizure of private documents from a citizen without their consent violated the Fourth Amendment.

<sup>85</sup> See *Mapp v Ohio* 367 US 643 (1961) and *Miranda v Arizona* 384 US 436 (1966).

<sup>86</sup> See LaFare, Israel and King *Criminal Procedure* 4<sup>th</sup> ed (Thomson West 2004) at 107, *Elkins v United States* 364 US 206 (1960) and *Terry v Ohio* 392 US 1 (1968).

<sup>87</sup> *State v Powell* 428 US 465 (1976), *United States v Leon* 468 US 897 (1984), *Herring v United States* 555 US 135 (2009) and *Davis v United States* 131 SC 2419 (2011).

the United States Supreme Court have expanded the “good faith” exception which has resulted in the erosion of the exclusionary rule in the United States.<sup>88</sup>

## **C Conclusions on search warrants and illegally or unconstitutionally obtained evidence**

### **(1) Illegally obtained evidence**

6.42 As noted above, a distinction can be drawn between evidence that is obtained illegally and evidence that is obtained unconstitutionally. Although the decision of the Supreme Court in *JC* now governs the admission of unconstitutionally obtained evidence, the test regarding illegally obtained evidence appears to have been left unchanged. Therefore, in line with the majority decision in *O’Brien*, evidence which is illegally obtained is not automatically inadmissible. Rather a determination will be made by the court on the basis of “all the circumstances” as to whether the evidence should be excluded or admitted. In *O’Brien* Kingsmill Moore J identified a list of factors with regard to illegally obtained evidence to be considered including:

- i) the nature and extent of the illegality;
- ii) whether the illegal action was intentional or not;
- iii) if it was intentional whether it was the result of an *ad hoc* decision or represented a settled or deliberate policy;
- iv) whether the illegality was trivial or technical in nature; or
- v) whether there were circumstances of urgency providing some excuse for the illegal action.

6.43 Kingsmill Moore J did not, however, intend this list to be exhaustive or exclusive. He observed that each case would have to be decided on the basis of its own facts and that it would be a matter for a judge to exercise his or her discretion to exclude evidence of facts ascertained by illegal means “where it appears that public policy, based on a balancing of public interests, requires such exclusion”.<sup>89</sup>

6.44 The balancing test put forward by Kingsmill Moore J is similar in a number of respects to the balancing tests used in Canada and New Zealand. Consideration of the nature of the breach, the intention of those who committed the breach, and the seriousness of the breach or illegality, are common to all three tests. The Canadian test and that put forward in *O’Brien* also share a common factor with regard to whether there were circumstances of urgency or emergency. It is notable that the factors identified for consideration in both Canada and New Zealand are perhaps more comprehensive in nature and scope than those contained in the *O’Brien* test. However as the *O’Brien* test was not intended by the Supreme Court to be exhaustive, there is no reason why it could not be developed further.

6.45 In light of the case law discussed above, in particular the decision of the Supreme Court in *O’Brien*,<sup>90</sup> and of the Court of Criminal Appeal in *The People (DPP) v McCarthy*<sup>91</sup> and *The*

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<sup>88</sup> For academic commentary suggesting that the decisions in *Hudson v Michigan* 547 US 586 (2006), *Herring v United States* 555 US 135 (2009) and *Davis v United States* 131 SC 2419 (2011) extended the “good faith” exception, thereby weakening the exclusionary rule, see Lafave “The Smell of a Herring: A Critique of the Supreme Court’s Latest Assault on the Exclusionary Rule” (2008-2009) 99 *Journal of Criminal Law and Criminology* 757; Tomkovicz “Davis v United States: The Exclusion Revolution Continues” (2011) 9 *Ohio State Journal of Criminal Law* 381.

<sup>89</sup> [1965] IR 142 at 161.

<sup>90</sup> [1965] IR 142.

<sup>91</sup> [2010] IECCA 89.

*People (DPP) v Mallon*,<sup>92</sup> the courts approach the question of admissibility in two stages. The first stage involves determining whether an error or defect in the search warrant is not of such a type as to invalidate it and to render the search illegal, and that the evidence obtained as a result of the search is therefore admissible having regard to all the circumstances of the case. The specific matters that have been identified to date in the case law include: (a) that the error or defect consisted of a misdescription or was otherwise of a trivial or technical nature; (b) that the error or defect was not likely to mislead, and did not mislead, the person to whom the warrant was directed; (c) that the error or defect was unintentional or inadvertent; and (d) that the error or defect did not, on its face, undermine the apparent jurisdiction to issue the warrant.

6.46 The second stage of the process arises if the court finds that the evidence was obtained illegally because the error passed the threshold test in the first stage. At the second stage, the court determines whether it should in its discretion exclude the evidence having regard to the range of matters that have also been identified in the case law, which include: (a) that the nature and extent of the error or defect was one of substance and not merely of form; (b) that the error or defect was likely to mislead, and did mislead, the person to whom the warrant was directed; (c) that the error or defect was the result of an intentional decision; (d) that the error or defect, on its face, undermined the apparent jurisdiction to issue the warrant; (e) that there did not exist exceptional circumstances of urgency or emergency that would excuse the error or defect; and (f) that the prejudicial effect of the evidence outweighed its probative value.

6.47 The Commission notes that some legislation, notably the *Criminal Justice (Surveillance) Act 2009*, has attempted to set out a statutory test for the admissibility of illegally obtained evidence. The 2009 Act allows a superior officer of An Garda Síochána, the Defence Forces or the Revenue Commissioners to apply to a judge (or superior officer in cases of urgency)<sup>93</sup> for an authorisation for carrying out surveillance on certain conditions being satisfied.<sup>94</sup> Section 14 of the 2009 Act concerns the admissibility of evidence obtained under such an authorisation. It provides that evidence obtained pursuant to an authorisation or approval under the Act may be admitted as evidence in criminal proceedings.<sup>95</sup> Section 14 of the 2009 Act specifies circumstances in which documents or material acquired as a result of surveillance undertaken under an authorisation or approval may be admitted in evidence where a member of An Garda Síochána, the Defence Forces or officer of the Revenue Commissioners has “failed to comply with a requirement of the authorisation or approval concerned.”<sup>96</sup> The Court may admit such documents or information where, having regard to the matters specified in section 14(4)(b), the Court decides that: (a) the member or officer concerned acted in good faith and that the failure was inadvertent; and (b) the information or document ought to be admitted in the interests of justice.<sup>97</sup> The factors that the Court must have regard to are:

- (i) whether the failure concerned was serious or merely technical in nature;
- (ii) the nature of any right infringed by the obtaining of the information or document concerned;
- (iii) whether there were circumstances of urgency;
- (iv) the possible prejudicial effect of the information or document concerned; and

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<sup>92</sup> [2011] IECCA 29, [2011] 2 IR 544.

<sup>93</sup> Section 7 of the *Criminal Justice (Surveillance) Act 2009*.

<sup>94</sup> Section 4 of the *Criminal Justice (Surveillance) Act 2009*.

<sup>95</sup> Section 14(1) of the *Criminal Justice (Surveillance) Act 2009*.

<sup>96</sup> Section 14(4) of the *Criminal Justice (Surveillance) Act 2009*.

<sup>97</sup> Section 14((a) of the *Criminal Justice (Surveillance) Act 2009*.

(v) the probative value of the information or document concerned.

- 6.48 The 2009 Act provides that information or material obtained as a result of surveillance carried out under an authorisation or approval “may be admitted as evidence in criminal proceedings notwithstanding any error or omission on the face of the authorisation or written record of approval concerned, if the court, having regard in particular to the matters specified above, decides that: (i) the error or omission was inadvertent; and (ii) the information or document ought to be admitted in the interests of justice. The factors which the Court should have regard to under section 14(3)(b) are the same as those that must be considered under section 14(4)(b).
- 6.49 It was noted during the Oireachtas debates on the *Criminal Justice (Surveillance) Bill* that section 14 was “the first statutory attempt in a Government Bill to place in legislative form the principles that have been developed through extensive case law on the admissibility of evidence on foot of defective search warrants.”<sup>98</sup>
- 6.50 The Commission has concluded that, while the 2009 Act provides a useful set of factors that may be considered in that specific statutory context, such an approach could limit the range of factors that may need to be considered in a case concerning a search warrant. In addition, bearing in mind that the relevant law continues to be developed and refined, new factors are likely to arise that may render such a list of statutory factors at best too limited and at worst redundant. For that reason, the Commission has concluded that the proposed Search Warrant Act should not codify the process by which the courts determine whether to admit evidence that has been obtained illegally. The Commission has concluded that this should remain a matter for the courts to determine and, where required, to develop in the context of the general principles and rules on the admissibility of illegally obtained evidence.

## **(2) Unconstitutionally obtained evidence**

- 6.51 Courts in Ireland have taken a much more protectionist approach in respect of unconstitutionally obtained evidence than illegally obtained evidence. This reflects the primacy of the Constitution in contrast to legislation and rules of law. As regards jurisdictional comparisons, the United States is the most comparable to Ireland as it also has a written constitution and a strict exclusionary rule. Courts in the United States have been greatly concerned with protecting the rights afforded by the Fourth Amendment to the Constitution, holding that if a high level of protection is not ensured then the Fourth Amendment might as well not exist. One of the primary rationales of the United States’ approach to the exclusion of evidence obtained in violation of the Constitution is to deter misconduct on the part of those obtaining evidence. The deterrence rationale has been recognised as one rationale for the exclusionary rule in Ireland but the fundamental goal of the Irish approach is the protection of rights.<sup>99</sup>
- 6.52 The emergence of the “good faith” exception in the United States has enabled the courts to carry out a greater assessment of the surrounding facts of a case but has not hugely limited the strict approach. That is to say, the exception simply considers whether the act was genuinely believed to be lawful. Cases where there has been a flagrant disregard for the law, for example, officers giving false information in a search warrant application, will not benefit from the exception.<sup>100</sup>

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<sup>98</sup> Seanad Éireann Debates Vol.196, No.7, 30 June 2009.

<sup>99</sup> *The People (DPP) v Kenny* [1990] 2 IR 110, 133 to 134, where the Supreme Court stated that “[t]he detection of crime and the conviction of guilty persons... cannot outweigh the unambiguously expressed constitutional obligation ‘as far as practicable’ to defend and vindicate the personal rights of the citizen.”

<sup>100</sup> However, there is a view that the exclusionary rule is being increasingly eroded in the United States through the expansion of the “good faith” exception. See for example Lafave “The Smell of a Herring: A Critique of the Supreme Court’s Latest Assault on the Exclusionary Rule” (2008-2009) *99 Journal of Criminal Law and*

6.53 The Supreme Court decision in *The People (DPP) v JC* establishes an exception allowing for the admissibility of unconstitutionally obtained evidence where the breach was through “inadvertence” or where it derives from subsequent legal developments. This test requires good faith on the part of the investigators. Delivering the majority judgment in *JC* Clarke J held that, for example, “investigative agencies cannot hide behind an unacceptable lack of knowledge appropriate to their task for the purposes of pleading inadvertence.”<sup>101</sup> It remains to be seen precisely how the consequences of the ruling in *JC* will develop, but in this way exclusion of the evidence obtained where there has been a genuine and unintentional breach may be avoided. The exception does not go so far as to admit any and all evidence where inadvertence arises. However it will enable the courts to carry out a greater analysis of all the facts so as to arrive at a balanced decision, rather than automatically excluding evidence.

6.54 The rule governing the exclusion of unconstitutionally obtained evidence, as developed by the Supreme Court in *The People (DPP) v JC*, has the status of a constitutional principle. Consequently, any modification of the rule would require a constitutional amendment or further consideration of the rule by the Supreme Court. The test set out by Clarke J in *JC* provides a statement of the procedure to be followed by a court in determining the admissibility of unconstitutionally obtained evidence. As with its approach to illegally obtained evidence the Commission does not recommend the inclusion of a statement of the test for the admissibility of unconstitutionally obtained evidence in the generally applicable Search Warrant Act.

**(3) Breach of the Search Warrants Act should not in itself render evidence inadmissible**

6.55 Having regard to the Commission’s view that the Search Warrants Act should not contain a test of admissibility for evidence because these rules remain in a state of ongoing judicial development, it has also concluded that the requirements of the proposed Search Warrant Act should not in themselves become the basis for questions of admissibility. In this respect, a good statutory precedent is section 7 of the *Criminal Justice Act 1984*, which provides that failure to comply with the provisions of Regulations made under the 1984 Act on the treatment of persons while detained in custody “shall not in itself render evidence inadmissible.” The Commission has therefore concluded that the Search Warrants Act should provide that evidence obtained in breach of its requirements is not of itself render evidence inadmissible.

**6.56 The Commission recommends that the proposed Search Warrants Act should provide that a failure by a person applying for or executing a search warrant to observe any provision of the Act shall not of itself affect the admissibility in evidence of any material obtained during a search.**

**6.57 The Commission recommends that the proposed Search Warrant Act should not include any provision as to the tests by which the courts determine whether to admit evidence that has been obtained illegally, or the tests used to determine the admissibility of unconstitutionally obtained evidence, and that these should remain a matter for the courts to determine and, where required, to develop.**

**D Code of Practice on Search Warrants**

6.58 In the Consultation Paper, the Commission considered the implementation of a search warrants code of practice.<sup>102</sup> The Commission is aware that various bodies responsible

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*Criminology* 757; Tomkovicz “Davis v United States: The Exclusion Revolution Continues” (2011) 9 *Ohio State Journal of Criminal Law* 381.

<sup>101</sup> *The People (DPP) v JC* [2015] IESC 31, at paragraph 5.16.

<sup>102</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 5.121 – 5.125.

for the execution of search warrants (including, for example, An Garda Síochána, the Office of the Director of Corporate Enforcement and the Office of the Revenue Commissioners) have their own practice and procedural guidelines in place with regard to searches and seizures. However, there is no generally applicable code of practice or set of guidelines in place in Ireland. The Commission provisionally recommended that a standard code be introduced.<sup>103</sup> Thus all search warrants, regardless of which body is carrying out the investigation and executing the warrant, would fall within the scope of the code.

- 6.59 The Commission remains of the view that a general code of practice would be of assistance to both executing authorities and owners or occupiers of property which is the subject of a warrant. As discussed in the Consultation Paper, such a code of practice could outline: (i) the best practice approaches to be followed by officers executing a search and seizure; (ii) the respective rights and duties of all parties involved in the process; and (iii) the safeguards applicable to this process.<sup>104</sup> The existence of such a code may provide executing authorities with greater certainty as regards the scope of their powers and the prescribed limits. It may also enable occupiers and owners to discern whether a search and seizure was conducted in a legitimate manner.

**(1) Jurisdictional comparison**

- 6.60 The Commission notes that a number of common law countries have developed standard codes of practice in respect of search and seizure. In England and Wales, for example, specific codes of practice have been developed to supplement the *Police and Criminal Evidence Act 1984*. Under the 1984 Act, Code B is concerned with searches of premises by police officers and the seizure of property found by police officers on persons or premises.<sup>105</sup>
- 6.61 In general terms, Code B emphasises the central importance of the right to privacy and the principle of respect for personal property. Acknowledging that powers of entry, search and seizure may significantly interfere with an occupier's privacy, the Code stipulates that recourse to these powers must be fully and clearly justified and that officers should consider whether the necessary objectives can be achieved by less intrusive means. The need for the police to exercise their powers courteously and with respect for persons and property is recognised. The Code also stipulates that when exercising these powers, the police may only employ reasonable force where this is considered necessary and proportionate to the circumstances.
- 6.62 Code B also provides more specific procedural guidance on issues such as: (i) the making of a search warrant application; (ii) general considerations relating to the execution of a search; (iii) the seizure and retention of materials; (iv) the rights of property owners or occupiers; and (v) the procedures to be followed after the search has been completed.
- 6.63 A similar code of practice can be found in Scotland, the *Code of Practice Issued under Section 410 of the Proceeds of Crime Act 2002*.<sup>106</sup> Although the Code is not exclusively concerned with search warrants, it contains specific provisions concerning search warrants as well as general provisions relating to all other investigative orders made under the *Proceeds of Crime Act 2002*. Although the Code is only applicable to warrants issued under the 2002 Act, it can nonetheless be regarded as providing guidance on the proper conduct of searches and seizures.

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<sup>103</sup> *Ibid* at paragraph 5.125.

<sup>104</sup> *Ibid* at paragraphs 5.123 – 5.124.

<sup>105</sup> *Code B: Code of Practice for Searches of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises*. All Codes under the *Police and Criminal Evidence Act 1984* are available at [www.homeoffice.gov.uk](http://www.homeoffice.gov.uk).

<sup>106</sup> Available at [www.scotland.gov.uk](http://www.scotland.gov.uk).

- 6.64 As with Code B in England and Wales, the general provisions of the *Code of Practice Issued under Section 410 of the Proceeds of Crime Act 2002* acknowledge firstly that the execution of investigative orders may interfere significantly with the privacy of those whose premises are searched.<sup>107</sup> Accordingly, the Code stipulates that these powers “need to be clearly justified before they are used.”<sup>108</sup> Secondly, it outlines that in all cases investigative orders should be executed courteously and with respect for the persons and property concerned.<sup>109</sup> Thirdly, it details that where it appears that the recipient of an order has a genuine difficulty in reading or understanding it, the officer shall “where necessary and practical identify someone who can act as an interpreter.”<sup>110</sup>
- 6.65 In relation to search warrants more specifically, the Scottish Code features a number of key provisions. Examples include: (i) a requirement for officers to initially attempt to communicate with the persons concerned, so as to request access rather than entering the premises forcefully (this is subject to exceptions, such as where it is known that the occupier is absent, or where it is believed that alerting a person may frustrate the search); (ii) a requirement for officers to show an official form of identification upon entry; (iii) a stipulation that a search may only be carried out to the extent which is necessary; (iv) a stipulation that if a premises has been entered by force, officers must ensure that it is secure before leaving; and (v) a requirement that details of the execution of the search should be recorded.<sup>111</sup>

**(2) Nature and Effect of Search Warrants Code of Practice**

- 6.66 It is not proposed that the code of practice should replace those that already exist within specific organisations which would have the effect of subjecting such organisations to multiple codes of practice. Rather, the proposed code of practice should supplement the pre-existing codes of practice that relate to specific organisations.
- 6.67 The Commission considers that the proposed Search Warrants Act should provide for a code of practice which should not be legislative in nature. The Commission considers that such a code may be more effective if it can be developed and amended with relative ease. The code of practice should be a functional and relevant working document. It should contain practical guidance concerning the main elements of the Search Warrants Act and in particular the procedural steps involved in the process. To this end the code should relate to both the officers involved and the owners or occupiers of the property which is subject to a search warrant, setting out their respective rights and duties. Additionally, the Commission is of the view that the code should employ plain and simple language so that it is readily comprehensible to all persons. In line with this rationale, the code should also be easily accessible to all persons, including that it would be available on the internet.
- 6.68 The Commission considers that failure to comply with the terms of the code of practice should not of itself affect the admissibility of evidence. Whether a breach would be considered a relevant factor in any case (such as where it is claimed that there has been misconduct, or a failure to follow proper procedures) would remain a matter for the application of the general rules on the admissibility of evidence, which have been discussed above in this Chapter.

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<sup>107</sup> *Code of Practice Issued under Section 410 of the Proceeds of Crime Act 2002* at paragraph 6.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid* at paragraph 7.

<sup>111</sup> *Ibid* at paragraphs 16-18, 21 and 23.

**(3) Indicative Content of Search Warrants Code of Practice**

6.69 In the Consultation Paper, the Commission identified a number of elements which it would be appropriate to include in a search warrants code of practice.<sup>112</sup> Having considered this matter in the preparation of this Report, the Commission considers that among the matters that could be included are the following:

- i) What are to be considered as “reasonable time or times” for executing the search warrant.<sup>113</sup>
- ii) The need to ensure that the search is conducted as efficiently as is practicable, including in connection with any breaks during the search.
- iii) Upon arrival at the premises to be searched, the executing officer should make the search team’s arrival known to the owner or occupier and request access to the premises. Officers need not comply with this requirement, however, if it is reasonably believed that informing the owner or occupier may frustrate the purpose of the search (for example, by creating a risk that evidence may be destroyed).
- iv) If it is necessary to use force to gain access to the premises, such force must be reasonable and must not go beyond what is necessary.
- v) On gaining access, the executing officer should identify himself or herself to the owner or occupier as the officer in charge of the execution of the search warrant.
- vi) The executing officer and all accompanying officers and persons should enter the premises in a respectful and courteous manner.
- vii) Respect and care should be shown for the premises and property at all times during the search.
- viii) Persons present during the search should be treated with respect and courtesy at all times. Officers should be sensitive to the fact that the experience may be upsetting for the owner or occupier of the premises.
- ix) Premises should only be searched to the extent necessary and permitted by the warrant.
- x) Unnecessary damage to the premises or property contained within it should be avoided.
- xi) Where the premises being searched are commercial premises, officers should cause the least possible disruption to the organisation and running of the business.
- xii) Any items that are seized should be carefully packaged, clearly labelled, and securely stored.
- xiii) An inventory should be made of all items seized. A copy of this should be given to the owner or occupier upon completion of the search, or as soon as practicable afterwards. This requirement need not be complied with if the executing officer reasonably believes that giving a copy of an inventory to the owner or occupier might frustrate or threaten the current investigation or any other investigation.
- xiv) Material that may be claimed to be subject to privilege (such as legal privilege or litigation privilege) should not be examined during the execution. Where an assessment as to the privileged status of the material is required, or it is necessary to seize privileged material as it is mixed with other non-privileged material, proper procedure regarding the seizure of legal professional privilege should be complied with at all times.

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<sup>112</sup> *Ibid* at paragraph 5.124.

<sup>113</sup> See paragraph 5.26, above.



- xv) On leaving the premises, the executing officer should ensure that it is secure.
- xvi) Seized items should be returned to the owner or occupier as soon as possible, unless there is lawful reason for withholding them from the person.

**6.70 The Commission recommends that the Search Warrants Act should provide for a code of practice which should contain practical guidance concerning the main elements of the Search Warrants Act, including the procedural steps involved in the process; that the code of practice should be written in plain, intelligible language; and that it should be easily accessible to all persons, including that it should be made available on the internet. The Commission also recommends that breach of the code of practice should not of itself render any evidence obtained under a search warrant inadmissible.**



## CHAPTER 7      BENCH WARRANTS, COMMITTAL WARRANTS FOR UNPAID FINES AND RELATED PROCEDURE

### A      Bench Warrants and Committal Warrants for Unpaid Court Fines

#### (1)      Bench warrants

7.01 A bench warrant is a written command, handed down by a judge, ordering the arrest of an individual.<sup>1</sup> In *Callaghan v Governor of Mountjoy Prison*,<sup>2</sup> the High Court described it as “a mechanism for bringing a person to Court who is in breach of his obligation to be in court.” The power to issue a bench warrant is an inherent power of the courts, where suitable circumstances exist.<sup>3</sup>

7.02 The statutory provisions in respect of bench warrants are set out in primary legislation and in the *District Court Rules 1997*. The circumstances in which a bench warrant may be issued include:

- (a) failure of a witness to appear in Court in response to summons: section 13 of the *Petty Sessions (Ireland) Act 1851* and Order 21, Rule 1(5) of the 1997 Rules;
- (b) a witness is evading service of a summons to appear in court to give evidence: section 13 of the *Petty Sessions (Ireland) Act 1851* and Order 21, Rule 1(5) of the 1997 Rules;
- (c) a witness is unlikely to appear or is refusing to appear in court to give evidence: section 13 of the *Petty Sessions (Ireland) Act 1851* and Order 21, Rule 1(6) of the 1997 Rules;
- (d) failure of an accused to appear in court in response to a summons: section 11 of the *Petty Sessions (Ireland) Act 1851* and Order 22, Rule 1 of the 1997 Rules;
- (e) an accused is evading service of summons to appear in court or is about to abscond or has absconded: section 11 of the *Petty Sessions (Ireland) Act 1851* and Order 22, Rule 1 of the 1997 Rules;
- (f) failure of an accused to appear on an adjourned date where he or she has been serviced with notice after failing to appear on summoned date: section 22(5) of the *Courts Act 1991*;<sup>4</sup>
- (g) failure by a person charged with an offence and released on bail by a member of An Garda Síochána to appear before court as specified in the recognisance: Order 22, Rule 2 of the 1997 Rules; and
- (h) failure to appear by a person who has appeared before a court in connection with an offence and who has been remanded and admitted to bail to appear before a subsequent sitting of a court: Order 22, Rule 2 of the 1997 Rules.

7.03 The bench warrant forms corresponding to these provisions are also contained in the *District Court Rules 1997*.<sup>5</sup> In its 2010 *Report on Consolidation and Reform of the Courts*

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<sup>1</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 7.02. Although a bench warrant is a command to arrest an individual, a bench warrant is separate to and distinct of an arrest warrant. The procedure for arrest warrants is set out in Order 16 of the *District Court Rules 1997*.

<sup>2</sup> [2007] IEHC 294.

<sup>3</sup> See, for example, *The State (Attorney General) v Roe* [1951] IR 172; *The State (Attorney General) v Fawsitt* [1955] IR 39; *Stephens v Governor of Castlereagh Prison* High Court 20 September 2002.

<sup>4</sup> Section 22(5) of the *Courts Act 1991*, as amended by section 36 of the *Criminal Procedure Act 2010*.

Acts,<sup>6</sup> the Commission recommended that the statutory provisions concerning the role and essential jurisdiction of the courts, which are currently contained in 240 separate Acts, should be set out in a single Act.<sup>7</sup> Appendix A to the 2010 Report sets out a draft *Courts (Consolidation and Reform) Bill* which contains provisions in respect of summary criminal procedure.<sup>8</sup> Part 2, Chapter 13 of the draft Bill deals with court instruments and consolidates the provisions relating to the issue and execution of warrants, unexecuted warrants and protection of persons executing warrants.<sup>9</sup>

- 7.04 Where a person fails to appear the court may issue a bench warrant for their arrest, despite their absence, where it appears that the summons was duly served.<sup>10</sup> Alternatively, the court has the power to proceed in the absence of the accused where he or she is not present and is not represented to answer the complaint where, in the case of a summons, it appears that the summons was duly served.<sup>11</sup> The Court, therefore, has discretion as to whether to issue a bench warrant or proceed in the absence of the accused. The jurisdiction of the Court to issue a bench warrant instead of proceeding in the absence of the accused if it is not known for certain that the person received a summons is an important safeguard.<sup>12</sup> It avoids a person who may not have had notice of the proceedings being convicted and sentenced to imprisonment in their absence.
- 7.05 In the Consultation Paper, the Commission noted that 26,474 bench warrants were issued in Ireland in 2008.<sup>13</sup> The Commission also noted that, at any given time, there are between 20,000 to 30,000 unexecuted bench warrants.<sup>14</sup> An answer to a parliamentary question in December 2007 indicated that 36,000 bench warrants remained unexecuted at that time.<sup>15</sup> In December 2008, the Dáil was informed that there were 36,972 outstanding bench warrants.<sup>16</sup> In April 2009, figures provided in Dáil debates indicated that there were 30,000 unexecuted bench warrants.<sup>17</sup> In July 2012, the Dáil was informed that there were 31,134 unexecuted bench warrants.<sup>18</sup> The Garda Inspectorate *Report on Crime Investigation* provides figures for the number of warrants recorded on the PULSE system

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<sup>5</sup> For further discussion relating to the provisions and forms see *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 7.12-7.22.

<sup>6</sup> *Report on Consolidation and Reform of the Courts Acts* (LRC 97–2010) at paragraph 1.09.

<sup>7</sup> *Ibid* at paragraph 1.09.

<sup>8</sup> *Ibid* at pp.189–197.

<sup>9</sup> These provisions are based on the legislation referred to above.

<sup>10</sup> See Order 23, Rule 2 of the *District Court Rules 1997*.

<sup>11</sup> Order 23, Rule 2 of the *District Court Rules 1997*. For case law on the authority of the court to proceed in the absence of the accused see *Rock v Governor of St. Patrick's Institution* Supreme Court 22 March 1993 and *Callaghan v Governor of Mountjoy Prison* [2007] IEHC 294.

<sup>12</sup> See *Brennan v Windle* [2003] 3 IR 494.

<sup>13</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 7.04.

<sup>14</sup> *Ibid* at paragraph 7.88.

<sup>15</sup> Dáil Éireann Debates, Vol. 643, No.15, 8 December 2008.

<sup>16</sup> Dáil Éireann Debates, Vol. 671, No.2, 18 December 2008.

<sup>17</sup> Dáil Éireann Debates, Vol. 681, No.2, 29 April 2009.

<sup>18</sup> Dáil Éireann Debates, Vol. 773, No.1, 17 July 2012.

(Police Using Leading Systems Effectively) as of 1 January for the years 2012 to 2014. 31,645 were outstanding in 2012, 30,895 in 2013 and 31,166 in 2014.<sup>19</sup>

- 7.06 The Commission is aware that efforts are being made to reduce the number of unexecuted bench warrants. In July 2012 the Dáil was informed that an Inspector of An Garda Síochána in each Garda Division is responsible for managing the execution of warrants and that a working group was in operation to “identify, address and prevent difficulties in the warrant process.”<sup>20</sup> The Commission has also been advised that certain sittings of the District Court are devoted to cancelling unexecuted bench warrants that are impossible to execute or unlikely to be executed. For example, if a person in respect of whom the bench warrant was issued has died or if the warrant is very old and relates to a minor offence, the District Court may cancel the warrant. This assists in reducing the figures for unexecuted bench warrants.
- 7.07 The 2014 *Report of the Garda Síochána Inspectorate on Crime Investigation* notes that between 1 January 2012 and 1 January 2014, there was a 2% reduction in the number of outstanding warrants.<sup>21</sup> However, there were still 31,166 unexecuted bench warrants on 1 January 2014.<sup>22</sup> Although continuing efforts are being made to improve the area of law concerning bench warrants, the Commission remains of the view taken in the Consultation Paper that the current number of unexecuted bench warrants is unsatisfactory.
- 7.08 It has been repeatedly noted that “the figure for outstanding warrants recorded by PULSE at any given time reflects an accumulation of old warrants which has arisen over the years.”<sup>23</sup> For example, figures supplied in the *Crime Investigation Report* shows that 89% of the bench warrants executed in 2013 were new warrants issued in that year.<sup>24</sup> As noted in the *Report of the Garda Síochána on Crime Investigation*, “[w]arrants are issued on a daily basis and to be successful in reducing overall numbers, a concerted effort is required by a police service to execute more warrants than are being issued by courts.”<sup>25</sup> Following an examination of several cases of such historical warrants, the report of the Garda Inspectorate concludes that “very little action has been taken to execute these warrants.”<sup>26</sup> It may no longer be possible to prove many crimes to which the warrants relate. It recommends that “the Garda Síochána conducts a review of historical warrants to establish if the original case is still capable of proof<sup>27</sup>” and that a standard policy should be developed on when a warrant can be cancelled.
- 7.09 In the Consultation Paper, the Commission discussed a number of factors which contribute to the large number of issued and unexecuted bench warrants, including:
- delay and failure to execute bench warrants;
  - inefficient use of the Garda PULSE system;

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<sup>19</sup> Garda Inspectorate *Report on Crime Investigation* (2014), part 10 at 19. This figure reflects the number of warrants “on hand”, which is the number of warrants on PULSE awaiting action.

<sup>20</sup> Dáil Éireann Debates, Vol. 773, No. 1, 17 July 2012.

<sup>21</sup> Garda Inspectorate *Report on Crime Investigation* (2014), part 10 at 19. This figure reflects the number of warrants “on hand”, which is the number of warrants on PULSE awaiting action.

<sup>22</sup> *Ibid.*

<sup>23</sup> Dáil Éireann Debates, Vol. 773, No. 1, 17 July 2012; Vol. 784, No. 3, 28 November 2012; Vol. 792, No. 1, 12 February 2013.

<sup>24</sup> Garda Inspectorate *Report on Crime Investigation* (2014), Part 10 at 20.

<sup>25</sup> *Ibid* at 23.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

- difficulties in the summons serving process;
- inability of persons to understand the requirement to appear in court; and
- management and processing issues, such as difficulties accessing records on the Courts Service Case tracking System to identify a person to whom a bench warrant relates.

7.10 The 2014 *Report of the Garda Síochána Inspectorate on Crime Investigation*<sup>28</sup> reviews the entire crime investigation process used by An Garda Síochána. This includes an examination of the system of managing and executing warrants, including bench warrants and penal warrants (discussed later). The Report makes short term, medium term and long term recommendations, which are mainly of an operational nature, and recommends the establishment of an overarching criminal justice service group to oversee the implementation of the recommendations.<sup>29</sup> It also recommends the introduction of a Standard Operating Procedure for the management of warrants and the convening of a multi-agency working group to examine and consider changes to the processing of warrants.<sup>30</sup> The Commission understands that the legislature intends to take steps to implement the recommendations of the Garda Síochána Inspectorate.<sup>31</sup> This should alleviate much of the operational difficulty relating to the management and processing of warrants. In the wake of the 2014 Report, a Working Group has been established to implement its recommendations, including those concerning bench warrants. For this reason, the Commission, which supports those recommendations, considers that it is not necessary to make any further recommendations on this matter.

**7.11 The Commission supports the comprehensive recommendations made in connection with bench warrants in the 2014 *Report of the Garda Síochána Inspectorate on Crime Investigation*, and accordingly considers that it is not necessary to make any further recommendations on this matter.**

**(2) *Committal Warrants for Unpaid Court Fines***

7.12 A committal warrant is the mechanism used to imprison a person who has been sentenced to a term of imprisonment (including a default period of imprisonment) or remanded in custody.<sup>32</sup> There are a variety of circumstances in which a committal warrant may issue, for example, where:

- i) a court imposes a fine on a person which he or she does not pay by the due date (often referred to as “penal” warrants);<sup>33</sup>
- ii) a person is convicted of an offence and the sentence requires the person to carry out certain conditions within a timeframe and those conditions are not met;<sup>34</sup>
- iii) a court conditionally suspends a sentence of imprisonment and is satisfied upon application being made by the prosecutor that the accused has failed to comply with the conditions;<sup>35</sup>

<sup>28</sup> Garda Inspectorate *Report on Crime Investigation* (2014).

<sup>29</sup> *Ibid*, part 10 at 15 - 29.

<sup>30</sup> Garda Inspectorate *Report on Crime Investigation* (2014), part 10 at 29.

<sup>31</sup> Dáil Éireann Debates, 18 November 2014.

<sup>32</sup> Section 32(7) of the *Petty Sessions (Ireland) Act 1851*.

<sup>33</sup> Order 25, Rule 2(a) of the *District Court Rules 1997* (SI No.93 of 1997). The corresponding form is Form 25.5 or Form 25.6, Schedule B.

<sup>34</sup> Order 25, Rule 2(b) of the *District Court Rules 1997*. The corresponding form is Form 25.7, Schedule B.

- iv) a person is in contempt of court;<sup>36</sup> and
- v) a person, who has been found not guilty by reason of insanity, is committed to a designated centre.<sup>37</sup>

7.13 Order 26, Rule 9 of the *District Court Rules 1997* provides that, where a committal warrant is issued, the officer or member of the Gardaí or other person whose duty it is to convey a person to prison must deliver the warrant to the governor of the prison specified on the warrant.<sup>38</sup> If the person is already in the custody of the relevant prison governor, the warrant must be delivered or transmitted by post. The governor must provide a receipt for the warrant and detain the person who is the subject of the warrant for the period set out in the warrant.<sup>39</sup>

7.14 The Commission has received feedback highlighting the large number of committal warrants issued for failure to pay fines which have been imposed by courts by the due date. The *Irish Prison Services Annual Report 2013* notes that over half of committals to prison in 2013 were for unpaid court fines.<sup>40</sup> At any given time, a large number of committal warrants remain unexecuted. On 17 July 2012, the Dáil heard that out of a total of 124,209 unexecuted warrants, 89,583 were penal warrants (committal warrants issued for non-payment of court fines).<sup>41</sup> The 2014 *Report of the Garda Síochána Inspectorate on Crime Investigation*<sup>42</sup> provides figures for unexecuted penal warrants as of 1 January 2015 for the years 2012, 2013 and 2014. 89,259 penal warrants awaited action in 2012, 88,702 in 2013 and 88,613 in 2014.<sup>43</sup> Like the figures for unexecuted bench warrants, the figure for unexecuted committal warrants reflects an accumulation of warrants over the years.

7.15 Imprisonment for non-payment of fines raises a number of concerns. A Dáil Sub-Committee Report on Crime and Punishment described such concerns as follows:<sup>44</sup>

- the original offences did not merit imprisonment;
- the sanction impacts severely on persons without means;

<sup>35</sup> Order 25, Rule 3 of the *District Court Rules 1997*. The corresponding form is Form 25.8, Schedule B.

<sup>36</sup> Section 9 of the *Petty Sessions (Ireland) Act 1851*, section 6 of the *Summary Jurisdiction (Ireland) Amendment) Act 1871*, Order 25, Rule 5 of the *District Court Rules 1997*. The form prescribed for such a committal warrant is Form 25.9, Schedule B.

<sup>37</sup> Section 4(3)(b) of the *Criminal Law (Insanity) Act 2006* and Order 23A of the *District Court Rules 1997*, as inserted by the *District Court (Insanity) Rules 2007* (SI No.727 of 2007).

<sup>38</sup> Order 26, Rule 9 of the *District Court Rules 1997*.

<sup>39</sup> *Ibid.*

<sup>40</sup> See *Irish Prison Service Annual Report 2013* at 18 and 26.

<sup>41</sup> Dáil Éireann Debates, Vol. 773, No. 1, 17 July 2012.

<sup>42</sup> Garda Inspectorate *Report on Crime Investigation* (2014).

<sup>43</sup> Garda Inspectorate *Report on Crime Investigation* (2014), Part 10 at 19. This figure reflects the number of warrants “on hand”, which is the number of warrants on PULSE awaiting action.

<sup>44</sup> *Report of the Sub-Committee on Crime and Punishment of the Joint Committee on Justice, Equality, Defence and Women’s Rights on Alternatives to Fines and the Uses of Prison* (March 2000) at 3, cited in Nexus Research Co-Operative *Report to the Department of Justice, Equality and Law Reform on Imprisonment for Fine Default and Civil Debt* (2002) at 10. See also Joint Committee on Justice, Defence and Equality *Report on Penal Reform* (2013) and Department of Justice and Equality Working Group on Penal Policy *Strategic Review of Penal Policy* (2014) at 23, where the Review Group expresses concern at the high level of committals, given the cost and lack of proof that it is an effective means of aiding desistance from crime.

- the imprisonment of large numbers of fine defaulters, albeit for short periods, exacerbates an already chronic overcrowding at the committal prisons, especially Mountjoy Prison;
- the fines remains uncollected;
- there are considerable costs associated with incarceration.

- 7.16 The high number of persons committed to prison for non-payment of fines has been noted. In 2014, there were 8,965 committals for failure to pay fines.<sup>45</sup> The committal of persons to prison for failure to pay court fines is inefficient and costly. The Garda Síochána Inspectorate 2014 *Report on Crime Investigation* provides case studies which “show a small fraction of the daily waste of resources across the criminal justice system, including Garda time and money in dealing with offenders who do not pay their fines”<sup>46</sup> and gives examples of cases where the cost of executing warrants greatly outweighed the value of the original fines.<sup>47</sup>
- 7.17 A Working Group on Penal Policy that was established by the Department of Justice and Equality to carry out a strategic review of penal policy notes that persons who default on payment of court fines do not spend a significant amount of time in prison.<sup>48</sup> However, it notes that the processing of such persons “is an unnecessary burden on the administration of prisons and undermines the credibility of the criminal justice system.”<sup>49</sup> The Group was more concerned with “the practice of applying, by default, the most severe of sanctions – imprisonment – for what otherwise might be generally regarded as a relatively minor offence”<sup>50</sup> and recommends the early and full implementation of the *Fines (Payment and Recovery) Act 2014*.<sup>51</sup>
- 7.18 The *Fines Act 2010* and *Fines (Payment and Recovery) Act 2014* should, when commenced, assist in reducing the number of committal warrants issued for non-payment of court fines. Under the *Fines Act 2010*, a court must take into account the financial circumstances of a person before imposing a fine “to ensure as far as practicable that, where a court imposes a fine on a person, the effect of the fine on that person or his or her dependants is not significantly abated or made more severe by reason of his or her financial circumstances.”<sup>52</sup> The *Fines (Payment and Recovery) Act 2014* contains a similar provision regarding the obligation of the court to take into account the capacity of a person to pay a fine. Part 3 of the 2010 Act provides for alternative options for payment and enforcement of court fines, including payment by instalments<sup>53</sup> and appointment of a

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<sup>45</sup> Dáil Éireann Debates, Vol. 870, No. 4, 6 March 2015.

<sup>46</sup> Garda Inspectorate *Report on Crime Investigation* (2014), part 10 at 27.

<sup>47</sup> *Ibid.*

<sup>48</sup> The Department of Justice and Equality Working Group on Penal Policy *Strategic Review of Penal Policy* (2014) notes at 23 that although the enactment of the *Fines (Payment and Recovery) Act 2014* should “remove an unnecessary administrative burden in reducing committals to prison, it will not have a significant impact on the daily prison numbers of persons in prison on any given day for the non-payment of a fine is low.” For example, according to the *Irish Prison Service Annual Report 2013* at 18, only 8 of the 4,099 persons in custody on 30 November 2013 were committed for non-payment of fines.

<sup>49</sup> Department of Justice and Equality Working Group on Penal Policy *Strategic Review of Penal Policy* (July 2014) at 46.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> Section 14 of the *Fines Act 2010*.

<sup>53</sup> Section 15 of the *Fines Act 2010*.



receiver or community service in default of payment of a fine.<sup>54</sup> However, these provisions in the 2010 Act have not commenced and are due to be replaced by provisions of the *Fines (Payment and Recovery) Act 2014*.

- 7.19 The 2014 Act provides for the payment of fines by instalments.<sup>55</sup> It provides that when a person fails to pay a fine by the due date, the court must either make a recovery order (if the fine exceeds €500), an attachment order or a community service order.<sup>56</sup> A notice in writing must be served on the person who has been fined requiring him or her to appear before the court on a specified date and time and provide the court with a statement in writing of his or her financial circumstances.<sup>57</sup> If a person fails to appear in court in response to such a notice, the court may either issue a warrant for the arrest of the person or if the court considers it appropriate, cause a further notice of writing specifying a new court date and time to be served on the person.<sup>58</sup> The Court must first, after considering the financial statement, consider making an attachment order. If the court is of the view that an attachment order would be inappropriate, it must consider making a recovery order or community service order.<sup>59</sup> It is only after forming the view that an attachment order, recovery order or community service order would be inappropriate that the court may make an order committing the person to prison.<sup>60</sup> The 2014 Act provides for the deduction of the amount of the fine from the pay of a person who is employed.<sup>61</sup> The provision for attachment orders, community service and recovery orders when a person defaults on a court imposed fine should result in the issuing of fewer committal warrants as a court will be able to consider these options prior to committing a person to prison.
- 7.20 However, it has been suggested to the Commission that, as the majority of issued, cancelled and re-issued warrants relate to offences under the *Road Traffic Acts*, other options that would specifically address non-payment of fines in respect of such offences ought to be considered.
- 7.21 Feedback also suggests that the alternative means of paying and enforcing court fines provided for in the *Fines (Payment and Recovery) Act 2014* may not fully alleviate difficulties associated with persons who repeatedly and purposefully default in payment of fines. Such “strategic” defaulters, it has been suggested, may have the means to pay court fines but may refuse to do so and may not be deterred by the possibility of being committed to prison.

## **B Road Traffic Offences and Warrants**

- 7.22 As noted above, the majority of cases that come before the District Court are prosecutions for cases under the *Road Traffic Acts*. The *Courts Service Annual Report 2012* indicates that, in 2012, almost 60% of summary matters before the District Court related to road traffic offences.<sup>62</sup>

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<sup>54</sup> Sections 16 and 18 of the *Fines Act 2010*.

<sup>55</sup> Section 6 of the *Fines (Payment and Recovery) Act 2014*.

<sup>56</sup> Section 7 of the *Fines (Payment and Recovery) Act 2014*.

<sup>57</sup> Section 7(4) of the *Fines (Payment and Recovery) Act 2014*.

<sup>58</sup> Section 7(7) of the *Fines (Payment and Recovery) Act 2014*.

<sup>59</sup> Section 7(5)(a) of the *Fines (Payment and Recovery) Act 2014*.

<sup>60</sup> Section 7(5)(b) of the *Fines (Payment and Recovery) Act 2014*.

<sup>61</sup> Section 14 of the *Fines (Payment and Recovery) Act 2014*.

<sup>62</sup> *Courts Service Annual Report 2012* at 21, 24 and 37, available at courts.ie.

- 7.23 A large proportion of these prosecutions relate to offences that can be dealt with under the Fixed Charge Notice system. This system was introduced to allow for the processing of road traffic offences which are sanctioned by fixed charges and penalty points. A significant advantage of this procedure is that fixed charge offences can be dealt with without recourse to the courts system. This reduces the number of such cases before the courts.
- 7.24 The 2012 *Courts Service Annual Report* provides a breakdown of the orders made in the District Court in respect of specific road traffic offences. This shows that in respect of the 147,371 defendants who had orders made against them for road traffic offences, 58,416 were prosecuted for penalty point offences, most of which would have originated by fixed charge notice.<sup>63</sup> An answer to a Parliamentary Question from April 2014 indicated that, in 2013, 47,967 people were summoned to court following failure to pay a fixed charge notice within 56 days of receiving the notice.<sup>64</sup> This results in the imposition of court fines in many of these cases. In 2012, 19,060 out of the 48,050 fines that were imposed for road traffic offences were for penalty point offences.<sup>65</sup>
- 7.25 Consequently, a large number of persons who are imprisoned on foot of committal warrants for failure to pay fines have been convicted of road traffic offences. On 17 July 2012 the Dáil heard that the majority of unexecuted warrants are penal warrants (committal warrants issued for non-payment of fines) issued for non-payment of court fines, 93% of which related to road traffic, public order and theft offences.<sup>66</sup> The unsuitability of imprisonment for such offenders has long been recognised. In that regard, the Commission has examined areas that could be reformed with a view to reducing the number of committal warrants issued for non-payment of fines in relation to road traffic offences.
- (1) *Payment of Fixed Charge Notice upon receipt of summons***
- 7.26 Section 44 of the *Road Traffic Act 2010*, which has not been commenced at the time of writing, provides for the payment of a fixed charge upon service of a summons. It provides that a person may pay a fixed charge of an amount stated on the notice served with the summons in a specified manner no later than 7 days before the date that the charge is listed for hearing in court. If the person pays the fixed charge in the manner specified within the timeframe, the proceedings will be discontinued and the person will not be required to attend court on the specified date. Such a fixed charge notice may be served by the Courts Service.<sup>67</sup> Section 44(3) provides that the amount of the new fixed charge notice should be 100% greater than the original fixed charge notice that was served on the person. Evidence by the person to whom the new fixed charge notice is addressed that he or she was not served with the fixed charge notice is not a defence to the alleged offence.<sup>68</sup>
- 7.27 The 2014 *Report of the Garda Síochána Inspectorate on the Fixed Charge Processing System* reviews the system and identifies technical and administrative issues that it considers need to be resolved.<sup>69</sup> The report recommends the commencement of section 44 of the 2010 Act. It notes that many people attempt to pay the fixed charge notice upon

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<sup>63</sup> *Ibid* at 37.

<sup>64</sup> Dáil Éireann Debates, 10 April 2014.

<sup>65</sup> *Courts Service Annual Report 2012* at 37.

<sup>66</sup> Dáil Éireann Debates. Vol. 773, No. 1, 17 July 2012.

<sup>67</sup> Section 44(2) of the *Road Traffic Act 2010*.

<sup>68</sup> Section 44(7) of the *Road Traffic Act 2010*.

<sup>69</sup> Garda Inspectorate *Report on The Fixed Charge Processing System: A 21<sup>st</sup> Century Strategy* (2014) at 11.

receipt of the summons but the present system does not permit them to do so.<sup>70</sup> The Criminal Justice (Fixed Charge Processing System) Working Group has been established to oversee the implementation of the recommendations contained in the report of the Garda Síochána Inspectorate.<sup>71</sup> Legislation providing for payment of the fixed charge notice on receipt of the summons would allow such cases to be disposed of at an earlier stage without having to bring such matters to the court. If such matters could be dealt with before reaching the court system, courts would not need to impose fines in such cases and this would reduce the numbers of committal warrants issued for failure to pay court imposed fines. The Commission is of the view that, given the high number of cases that come before the District Court are prosecutions for road traffic offences that originate by way of fixed charge notice, the commencement of section 44 of the *Road Traffic Act 2010* would greatly assist in reducing the number of bench warrants and committal warrants issued for such offences. Such a reform would also result in a considerable reduction of court lists in the District Court, making case management more efficient.<sup>72</sup>

7.28 The Commission notes that the introduction of such a system depends on the appropriate ICT infrastructure being put in place.

**7.29 The Commission recommends that section 44 of the *Road Traffic Act 2010*, which provides for payment of a fixed charge notice upon receipt of a summons, should be commenced.**

**(2) *Postal response to summons***

7.30 In the Consultation Paper, the Commission invited submissions as to whether a system of postal response to summonses should be introduced in respect of minor offences with a view to enabling District Courts to deal with cases in a quick and efficient manner and assist in reducing the number of bench warrants issued.<sup>73</sup> A postal response system would permit summary only offences to be dealt with without the need for a defendant who wishes to plead guilty to appear in court. The Consultation Paper noted that such a system could help to reduce the need to issue a bench warrant where a person has failed to appear for a hearing in respect of a minor offence.<sup>74</sup>

**(a) *Postal response procedure in Britain***

7.31 In the Consultation Paper, the Commission observed that a postal procedure is in place in England and Wales under section 12 of the *Magistrates Courts Act 1980*, enabling persons summoned to appear before a Magistrates Court on a summary matter to respond by post where the conditions of the section are satisfied.<sup>75</sup> Where a summons (relating to a summary matter) is issued and sent to a person, it is to be accompanied by:

- (1) a notice explaining the effect of section 12;

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<sup>70</sup> Garda Inspectorate *Report on The Fixed Charge Processing System: A 21<sup>st</sup> Century Strategy* (2014) at 48.

<sup>71</sup> Dáil Éireann Debates, 2 April 2014.

<sup>72</sup> Garda Inspectorate *Report on The Fixed Charge Processing System: A 21<sup>st</sup> Century Strategy* (2014) notes that other jurisdictions have taken minor road traffic offences out of the criminal justice system. It recommends that a Criminal Justice Working Group should review current fixed charge offences and consider whether certain offences should be adjudicated upon in designated administrative courts rather than in the District Court. This view was reiterated in the Garda Inspectorate *Report on Crime Investigation* (2014), Part 10 at 26.

<sup>73</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 7.49.

<sup>74</sup> *Ibid.*

<sup>75</sup> Archbold *Magistrates Courts Criminal Practice 2014* 10<sup>th</sup> ed (Thomson, Sweet and Maxwell ) at 466–468.

(2) a statement of the facts which will be put before the court at the hearing in respect of the offence, if the accused pleads guilty without appearing,<sup>76</sup> or a copy of written statement(s) complying with subsections (2)(a) and (b) and (3) of section 9 of the *Criminal Justice Act 1967* if such have been submitted to the court;<sup>77</sup> and

(3) if any information relating to the accused will or may be put before the court or on behalf of the prosecutor, a notice or description of that information.<sup>78</sup>

7.32 On receiving these documents, the accused, or a legal representative acting on his or her behalf, may inform the court in writing that he or she wishes to plead guilty to the charge without appearing before the court.<sup>79</sup> The court brings this notification to the attention of the prosecutor.<sup>80</sup> At the time and place appointed for the hearing, the court may proceed to hear and dispose of the case in the absence of the accused (whether or not the prosecutor is also absent) as if both parties had appeared and the accused had pleaded guilty.<sup>81</sup> Before the court accepts the guilty plea and convicts the accused in his or her absence, the statement of facts and/or (unless otherwise directed by the court) the written statement, which has been sent to the accused with the summons, is read out by the clerk, as well as the notification of the guilty plea sent by the accused.<sup>82</sup> The accused may also make a submission to the court on a matter which may be considered as a mitigating factor. This submission is also read out by the clerk prior to conviction.<sup>83</sup>

7.33 Where the court proceeds in the absence of the accused, having received notification of a guilty plea, the prosecution is not permitted to: (i) offer any further facts relating to the

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<sup>76</sup> Sprack has commented that the statement of facts is necessary because the accused may admit that he committed the offence alleged in the summons “but be unwilling to forgo attending court unless he knows what the prosecution will say about the manner in which he committed the offence”. Sprack *A Practical Approach to Criminal Procedure* 12<sup>th</sup> ed (Oxford University Press 2008) at 169.

<sup>77</sup> Section 9(1) of the *Criminal Justice Act 1967* (England and Wales) provides that in any criminal proceedings, other than committal proceedings, a written statement by any person shall, if the required conditions are satisfied, be admissible as evidence to the like extent as oral evidence to the like effect by that person. The conditions relevant to section 12 of the *Magistrates Courts Act 1980* are set out in sections 9(2)(a), 9(2)(b) and 9(3). Subsection 9(2)(a) provides that the statement must purport to be signed by the person who made it. Subsection 9(2)(b) provides that the statement must contain a declaration by that person to the effect that it is true to the best of his knowledge and belief, and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or did not believe to be true. Section 9(3) of the 1967 Act provides that where a written statement is tendered in evidence under the section: (a) if the person making it is under 21 years of age it shall state his age; (b) if it is made by a person who cannot read it, it shall be read to him before he signs it and shall be accompanied by a declaration by the person who read the statement to the effect that it was so read; and (c) if it refers to any other document as an exhibit, a copy of that document, or such information as may be necessary in order to enable the party on whom it is served to inspect that document or a copy thereof, shall be provided.

<sup>78</sup> Section 12(3) of the *Magistrates Courts Act 1980*.

<sup>79</sup> Section 12(4) of the *Magistrates Courts Act 1980*.

<sup>80</sup> Section 12(4)(a) of the *Magistrates Courts Act 1980*.

<sup>81</sup> Section 12(5) of the *Magistrates Courts Act 1980*.

<sup>82</sup> Section 12(7) of the *Magistrates Courts Act 1980*.

<sup>83</sup> Section 12(7)(d) of the *Magistrates Courts Act 1980*. Sprack explains that where this submission of mitigating circumstances alleges facts which, if accepted, would amount to a defence to the charge, “it would clearly be wrong to proceed on the guilty plea. Instead, the court should adjourn the case”. Sprack *A Practical Approach to Criminal Procedure* 12<sup>th</sup> ed (Oxford University Press 2008) at 169. Thus, the submission of the accused must be within the scope of the statement of the offence to which the accused has pleaded guilty.

offence charged; or (ii) give any other information relating to the accused.<sup>84</sup> Thus, there can be no change made to the information which the accused has been notified of and has chosen to plead guilty to. However, the court has a residual discretion to decide whether the case is suitable to be dealt with in the absence of the accused.<sup>85</sup> Where a court decides not to proceed, the matter can be adjourned and any such adjourned hearing will proceed as though the accused had not pleaded guilty by postal notification.<sup>86</sup> The accused, or somebody acting on his or her behalf, can, at any time before the date of the hearing, inform the court in writing that he or she wishes to withdraw his or her guilty plea.<sup>87</sup> The court will inform the prosecutor of this withdrawal and proceed as though the guilty plea was never received.<sup>88</sup>

**(b) Trial by single justice on the papers in England and Wales**

7.34 The *Criminal Justice and Courts Act 2015* introduces a new single justice procedure by the insertion of sections 16A to 16E in the *Magistrates Courts Act 1980*. The implementation of such a procedure means that summary only offences that are not punishable by imprisonment, such as television licence evasion and speeding, can be dealt with by a single magistrate (rather than three) and there will be no obligation for the case to be heard in open court.<sup>89</sup> Initiation will be by way of a single justice notice by the prosecutor.

7.35 Under the single justice notice procedure a summary only offence, which is not punishable by imprisonment, can be dealt with by a single magistrate where an adult accused has been served with a written charge, single justice procedure notice and any other documents prescribed by the Criminal Procedure Rules.<sup>90</sup> The accused must not have sent a written notification stating a desire to plead not guilty or not to be tried in accordance with the procedure.<sup>91</sup> The court will be empowered to try the charge by relying only on the written charge, single justice procedure notice, any documents prescribed by the Criminal Procedure Rules and any written submission that the accused makes with a view to mitigating the sentence.<sup>92</sup> The court may not try or continue to try the charge under the procedure where it decides that it is inappropriate to convict an accused in that manner or where the accused gives written notice that he or she does not wish to be tried under the procedure.<sup>93</sup> In these circumstances, the court must adjourn the trial and issue a summons. The explanatory memorandum notes that under the single justice notice procedure, “the case [may] be dealt with in the absence of the parties and with no obligation to sit in open court, providing greater flexibility as to the date and time

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<sup>84</sup> Section 12(8) of the *Magistrates Courts Act 1980*.

<sup>85</sup> Archbold *Magistrates Courts Criminal Practice 2014* 10th ed (Thomson, Sweet and Maxwell) at 469.

<sup>86</sup> Section 12(9) of the *Magistrates Courts Act 1980*.

<sup>87</sup> Section 12(6) of the *Magistrates Courts Act 1980*.

<sup>88</sup> Section 12(6)(b) of the *Magistrates Courts Act 1980*.

<sup>89</sup> See Explanatory Notes accompanying the *Criminal Justice and Courts Bill 2014-2015* at 38. Available at <http://services.parliament.uk/bills/2014-15/criminaljusticeandcourts/documents.html>.

<sup>90</sup> Section 16A of the *Magistrates Courts Act 1980*, as inserted by section 48(3) of the *Criminal Justice and Courts Act 2015*.

<sup>91</sup> Section 16A of the *Magistrates Courts Act 1980*, as inserted by section 48(3) of the *Criminal Justice and Courts Act 2015*.

<sup>92</sup> *Ibid.*

<sup>93</sup> Section 16B of the *Magistrates Courts Act 1980*, as inserted by section 48(3) of the *Criminal Justice and Courts Act 2015*.

<sup>93</sup> *Ibid.*

when the cases can be heard.”<sup>94</sup> The 2015 Act amended the *Magistrates Courts Act 1980* so that section 12, discussed above, which provides for a postal response to summonses, does not apply when the single justice procedure is being used.<sup>95</sup> It will be possible to use the procedure for summary only offences which do not carry a custodial sentence, such as speeding and television licence evasion.<sup>96</sup>

### **(3) Discussion**

7.36 In the Consultation Paper, the Commission invited submissions as to whether a postal response system should be implemented in Ireland. The Commission discussed the benefits of such a system.<sup>97</sup> It would allow the District Court to deal with minor offences in an efficient manner. It would reduce the number of people attending at a District Court, thereby making the organisation of the relevant courtrooms more manageable. Regarding bench warrants, a postal response system would assist in reducing the number of bench warrants issued for cases of non-appearance in respect of summary offences. In some cases, failure to appear is not the result of wilful refusal, but rather because in the circumstances it is not possible for the person to attend. This could be as a result of a number of things, including family or work commitments, the unavailability of transport, or because the particular District Court is quite a distance from where the person lives. In such cases a postal response system would enable the person to inform the court that he or she has: (i) received the summons; (ii) is willing to plead guilty to the charge; and (iii) is unable to attend at the hearing, but is satisfied for the court to continue in his or her absence. This in turn would have the effect of informing the court that the summons has been received and that it should proceed with the matter rather than issue a bench warrant to secure the attendance of the person.

7.37 During the consultation period the Commission received positive responses to the suggestion that a postal response system should be implemented.<sup>98</sup> It was generally agreed that the approach would be useful and efficient, and would help to reduce the number of bench warrants issued. Furthermore, such a system would not be onerous or costly to implement. The Commission therefore recommends that a postal response system to summonses, in respect of summary matters, should be implemented in Ireland.

**7.38 The Commission recommends that legislation should provide for a postal response system to summonses in respect of summary only offences.**

### **(4) Registration of fines on National Vehicle Driver File**

7.39 The Commission is of the view that, as a high proportion of persons imprisoned on foot of committal warrants for failure to pay fines are convicted of road traffic offences, consideration should be given to the introduction of additional means of addressing non-payment of fines for road traffic offences. The Report of the Garda Inspectorate recommends that the Criminal Justice Working Group should consider alternative measures for collecting unpaid court fines.<sup>99</sup> One measure that it suggests is the collection of unpaid fines at the time of renewal of motor tax, vehicle registration or driving

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<sup>94</sup> Explanatory Notes accompanying the *Criminal Justice and Courts Bill 2014-2015* at 39.

<sup>95</sup> Section 11(8) of the *Magistrates Courts Act 1980*, as inserted by section 48 of the *Criminal Justice and Courts Act 2015*.

<sup>96</sup> Explanatory Notes accompanying the *Criminal Justice and Courts Bill 2014-2015* at 39.

<sup>97</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 7.49.

<sup>98</sup> It is worth noting that there were some concerns that such an approach may interfere with a person's constitutional right to a fair hearing under Article 38.1 of the Constitution. However, such concerns could be addressed by providing for the entitlement of persons to attend court for the hearing if they so wish.

<sup>99</sup> Garda Inspectorate *Report on The Fixed Charge Processing System: A 21<sup>st</sup> Century Strategy* (2014) at 28.

licences.<sup>100</sup> The 2000 *Report of the Comptroller and Auditor General on the Collection of Fines* also suggests that registration of unpaid fines could assist in increasing the level of payment of fines, and therefore reduce the number of persons being committed to prison for default of payment.<sup>101</sup> A 2014 *Report to the Department of Public Expenditure and Reform on Debt Management Review* recommends that, in due course, a central debt management unit should be established to manage moneys owed to all state bodies.<sup>102</sup> The Report suggests that it should be possible to attach an unpaid court fine to an asset or other state licence renewal, such as motor tax, driver licence or NCT.<sup>103</sup> As noted at paragraph 7.18, the *Fines (Payment and Recovery) Act 2014*, when commenced, will provide alternative methods of enforcement of court fines. However, considering the large number of committals that arise in the context of road traffic offences, it would be useful to consider a means of enforcement that would be relevant and particular to such offences.

- 7.40 Other jurisdictions use measures of enforcement that restrict the use of vehicles, such as registration of fines against vehicles, clamping of vehicles and disqualification of persons who default in payment to enforce court fines. Many other jurisdictions have designated responsibility for the enforcement and collection of unpaid court fines to administrative agencies. In New South Wales, the Commissioner of Fines Administration may, in certain circumstances, hand over the responsibility for enforcement of a fine to the Roads and Maritime Services, which is the government agency responsible for vehicle registration and licensing of drivers. Under the *Fines Act 1996*, the Roads and Maritime Services may, where a person who has not paid a fine as required by a notice of a fine enforcement order, and has: (1) not paid a fine by an extended due date; or (2) not paid a fine by instalments after being allowed to do so, suspend or cancel the driving licence of the person.<sup>104</sup> The Roads and Maritime Services may not use this method of enforcement where the convicted person against whom the fine was imposed is under 18 or where the offence in question is not a road traffic offence.<sup>105</sup> Under section 66 of the 1996 Act, the Roads and Maritime Services must suspend the licence for the balance of its validity period. If the Commissioner of Fines Administration grants an extension of time for payment or allows payment by instalments and the person who has defaulted fails to comply within 6 months, the Roads and Maritime Services must, if the Commissioner so directs, cancel the licence.<sup>106</sup> Section 67 of the 1996 Act provides for the cancellation of vehicle registration where the fine defaulter does not have a valid licence.<sup>107</sup> In the case of a fine defaulter whose licence has been cancelled or suspended or vehicle registration cancelled, the Roads and Maritime Service must refuse to take certain courses of action, including: (a) issue or renew the driver's licence of the person who has defaulted; (b) register a vehicle in the name of the fine defaulter or renew his or her registration; and (c) transfer the registration of the vehicle to another person.

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<sup>100</sup> *Ibid.*

<sup>101</sup> Comptroller and Auditor General *Report on Value for Money Examination: Collection of Fines* (2000). Available at <http://audgen.irlgov.ie/documents/vfmreports/CollectionofFines.pdf>.

<sup>102</sup> *Report to the Department of Public Expenditure and Reform on Debt Management Review* (BearingPoint Ireland 2014).

<sup>103</sup> *Report to the Department of Public Expenditure and Reform on Debt Management Review* (BearingPoint Ireland 2014) at 46.

<sup>104</sup> Division 3, section 65(1) of the *Fines Act 1996*.

<sup>105</sup> Division 3, section 65(3) of the *Fines Act 1996*.

<sup>106</sup> Division 3, section 66(2) of the *Fines Act 1996*.

<sup>107</sup> Division 3, section 67(1) of the *Fines Act 1996*.

- 7.41 In South Australia, section 70M of the *Criminal Law (Sentencing) Act 1988* (“the 1988 Act”) provides that a Fines Enforcement Officer may suspend the driving licence of a person who has defaulted in payment of a fine. The suspension may be cancelled if the defaulter pays the fine in full.<sup>108</sup> If the Fines Enforcement Officer suspends the driver’s licence, they must notify the Registrar of Motor Vehicles of the suspension.<sup>109</sup> The Fines Enforcement and Recovery Officer may, by written determination, impose a prohibition on the debtor transacting any business with the Registrar of Motor Vehicles.<sup>110</sup> The 1988 Act also provides for the clamping or impounding of any vehicle that the defaulter owns or is accustomed to drive and the disposal of uncollected vehicles by sale or other means.<sup>111</sup>
- 7.42 In England and Wales, the Magistrates Court was, prior to the *Courts Act 2003*, responsible for the enforcement of court fines. An administrative fine recovery system was introduced under the *Courts Act 2003*, which is supplemented by the *Fines Collections Regulations 2006*. A court must make a collection order before exercising its powers of enforcement, which results in the transfer of the fine to a fines officer. The fines officer has the power to collect the fine by issuing a warrant for distress, deduction of the fine from benefits, attachments of earnings orders and clamping of the vehicle belonging to the person who has defaulted.<sup>112</sup> The fines officer may also refer a case back to the Magistrates Court, which can impose a range of sanctions.<sup>113</sup> A magistrate may, instead of issuing a committal warrant, disqualify a person from driving for up to 12 months.<sup>114</sup> The disqualification order ceases to have effect if the fine is paid.<sup>115</sup> If part of the fine is paid, the period of disqualification is reduced in proportion to the amount of the fine paid.<sup>116</sup> In respect of clamping orders, legislation provides for the clamping of a vehicle registered to the person who has defaulted with a view to selling the vehicle to discharge the fine.<sup>117</sup> An order to sell the clamped vehicle can only be made by a court.<sup>118</sup>
- 7.43 The Commission has considered whether, as an alternative means of enforcement of unpaid court fines, legislation should provide for the placing of restrictions on the vehicle of the person who has defaulted in fine payment. One option would be for legislation to empower a court to direct the Department of Transport, Tourism and Sport or the Department of Environment, Community and Local Government to refrain from taking certain courses of action in respect of a vehicle of a person who has failed to pay a fine imposed by the court. Such legislation could provide that a vehicle that is registered to a person who has defaulted in payment of a fine cannot be taxed or the tax renewed until the fine is paid in full. It could also provide that change of vehicle ownership cannot take

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<sup>108</sup> Section 70M of the *Criminal Law (Sentencing) Act 1988*.

<sup>109</sup> Section 70M of the *Criminal Law (Sentencing) Act 1988*.

<sup>110</sup> Section 70N of the *Criminal Law (Sentencing) Act 1988*.

<sup>111</sup> Section 70O of the *Criminal Law (Sentencing) Act 1988*.

<sup>112</sup> Schedule 5, part 4, section 12 to the *Courts Act 2003*.

<sup>113</sup> See generally *Halsbury’s Laws of England*, Vol. 71, 5<sup>th</sup> ed (2013), at paragraphs 667-692, for a discussion of such options, which include: instalments, Money Payment Supervision Orders, deduction from benefits, attachment of earnings order, distress warrants, referrals for enforcement by the High Court or County Court, unpaid work or curfew, driving disqualification, sale of clamped vehicles, detention in a police station, distress (or control) warrant and warrant of commitment.

<sup>114</sup> Section 81 of the *Magistrates Courts Act 1980*.

<sup>115</sup> Section 40 of the *Crime (Sentences) Act 1997*.

<sup>116</sup> *Ibid.*

<sup>117</sup> Schedule 5, part 9, section 38 of the *Courts Act 2003* and Part 4 of the *Fines Collection Regulations 2006*.

<sup>118</sup> Schedule 5, part 9, section 40 to the *Courts Act 2003*.



place until the fine is paid. Such a measure would apply where the unpaid fine relates to an offence under the Road Traffic Acts and could be implemented by an amendment to the *Road Traffic Acts*.

- 7.44 An advantage of such a measure is that it would be an effective means of encouraging persons who have been convicted of offences under the *Road Traffic Acts* to pay a fine. As the majority of cases heard in the District Court relate to offences under the *Road Traffic Acts*, many persons who receive fines are the registered owners of vehicles. The possibility of being prohibited from driving or selling a vehicle as a result of a prohibition on renewing motor tax or change of ownership would encourage persons to pay their fines. However, the Commission is aware that difficulties may arise where the vehicle is unregistered, making it impossible to register a fine against it on the National Vehicle Driver File. In addition, a number of persons convicted of such offences may not be the registered owner of a vehicle or may not have had a driving licence, tax or insurance to begin with. There is also a danger that providing for the registration of unpaid fines against a file might result in some people wilfully refusing to register their vehicle to avoid an unpaid court fine later being recorded against it.
- 7.45 Notwithstanding that it may not be possible to register an unpaid fine against a vehicle on the National Vehicle Driver File in all cases, the Commission is of the view that such an approach would be an effective way of enforcing unpaid court fines in the context of offences under the *Road Traffic Acts*. It would provide another alternative approach to the issuing of a committal warrant in such cases.

**7.46 The Commission recommends that legislation should provide that, where a court imposes a fine on a person who has been convicted of an offence under the *Road Traffic Acts* and the person does not pay the fine by the due date, it may direct the Department of Transport Tourism and Sport or Department of the Environment, Community and Local Government to refrain from processing motor tax applications and changes in vehicle ownership in respect of a vehicle that is registered in the name of a person against whom the fine was imposed.**

### **C Deduction of Unpaid Fines at Source from Social Welfare Payments**

- 7.47 It was brought to the attention of the Commission that, although the *Fines (Payment and Recovery) Act 2014* provides for the making of attachment orders in respect of persons who have not paid a court fine and are in employment or receiving an occupational pension, there is no equivalent provision for deductions to be made from social welfare payments. The Commission has considered whether legislation ought to provide for such a measure. During the Parliamentary debates on the *Fines (Payment and Recovery) Bill 2014*, some members of the Houses of the Oireachtas suggested that the Act should provide for unpaid court fines to be deducted from social welfare payments.<sup>119</sup> It was suggested in Dáil Debates that such an approach was “not a valid option due to the cost of administration and because social welfare rules mean that only approximately €2 per week can be deducted”<sup>120</sup> from a person’s social welfare payment.
- 7.48 The 2000 Comptroller and Auditor General *Report on Value for Money Examination of the Collection of Fines* explored the effectiveness of the fines system in ensuring that financial penalties are imposed and collected, and the management of the system by An Garda Síochána and the Courts Service. The Report noted that many fines imposed by the

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<sup>119</sup> See Dáil Éireann Debates, 25 and 26 September 2013, and Seanad Éireann Debates, 26 February 2014, 1 April 2014, and 8 April 2014.

<sup>120</sup> Dáil Éireann Debates, 26 September 2013.

District Court are not collected, “resulting in a considerable loss of fines revenue”<sup>121</sup> and commented that in Dublin only 55% of fines imposed by a court are paid.<sup>122</sup> It also highlighted the long delays in issuing and executing warrants for the arrest of people who default on payment of fines.<sup>123</sup> The Report put forward other options that could be used to enforce court fines without having to use the warrant and imprisonment procedure. The proposed options included: (1) the payment of fines by instalment, attachment of earnings; (2) deduction at source of social welfare benefits; (3) seizure and sale of goods and registration of a fine against a vehicle, so that outstanding fines can be collected when the vehicle is re-taxed or changes ownership. As noted above, the *Fines (Payment and Recovery) Act 2014* provides for all of these options apart from the deduction at source from social welfare payments and registration of a fine against a vehicle.

- 7.49 The difficulties associated with attaching unpaid fines to social welfare payments were highlighted in the 2002 Nexus Research Co-operative *Report to the Department of Justice, Equality and Law Reform on Imprisonment for Fine Default and Civil Debt*. The Report was commissioned by the Department of Justice, Equality and Law Reform to assist in the formulation of legislation respect of the proposals concerning the enforcement of fines. The purpose of the 2002 Report was “to gather qualitative information in relation to those persons who find themselves committed to prison for non-payment of fines and civil debt.”<sup>124</sup> Interviews were conducted with offenders who had been committed to prison for non-payment of fines. The study found that the majority of persons committed to prison for non-payment of court fines or civil debt are male, many of whom are unemployed or in “unskilled occupation.”<sup>125</sup> The Report noted that two-thirds of persons committed to prison for defaulting in fine payment had been convicted of road traffic offences.<sup>126</sup> Over 50% of the fines that had been imposed were for below £300.<sup>127</sup> In addition, almost half of those committed to prison were imprisoned for less than 10 days and 75% were discharged from prison within 5 days of being committed.<sup>128</sup>
- 7.50 The Report concluded that persons committed for failure to pay fines “tend not to be representative of the general population,”<sup>129</sup> with disproportionately high numbers of those committed being unemployed or not capable of work due to disability. Interviews suggested that a “significant minority” of those committed were living in poverty and had “troubled family backgrounds with life problems that overshadow the offences and fines at issue.”<sup>130</sup> The study found that change in employment circumstances was a primary reason for fine default, with lack of provision for payment of fines by instalment being an impediment.<sup>131</sup> Interviewees suggested that allowing for payment of fines by instalment taking into account the capacity of the person to pay would be of assistance. Community

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<sup>121</sup> *Report of the Comptroller and Auditor General on Value for Money Examination of the Collection of Fines* (2000) at iii.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> Nexus Research Co-Operative *Report to the Department of Justice, Equality and Law Reform on Imprisonment for Fine Default and Civil Debt* (2002) at 7.

<sup>125</sup> *Ibid* at 32.

<sup>126</sup> *Ibid* at 32.

<sup>127</sup> *Ibid* at 32.

<sup>128</sup> *Ibid* at 32.

<sup>129</sup> *Ibid* at 53.

<sup>130</sup> *Ibid* at 53.

<sup>131</sup> *Ibid* at 53.

service was also put forward as an option. As discussed above, such measures have been provided for in the *Fines (Payment and Recovery) Act 2014*, which has not yet commenced. However, regarding attachment of fines to earnings, the Report concluded that “[l]egislative proposals for attachment of earnings of fine defaulters may be of little or no use for those who end up in prison.”<sup>132</sup> It suggested that many of those who receive fines are not in employment that has an administrative capacity to facilitate attachment. In addition, the Report concluded that “attachment of social welfare entitlements and benefits is problematic given that persons dependent on these may be living in or close to the poverty line.”<sup>133</sup>

7.51 In 2003, the Free Legal Advice Centres (FLAC) published a report in response to a government proposal to introduce attachment of earnings for non-payment of civil debt and fines. Most of the discussion in the report related to non-payment of civil debt. However, the discussion in the report of the proposed provisions concerning the attachment of earnings in the *Enforcement of Court Orders Bill 1998*, which was ultimately defeated, is noteworthy. Part III of the Bill provided for the attachment of social welfare payments. The report contended that this was “inequitable and would be likely to lead to further social exclusion of an already excluded minority.”<sup>134</sup> It noted that there is a view that social welfare payments are insufficient to meet basic needs of families and suggested that a survey of attachment models in European jurisdictions shows that many European countries do not allow for attachment of social security.<sup>135</sup>

7.52 Regarding non-payment of court fines, the report asserted that failure to pay a court fine will often be a result of the inadequacy of a person’s income and noted the lack of provision for the payment of fines by instalment, now provided for in the *Fines (Payment and Recovery) Act 2014*.<sup>136</sup> The “lack of proportionality in the levying of fines” was also noted.<sup>137</sup> The Report contended that this is significant given that in many cases, for example, failure to pay a television licence, motor tax or insurance, the prosecution arises because of a person’s financial difficulties. It recommended that those with a low income or in financial difficulty should be permitted to pay off fines in affordable instalments.<sup>138</sup> It also recommended the abolition of committal for employed persons or persons in receipt of social welfare, in favour of attachment. The *Fines (Payment and Recovery) Act 2014* favours attachment over recovery, community service and committal. The FLAC Report contended that “[a]ny attachment in the case of social welfare recipients should be absolutely minimal” and that community service should be considered as an alternative option to attachments in relation to social welfare recipients.<sup>139</sup>

**(1) Current procedures in Ireland allowing for the deduction at source from social welfare payments**

7.53 Legislative provisions in Ireland provide for the deduction at source from social welfare payments in a number of specific areas. These include the following:

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<sup>132</sup> *Ibid.* at 53.

<sup>133</sup> *Ibid.* at 53.

<sup>134</sup> *Ibid.* at 44.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.* at 116.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

**(a) Recovery of Social Welfare Overpayments**

- 7.54 When the Department of Social Protection finds that a person has been provided with payment to which he or she is not entitled, that person is liable to repay the overpayment. This is the case whether the person purposefully concealed the overpayment or whether the overpayment was through no fault of the person who received the payment. Recovery of social welfare payments is provided for in section 341 of the *Social Welfare (Consolidation) Act 2005*.<sup>140</sup> The amount that could be recovered through deductions was previously set out in the *Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007*, as amended.<sup>141</sup> The 2007 Regulations provided for recovery through the withholding of arrears or deductions from ongoing payments, or both, “provided that recovery of the overpayment shall not cause, without the prior written agreement of the person liable to repay the overpayment, that person’s weekly payment of benefit or assistance, as the case may be, to fall below the weekly rate of supplementary welfare allowance appropriate to his or her family circumstances that would be payable if the person was not in receipt of the benefit or assistance.”<sup>142</sup> For a person in receipt of a primary payment, such as Jobseeker’s Allowance or One Parent Family Payment, the current maximum rate of payment is €188. As a result, the maximum sum which the Department of Social Protection could recover was €2 per week, as this would bring the person’s payment to €186 per week, which is the minimum Supplementary Welfare Allowance payment. However, the 2005 Act was amended by the *Social Welfare Act 2012*. Rather than limiting the recovery of overpayments to the amount of Supplementary Welfare Allowance to which the person would be entitled, the 2005 Act, as amended, provided that deductions may not, without the prior written consent of the person liable to repay the overpayment, exceed 15% of the weekly rate of benefit or assistance to which the person is entitled.<sup>143</sup> Therefore, a person receiving a weekly payment of €188 can now potentially be subject to a reduction of €28 from their payment.
- 7.55 The *Social Welfare and Pensions (Miscellaneous Provisions) Act 2013* aims to “further improve the Department [of Social Protection]’s ability to recover overpayments by giving additional powers of recovery in the case of overpayments by way of a notice of attachment to be put in place.”<sup>144</sup> Section 15 of the 2013 Act amends the 2005 Act by providing the Minister for Social Protection with additional powers exercisable in the event of overpayment. A person who is liable to repay an overpayment must make arrangements to repay the amount owed.<sup>145</sup> A notice of attachment may be given to a person who fails to repay the relevant amount and respond to a notice in writing, requesting either repayment of the relevant amount or any representations the person

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<sup>140</sup> Section 341 of the *Social Welfare (Consolidation) Act 2005*.

<sup>141</sup> *Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007* (SI No.142 of 2007), as amended by the *Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No.4) (Overpayments) Regulations 2011* (SI No.461 of 2011). Section 189 of the *Social Welfare Consolidation Act 2005* provides that, subject to the Act, “every person in the State whose means are insufficient to meet is or her needs and the needs of any qualified adult or qualified child of the person shall be entitled to supplementary welfare allowance.”

<sup>142</sup> Article 245 of *Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007* (SI No.142 of 2007), as amended by *Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No.4) (Overpayments) Regulations 2011* (SI No.461 of 2011).

<sup>143</sup> Section 341 of the *Social Welfare Consolidation Act 2005*, as amended by section 13 of the *Social Welfare Act 2012*.

<sup>144</sup> Dáil Éireann Debates, 11 June 2013.

<sup>145</sup> Section 343B of the *Social Welfare Consolidation Act 2005*, as inserted by section 15 of the *Social Welfare and Pensions (Miscellaneous Provisions) Act 2013*.

may wish to make and stating that the Minister intends to proceed by way of notice of attachment relating to the overpayment.<sup>146</sup> Prior to furnishing such a notice, the Minister must take into account the circumstances of the overpaid person<sup>147</sup> and must give due consideration to any responses received before making a notice of attachment.<sup>148</sup> The 2013 Act provides for weekly deductions from a person's net income through their employer.<sup>149</sup> The amount deducted cannot be greater than 15% without prior written consent or exceed an amount that would result in the income of the person falling below the amount of Supplementary Welfare Allowance to which the person would be entitled.<sup>150</sup> In addition, the 2013 Act provides for the attachment of money held by financial institution so that the overpaid amount can be attached to any money held on deposit in the financial institution or held in a joint account.<sup>151</sup> Any notice of attachment in respect of a financial institution may not specify an amount that would exceed an amount that would result in the overpaid person to become entitled to claim for Supplementary Welfare Allowance.<sup>152</sup>

**(b) Finance (Local Property) Tax Act 2012**

7.56 The *Finance (Local Property) Tax Act 2012* provides for a number of different methods that can be used to pay the local property tax. The Revenue Commissioners may, in certain circumstances, direct the Minister for Social Protection to deduct local property tax from a person's payments.<sup>153</sup> Those who are in receipt of certain social welfare payments may choose to have the property tax deducted at source from their payment.<sup>154</sup> It is worth noting that Jobseeker's Allowance and Jobseeker's Benefit are not included in the category of social welfare payments which may be the subject of deductions. The circumstances in which such a direction may be given include: (1) where a liable person elects in a return to have the tax deducted from his or her payments;<sup>155</sup> (2) where the person does not deliver a return containing an election of a specific method of payment; (3) elects for a method of payment in a return but defaults in such payment; or (4) agrees

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<sup>146</sup> Sections 343C and 343D of the *Social Welfare Consolidation Act 2005*, as inserted by section 15 of the *Social Welfare and Pensions (Miscellaneous Provisions) Act 2013*.

<sup>147</sup> The circumstances are set out in section 343C of the *Social Welfare Consolidation Act 2005*, as inserted by section 15 of the *Social Welfare and Pensions (Miscellaneous Provisions) Act 2013*, and include: (a) his or her personal and family circumstances; (b) any statutory deductions that may affect his or her earnings or income; (c) the amount of the overpayment; (d) the period of time for which the overpayment is outstanding; (e) the amount of income or earnings of the overpaid person; (f) the employment circumstances of the overpaid person; and (g) the amount of deduct due to the overpaid person.

<sup>148</sup> Section 343D(2) of the *Social Welfare Consolidation Act 2005*, as inserted by section 15 of the *Social Welfare and Pensions (Miscellaneous Provisions) Act 2013*.

<sup>149</sup> Section 343E of the *Social Welfare Consolidation Act 2005*, as inserted by section 15 of the *Social Welfare and Pensions (Miscellaneous Provisions) Act 2013*.

<sup>150</sup> Section 343E(3) of the *Social Welfare Consolidation Act 2005*, as inserted by section 15 of the *Social Welfare and Pensions (Miscellaneous Provisions) Act 2013*.

<sup>151</sup> Section 343F of the *Social Welfare Consolidation Act 2005*, as inserted by section 15 of the *Social Welfare and Pensions (Miscellaneous Provisions) Act 2013*.

<sup>152</sup> Section 343F(4) of the *Social Welfare Consolidation Act 2005*, as inserted by section 15 of the *Social Welfare and Pensions (Miscellaneous Provisions) Act 2013*.

<sup>153</sup> Section 84 of the *Finance (Local Property) Tax Act 2012*.

<sup>154</sup> The social welfare payments from which the local property tax can be deducted include the State Pension (Contributory and Non-Contributory), Widow, Widower or Surviving Civil Partner's pension (contributory and non-contributory), State Pension, One Parent Family Payment, Invalidity Pension, Care's Allowance, Disability Allowance, Blind Pension.

<sup>155</sup> Section 85 of the *Finance (Local Property Tax) Act 2012*.

with the Revenue Commissioners that the Minister deduct the local property tax from his or her payments.<sup>156</sup> The Revenue Commissioners must notify the liable person that they have directed the Minister for Social Protection to deduct the tax from the person's payments where the person has not chosen this method of payment.<sup>157</sup> The Minister may not deduct an amount that would reduce the person's payment below the amount of Supplementary Welfare Allowance to which he or she would be entitled.<sup>158</sup> Deferral of the local property tax is provided for in respect of persons whose income does not exceed a certain threshold.<sup>159</sup> The 2012 Act, as amended, also provides for a deferral of the local property tax where a person has suffered a significant unavoidable financial loss or incurs a significant expense.<sup>160</sup>

**(c) The Household Budget Scheme**

7.57 The Household Budget Scheme, which is operated by An Post, allows those receiving social welfare payments to spread the cost of household bills, including Electric Ireland (formerly ESB), Ervia (formerly Bórd Gáis), eir (formerly eircom), Airtricity and local authority rent, across the year through deduction from social welfare payments.<sup>161</sup> Section 290 of the *Social Welfare Consolidation Act 2005* governs budgeting in relation to social welfare payments and provides for the withholding on consent of an amount of a social welfare payment and payment to a specified body designated by the social welfare recipient. The 2005 Act was amended by the *Social Welfare Act 2012* to allow a person who is the tenant of a housing body and in receipt of social welfare to arrange for rent to be deducted from his or her social welfare payment.<sup>162</sup> The scheme is optional and there is no provision for the making of compulsory deductions. The maximum amount of a person's social welfare payment that can be deducted is 25%. The scheme allows for the amendment or cancellation of deductions. The deduction may not exceed 25% of a person's weekly social welfare payment.<sup>163</sup>

**(2) Legislation providing for deduction of fines from income support in England and Wales**

7.58 In England and Wales, provision for the deduction of unpaid fines from income support was introduced by the *Criminal Justice Act 1991*. Where the Magistrates Court has imposed a fine or a compensation order on a person who is entitled to income support, jobseekers allowance, a state pension credit or an employment and support allowance, the Court may apply to the Secretary of State requesting the deduction of sums payable to that person to secure payment. The Secretary of State is empowered to deduct payments and provide them to the Magistrates Court towards satisfaction of the unpaid amount.<sup>164</sup>

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<sup>156</sup> Sections 85 and 66 of the *Finance (Local Property Tax) Act 2012*.

<sup>157</sup> Section 87 of the *Finance (Local Property Tax) Act 2012*.

<sup>158</sup> Section 92 of the *Finance (Local Property Tax) Act 2012*.

<sup>159</sup> Section 132 of the *Finance (Local Property Tax) Act 2012*.

<sup>160</sup> Section 133C of the *Finance (Local Property Tax) Act 2012*, as inserted by section 13 of the *Finance (Local Property Tax)(Amendment) Act 2013*.

<sup>161</sup> See [anpost.ie](http://anpost.ie).

<sup>162</sup> Section 290A of the *Social Welfare Consolidation Act 2005*, as inserted by section 15 of the *Social Welfare Act 2012*.

<sup>163</sup> Section 290B of the *Social Welfare Consolidation Act 2005*, as inserted by section 15 of the *Social Welfare Act 2012*.

<sup>164</sup> Section 24 of the *Criminal Justice Act 1991* authorises the Secretary of State to provide for the recovery of fines by deductions from social welfare by Regulations: see the *Fines (Deductions from Income Support) Regulations 1992* (SI 1992 No.2182), as amended.

Section 24(2) of the 1991 Act provides that the regulations allowing for such deductions may include provision:

- (a) that, before making an application, the court shall make an enquiry as to the offender's means;
- (b) that the court may require the offender to provide prescribed information in connection with an application;
- (c) allowing or requiring adjudication as regards an application, and provision as to appeals to appeal tribunals constituted under Chapter I of Part I of the Social Security Act 1998 and decisions under section 9 or 10 of that Act;
- (d) as to the circumstances and manner in which and the times at which sums are to be deducted and paid;
- (e) as to the calculation of such sums (which may include provision to secure that amounts payable to the offender by way of income support, a jobseeker's allowance, state pension credit or an income-related employment and support allowance do not fall below prescribed figures);
- (f) as to the circumstances in which the Secretary of State is to cease making deductions;
- (g) requiring the Secretary of State to notify the offender, in a prescribed manner and at any prescribed time, of the total amount of sums deducted up to the time of notification; and
- (h) that, where the whole amount to which the application relates has been paid, the court shall give notice of that fact to the Secretary of State.

7.59 The rationale for the introduction of the *Criminal Justice Act 1991* was to encourage the use of fines as a sentencing option by providing for a system that would ensure that fines would be appropriate to the means of a person and introduce measures to ensure that persons with a low income can pay fines.<sup>165</sup> The maximum amount of deductions that could be made was £2.70 per week. However, this was increased to £5 following a recommendation of a review on correctional services.<sup>166</sup> The *Courts Act 2003* allows for automatic imposition of deduction from benefits as soon as an offender defaults in payments. A 2006 Report by the English Comptroller and Auditor General found that out of 406 cases surveyed, 280 were the subject of enforcement orders, only 12 of which were enforced by deductions from benefits.<sup>167</sup> The Report noted the suggestion, however, that deductions from benefit orders had increased nationally from 18,500 in December 2002 to 31,100 in May 2005.<sup>168</sup> The Report also noted that there were difficulties deducting from benefits where a person changed benefits or became unemployed, as the enforcement process took several weeks to catch up with the change in circumstances.<sup>169</sup>

### **(3) Discussion**

7.60 The Commission has considered whether legislation should provide for the deduction at source of unpaid court fines from the social welfare payments of persons who have not paid court fines by the due date. Providing for the deduction of unpaid court fines from

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<sup>165</sup> The *Criminal Justice Act 1991* was enacted following a Home Office Report, *Deductions From Benefits for Fine Default* (Home Office, 1990).

<sup>166</sup> Carter *Managing Offenders, Reducing Crime: a New Approach* (2002) at 27.

<sup>167</sup> *Report by the Comptroller and Auditor General Department for Constitutional Affairs: Fines Collection* (National Audit Office 2006) at 38.

<sup>168</sup> *Ibid* at 26.

<sup>169</sup> *Ibid*.

social welfare benefits would have some advantages. Such an approach would be likely to reduce the number of persons committed to prison for non-payment of fines, a measure which should be a last resort. It would provide courts with another alternative to issuing a warrant in respect of a person who has not paid a court fine, thereby reducing the figures for committal warrants issued. This would eventually lead to a decrease in the figures for outstanding committal warrants. Providing for the deduction of fines from social welfare payments would result in the collection of more revenue by ensuring the payment of a higher percentage of court fines. The Commission has also been advised that some people who are repeat offenders might strategically refuse to pay a fine or comply with any community service order that a court imposes, as they are aware that they will only spend a short time in custody if a committal warrant issues. Deduction from social welfare benefits would provide an additional means of enforcing court fines in respect of those who have the means to pay the fine but choose not to. During the Oireachtas debates on the *Fines (Payment and Recovery) Act 2014*, some TDs expressed the view that providing for attachment orders to persons who are employed, but not those who are in receipt of social welfare, unfairly targets those who are in employment.<sup>170</sup> However, others argued that the exclusion of social welfare payments from the ambit of the attachment order provisions in the 2014 Act discriminates against those in receipt of social welfare, as the lack of provision for attachment orders for social welfare recipients means that such persons are more likely to be committed to prison.<sup>171</sup> However, under the *Fines (Payment and Recovery) Act 2014* (as yet uncommenced) a court has the option of considering a community service order where attachment is inappropriate.

- 7.61 There are also arguments against providing for the deduction of court fines from social welfare payments. In the case of most primary social welfare payments, the means of applicants are assessed by the Department of Social Protection. Most persons receiving such payments have therefore already undergone a thorough means-assessment process, after which a Department official has decided that the person meets the threshold that entitles them to a social welfare payment. Such payments are minimum subsistence payments and it can be argued that it would be unjust to provide for such incomes to be reduced. As discussed earlier, a number of legislative provisions exist which allow for deduction at source from social welfare payments. However, it can be argued that the legislation providing for the deduction of payments to repay overpayments, which allows for the deduction of up to 15% of a person's payment without consent, was enacted for the specific purpose of addressing social welfare fraud,<sup>172</sup> and is therefore exceptional. Those who received the overpayments were never entitled to them, but allowing for attachment of social welfare payments to unpaid court fines would involve compulsorily reducing payments to which persons have already been deemed entitled.
- 7.62 As discussed at paragraph 7.56, the *Finance (Local Property Tax) Act 2012* provides for the tax to be deducted from a person's social welfare payment. However, deductions can only be made in respect of certain social welfare payments which do not include Jobseeker's Allowance or Jobseeker's Benefit.<sup>173</sup> In addition, such deductions can only be made where a person chooses this option, where a person fails to deliver a return choosing a payment method or chooses a payment method but defaults in payment.<sup>174</sup> Moreover, the lack of power to deduct a sum which would bring a person's payment to

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<sup>170</sup> See Dáil Éireann Debates, 26 September 2013.

<sup>171</sup> See Dáil Éireann Debates, 25 September 2013.

<sup>172</sup> Dáil Éireann Debates, Vol. 805 No. 3, 30 May 2013.

<sup>173</sup> The tax can be deducted from the State Pension, Widower/widower's or Surviving Civil Partner's Pension; One Parent Family Payment; Invalidity Pension; Carer's Allowance; Disability Allowance and Blind Pension.

<sup>174</sup> Section 85 of the *Finance (Local Property Tax) Act 2012*.



below the rate for Supplementary Welfare Allowance safeguards against a person's income falling below the minimum basic level. If legislation providing for the deduction of unpaid court fines from social welfare were to include a similar safeguard, any deduction from a person receiving a primary payment of €188 could not result in the person's payment falling below €186, which is the relevant rate of Supplementary Welfare Allowance. In the case of a person who fails to pay a court fine of €300, only €2 per week could be deducted from the person's weekly payment, and it would therefore take 150 weeks or almost three years to recover the unpaid fine. From an economic perspective, the administrative costs involved in collecting fines using such a process may outweigh the benefits of collecting the fine.

7.63 It could be argued that legislation providing for deduction of unpaid fines from social welfare payments so as to reduce the social welfare payment below the minimum subsistence level would be an unconstitutional interference with a person's property rights or socio-economic rights. It may be argued that social welfare payments amount to property rights under Article 43.1 of the Constitution. Article 45 provides:

“The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community and, where necessary, to contribute to the support of the infirm, the widow, the orphan and the aged.”

7.64 However, Article 45 also states that the directive principles of social policy are not cognisable by the courts. In *Minister for Social, Community and Family Affairs v Scanlon*,<sup>175</sup> the Supreme Court held that benefits were governed by statute and that there was no constitutional right to overpaid benefits.<sup>176</sup>

7.65 Assuming the deduction of social welfare payments to satisfy unpaid court fines is not unconstitutional, it would be possible for legislation to provide for the deduction of a higher sum than €2 from social welfare payments. However, bearing in mind the conclusion of the Nexus Research Report that attachment of social welfare payments may be problematic given that many people in receipt of such payments live in or are close to poverty, the desirability of deducting a greater sum from persons in receipt of social welfare is questionable. The Commission acknowledges that there may be people who can afford to pay their fines but choose not to, and deduction of fines from social welfare payments might assist in collecting fines from such persons. However, rather than enforcing the fine by providing for deduction from social welfare payments in all cases, the provisions of the *Fines (Payment and Recovery) Act 2014* should be commenced. These allow for payment of fines by instalments and by enforcement of fines in the cases where persons wilfully choose not pay through the alternative measures of recovery orders and community service. Legislative provision for deduction from social welfare payments that sets a maximum deduction of €2 per week in the case of a person receiving a primary payment is unlikely to be of significant benefit, as it would take a number of years for a person to pay off most fines, making such a process costly to administer.

7.66 A better way of reducing the numbers of persons committed to prison for unpaid court fines might be for the courts to consider, where possible, alternative sanctions when sentencing offenders. The *Scheme of the Criminal Justice (Community Sanctions) Bill*, published in 2014 by the Department of Justice and Equality, sets out a range of community sanctions that a court may consider when sentencing a person. The Explanatory Notes published by the Department to accompany the General Scheme indicate that it proposed to repeal and replace the *Probation of Offenders Act 1907* so as to provide the courts with a wide range community sanctions options in cases concerning minor offences. Head 8 of the General Scheme would permit a court to make a discharge order without proceeding to conviction where it is satisfied of the guilt of the person but

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<sup>175</sup> [2001] 1 IR 64.

<sup>176</sup> *Ibid* at 87.

that, having regard to a range of factors, is of the opinion that it is inexpedient to impose punishment.<sup>177</sup>

7.67 The factors to which a court may have regard include any of the following:

- (1) the character, circumstances, previous convictions, age, health or mental condition of the person;
- (2) any previous order made under Head 8 or section 1(1) of the Probation of Offenders Act 1907;
- (3) the trivial nature of the offence;
- (4) any extenuating circumstances under which the offence was committed;
- (5) the need to have due regard to the interests of any victim of the offence;
- (6) the satisfaction by the person of all of the specified restorative justice criteria.

7.68 The General Scheme proposes to put the restorative justice programme on a statutory footing and to afford the courts the opportunity to leave a person who has committed an offence without a conviction if the relevant factors have been satisfied. The General Scheme also proposes to empower the court to make a binding over order in a summary case, or an indictable case being tried summarily, where the court is satisfied of the guilt of the person but, having regard to the factors in Head 8(3), is of the view that it would be appropriate to discharge the person subject to certain conditions.<sup>178</sup> This would replace similar provisions in the *Probation of Offenders Act 1907*, which allow for the dismissal of a charge or conditional discharge.<sup>179</sup> Under Head 10 of the Scheme, a court would be empowered to consider a binding over order in respect of an indictable offence. The factors to which a court could have regard are different to those set out for summary offences, and do not include the possibility of satisfying specific restorative justice criteria.<sup>180</sup> The General Scheme provides that a court may not make a discharge order or binding over order in relation to a list of specified offences.<sup>181</sup> These include a number of road traffic offences that relate to drink driving and offences that attract penalty points.

7.69 The General Scheme also makes provision for community sanctions supervised by the Probation Service, including deferred sentence supervision orders,<sup>182</sup> probation supervision orders<sup>183</sup> and reparation orders.<sup>184</sup> The General Scheme specifically prohibits the making of binding over or discharge orders in respect of a number of road traffic offences, including offences that attract penalty points. Thus, if the Scheme were enacted more frequent use of community sanctions would not, therefore, assist in reducing the

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<sup>177</sup> Head 8(1) of the General Scheme of the *Criminal Justice (Community Sanctions) Bill*. This would replace section 1(1) of the *Probation of Offenders Act 1907*.

<sup>178</sup> Head 8(2) of the General Scheme of the *Criminal Justice (Community Sanctions) Bill*. This would replace the unsupervised conditional discharge order provided for in section 1(2) of the *Probation of Offenders Act 1907*.

<sup>179</sup> Sections 1(1)(i) and 1(1)(ii) of the *Probation of Offenders Act 1907*.

<sup>180</sup> Head 10(2) of the General Scheme of the *Criminal Justice (Community Sanctions) Bill*.

<sup>181</sup> Head 13(1) of the General Scheme of the *Criminal Justice (Community Sanctions) Bill*.

<sup>182</sup> Head 24 of the General Scheme of the *Criminal Justice (Community Sanctions) Bill*. The explanatory note accompanying the head states that it “draws from section 100 of the *Criminal Justice Act 2006*.”

<sup>183</sup> Head 25 of the General Scheme of the *Criminal Justice (Community Sanctions) Bill*. The explanatory note indicates that this provision would replace probation orders under section 2 of the *Probation of Offenders Act 1907*.

<sup>184</sup> Head 30 of the General Scheme of the *Criminal Justice (Community Sanctions) Bill 2014* provides for a reparation fund to replace the Court Poor Box.

number of people committed for non-payment of fines imposed for road traffic offences. However, the imposition of such sanctions in cases involving other minor offences, such as public order, minor drugs or assault offences might assist in cases being disposed of in a manner that does not result in persons being committed to prison for unpaid fines.

- 7.70 The Commission recommends that the *Fines (Payment and Recovery) Act 2014* be commenced.**
- 7.71 The Commission recommends that unpaid fines imposed under the Road Traffic Acts should be registered on the National Vehicle Driver File in order to reduce the number of persons committed to prison for non-payment of court fines.**
- 7.72 The Commission does not recommend that deduction of fines at source from social welfare payments should be provided for at this time.**

## **D Service of Summonses in Criminal Cases**

### **(1) Service of summonses by registered post**

7.73 The Consultation Paper outlined a number of issues regarding delivery of summonses by ordinary post, or “letterbox delivery” as it is more commonly known, as provided for in section 22(1) of the *Courts Act 1991*. The practice of letterbox delivery does not require anyone to sign to say that they have received the documents, nor does it provide for personal delivery.<sup>185</sup> The lack of a personal element means that an accused person may often be unaware that they are expected to appear in court. In turn, the Courts Service and prosecutors may be unaware that the accused did not receive the summons. Consequently, the court usually adjourns the case and directs service of the summons by alternative means, but may also issue a bench warrant.

7.74 The Garda Inspectorate has, based on percentages compiled by the Comptroller and Auditor General, identified that approximately 238,000 fixed charge notice fines were unpaid in 2011 and 2012.<sup>186</sup> Approximately 178,000 summonses were issued in 2011 and 2012 for unpaid fixed charge notice fines.<sup>187</sup> 85,000 (48%) of these summons were served and 93,500 (52%) were not. This resulted in a potential revenue loss of €7.4 million due to summonses not being served.<sup>188</sup> The Garda Inspectorate Report notes the inefficiency involved in such an approach and states that “[s]ummons must be served by a member of an Garda Síochána and the time directed to serving summonses, which at best has less than a fifty per cent success rate, impacts on Garda availability to undertake more urgent policing duties.”<sup>189</sup> The Inspectorate recommends that a review be undertaken of the process for serving summonses to ascertain the reasons for the significant level of unserved summonses and to make recommendations to provide a more effective process.<sup>190</sup>

### **(2) Service of summonses in criminal cases**

#### **(a) Statutory provisions relating to the service of summonses**

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<sup>185</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 7.43-7.46.

<sup>186</sup> Garda Inspectorate *Report on The Fixed Charge Processing System: A 21<sup>st</sup> Century Strategy* (2014) at 24, referring to the Comptroller and Auditor General *Report on the Accounts of the Public Services 2012* at 106.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.*

7.75 In the Consultation Paper, the Commission outlined the statutory provisions on the service of summonses.<sup>191</sup>

**(b) *Petty Sessions (Ireland) Act 1851***

7.76 Section 12(3) of the *Petty Sessions (Ireland) Act 1851* provides that a summons shall be served upon someone “by delivering to him a copy of such summons, or if he cannot be conveniently met with, by leaving such copy for him at his last or most usual place of abode, or at his office...or place of business, with some inmate of the house not being under sixteen years of age.” The 1851 Act, therefore, provides for personal service of a summons, or if such service would be inconvenient, it may be left at the workplace of the person, their residence or another person residing at the person’s home. The 1851 Act therefore requires an element of personal service.

**(c) *Courts Act 1991***

7.77 Section 22 of the *Courts Act 1991* relates to summonses in respect of summary only offences and offences that can be tried summarily pursuant to the *Criminal Justice Act 1951*.<sup>192</sup> Section 22(1) of the 1991 Act states:

“[N]otwithstanding section 12 of the Act of 1851 and without prejudice to the provisions of any Act authorising the service of summons....a summons issued in a case of summary jurisdiction under section 11(2) or 13 of the Act of 1851 or section 1 of the Act of 1986 [*Courts No. 3 Act 1986*] may be served upon the person to whom it is directed

- (1) by sending, by registered prepaid post, a copy thereof in an envelope addressed to him at his last known residence or most usual place of abode...
- (2) by sending, by any other system of recorded delivery prepaid post specified in rule of court, a copy thereof in such an envelope as aforesaid, or
- (3) by delivery by hand, by a person other than the person on whose behalf it purports to be issued authorised in that behalf by rules of court, of a copy thereof in such an envelope as aforesaid.”

7.78 By allowing for service by registered post or recorded delivery prepaid post, the 1991 Act provides for alternative means of service to the personal service required by the *Petty Sessions (Ireland) Act 1851*.

7.79 Under section 22(2) of the 1991 Act, service will be deemed good “upon proof that a copy of the summons was placed in an envelope and that the envelope was addressed, recorded, prepaid and sent or was delivered in accordance with... subsection (1).” It is for the person claiming that they did not receive the summons to rebut the presumption of good service by demonstrating that they did not receive the summons or notice of the hearing date to which the summons relates.<sup>193</sup> Where a summons is served by registered prepaid post or recorded prepaid post, the summons is deemed to be served upon the person “at the time at which the envelope containing a copy of the summons would be delivered in the ordinary course of post.”<sup>194</sup> A person may prove that the provisions of section 22(1)(a) or (b) have been complied with by a statutory declaration “exhibiting the record of posting of the envelope... and stating, if it be the case, that the original summons

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<sup>191</sup> Consultation Paper on Search Warrants and Bench Warrants (LRC CP 58-2009) at paragraphs 7.38-7.47.

<sup>192</sup> Sections 22(1) and 22(9) of the *Courts Act 1991*. Section 2 of the *Criminal Justice Act 1951*, as substituted by section 8 of the *Criminal Justice (Miscellaneous Provisions) Act 1997* allows for scheduled indictable offences to be tried summarily in certain circumstances.

<sup>193</sup> Section 22(2) of the *Courts Act 1991*.

<sup>194</sup> Section 22(3)(a) of the *Courts Act 1991*.

was duly issued at the time of posting and that the envelope has not been returned undelivered to the sender.”<sup>195</sup>

**(d) District Court Rules 1997**

7.80 At the time that the Consultation Paper was published, the *District Court Rules 1997* did not specify the methods of service that may be used to serve a summons on a person. Order 10, rule 5 simply required documents to be delivered to the person or left at one of a number of places.<sup>196</sup> However, Order 10 has since been amended, and now provides that in a case of summary jurisdiction pertaining to section 22 of the *Courts Act 1991*,<sup>197</sup> a summons may be served:

“(a) by sending, by registered prepaid post, a copy thereof in an envelope addressed to that person at his or her last known residence or most usual place of abode or at his or her place of business in the State, or

(b) by delivery by hand, by a person (other than the person on whose behalf it purports to be issued) authorised by these Rules in that behalf, of a copy thereof in such an envelope as aforesaid.”<sup>198</sup>

**(3) Discussion**

7.81 In the Consultation Paper, the Commission invited submissions as to whether summonses in respect of criminal proceedings delivered by post should be served by registered post only, thereby removing standard letter box delivery. However, such a reform would not affect the law on personal service of summonses by hand. The procedure for registered postal delivery set out in section 22 of the *Courts Act 1991* would apply to any summons not personally served by hand. One of the main advantages for this suggestion is that it would provide greater certainty regarding delivery. Courts could more often proceed with a hearing in the absence of the person without having to adjourn the case to allow for an alternative means of service in the knowledge that the person has received the summons. This would ultimately reduce the number of bench warrants issued in such circumstances and would result in greater speed and efficiency regarding court lists.

7.82 Notwithstanding the advantages of dispensing with standard letterbox delivery, it has been suggested to the Commission that there may be practical difficulties associated with requiring either registered post or personal delivery of summonses. The cost of requiring registered or recorded post would be higher than those relating to standard post. The Garda Síochána Inspectorate *Report on Crime Investigation* notes that it costs €5.25 to send a summons by recorded delivery.<sup>199</sup> However, as noted in the Consultation Paper, the cost of adjourning a hearing or issuing and executing a bench warrant where it is unknown whether a person received the summons is high.<sup>200</sup> In addition, the potential loss of €7.4 million revenue over 2 years due to the number of unserved summonses, as noted by the Garda Síochána Inspectorate *Report on the Fixed Charge Processing System*, is very

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<sup>195</sup> Section 22(3)(b) of the *Courts Act 1991*.

<sup>196</sup> *District Court Rules 1997* (SI No.93 of 1997), Order 10, Rule 5, as substituted by the *District Court (Service) Rules 2012* (SI No.285 of 2012), and *District Court (Civil Procedure) Rules 2014* (SI No.17 of 2014).

<sup>197</sup> Section 22(1) relates to summonses issued in a case of summary jurisdiction under section 11(2) or 13 of the *Petty Sessions (Ireland) Act 1851* or the *Courts (No. 2) Act 1986*.

<sup>198</sup> *District Court Rules 1997* (SI No.93 of 1997), Order 10, Rule 5, as substituted by the *District Court (Service) Rules 2012* (SI No.285 of 2012), and *District Court (Civil Procedure) Rules 2014* (SI No.17 of 2014).

<sup>199</sup> Garda Inspectorate *Report on Crime Investigation* (2014), part 11 at 25.

<sup>200</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 7.46.

high.<sup>201</sup> Although service by registered post would be more costly, revenue would be generated by persons paying subsequently imposed court fines.

- 7.83 It has also been suggested that it is possible for any person present to sign for registered post at a premises, and there would be therefore no guarantee that the person to whom the summons was directed would receive it. However, if this occurred, a court would see that the person who signed for the summons was not the person to whom the summons was addressed. Service by registered post would still involve an element of personal service if another person signed for it and such an approach would carry a greater degree of certainty as to service than standard letterbox service.
- 7.84 A concern was also raised that some people would simply refuse to sign for the registered post. The Garda Síochána Inspectorate *Report on Crime Investigation* notes that in “one busy division that posted approximately 1,000 summonses per month... 50% of the summonses are returned as unserved.”<sup>202</sup> As a result, Gardaí must personally serve the summonses. In contrast, the Report notes that in another Garda division, 81% of summonses were successfully served.<sup>203</sup> The Report observed that Gardaí spend a significant amount of time serving summonses. It recommends that “the Department of Justice and Equality convene a working group to ensure a more efficient summons process system”<sup>204</sup> which should “examine the issue of summons service and explore new ways to deal with summonses such as E-service.”<sup>205</sup>
- 7.85 In the Commission’s 2010 *Report on Consolidation and Reform of the Courts Acts*, section 240 of the draft Bill attached to the Report removes the traditional “letterbox delivery” method as provided for in section 22 of the *Courts Act 1991* and provides that service of summons may be carried out by either registered postal service, personal service or any other method of “recorded delivery service” specified in the *District Court Rules 1997*.<sup>206</sup> Section 232 of the draft Bill defines personal service as including: (a) delivery at any place to the person to be served; (b) delivery at the usual place of residence of the person to another person of full age who is: (i) the wife, husband, child, father, mother, brother, sister, or another relation of the person to be served, (ii) the civil partner of the person; or (iii) also residing at that place; or (c) delivery at the place of business of the person to another person of full age who is the employer or employee of the person.
- 7.86 In recommending the removal of the “letterbox” method of delivery, the Commission took into account the considerable practical difficulties that “letterbox” service creates in the District Court.<sup>207</sup> In particular, it results in a great many non-attendances on the return dates of criminal summonses and the judge must either adjourn the case and direct another form of service or issue a bench warrant. Many cases proceed in the absence of the defendant on the adjourned date, which results in the defendant applying to the Court to set aside the proceedings of which he or she was unaware until receiving notice of a default warrant or non-payment of a fine.<sup>208</sup>

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<sup>201</sup> Garda Inspectorate *Report on The Fixed Charge Processing System: A 21<sup>st</sup> Century Strategy* (2014) at 22.

<sup>202</sup> Garda Inspectorate *Report on Crime Investigation* (2014), part 11 at 25.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*, part 11 at 26.

<sup>205</sup> *Ibid.*

<sup>206</sup> *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010). See section 240 of Appendix A. Section 240(1)(c) also provides for the delivery of summonses by any other recorded method.

<sup>207</sup> *Ibid.* at paragraph 2.95.

<sup>208</sup> *Ibid.*

- 7.87 Personal service or service by registered post are preferable to letterbox service. However, in light of the feedback which it has received since the publication of the Consultation Paper, the Commission is of the view that there would be too many practical difficulties associated with requiring personal service or service by registered post in all cases.
- 7.88 The Commission agrees with the recommendation of the Garda Inspectorate Report, *Crime Investigation*, that other methods of serving summonses ought to be explored. However, the Commission does not believe that electronic service would be appropriate. Courts in Ireland and other jurisdictions have, in specific cases, allowed for service of documents in civil cases to be carried out by electronic means. For example, in 2012, the High Court in Ireland allowed service of a civil summons through Facebook where a solicitor had been trying unsuccessfully to serve proceedings on a defendant who had left the jurisdiction.<sup>209</sup> In the United States decision of *Mpafe v Mpafe*<sup>210</sup>, a court allowed substituted service of divorce proceedings by email, Facebook, MySpace or any other social networking site on a defendant who was believed to have left the country. In the Australian case *MKM Capital v Corbo and Poyser*<sup>211</sup> the Court allowed service by private Facebook mail of a foreclosure notice on a couple who could not be found by traditional means.
- 7.89 However, legislation in other common law jurisdictions generally provides for service of summonses in criminal cases by personal service or post, but not electronically. In England and Wales, service of documents is governed by the *Criminal Procedure Rules 2013*. The Rules provide that a document may be served by handing over the document,<sup>212</sup> by leaving or posting it,<sup>213</sup> by document exchange<sup>214</sup> or by electronic means<sup>215</sup>. However, Rule 4.7 provides that certain documents may be served only by handing them over under Rule 4.3 or leaving or posting them under Rule 4.4. One of the specified documents is a summons.<sup>216</sup> The person who serves a document may prove it by signing a certificate explaining how and when it was served.<sup>217</sup>
- 7.90 In the United States, the *Federal Rules of Criminal Procedure* provide that a summons is served on a person by: (a) delivering a copy to the defendant personally; or (b) leaving a copy at the defendant's usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address.<sup>218</sup> Service on an organisation is affected by delivering a copy of the summons to an officer, a managing or general agent, or to another agent appointed or legally authorised to receive service. A copy must also be mailed to the organisation's last known address.<sup>219</sup>
- 7.91 In Canada, the *Criminal Code* provides that a summons must be served on a person by delivering it personally to the person or, if that person cannot conveniently be found,

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<sup>209</sup>, "Proceedings Served through Facebook", *Law Society Gazette*, May 2012 at 5.

<sup>210</sup> Hennepin County, MN No. 27 FA 11 3453.

<sup>211</sup> No. SC 608 of 2008.

<sup>212</sup> Rule 4.3 of the *Criminal Procedure Rules 2013*.

<sup>213</sup> Rules 4.4 of the *Criminal Procedure Rules 2013*.

<sup>214</sup> Rule 4.5 of the *Criminal Procedure Rules 2013*

<sup>215</sup> Rule 4.6 of the *Criminal Procedure Rules 2013*

<sup>216</sup> Rule 4.7(2)(a) of the *Criminal Procedure Rules 2013*.

<sup>217</sup> Rules 4.11 of the *Criminal Procedure Rules 2013*.

<sup>218</sup> Rule 4(3)(B) of the *Federal Rules of Criminal Procedure*.

<sup>219</sup> Rule 4(3)(C) of the *Federal Rules of Criminal Procedure*.

leaving it for him or her at his or her latest or usual place of abode with a resident who appears to be at least 16 years of age.<sup>220</sup> In New Zealand, the *Criminal Procedure Act 2011* provides that a summons for a category 1 offence (an offence carrying on conviction the possibility of a fine only) may be served: (a) by personal service; (b) by sending it to the person's address for service; or (c) if no address has been provided, by sending it to the person's last known postal address or place of residence or business; or (d) by being left for the person at the person's place of residence with a member of the person's family living with him or her who appears to be over the age of 18 years; or (e) by any other method agreed by the parties or approved by the court or registrar.<sup>221</sup> A document is personally served when it is left with the person to be served or, if that person does not accept it, by putting it down and bringing it to the notice of the person<sup>222</sup> or the person's lawyer if the lawyer has provided an address for service, unless the court directs otherwise. However, a court may direct personal service in any case.<sup>223</sup> However, a summons for a category 2, 3 or 4 offence (an offence carrying on conviction the possibility of a sentence of imprisonment) must be served by personal service or leaving it for the person at the person's place of residence with a member of the person's family living there who appears to be over the age of 18.<sup>224</sup>

7.92 In Australia, a summons must generally be served personally or by leaving it at the person's last place of abode. However, service can be affected by post in some or all cases depending on the State.<sup>225</sup>

7.93 The practical difficulties regarding uncertainty of delivery when sending summonses by ordinary post or letterbox delivery would also be present if service of summonses could be carried out electronically in criminal cases. Most email facilities do not indicate whether an email has been received or read. It would, therefore, be very difficult for judges to satisfy themselves that an accused person has received the summons or is aware of the court date. It is clear from the decision of *Brennan v Windle*<sup>226</sup> that principles of natural and constitutional justice and fair procedures mean that a judge cannot proceed to sentence a person to imprisonment in their absence where he or she is not satisfied that an accused is aware of the proceedings. Therefore, legislation allowing for electronic service of court summonses in criminal cases would have to provide that a court could adjourn proceedings and direct an alternative means of service or issue a bench warrant if it was not satisfied that the defendant was aware of proceedings. Such a procedure could result in the court having to adjourn a large number of cases. This could result in delays in proceedings, high costs and inefficiency in the management of court lists. It could also result in the issuing of more bench warrants.

**7.94 The Commission recommends that, where possible, summonses should be served by personal delivery or by registered post but that since it would be impractical to require personal service or service by registered post in all cases, the Commission recommends that letterbox service should remain as an alternative option.**

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<sup>220</sup> Rule 509(2) of the *Criminal Code*.

<sup>221</sup> Section 2.5 of the *Criminal Procedure Act 2011*.

<sup>222</sup> Section 2.5(2) of the *Criminal Procedure Act 2011*.

<sup>223</sup> Section 2.6 of the *Criminal Procedure Act 2011*.

<sup>224</sup> Section 2.6 of the *Criminal Procedure Act 2011*.

<sup>225</sup> In the Australian Capital Territory, for example, section 41 of the *Magistrates Court Act 1930* requires personal service of a summons. However, section 116B allows for service by post for certain offences. In Tasmania, rule 20 of the *Justices Rules 2003* allows for personal service and service by post.

<sup>226</sup> [2003] 3 IR 494.



#### (4) **Delivery of summons to incorrect address**

7.95 In the Consultation Paper, the Commission also noted concerns that were raised regarding instances where summonses have been inadvertently sent to an incorrect address resulting in a person being unaware of the requirement to attend court.<sup>227</sup> The Commission notes that this issue would not be remedied by removing letterbox service of summonses, as the registered post could still be directed to an incorrect address. The Consultation Paper suggested that it is likely that the use of an incorrect address may become known at an earlier stage if a registered postal summons delivery service was employed. However, the Commission received submissions suggesting that a registered postal system would not be of assistance in this regard as a summons cannot be interfered with until such time as the return date has lapsed. Thus, to amend a summons before the court date with a view to re-delivering it to the person named thereon, a change in the law pertaining to amending a summons prior to the return date would be required. At present, it is possible to amend a summons in accordance with the procedure laid down by in the *District Court Rules 1997*.<sup>228</sup> However it is only possible to do so once the return date has passed and a mistake has become apparent.

7.96 The Commission received feedback suggesting that the availability of a person's Personal Public Service (PPS) number would enable the Courts Service and Gardaí to direct summonses to an accurate address. The accessing of PPS numbers by a public body such as the Courts Service engages the right to privacy and is subject to the requirements set out by the *Data Protection Act 1988* and the *Data Protection (Amendment) Act 2003*. However, other legislation provides for the sharing of a person's data for the purpose of enabling a court to perform its functions. In that regard, section 14(3) of the *Fines (Payment and Recovery) Act 2014* states that when a Court is making an attachment of earnings order following a failure of a person to pay a fine by the due date, the person's address and PPS number must be included in the attachment order. Section 23 of the 2014 Act provides:

“Notwithstanding any enactment or rule of law, a relevant person shall, upon request from a court, provide the court with such information in the possession or control of the relevant person as the court may reasonably require for the purpose of enabling the court to perform its functions under this Act in relation to recovery orders or attachments orders”

7.97 “Relevant persons” for the purposes of section 23 of the Act are defined as: (a) the Revenue Commissioners; (b) the Minister for Social Protection; or (c) such persons as may be prescribed. Other legislation also permits the sharing of data using the PPS number as a unique identifier for certain purposes such as for the administration and control of Health Service Executive schemes.<sup>229</sup>

7.98 The Commission is of the view that a similar provision allowing for the sharing of data might assist in overcoming the issue of summons being sent to incorrect addresses. However, the guidelines would need to be set out to safeguard the right to privacy and promote compliance with data protection requirements. The Data Protection Commissioner has approved codes of practice set out by bodies such as An Garda Síochána and the Revenue Commissioners for the purposes of section 13 of the *Data*

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<sup>227</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 7.43.

<sup>228</sup> Orders 12 and 38 of the *District Court Rules 1997* (SI No.93 of 1997), as amended by *District Court (Civil Procedure) Rules 2014* (SI No.17 of 2014); and *District Court (Refugee Act 1996) Rules 2005* (SI No.687 of 2005).

<sup>229</sup> See for example section 8 of the *Immigration Act 2003*.

*Protection Acts 1988*, as amended.<sup>230</sup> The Department of Social Protection has also set out guidelines to promote and facilitate the proper use of PPS numbers in accordance with data protection legislation.<sup>231</sup> The Commission is of the view that any provision allowing for the sharing of data between the Courts Service and other bodies for the purpose of directing summonses to an accurate address should be supplemented by a code of practice or guidelines to promote proper use of PPS numbers in accordance with data protection legislation.

- 7.99 This approach would also improve the collection rates of fines imposed by the courts by the Courts Service so that fines can be collected by their due date. As a result, courts would not have to consider alternative options of enforcing fines, including issuing committal warrants. The *Report to the Department of Public Expenditure and Reform on Debt Management* notes that the Courts Service collects debts by issuing bills and following up with a reminder but legislation does not allow for other means of collecting debts, such as phoning the defaulter or negotiating payment plans. It notes that “[m]uch of the debt management activity is outside of the Courts Service control. The quality of data, which underpins the Courts Service’s ability to collect fines, is poor and hard to verify.”<sup>232</sup> The Report notes that the Courts Service relies on the capture of data, such as names, addresses and contact details by the prosecutor (usually the Gardaí). The Report recommends that, ideally, a person should be required to provide a unique identifier such as a PPS number, driver licence number or vehicle registration number to verify the person’s identity and address.<sup>233</sup> It further recommends that where this is impossible, such as where a person does not appear in court, it should be possible to attach the fine to an asset or other state licence renewal (the Commission has made a recommendation in respect of this at paragraph 7.46 above).<sup>234</sup> The Report concludes that the Courts Service should also have access to other state databases to assist in verifying identity and gain access to contact details.<sup>235</sup> The Commission supports this approach and recommends that such data sharing be permitted, subject to appropriate protections in accordance with data protection legislation.

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<sup>230</sup> Section 13 of the *Data Protection Act 1988*, as amended by section 14 of the *Data Protection (Amendment) Act 2003*, requires the Data Protection Commissioner to encourage trade associations and other bodies representing categories of data controllers to prepare codes of practice to be complied with by those categories when dealing with personal data.

<sup>231</sup> *PPS Number Code of Practice* (Department of Social Protection, 2011). Available at <http://www.welfare.ie/en/Pages/Personal-Public-Service-Number-Code-of-Practice.aspx>.

<sup>232</sup> *Report to the Department of Public Expenditure and Reform on Debt Management Review* (BearingPoint Ireland 2014) at 42.

<sup>233</sup> *Ibid* at 46.

<sup>234</sup> *Ibid*.

<sup>235</sup> *Ibid*.

**7.100 The Commission recommends that legislation should allow for the sharing of data between the Courts Service and other bodies such as the Revenue Commissioners and Minister for Social Protection for the purpose of directing a summons to an accurate address. The Commission recommends that such legislation should be supplemented by guidelines promoting the proper use of PPS numbers in accordance with data protection legislation.**

## **E Return of Unexecuted Bench Warrants**

7.101 The Consultation Paper noted that the large number of unexecuted bench warrants is often a result of delay or a pragmatic decision not to execute them. The Garda Síochána Inspectorate *Report on Crime Investigation* stated that the Inspectorate visited Garda stations and, while there, examined the activity carried out to execute warrants.<sup>236</sup> It observed that “[i]n some divisions, it was clear that there were concerted efforts by all Gardaí to try to execute warrants. In other divisions some Gardaí held a view that warrants were the remit of the warrant unit.”<sup>237</sup> The Report also noted that PULSE has a tab on which Gardaí can record attempts and actions carried out to execute warrants. However, it stated that “[m]any warrants checked by the Inspectorate appeared to have little or no action recorded on PULSE.”<sup>238</sup> A number of case studies were outlined highlighting “key issues in respect of the management of warrants and failure to execute them.”<sup>239</sup> The Report recommended that “the Garda Síochána develops a Standard Operating Procedure for the management of warrants.” To achieve this, it recommends a number of actions, including<sup>240</sup>:

- move to a divisional approach for the management of warrants;
- confirm that all warrants are entered onto the PULSE system;
- ensure that all reasonable opportunities to execute a warrant are explored and entered on PULSE;
- provide for good supervision around dealing with warrants and failures to execute warrants;
- provide appropriate staffing levels in all warrant units; and
- ensure that a person in Garda custody is never released without searching for and executing outstanding warrants.

7.102 The Commission agrees that the implementation of such operating procedures would address difficulties relating to the management of warrants. However, it has also considered whether legislation should require Gardaí after a certain period of time to return to the Court that issued a bench warrant and explain why it has not been executed.

### **(1) Return of unexecuted warrants to court of issue**

7.103 Section 33 of the *Petty Sessions (Ireland) Act 1851* provides for the return of unexecuted warrants. It states that whenever a person to whom a warrant is addressed is unable to find the person in respect of whom the warrant was issued, he or she should return the warrant to the court that issued it within such time as fixed by the warrant or within a reasonable time. A certificate should be provided containing the reasons why the warrant has not been executed and the judge may examine the person under oath in relation to

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<sup>236</sup> Garda Inspectorate, *Report on Crime Investigation* (2014), Part 10 at 22.

<sup>237</sup> *Ibid.*

<sup>238</sup> *Ibid.*, Part 10 at 23.

<sup>239</sup> *Ibid.*, Part 10 at 24 and 25.

<sup>240</sup> Garda Inspectorate, *Report on Crime Investigation* (2014), part 10 at 29.

the non-execution of the warrant and may re-issue the warrant or issue another warrant for the same purpose from time to time as shall seem expedient. Order 26, Rule 11 of the *District Court Rules 1997* is almost identical to section 33 of the 1851 Act, but specifically excludes the following from its ambit:

1. A warrant for the arrest of a person charged with an indictable offence;
2. A warrant for the arrest of a person who has failed to appear in answer to a summons in respect of an offence;
3. A bench warrant for the arrest of a person who has failed to appear in compliance with the terms of a recognisance; or
4. A search warrant.

7.104 As discussed in Chapter 5, above, legislative provisions relating to search warrants specify their validity periods. Order 26, Rule 11 of the *District Court Rules 1997* provides that when the warrant does not specify a time period for its return to the court that issued it, it should be returned within a reasonable time not exceeding 6 months. The certificate must be in Form 26. 4, as set out in schedule B to the 1997 Rules.<sup>241</sup>

7.105 In *Brennan v Windle*,<sup>242</sup> the Supreme Court held that “[a] person who holds a warrant which has expired is not entitled, as of right, to have it reissued, but only on proof of particular matters.”<sup>243</sup> Form 26.4 provides for the specification of why “after a diligent search” the person or goods against whom the warrant was issued cannot be found.

7.106 Failure to produce a certificate relating to the non-execution of the warrant will result in the quashing of a re-issued warrant. For example, in *Daly v Coughlan*<sup>244</sup> the High Court quashed a committal warrant which a judge of the District Court attempted to issue 17 months after it was originally issued. The endorsement on the warrant stated that it was being re-issued “within 6 months.” The High Court held that the warrant lacked jurisdiction as the warrant did not contain an endorsement stating that the judge of the District Court had made enquiries with the relevant Garda regarding the non-execution of the warrant.

7.107 Failure by Gardaí to return a warrant within the prescribed time will not result in a judge of the District Court lacking jurisdiction to re-issue the warrant.<sup>245</sup> However, failure of the Gardaí to explain why a warrant was not executed will mean that a judge of the District Court who purports to re-issue the warrant will not have jurisdiction to do so.<sup>246</sup>

## **(2) Failure or delay in execution of bench warrants**

7.108 As noted above, Order 26, Rule 11 of the *District Court Rules 1997* provides that the duty to return unexecuted warrants does not apply to bench warrants.

7.109 Despite there being no specific time limit for the execution of bench warrants, there have been many cases where applicants have sought orders of prohibition or quashing of their convictions on the grounds that a delay in the execution of a bench warrant breached their right to a fair trial with reasonable expedition. In the Consultation Paper, the Commission discussed the duty of the Gardaí to execute bench warrants expeditiously.<sup>247</sup> In the

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<sup>241</sup> Form 26.4.

<sup>242</sup> [2003] 3 IR 494.

<sup>243</sup> *Ibid* at 503.

<sup>244</sup> [2006] IEHC 126.

<sup>245</sup> *R (Shields) v Justices of Tyrone* [1914] 2 IR 89; *The State (McCarthy) v Governor of Mountjoy Prison* Supreme Court 20 October 1967; *The State (O’Hanlon) v Hussey* High Court 5 May 1986.

<sup>246</sup> *Casey v Governor of Cork Prison* [2000] IEHC 64; *O’Rourke v Judges of the District Court* [2009] IEHC 309.

<sup>247</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 7.72-7.86.

Supreme Court decision *Cormack and Farrell v Director of Public Prosecutions*,<sup>248</sup> the Supreme Court considered jointly two applications for orders of prohibition resulting from the delay in the execution of bench warrants which had been issued against them. Regarding blameworthy prosecutorial delay, the Supreme Court stated:<sup>249</sup>

“In the context of delay... the legal position in relation to the execution of bench warrants may be simply stated. There is an obligation on An Garda Síochána to execute same promptly or within a reasonable time. A failure to do so may amount to blameworthy prosecutorial delay. However, members of the Gardaí cannot automatically be assumed to be in default where immediate execution of warrants does not occur, bearing in mind the multiple other duties and obligations requiring to be performed by them. They may encounter all sorts of difficulties when endeavouring to execute bench warrants which are brought about by deceit and false information given to them. Nonetheless, it must be the case that a point in time will arise where the continuing failure to execute a bench warrant will amount to blameworthy prosecutorial delay sufficient to trigger an inquiry into whether an applicant’s right to an expeditious trial has been compromised to such a degree as to warrant prohibition. It is impossible to be more specific as to what timeframe for the execution of a warrant should obtain other than to stress that warrants must be executed promptly or at least within a reasonable time. For reasons set out below, that permissible timeframe must be one of shorter duration where summary proceedings are concerned.”

7.110 Courts must consider all of the relevant facts in a particular case when adjudicating in cases involving a delay in the execution of bench warrants. The contribution of the accused to the delay will be weighed against them and a person will be required to show that any delay has had a prejudicial effect on the case. In addition, courts expect Gardaí to take active steps to execute bench warrants.

7.111 The High Court decision *Murphy v Shields*<sup>250</sup> concerned the complete failure to execute a bench warrant, rather than a delay in its execution. The applicant’s hearing for drunken driving had been adjourned a number of times. On the fourth occasion, the applicant and his solicitor failed to appear in court due to hazardous weather conditions. Another solicitor applied for an adjournment on behalf of the applicant but the judge issued a bench warrant. The warrant remained unexecuted at the time the applicant brought judicial review proceedings seeking the quashing of the decision of the judge of the District Court to issue the bench warrant. He contended that the judge of the District Court had acted unreasonably and outside his jurisdiction. The High Court was of the view that the judge had jurisdiction to issue the bench warrant and had exercised his discretion correctly. However, the Court was critical of the general attitude of Gardaí towards the execution of bench warrants and stated that “members of An Garda Síochána to whom a warrant is issued for execution must be accountable to the Court which issued the warrant for its prompt execution and in default of a prisoner being expeditiously produced, have an explanation for his non-production and furnish an explanation of what steps were taken to bring about his apprehension.”<sup>251</sup> The Court, in exercise of its “general

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<sup>248</sup> [2008] IESC 63, [2009] 2 IR 208.

<sup>249</sup> [2008] IESC 63 [2009] 2 IR 208, 223. See also *Dunne v Director of Public Prosecutions* High Court 6 June 1996; *Bazoka v Judges of the Dublin Metropolitan District Court* [2004] IEHC 126; *Conway v Director of Public Prosecutions* [2007] IEHC 434; *McDonagh v Director of Public Prosecutions* [2009] IEHC 73; *Mooney v Watkin* [2011] IEHC 288; and *McArdle v Director of Public Prosecutions* [2012] IEHC 286.

<sup>250</sup> [1998] IEHC 167.

<sup>251</sup> [1998] IEHC 167.

supervisory jurisdiction”,<sup>252</sup> granted *certiorari*, not because of the issuing of the warrant, but “because of its continued existence a year later.”<sup>253</sup>

### (3) *Discussion*

7.112 The Commission is aware that delay or failure to execute a bench warrant can have a number of negative effects. A lengthy delay in executing a bench warrant may have a prejudicial effect on a person whose trial is delayed as a result if, for example, witnesses that previously might have helped the defence are no longer available. It can also be argued that a person in respect of whom a bench warrant issued is entitled to “peace of mind”<sup>254</sup> and not to have the threat of an unexecuted warrant hanging over him or her. In addition, the public interest in the prosecution of crime and the interests of the victim of a crime are negatively affected if bench warrants are not dealt with expeditiously as there is a lack of progress in the relevant case. Delay and failure to execute bench warrants contribute to the high figures for unexecuted bench warrants, which result in general inefficiency in the courts system.

7.113 The Commission has considered whether there should be a duty on Gardaí to return to the court which issued the warrant after a certain period of time and explain what efforts have been made to execute the warrant and any reasons why it has not yet been executed. It could then be open to the issuing authority to extend the validity period of the warrant or to cancel the warrant if he or she was of the view that insufficient efforts had been made to locate the person to whom the warrant related. Such an approach would encourage Gardaí to take active steps to execute outstanding warrants as soon as possible. This would result in cases in which bench warrants are issued being disposed of more quickly and would result in fewer unexecuted bench warrants.

7.114 However, the imposition of a formal time limit might not take account of different factors in individual cases. For example, while it might be easy for Gardaí to locate a person who has a bench warrant against them within a certain time period in some cases, it might be more difficult in a case where, for example, an accused had left the county for some time. Courts have held that it is not possible or desirable to impose strict time periods on the validity of bench warrants and each case involving a delay in the execution of a bench warrant that is under consideration should require a balancing of all of the factors.<sup>255</sup> A procedure requiring Gardaí to return to the Court of issue to explain why a bench warrant had not yet been executed might result in person purposefully absconding or avoiding arrest until the date for returning the warrant had passed. In addition, it might be too onerous and require a disproportionate commitment of Garda resources if Gardaí were required to execute bench warrants within a certain period of time. Much Garda and court time and resources would be taken up with Gardaí returning to court to explain why a bench warrant had not been executed.

7.115 It is important that bench warrants be executed expeditiously. However, having considered the advantages and disadvantages, the Commission is of the view that there should not be a requirement that Gardaí return to court to explain why a bench warrant has not been executed. Rather, it should remain the case that delay in the execution of a bench warrant may be challenged and dealt with on a case by case basis.

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<sup>252</sup> *Ibid.*

<sup>253</sup> *Ibid.*

<sup>254</sup> This also formed part of the reasoning for the High Court’s decision in *Murphy v Shields* [1998] IEHC 167 to grant an order of *certiorari*.

<sup>255</sup> *Cormack v Director of Public Prosecutions* [2008] IESC 63, [2009] 2 IR 208, at paragraph 42.

**7.116 The Commission recommends that the arguments that a delay or failure to execute a bench warrant breached a person's right to a fair trial should continue to be adjudicated upon on a case by case basis and there should not be a duty on Gardaí in all cases to return to a court that issued a bench warrant and explain why the bench warrant remains unexecuted.**

## **F Inspection of PULSE**

7.117 In the Consultation Paper, the Commission provisionally recommended that a protocol should be put in place requiring members of An Garda Síochána to inspect PULSE records to determine whether an unexecuted bench warrant exists in respect of a person. The Commission also provisionally recommended the introduction of a certification process whereby members of An Garda Síochána would have to sign a declaration stating that he or she had examined PULSE records. Such a declaration requirement would have to be satisfied before a member granted station bail, before bringing the person before a court to be dealt with by a judge, or in respect of any other matter to be dealt with by An Garda Síochána. The requirement could be implemented through a standard declaration form to be completed, and attached to the relevant file or papers, such as a bail bond or charge sheet. Alternatively, a declaration section could be added to existing forms so that a member would simply have to tick a box stating that PULSE had been checked to determine whether there was an unexecuted bench warrant against the person, and then sign the declaration section.

7.118 PULSE (Police Using Leading Systems Effectively) is the database currently employed by the Gardaí to store and share knowledge across the organisation and with other organisations, such as the Courts Service. All incidents of notable concern are logged on PULSE, which stores the details and provides an identification number specific to the person in question. Thus, when a court issues a bench warrant, the Gardaí are informed and a record reflecting this is created on PULSE. The Consultation Paper highlighted a number of issues pertaining to the manner in which PULSE is used. Most commonly, this relates to a failure by the Gardaí to properly inspect PULSE so that persons are often granted station bail when there is an unexecuted bench warrant against them. Alternatively, the court may not be informed that a person before them has an unexecuted warrant against them. The Consultation Paper suggested that a specific protocol be established in respect of PULSE in order to address these issues. A simple document certification procedure whereby the Garda in question was obliged to declare formally that he or she has inspected PULSE would suffice.

7.119 The *Report of the Garda Síochána Inspectorate on Crime Investigation* mentions that, following the Guerin Report, a system will be implemented requiring a sergeant or member in charge of detained persons at Garda stations to cover 5 key points before releasing a person from custody.<sup>256</sup> One of these is ensuring that the person does not have an outstanding bench warrant against them.

7.120 The Commission received a submission suggesting that a document certification procedure is unnecessary as Gardaí can give evidence under oath confirming that they have inspected PULSE and there are no outstanding bench warrants against the relevant person. While the Commission acknowledges that Gardaí can give such evidence, it is important that every Garda who is considering whether to grant a person station bail, or a court that is considering an application for bail, is aware that an unexecuted bench warrant exists in respect of a person. Firstly, the existence of an unexecuted bench warrant is a factor that may be relevant to whether a person should be granted bail or not. Secondly, failure of a member of An Garda Síochána to check PULSE or inform the Court of an unexecuted bench warrant does not assist in reducing the high number of

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<sup>256</sup> Garda Inspectorate *Report on Crime Investigation* (2014), part 10 at 24.

unexecuted bench warrants. One measure that An Garda Síochána recommends is to “ensure that a person in Garda custody is never released without searching for and executing outstanding warrants.”<sup>257</sup>

7.121 Thus, the Commission recommends the implementation of a procedure whereby the member of the Gardaí dealing with a person should be required to sign a formal declaration stating that he or she has examined PULSE and satisfied himself or herself that there are no outstanding bench warrants to be executed in respect of the person.

7.122 Some IT improvements may be required if a protocol requiring members of An Garda Síochána to inspect PULSE records to determine whether an unexecuted bench warrant exists is to be effective. A check of PULSE may not always identify the existence of an unexecuted bench warrant against a person. The *Report of the Garda Síochána Inspectorate on Crime Investigation* notes that when a warrant is recorded on PULSE, a warning marker is created in respect of a person’s record.<sup>258</sup> The warning marker should show up when an intelligence check is carried out and flag the existence of a warrant. However, the Report notes that the warning marker “does not update the original PULSE record for the crime the suspect is linked to, and it does not link the warrant to the address where the person resides.”<sup>259</sup> As a result, a Garda visiting an address of a person may be unaware that that person has an outstanding warrant. The Report recommends that “the Garda Síochána reviews the system of PULSE warning markers and sources and IT solution to ensure that markers are automatically flagged to an address or an incident on PULSE to which the person is connect.”<sup>260</sup> Such an IT solution would ensure that all relevant information is highlighted when members of An Garda Síochána are checking PULSE for unexecuted warrants in respect of a person.

**7.123 The Commission recommends that a protocol should be put in place requiring members of An Garda Síochána to inspect PULSE records to determine whether an unexecuted bench warrant exists in respect of a person.**

**7.124 The Commission also recommends the introduction of a certification process whereby a declaration would have to be signed by a member of An Garda Síochána dealing with a person stating that he or she has examined PULSE records.**

## **G Unexecuted Bench Warrants and Station Bail**

7.125 In the Consultation Paper, the Commission invited submissions as to whether a member of An Garda Síochána of a certain minimum rank should be given a discretionary power to grant station bail where a person has an unexecuted bench warrant against him or her. The Consultation Paper outlined the statutory power of Gardaí in certain cases to release a person on bail to appear before the District Court where it is considered “prudent” to do so.<sup>261</sup> However, where there is a warrant in existence for any such person this option is not currently available.<sup>262</sup> In such circumstances, the person must be brought before the

<sup>257</sup> *Ibid*, part 10 at 29.

<sup>258</sup> *Ibid*, part 10 at 19.

<sup>259</sup> *Ibid*.

<sup>260</sup> *Ibid*.

<sup>261</sup> Section 31 of the *Criminal Procedure Act 1967*, as amended by section 3 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, authorises a sergeant or member in charge of a Garda station, if he or she considers it prudent to do so and no warrant directing the detention of that person is in force, release a person who has been brought in custody on bail to appear before the next sitting of the District Court.

<sup>262</sup> See *Dunne v Director of Public Prosecutions* High Court 6 June 1996 where the High Court stated that a bench warrant is a command issued to An Garda Síochána to bring the named person before the Court and therefore places a “mandatory duty” upon them to apprehend the person concerned.



District Court as soon as possible,<sup>263</sup> which often requires the convening of an emergency sitting of the court. Such a process is costly and it is in this context that the Commission invited submissions on whether there should be a discretion to grant station bail. The Consultation Paper noted that this may be a suitable solution in circumstances where:

- (1) a bench warrant has existed for a long time and/or pertains to a minor matter; and
- (2) a member of An Garda Síochána of a certain rank does not believe that the person is likely to abscond or evade justice.<sup>264</sup>

7.126 Giving Gardaí of a certain minimum rank discretion to release a person against whom a live bench warrant exists would reduce the need to convene out of hours court sittings as the person could instead be released on station bail and given a court time and date to appear in court. This would reduce costs because Gardaí, judges and court staff would not need to travel to a court so that the bench warrant could be executed. In cases where a bench warrant has remained unexecuted for a long period of time or relates to a minor offence, there may not be a great risk that the warrant cannot be executed in the very near future. For example, there may be no real concern that the person will abscond. He or she may have a long term fixed address, and it may therefore not be difficult to find him or her at a later time. Therefore the person could be released on station bail until the next scheduled sitting of the relevant court.

7.127 A bench warrant is a command to An Garda Síochána to arrest a person and bring them before a court. In the Supreme Court decision *Cormack and Farrell v Director of Public Prosecutions*,<sup>265</sup> the Court stated:

“The law unambiguously requires Gardaí to execute bench warrants without delay and within a reasonable timeframe. In this context the courts must ensure that court processes and orders are given due respect by the relevant State authorities and the execution of a bench warrant is not something to be simply left to the relevant State authority as a matter of discretion.”<sup>266</sup>

7.128 The Court cited the following passage from the High Court decision *Dunne v Director of Public Prosecutions*,<sup>267</sup> which has been referred to in numerous cases:<sup>268</sup>

“A warrant of apprehension is a command issued to the Gardaí by a Court established under the Constitution to bring a named person before the Court to be dealt with according to law. It is not a document which merely vests a discretion in the Guards to apprehend the person named in it; it is a command to arrest that person immediately and bring him or her before the Court which issued it. That it is a command rather than merely an authority of permission to arrest can be clearly seen from the terms of the warrant in the instant case.”

7.129 The status of a bench warrant, namely, a court order or command to arrest, may mean that it would be unsuitable to afford a discretion to Gardaí to release a person against whom there is an outstanding bench warrant. Moreover, if a bench warrant exists in respect of a person, it means that he or she previously failed to appear in court. This

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<sup>263</sup> Section 15(1) of the *Criminal Justice Act 1951*, as substituted by section 18 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*.

<sup>264</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 7.60.

<sup>265</sup> *Cormack and Farrell v Director of Public Prosecutions* [2008] IESC 63, [2009] 2 IR 208.

<sup>266</sup> [2008] IESC 63, [2009] 2 IR 208 at 221.

<sup>267</sup> High Court 6 June 1996.

<sup>268</sup> See for example *Murphy v Shields*, High Court 27 November 1998; *Cormack and Farrell v Director of Public Prosecutions* [2008] IESC 63, [2009] 2 IR 208; and *Mooney v Watkin* [2011] IEHC 288.

means that there may be an increased risk that such a person will not appear in court if released on station bail. When considering whether to grant a person bail, courts take into account whether and, if relevant, the number of times that the person has previously failed to appear in court. There is a danger that giving Gardaí of a certain minimum rank discretion to release a person on station bail where there is a live warrant would have the effect of increasing the number of bench warrants issued if the court had to issue another bench warrant as a result of that person subsequently failing to appear in court.

7.130 It can also be argued that the most suitably placed authority to decide whether or not to grant bail to a person who has been arrested on foot of a bench warrant is a court. The *District Court Rules 1997* already provide for the endorsement of a warrant of arrest by a judge when issuing the warrant authorising the release of a person arrested on foot of a warrant. Section 8(1) of the *Bail Act 1997* provides that, where a court issues a warrant for the arrest of a person, it may direct that the person be released on arrest upon entering into recognisances with or without sureties to appear before the court at a specified date and time.<sup>269</sup> Order 17, Rule 5 of the *District Court Rules 1997* mirrors the power of endorsement contained in section 8(1) of the 1997 Act.<sup>270</sup> Form 26.1 is the relevant form in this regard and is set out in schedule B to the *District Court Rules 1997*. Thus, it is already possible, in cases involving minor offences, for a person to be released on station bail once a judge has endorsed the warrant to that effect at the time of issue. There is also a concern that providing for a discretion in respect of a minor offence where the bench warrant was very old would have a net-widening effect so that it would eventually lead to persons against whom a live bench warrant exists being released on station bail for more serious offences. The Commission is also aware that in many cases, an unexecuted bench warrant comes to light when Gardaí arrest a person for a new alleged offence, bring him or her to the Garda station and discover on PULSE that there is an unexecuted bench warrant in respect of that person. If this is the manner in which unexecuted bench warrants are discovered in a large number of cases, it may not be effective to recommend that Gardaí should have a discretion to release a person on bail in such circumstances.

7.131 In light of the significant concerns that giving Gardaí of a certain rank a discretion to release a person on station bail when an unexecuted bench warrant exists, the Commission is of the view that legislation should not provide for such a discretion. Rather, the provision in section 8(1) of the *Bail Act 1997* which allows a judge to endorse a warrant for the arrest of a person authorising the release of the person upon entering into recognisances can be used where the bench warrant relates to a minor offence.

**7.132 The Commission recommends that section 8(1) of the *Bail Act 1997*, which provides for the endorsement of a warrant of arrest by a judge when issuing the warrant authorising the release of a person arrested on foot of a warrant on station bail, should be used where appropriate, and there should be no discretion for a member of An Garda Síochána of a certain minimum rank to release a person on station bail where an unexecuted bench warrant exists in respect of that person.**

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<sup>269</sup> Section 8(1) of the *Bail Act 1997*, as amended by section 14 of the *Criminal Justice Act 2007*. By contrast, a person arrested without warrant need only be brought before the District Court when charged with an offence.

<sup>270</sup> Order 7, Rule 5 of the *District Court Rules 1997* (SI No.93 of 1997), as substituted by the *District Court (Criminal Justice Act 2007) Rules 2008* (SI No.41 of 2008).

## H Explaining the Requirement to Appear as a Condition of Bail

7.133 In the Consultation Paper, the Commission noted that a person's failure to appear in Court after being granted bail may be due to a lack of awareness or understanding of his or her obligation to appear.<sup>271</sup> For example, where a person is released on bail from a Garda station, he or she may be under the impression that the matter has been completely dealt with and may not realise that he or she has been released on bail and is required to appear in court. Alternatively, when a person leaves court, he or she may be unaware of the requirement to attend at a subsequent court sitting, particularly where he or she has not had a legal representative present to explain the proceedings.

7.134 The Commission therefore provisionally recommended that a procedure should be put in place so that where bail is granted to a person (whether Garda station bail or court granted bail), the person should clearly understand the bail condition that he or she is to appear before the court at a later date.<sup>272</sup> The Commission is aware that it is the practice of many judges to ask individuals whether they understand their bail conditions. However, it may be appropriate to set out this requirement in rules of court or a code of practice or practice direction.

7.135 The Commission identified a number of best practice approaches which could be set out in respect of such a procedure. With regard to Garda station bail the Commission noted the following<sup>273</sup>:

- (1) in cases where there is a language barrier between the relevant authority and the person concerned, it may be advisable to call upon an interpreter to explain the bail condition to appear in court to the person;
- (2) where a person appears to be under the influence of an intoxicating substance the matter should be followed up by meeting with the person at another time, when he or she may be better able to understand his or her obligations;
- (3) where a person appears to have literacy problems, any document setting out the requirement to appear should be clearly explained, so that he or she understands its content;
- (4) where a person's capacity may be in question, a suitable or relevant assisted decision-maker, social worker, carer, solicitor or other person should be contacted to follow up on the matter.

7.136 In respect of court bail, the judge or legal representative involved should be certain that the person understands the requirement to attend at the court on a future date. This may, for example, involve taking the person to a quiet area of the court, or relying on an interpreter, to explain the matter completely.

7.137 The Commission also provisionally recommended in the Consultation Paper that, as an overall precaution, it would be advisable to give a person who has been granted bail and who is required to appear before a court a simple document noting his or her obligation to appear, and the time and date set for that appearance.<sup>274</sup>

7.138 The Commission received a submission suggesting that such a code of practice is consistent with the existing practice of the Gardaí in respect of station bail. Each arrested

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<sup>271</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraph 7.51

<sup>272</sup> *Ibid* at paragraph 7.57.

<sup>273</sup> *Ibid* at paragraph 7.54.

<sup>274</sup> *Ibid* at paragraph 7.57.

person is given a copy of the charge sheet and a copy of the station bail document<sup>275</sup> which outlines the offence that the person has been charged with and the requirement to appear at a court on a specific date and time. The submission suggests that these simple documents. The requirement to attend court is also explained to the person by a member of the Garda station staff in ordinary language. Where there is an issue pertaining to language an interpreter is called to the station to explain this to the person in their native language.

7.139 The Commission is of the view that it would be appropriate to set out current practice in a code of practice so that when a person is granted bail, the relevant authority, or a decision-making assistant, should ensure that the person fully understands his or her requirement to appear before a court, as a condition of the bail agreement. Such an approach should help to reduce the number of people who fail to attend at court due to being unaware or unable to understand that they are under an obligation to appear. In turn, this should help to reduce the number of bench warrants issued in respect of non-appearance of persons who have been admitted to bail.

7.140 In light of submissions received, the Commission has considered whether Form 17.2, which is the document provided to persons released on station bail, is simple enough to make it clear to that person that he or she must appear at a sitting of the District Court at a specific date, time and location. Part 2 of the form contains such information but the form also contains a large amount of other information that might confuse a person who is not familiar with court proceedings and bail procedure. For example, the form uses terms such as “recognisance”, “surety” and “estreated”. It is important that Gardaí provide the person with a form which specifies the conditions of his or her bail, such as any sum of money to be lodged or independent surety. However, the Commission is of the view that Gardaí should provide a person being released on station bail with a separate document indicating the requirement to appear at a District Court at a specified time, date and location. This document should use plain language so that it can be easily understood. Such an approach would be beneficial in cases where it does not immediately appear to the authority concerned that a person is having difficulty understanding the condition to appear, or where a person is not comfortable with outlining that he or she does not in fact understand the bail conditions. Providing the person with a simple written notice enables him or her to show the notice to another person who can assist in explaining the condition to appear, and perhaps assist the person to fulfil the obligation.

**7.141 The Commission recommends that where a person is granted bail, whether at a Garda station or by a court, the relevant authority should have in place a clear procedure to ensure that he or she is notified of and understands the obligation to appear before a court at a later date, as a condition of the bail agreement.**

**7.142 The Commission also recommends that where a person is granted bail, he or she should be provided with a document at that time setting out, in plain intelligible language, his or her requirement to attend at a court sitting, as well as the time and date upon which he or she is required to appear.**

## **I Informing Courts of Existing Bench Warrants**

7.143 In the Consultation Paper, the Commission invited submissions as to whether a District Court rule or code of practice should be implemented requiring judges of the District Court and Gardaí to determine if there are any unexecuted warrants against an individual appearing before the court.<sup>276</sup> The Commission also sought views on how all records

<sup>275</sup> Schedule B to the *District Court Rules* contains Form 17.2 *Recognisance Taken By Member of Garda Síochána – Criminal Procedure Act 1967, Section 31 (As Amended By Criminal Justice Act 2007, Section 20)*, which is the form given to persons released on station bail.

<sup>276</sup> *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) at paragraphs 7.104-7.107.

relating to an individual could be made easily accessible to the Courts Service so that the court may be fully informed when dealing with that person.<sup>277</sup>

**(1) Requirement of judges of the District Court and/or Gardaí to ascertain if there are any unexecuted warrants**

7.144 The Consultation Paper noted that, in some cases where persons appear in court, the existence of an unexecuted bench warrant is not brought to the attention of the court.<sup>278</sup> This can result in the court taking an approach that it would not necessarily have taken if it had been aware of the outstanding warrant. For example, a court might grant bail or impose less stringent bail conditions than it would have if it had been aware of the outstanding bench warrant. The Consultation Paper noted that some judges make specific enquiries as to whether there are any unexecuted bench warrants against a person and that this seems to be a best practice approach.<sup>279</sup> The Commission is of the opinion that a process requiring Gardaí to check PULSE to determine whether there are any existing bench warrants would assist in keeping courts informed of outstanding bench warrants. Such a requirement should be supplemented by a District Court rule or practice direction requiring judges of the District Court to enquire with the relevant Garda and Courts Service staff as to whether there are any unexecuted bench warrants in respect of a person who is before the court. A judge making oral enquiries in relation to the existence of any unexecuted warrants would remind Gardaí and Courts Service staff of the need to check to see whether there are any unexecuted warrants. The incorporation of best practice into standard procedure would result in more warrants being executed and may assist in reducing the number of unexecuted bench warrants.

**7.145 The Commission recommends that the current practice of judges enquiring as to whether there are any unexecuted warrants against a person appearing before the court should be implemented in a District Court rule or practice direction.**

**(2) Court Records**

7.146 In the Consultation Paper, the Commission noted that there are often difficulties identifying a person and his or her records on the Courts Service Criminal Case Tracking System (CCTS).<sup>280</sup> When a court issues a bench warrant, it is recorded on the CCTS. Usually the person's name address and date of birth is recorded. Lack of precision and inconsistencies in the format of recording information on the CCTS can lead to difficulties accessing all or any of a person's records on the system. As a result, a search of the CCTS in respect of a person being dealt with by the court may not bring up records of outstanding warrants against that person. Other issues, such as a person providing a false address or having a common name, contribute to difficulties in locating complete and accurate records through a search of the CCTS. The Commission also received feedback suggesting that not all warrants that have been issued contain the date of birth of the relevant person. This can result in an inability to identify the person to whom the warrant relates if it is a common name or if more than one person in a family has a certain name.

7.147 In the Consultation Paper, the Commission invited submissions as to how all records relating to a person could be easily accessible to the Court so that the Court may be fully informed when dealing with that person.<sup>281</sup>

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<sup>277</sup> *Ibid* at paragraphs 7.108-7.110

<sup>278</sup> *Ibid* at paragraph 7.104.

<sup>279</sup> *Ibid* at paragraph 7.105.

<sup>280</sup> *Ibid* at paragraph 7.108.

<sup>281</sup> *Ibid* at paragraph 7.110.

**(a) A unique identifier**

7.148 In the Consultation Paper, the Commission suggested that including a person's PPS number on records might assist in precisely and definitively identifying a person's court records.<sup>282</sup> The Commission received feedback suggesting that the availability of PPS numbers would greatly assist the Courts Service in this regard.

7.149 The issue of warrant records is discussed in the *Garda Síochána Inspectorate Report on Crime Investigation*.<sup>283</sup> The Report noted that there are many reference numbers associated with warrants, including a PULSE number, court case file number, charge sheet number and warrant number, and suggests that "[a] unique reference number shared between the court and the Garda Síochána would certainly reduce some of the confusion over a warrant reference number."<sup>284</sup>

7.150 The use of PPS numbers to help identify persons would necessitate legislation requiring a person who is arrested or suspected of an offence that is non-arrestable to provide a Garda with their PPS number. There could be a penalty for refusing to give a PPS number or giving a false PPS number. Alternatively, if the Commission's recommendation that legislation should allow for data sharing between the Courts Service and other state bodies to enable summonses to be sent to an accurate address is implemented, a PPS number could be obtained from another public service body. The PPS number could then be used on all documents during proceedings on both the PULSE system and CCTS.

7.151 As with the recommendation at paragraph 05 regarding sharing data between the Court Service and other agencies, the introduction of a provision allowing for PPS numbers to be used on the CCTS and PULSE systems as a unique identifier would need to be supplemented by a code of practice or guidelines to promote proper use of PPS numbers in accordance with data protection legislation.

**7.152 The Commission recommends that legislation should provide for access by the Courts Service to PPS numbers to be used as a unique identifier to assist the Courts Service in identifying a person on the Criminal Case Tracking System for the purpose of executing bench warrants. Any provision allowing for PPS numbers to be used on the CCTS and PULSE systems as a unique identifier would need to be supplemented by a code of practice or guidelines to promote proper use of PPS numbers in accordance with data protection legislation.**

**(b) Tracking warrants and verification of identity**

7.153 The *Report of the Garda Síochána Inspectorate on Crime Investigation* notes that there may be a significant gap between the records of warrants first issued in court and those recorded on the PULSE system.<sup>285</sup> Garda Internal audits in 2010 and 2011 found "indications that significant numbers of warrants are not tracked correctly"<sup>286</sup> and considerable differences between the records kept by the courts and on the PULSE system. Regarding the tracking of warrants, the Report notes that two previous warrant

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<sup>282</sup> In its 2013 *Report on Jury Service* (LRC 107-2013), the Commission discussed the issue of using the Public Services Card (PSC) as an alternative database for use in the selection of juries. The *Social Welfare Consolidation Act 2005* provides that the PSC, which is based on the PPS number, is to be used as a unique identifier that enables a person to access public services, including social welfare payments. Section 262 of the 2005 Act, as amended, provides for the type of information that may be stored on the card.

<sup>283</sup> Garda Inspectorate *Report on Crime Investigation* (2014), Part 10 at 16.

<sup>284</sup> *Ibid.*

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.*

audits conducted over the past three years discovered that “22% of warrants could not physically be located on the day that the audits were conducted.” As a result, Gardaí are occasionally unable to find a warrant when they stop or arrest a person, and sometimes release persons from Garda stations without executing the warrant. The Commission has been advised that the Courts Service uses identification numbers provided to them by An Garda Síochána using the PULSE system. Occasionally, however, a second, separate PULSE identification number is created for a person, making it difficult for the Courts Service to locate the person’s complete records. It recommended that “the Garda Síochána in conjunction with the Courts Service reviews the process for tracking warrants from the courts to Garda stations.”<sup>287</sup>

7.154 The Garda Síochána Inspectorate Report also notes that the issuing of many warrants is a result of “ineffective verification of the identity of a person that the Garda Síochána or other agencies have dealt with.” It noted the importance of verifying the identity of a suspect when first dealing with them either away from a Garda station or at a Garda station. An inaccurate identification can result in a warrant being issued for a wrong person or a person that does not exist, and therefore there are many unexecuted warrants in false names and for non-existent addresses or for persons with no connection to a case.<sup>288</sup> As already noted, incorrect identification, whether when a person is being dealt with by Gardaí or another agency or when false or inaccurate details are entered on the CCTS system, can result in problems accessing correct records for a person before the court and a failure to identify that an outstanding bench warrant exists in respect of that person. The Garda Inspectorate Report suggests that “a small investment of time to conduct proper enquiries at the first stage of dealing with an offender will significantly reduce the number of warrants that are issued by the courts and recommended that An Garda Síochána should implement a Standard Operating Procedure for identity verification.”<sup>289</sup> These observations are consistent with feedback that the Commission received. The Commission supports this recommendation and is of the view that a standard operating procedure for identity verification would assist in reducing the number of issued and unexecuted warrants.

**7.155 The Commission recommends the implementation of a standard operating procedure by An Garda Síochána for identity verification to ensure the proper tracking of warrants.**

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<sup>287</sup> *Ibid.*

<sup>288</sup> *Ibid.*

<sup>289</sup> *Ibid*, part 10 at 18.





## CHAPTER 8 SUMMARY OF RECOMMENDATIONS

The recommendations made by the Commission in this Report are as follows.

### **Chapter 2: a generally applicable Search Warrants Act**

- 8.01 The Commission recommends the enactment of a generally applicable Search Warrants Act. [paragraph 2.27]
- 8.02 The Commission recommends that the proposed Search Warrants Act should apply to all indictable offences and (in accordance with the recommendation in paragraph 2.55) to those summary offences for which existing legislation provides for search warrant powers. [paragraph 2.40]
- 8.03 The Commission recommends that existing legislative provisions which authorise search warrants to be issued for the investigation of specific indictable offences should be repealed. [paragraph 2.50]
- 8.04 The Commission recommends that the repeal of these legislative provisions should be achieved by way of textual amendment and not a blanket non-textual amendment. [paragraph 2.51]
- 8.05 The Commission recommends that, in the future, where new legislation is enacted or made that provides for search warrants, the legislation should provide that the generally applicable Search Warrants Act should apply to that legislation and that the new legislation should also expressly amend a Schedule to the Search Warrants Act to include a reference to the new legislation. [paragraph 2.52]
- 8.06 The Commission recommends that the Search Warrants Act should apply to existing search warrant provisions that apply to summary offences, and that these provisions should be listed in a Schedule to the Act. [paragraph 2.55]
- 8.07 The Commission recommends that the Search Warrants Act (other than provisions relating to the use in any subsequent criminal proceedings of material seized during a search) should apply to a scheduled list of Acts and Statutory Instruments which authorise the issuing of a search warrant where suspicion or belief that evidence relating to an offence is not a requirement or not the only requirement for the issuing of a warrant (in particular, Acts and Statutory Instruments that authorise the issuing of search warrants to regulatory authorities for purposes of regulatory supervision and inspection). [paragraph 2.71]
- 8.08 The Commission recommends that the key elements of the Search Warrants Act should be supplemented by elements in other legislation only where there is a particular need to do so, such as the need for a longer validity period in the *Companies Act 2014*.<sup>1</sup> [paragraph 2.72]
- 8.09 The Commission recommends that the Search Warrants Act should not alter or affect any common law rule or statutory provision that authorises a person to enter property without a search warrant. [paragraph 2.75]
- 8.10 The Commission recommends that the proposed Search Warrants Act should contain transitional provisions to safeguard the validity of search warrants issued under any prior legislative provisions. [paragraph 2.84]

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<sup>1</sup> Section 787(9) of the *Companies Act 2014*.

### **Chapter 3: application for search warrants**

- 8.11 The Commission recommends that the proposed Search Warrants Act should use the term “applicant” to refer to the person applying for a search warrant. [paragraph 3.03]
- 8.12 The Commission recommends that a single, standard requirement should be used to describe the opinion required by the search warrant applicant. [paragraph 3.12]
- 8.13 The Commission recommends that “reasonable grounds for suspicion” should be the standard requirement in respect of an application for a search warrant. [paragraph 3.21]
- 8.14 The Commission recommends that “information on oath and in writing” should be the standard requirement for an applicant to affirm his or her opinion. [paragraph 3.36]
- 8.15 The Commission recommends that the proposed Search Warrants Act should retain the current requirement that a search warrant may be issued where material in respect of an offence is to be found at a specified location, and that the recommended Search Warrants Act should not therefore provide for anticipatory warrants. [paragraph 3.47]
- 8.16 The Commission recommends that the power of an authority considering whether to issue a search warrant to request further information from an applicant should be placed on a statutory footing in the Search Warrants Act. Such a provision should not create a positive obligation but should simply acknowledge the power to request additional information where it is necessary and appropriate to do so. [paragraph 3.52]
- 8.17 The Commission recommends that the proposed Search Warrants Act should provide for a standard search warrant information form to be used when applying for a search warrant, which should replace the array of “information for search warrant” forms that currently exist. [paragraph 3.63]
- 8.18 The Commission recommends that the proposed Search Warrants Act should allow for search warrant information forms to be filed electronically. [paragraph 3.71]
- 8.19 The Commission recommends that as a general rule a person applying for a search warrant should be required to appear personally before a judge of the District Court to affirm his or her opinion under oath; but that the proposed Search Warrants Act should also provide that an application may be made without the applicant appearing personally before a judge where circumstances of urgency giving rise to the immediate need for a search warrant means that the delay of appearing in person before a judge would frustrate the effective execution of the search warrant. [paragraph 3.90]
- 8.20 The Commission recommends that in the urgent circumstances allowing for the removal of the requirement for a personal appearance by the applicant, the issuing authority should be a judge of the High Court. [paragraph 3.96]
- 8.21 The Commission recommends that in cases where the applicant has not appeared personally before a judge, he or she should be required to communicate with the judge of the High Court considering the application by video link or telephone to affirm his or her opinion under oath and answer any questions that the issuing authority deems necessary. Where the applicant has affirmed his or her opinion by video link or telephone, the applicant should be required to file a record of the search warrant application with the High Court as soon as practicable thereafter and not later than 24 hours after the issuing of the search warrant. [paragraph 3.104]
- 8.22 The Commission recommends that where a judge wishes to be informed of previous search warrant applications, he or she may enquire as to this matter as part of his or her power to request further information of an applicant, but that the proposed Search Warrants Act should not include a mandatory requirement to inform the court of previous search warrant applications. [paragraph 3.110]

#### **Chapter 4: issuing search warrants**

- 8.23 The Commission recommends that the proposed Search Warrants Act should provide that search warrants should only be issued by a court, and that this should ordinarily be a judge of the District Court. This should be subject to an exception that search warrants may be issued by the High Court where circumstances of urgency exist giving rise to the immediate need for a search warrant which would be frustrated by the general requirement for the applicant to appear in person before a judge of the District Court. [paragraph 4.39]
- 8.24 The Commission recommends the repeal of legislative provisions empowering members of An Garda Síochána and peace commissioners to issue search warrants. [paragraph 4.40]
- 8.25 The Commission recommends that the proposed Search Warrants Act should provide for a standard search warrant form to be used when issuing a search warrant, which should replace the array of search warrant forms that currently exist. [paragraph 4.56]
- 8.26 The Commission recommends that a copy of each issued search warrant, supplied by the applicant, should be retained on file by the District Court; and in the case of urgent applications, by the High Court, and where the search warrant has been transmitted to the applicant electronically by the High Court, a copy shall be saved on an electronic database. [paragraph 4.63]
- 8.27 The Commission recommends that the executing authority should possess the search warrant so that he or she can show it to the owner or occupier. [paragraph 4.78]
- 8.28 The Commission also recommends that where, in urgent circumstances, the applicant has not personally appeared before the issuing authority, it should be possible for the search warrant to be transmitted to him or her electronically so that he or she can show the owner or occupier of the premises being searched the search warrant on a device or a printed copy of the electronically transmitted warrant. [paragraph 4.79]

#### **Chapter 5: execution of search warrants**

- 8.29 The Commission recommends that the Search Warrants Act should provide for a standard validity period for search warrants of 7 days. [paragraph 5.05]
- 8.30 The Commission recommends that where an applicant has applied to the High Court for a search warrant in urgent circumstances without appearing personally before a judge of the District Court, the validity period of the warrant should be 24 hours. The Commission recommends that the Search Warrants Act should provide that this is an exception to the general standard period of 7 days. [paragraph 5.09]
- 8.31 The Commission recommends that the Search Warrants Act should provide for the extension of the search warrant validity period of 7 days where this is deemed necessary; and the executing officer should be required to provide information on oath as to the reasons why an extension is considered necessary. [paragraph 5.15]
- 8.32 The Commission recommends that extension of the validity period should not be permitted at the time of the initial search warrant application nor once the warrant expiration date has passed. [paragraph 5.16]
- 8.33 The Commission recommends that the extension period should be no more than 7 days, but that a subsequent application for extension should be permitted where a further extension is required. [paragraph 5.17]
- 8.34 The Commission recommends that the Search Warrants Act should permit no more than three orders to be made extending the validity period of a search warrant. [paragraph 5.18]
- 8.35 The Commission recommends that the provisions in the Search Warrants Act concerning the 7 day validity period and extension of the validity period should be without prejudice to

specific legislative provisions, including those in the *Central Bank (Supervision and Enforcement) Act 2013* and the *Companies Act 2014*, which specify longer validity periods where these are necessary for investigations under, for example, financial services legislation or company law. [paragraph 5.19]

- 8.36 The Commission recommends that the Search Warrants Act should include a presumption that a search warrant will be executed at a reasonable time unless there are specific reasons why this should not be the case; and that if the search warrant is not to be executed at a reasonable time, the reasons for this should be provided when the application for the search warrant is being made and should form part of the sworn basis for the application. The Commission also recommends that any reference to what specific times are to be regarded as reasonable for this purpose should be a matter for consideration in the statutory Code of Practice on Search Warrants recommended in paragraph 6.70 of this Report. [paragraph 5.26]
- 8.37 The Commission recommends that the Search Warrants Act should provide that the scope of the authority to enter a location should be “at any reasonable time or times.” [paragraph 5.39]
- 8.38 The Commission recommends that the Search Warrants Act should not require the applicant to state at the time of the search warrant application how many entries are required. [paragraph 5.40]
- 8.39 The Commission recommends that the Search Warrants Act should provide that where it is necessary to use force during the execution of a search warrant, any force used must be reasonable. [paragraph 5.44]
- 8.40 The Commission recommends that a copy of the search warrant should be given to the owner or occupier of the property concerned upon the completion of the warrant execution. [paragraph 5.53]
- 8.41 The Commission recommends that when the owner or occupier is not present at the place at the time of the execution of the warrant the executing authority should leave a copy of the search warrant in a prominent place at the place. [paragraph 5.54]
- 8.42 The Commission recommends that the requirement to give a copy of the search warrant to the owner or occupier should not be absolute and that the Search Warrants Act should provide for an exception that where an executing officer believes that it is not advisable to give a copy of the warrant it may be withheld from the owner or occupier. [paragraph 5.57]
- 8.43 The Commission recommends that there should be an appeal from a decision to withhold the search warrant copy from an owner or occupier to a judge of the District Court. [paragraph 5.58]
- 8.44 The Commission recommends that the occupier of a location which is the subject of a search should be provided with an occupier’s notice outlining the nature of the authority afforded to executing officers, the procedure for seizing material under the warrant and the rights and obligations of the occupier. [paragraph 5.63]
- 8.45 The Commission recommends that when the occupier is not present at the premises at the time of the execution of the warrant the executing authority should leave the occupier’s notice in a prominent place on the premises. [paragraph 5.64]
- 8.46 The Commission recommends that, where a person who is not a member of An Garda Síochána is required to assist with the execution of a search warrant, specific permission should be sought from the court issuing the search warrant and that where such permission is granted this must be stated on the issued search warrant. The Commission therefore also recommends that the Search Warrants Act should not contain a broad provision to the effect that any person whose assistance is deemed to be necessary may accompany the executing officer. [paragraph 5.67]

- 8.47 The Commission recommends that the Search Warrants Act should, where it is necessary and justified in the circumstances, enable executing officers:
- (a) where the person acting under the authority of the warrant is a member of An Garda Síochána, to search persons present at a search location;
  - (b) to request basic personal details from persons present at a search location;
  - (c) to request assistance from persons present so as to gain access to materials sought under the search warrant; and
  - (d) to require any person that appears to be in a position to facilitate access to information held in a computer to take certain steps to assist the executing officer to access that information, and that the executing officer may copy any document, use any equipment to copy electronically stored information and to seize and retain any computer or storage medium in which material is kept. [paragraph 5.77]
- 8.48 The Commission recommends that the Search Warrants Act should provide that refusal of a person to comply with a permissible request by executing officers or obstruction or attempted obstruction of the execution of a search warrant is an offence. [paragraph 5.82]
- 8.49 The Commission recommends that the Search Warrants Act should provide for the power of an executing officer to seize incidentally discovered material and should provide that where, in the course of exercising any powers under the Act, the executing authority comes into possession of anything which he or she reasonably believes to be evidence of, or relating to an offence or suspected offence, he or she may seize and retain it. [paragraph 5.94]
- 8.50 The Commission recommends that the Search Warrants Act should provide that where privileged material is found during the course of a search warrant execution, such material may generally not be examined or seized. [paragraph 5.99]
- 8.51 The Commission recommends that the Search Warrants Act should provide for a specific procedure to be applied when material is found during the execution of the search which may attract privilege. [paragraph 5.106]
- 8.52 The Commission recommends that the procedure should involve securely sealing any material which the executing officer apprehends is privileged without any examination of it, removing the material from the search location and storing it in a safe and secure place. An application should be made to the High Court by either the executing authority or the person from whom material was taken for a determination as to whether or not the material is to benefit from the protection of legal privilege. Where the material is certified as privileged it should not be examined by the investigating authority. If it is determined not to be privileged, the material should be placed with the investigating authority if it is examinable under the scope of the search warrant. [paragraph 5.107]
- 8.53 The Commission recommends that the Search Warrants Act should identify that in certain circumstances privileged and non-privileged material may be mixed and contained in one file. It should allow for the seizure of all the material in order to examine the non-privileged material, where necessary. The examination process should be strictly controlled so that the privileged material is not compromised. [paragraph 5.115]
- 8.54 The Commission recommends that an inventory of all seized or copied items should be given to the person concerned upon completion of the search and seizure under warrant. The Commission recommends that if some, but not all, of the seized materials are returned the inventory should be amended to reflect this. [paragraph 5.122]
- 8.55 The Commission recommends that the Search Warrants Act should not contain any provision on the electronic recording of the execution of search warrants (including the use of body-worn cameras) as this is primarily an operational policing matter for the relevant authorities to consider in the light of, in particular, the *Data Protections Acts 1988 and 2003*. [paragraph 5.131]

## **Chapter 6: admissibility of evidence and a search warrants code of practice**

- 8.56 The Commission recommends that the proposed Search Warrants Act should provide that a failure by a person applying for or executing a search warrant to observe any provision of the Act shall not of itself affect the admissibility in evidence of any material obtained during a search. [paragraph 6.56]
- 8.57 The Commission recommends that the proposed Search Warrant Act should not include any provision as to the tests by which the courts determine whether to admit evidence that has been obtained illegally, or the tests used to determine the admissibility of unconstitutionally obtained evidence, and that these should remain a matter for the courts to determine and, where required, to develop. [paragraph 6.57]
- 8.58 The Commission recommends that the Search Warrants Act should provide for a code of practice which should contain practical guidance concerning the main elements of the Search Warrants Act, including the procedural steps involved in the process; that the code of practice should be written in plain, intelligible language; and that it should be easily accessible to all persons, including that it should be made available on the internet. The Commission also recommends that breach of the code of practice should not of itself render any evidence obtained under a search warrant inadmissible. [paragraph 6.70]

## **Chapter 7: bench warrants, committal warrants and related procedure**

- 8.59 The Commission supports the comprehensive recommendations made in connection with bench warrants in the 2014 *Report of the Garda Síochána Inspectorate on Crime Investigation*, and accordingly considers that it is not necessary to make any further recommendations on this matter. [paragraph 7.11]
- 8.60 The Commission recommends that section 44 of the *Road Traffic Act 2010*, which provides for payment of a fixed charge notice upon receipt of a summons, should be commenced. [paragraph 7.29]
- 8.61 The Commission recommends that legislation should provide for a postal response system to summonses in respect of summary only offences. [paragraph 7.38]
- 8.62 The Commission recommends that legislation should provide that, where a court imposes a fine on a person who has been convicted of an offence under the *Road Traffic Acts* and the person does not pay the fine by the due date, it may direct the Department of Transport Tourism and Sport or Department of the Environment, Community and Local Government to refrain from processing motor tax applications and changes in vehicle ownership in respect of a vehicle that is registered in the name of a person against whom the fine was imposed. [paragraph 7.46]
- 8.63 The Commission recommends that the *Fines (Payment and Recovery) Act 2014* be commenced. [paragraph 7.70]
- 8.64 The Commission recommends that unpaid fines imposed under the *Road Traffic Acts* should be registered on the National Vehicle Driver File in order to reduce the number of persons committed to prison for non-payment of court fines. [paragraph 7.71]
- 8.65 The Commission does not recommend that deduction of fines at source from social welfare payments should be provided for at this time. [paragraph 7.72]
- 8.66 The Commission recommends that, where possible, summonses should be served by personal delivery or by registered post but that since it would be impractical to require personal service or service by registered post in all cases, the Commission recommends that letterbox service should remain as an alternative option. [paragraph 7.94]
- 8.67 The Commission recommends that legislation should allow for the sharing of data between the Courts Service and other bodies such as the Revenue Commissioners and Minister for Social Protection for the purpose of directing a summons to an accurate address. The Commission recommends that such legislation should be supplemented by

guidelines promoting the proper use of PPS numbers in accordance with data protection legislation. [paragraph 7.100]

- 8.68 The Commission recommends that arguments that a delay or failure to execute a bench warrant breached a person's right to a fair trial should continue to be adjudicated upon on a case by case basis and there should not be a duty on Gardaí in all cases to return to a court that issued a bench warrant and explain why the bench warrant remains unexecuted. [paragraph 7.116]
- 8.69 The Commission recommends that a protocol should be put in place requiring members of An Garda Síochána to inspect PULSE records to determine whether an unexecuted bench warrant exists in respect of a person. [paragraph 7.123]
- 8.70 The Commission recommends the introduction of a certification process whereby a declaration would have to be signed by a member of An Garda Síochána dealing with a person stating that he or she has examined PULSE records. [paragraph 7.124]
- 8.71 The Commission recommends that section 8(1) of the *Bail Act 1997*, which provides for the endorsement of a warrant of arrest by a judge when issuing the warrant authorising the release of a person arrested on foot of a warrant on station bail, should be used where appropriate, and there should be no discretion for a member of An Garda Síochána of a certain minimum rank to release a person on station bail where an unexecuted bench warrant exists in respect of that person. [paragraph 7.132]
- 8.72 The Commission recommends that where a person is granted bail, whether at a Garda station or by a court, the relevant authority should have in place a clear procedure to ensure that he or she is notified of and understands the obligation to appear before a court at a later date, as a condition of the bail agreement. [paragraph 7.141]
- 8.73 The Commission recommends that where a person is granted bail, he or she should be provided with a document at that time setting out, in plain intelligible language, his or her requirement to attend at a court sitting, as well as the time and date upon which he or she is required to appear. [paragraph 7.142]
- 8.74 The Commission recommends that the current practice of judges enquiring as to whether there are any unexecuted warrants against a person appearing before the court should be implemented in a District Court rule or practice direction. [paragraph 7.145]
- 8.75 The Commission recommends that legislation should provide for access by the Courts Service to PPS numbers to be used as a unique identifier to assist the Courts Service in identifying a person on the Criminal Case Tracking System for the purpose of executing bench warrants. Any provision allowing for PPS numbers to be used on the CCTS and PULSE systems as a unique identifier would need to be supplemented by a code of practice or guidelines to promote proper use of PPS numbers in accordance with data protection legislation. [paragraph 7.152]
- 8.76 The Commission recommends the implementation of a standard operating procedure by An Garda Síochána for identity verification to ensure the proper tracking of warrants. [paragraph 7.155]





## APPENDIX A SEARCH WARRANT POWERS IN ACTS AND STATUTORY INSTRUMENTS

The list of statutory search warrants powers in this Appendix has been prepared by the Commission to illustrate the extensive number of such provisions in existing legislation (up to July 2015).<sup>1</sup> As noted in the Report, section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997* as substituted by section 6(1) of the *Criminal Justice Act 2006* is the most widely-applicable search warrant power as it allows a judge of the District Court to issue a search warrant where he or she has reasonable grounds for suspecting that evidence relating to the commission of an arrestable offence may be found on a particular premises. An arrestable offence is an offence that carries a sentence of imprisonment of 5 years or more. There is an overlap between section 10 of the 1997 Act and a number of provisions in the list below that also allow for the issuing of a search warrant for an offence punishable by a minimum of 5 years imprisonment. However, the list also includes examples of powers to issue a search warrant where the suspected offence carries a maximum penalty of less than 5 years imprisonment.<sup>2</sup>

Agriculture	
Legislation	Provision
European Union (Direct Support Rural Development Schemes) Offences and Control Regulations 2015 (93/2015)	Regulation 8
European Union (Identification of Equidae) Regulations 2014 (207/2014)	Regulation 27
European Union (Animal By-Products) Regulations 2014 (187/2014)	Regulation 16
European Union (Marketing of Vegetable Propagating and Planting Material, Other than Seed) Regulations 2014 (152/2014)	Regulation 9
European Union (Good Agricultural Practice for Protection of Waters) Regulations 2014 (31/2014)	Regulation 25
European Union (Biocidal Products) Regulations 2013 (427/2013)	Regulation 28
European Communities (Swine Vesicular Disease) Regulations 2013 (73/2013)	Regulation 24
European Communities (African swine fever) Regulations 2013 (4/2013)	Regulation 24
European Communities (Direct Support Schemes) Offences and Control Regulations 2012 (115/2012)	Regulation 7-
European Communities (Classical Swine Fever) Regulations 2012 (516/2012)	Regulation 25
European Communities (Import of Personal Consignments of Products of Animal Origin) Regulations 2012 (374/2012)	Regulation 6
European Communities (Control of Foot and mouth Disease)	Regulation 49

<sup>1</sup> The subject headings under which the powers are listed are based on those in the Classified List of Legislation-In-Force prepared and maintained by the Commission on its website, lawreform.ie.

<sup>2</sup> Every care has been taken in the preparation of this list. However the Commission does not guarantee that the list is complete.

Regulations 2012 (51/2012)	
European Communities (Newcastle Disease) Regulations 2012 (57/2012)	Regulation 22
European Communities (Sustainable Use of Pesticides) Regulations 2012 (155/2012)	Regulation 18
European Communities (Phytosanitary Measures) (Brown Rot in Egypt) Regulations 2012 (211/2012)	Regulation 6
European Communities (Sheep Identification) Regulations 2011 (309/2011)	Regulation 14
European Communities (Equine) Regulations 2011 (357/2011) as amended by European Communities (Equine) (Amendment) Regulations 2012 (371/2012)	Regulation 21 Regulation 2
European Communities (Potato Cyst Nematodes) Regulations 2011 (359/2011)	Regulation 10
European Communities (Carnation Leaf-Rollers) Regulations 2011 (360/2011)	Regulation 8
European Communities (Marketing Standards) (Crops and oils) Regulations 2011 (378/2011)	Regulation 10
European Communities (Marketing of Fruit Plant Propagating Material) Regulations 2011 (384/2011)	Regulation 12
European Communities (Seed Potatoes) Regulations 2011 (532/2011)	Regulation 16
European Communities (Common Agricultural Policy) (Scrutiny of Transactions) Regulations 2010 (422/2010)	Regulation 6
European Communities (Control of Salmonella In Broilers) Regulations 2009 (64/2009)	Regulation 11
European Communities (Bovine Breeding) Regulations 2009 (19/2009)	Regulation 13
European Communities (Identification of Bovines) Regulations 2009 (77/2009)	Regulation 18
European Communities (Control of Animal Remedies and their Residues) Regulations 2009 (183/2009)	Regulation 29
European Communities (Phytosanitary Measures) (Anoplophora Chinensis) Regulations 2009 (391/2009)	Regulation 8
European Communities (Agriculture, Fisheries and Food) (Compliance) Regulations 2009 (424/2009)	Regulation 6
European Communities (Food and Feed Hygiene) Regulations 2009 (432/2009)	Regulation 14
European Communities (Machinery) Regulations 2008 (407/2008)	Regulation 36
European Communities (Transmissible Spongiform Encephalopathies and Animal By-Products) Regulations 2008 (252/2008)	Regulation 22
European Communities (Approval and Registration of Dealers of Ovine Animals) Regulations 2008 (100/2008)	Regulation 12
European Communities (Bluetongue) Regulations 2008 Arrangement of Regulations (133/2008)	Regulation 18

European Communities (Milk Quota) Regulations 2008 (227/2008)	Regulation 35
European Communities (Marketing of Meat of Bovine Animals Aged 12 Months Or Less) Regulations 2008 (245/2008)	Regulation 28
European Communities (Control of Salmonella in Laying Flocks of Domestic Fowl) Regulations 2008 (247/2008)	Regulation 13
European Communities (Pesticide Residues) Regulations 2008 (565/2008)	Regulation 6
European Communities (Potato Brown Rot) Regulations 2007 (198/2007)	Regulation 7
European Communities (Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs) Regulations 2007 (704/2007)	Regulation 9
European Communities (Animal Transport and Control Post) Regulations 2006 (675/2006)	Regulation 12
Health (Country of Origin of Beef) Regulations 2006 (307/2006) as amended by Health (Country of Origin of Beef) (Amendment) Regulations 2007 (85/2007)	Regulation 9 Regulation 5
European Communities (Control on Imports of Products of Animal Origin from Madagascar) Regulations 2006 (190/2006)	Regulation 5
European Communities (Goat Identification) Regulations 2005 (792/2005)	Regulation 14
European Communities (Fertiliser) Regulations 2005 (360/2005)	Regulation 10
European Communities (Feed Additives) Regulations 2005 (242/2005)	Regulation 13
European Communities (Phytosanitary Measures) Regulations 2004 (578/2004)	Regulation 9
European Communities (Control of Organisms Harmful To Plants and Plant Products) Regulations 2004 (894/2004)	Regulation 12
European Communities (Feedingstuffs) (Genetically Modified Feed) Regulations 2004 (424/2004)	Regulation 6
European Communities (Organic Farming) Regulations 2004 (112/2004) as amended by European Communities (Organic Farming) (Amendment) Regulations 2007 (698/2007)	Regulation 9 Regulation 2
European Communities (Seed of Oil Plants and Fibre Plants) Regulations (280/2003)	Regulation 13
European Communities (Authorization, Placing on The Market, Use and Control of Plant Protection Products) Regulations 2003 (83/2003) as amended by European Communities (Authorization, Placing On the Market, Use and Control of Plant Protection Products) (Amendment) (No. 4) Regulations 2009 (329/2009)	Regulation 31A Regulation 2

European Communities (Classification, Packaging and Labelling of Plant Protection Products and Biocide Products) Regulations 2001 (624/2001) as amended by European Communities (Classification, Packaging and Labelling of Plant Protection Products and Biocide Products) (Amendment) Regulations 2008 (351/2008)	Regulation 21  Regulation 2
European Communities (Veterinary Checks on Products Imported From Third Countries) Regulations 2000 (292/2000)	Regulation 19
European Communities (Trade in Certain Animal Products) Regulations 1996 (102/1996)	Regulation 27
European Communities (Trade in Animals and Animal Semen, Ova and Embryos) Regulations 1996 (12/1996)	Regulation 19
European Communities (Trade in Bovine Breeding Animals, Their Semen, Ova and Embryos) Regulations 1994 ( 297/1994)	Regulation 24
European Communities (Trade in Animals and Animal Products) Regulations 1994 (289/1994)	Regulation 7

<b>Animals</b>	
<b>Legislation</b>	<b>Provision</b>
Animal Health and Welfare Act 2013 (15/2013)	Section 45(1)
European Union (Protection of Animals at the Time of Killing) Regulations 2013 (292/2013)	Regulation 22
Veterinary Practice Act 2005 (22/2005) as amended by Veterinary Practice (Amendment) Act 2012 (25/2012)	Section 126(1)  Section 7
European Union (Protection of Animals used for Scientific Purposes) Regulations 2012 (543/2012)	Regulation 72
Welfare of Greyhounds Act 2011 (29/2011)	Section 19
Dog Breeding Establishments Act 2010 (29/2010)	Section 19(4)
European Communities (Welfare of farmed animals) Regulations 2010 (311/2010)	Regulation 32
European Communities (Cat and Dog Fur) (Restriction on Trade) Regulations 2008 (513/2008)	Regulation 7
European Communities (Health of Aquaculture Animals and Products) Regulations 2008 (261/2008)	Regulation 28
European Communities (Avian Influenza) (Control on Imports) Regulations 2008 (17/2008)	Regulation 6
European Communities (Avian Influenza) (Precautionary Measures) Regulations 2008 (7/2008)	Regulation 8
European Communities (Animal Remedies) (No. 2) Regulations 2007 (786/2007)	Regulation 53
European Communities (Circuses) Regulations 2007 (257/2007)	Regulation 7

European Communities (Avian Influenza) (Control on Movement of Pet Birds) Regulations 2007 (96/2007)	Regulation 6
European Communities (Avian Influenza) (Control on Imports of Birds) Regulations 2005 (709/2005)	Regulation 6
Control of Horses Act 1996 (37/1996)	Section 35(1)
Control of Dogs Act 1986 (32/1986)	Section 26(1)

<b>Betting and Gaming</b>	
<b>Legislation</b>	<b>Provision</b>
Gaming and Lotteries Act 1956 (2/1956)	Section 39(1)

<b>Broadcasting</b>	
<b>Legislation</b>	<b>Provision</b>
Wireless Telegraphy Act 1926 (45/1926) as amended by Broadcasting Act 2009 (18/2009)	Section 8(1) Section 182
Broadcasting Act 1990 (24/1990)	Section 14(1)
Wireless Telegraphy Act 1926 (45/2009) as amended by Broadcasting Authority Act 1960 (10/1960)	Section 12A(11) Section 34 and schedule 3, Part 2

<b>Child Care</b>	
<b>Legislation</b>	<b>Provision</b>
Child Care Act 1991 (17/1991) as amended by Child and Family Agency Act 2013 (40/2013)	Section 58J(2) Section 92
Child Care Act 1991 (17/1991) as amended by Health Act 2004 (42/2004) and Child and Family Agency Act 2013 (40/2013)	Section 35 Section 75 Section 97 and schedule 2, part 4
Child Care Act 1991 as amended by Child and Family Agency Act 2013	Section 46(6) Section 97
Child Care Act 1991 as amended by Children Act 2001	Section 23T Section 16

<b>Civil Liability</b>	
<b>Legislation</b>	<b>Provision</b>
Defamation Act 2009 (31/2009)	Section 37(1)

Package Holidays and Travel Trade Act 1995 (17/1995) as amended by State Airports (Shannon Group) Act 2014 (27/2014)	Section 21A(1) Section 55
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<b>Commissions of Investigation</b>	
<b>Legislation</b>	<b>Provision</b>
Commissions of Investigation Act 2004 (23/2004)	Section 29(1)

<b>Company Law</b>	
<b>Legislation</b>	<b>Provision</b>
Companies Act 2014 (38/2014)	Section 787(1)
Companies Act 1990 (33/1990) as amended by Company Law Enforcement Act 2001 (28/2001) and Companies (Amendment) Act 2009	Section 20 Section 30 Section 5

<b>Competition, Consumer Protection and Consumer Credit</b>	
<b>Legislation</b>	<b>Provision</b>
Competition and Consumer Protection Act 2014 (29/2014)	Section 36(4)
European Union (Provision of Services) Regulations 2010 (533/2010)	Regulation 46
European Communities (Directive 2000/31/EC) Regulations 2003 (68/2003)	Regulation 22
European Communities (Requirements To Indicate Product Prices) Regulation 2002 (639/2002)	Regulation 10
Consumer Credit Act 1995 (24/1995)	Section 106(1)
Consumer Credit Act 1995 (24/1995) as amended by Central Bank and Financial Services Authority of Ireland Act 2003 (12/2003)	Sections 8C and 8O Section 35 and schedule 2, part 21
European Communities (Application of Rules on Competition To Rail and Road Transport) Regulations 1993 (416/1993)	Regulation 5
European Communities (Application of the Rules on Competition To Maritime Transport) Regulations 1993 (386/1993)	Regulation 6
European Communities (Rules on Competition) Regulations 1993 (124/1993)	Regulation 6
European Communities (Application of the Rules on Competition To Air Transport) Regulations 1992 (379/1992)	Regulation 6

<b>Communications and Energy</b>	
<b>Legislation</b>	<b>Provision</b>

European Communities (Internal Market in Natural Gas and Electricity) (Amendment) Regulations 2015 (16/2015)	Regulation 23
European Union (Wholesale Energy Market Integrity and Transparency) Regulations 2014 (480/2014)	Regulation 9
European Union (Energy Performance of Buildings) Regulations 2012 (243/2012)	Regulation 30
European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (336/2011)	Regulation 19
Electricity Regulation Act 1999 (23/1999) as amended by Petroleum (Exploration and Extraction) Safety Act 2010 (4/2010)	Section 13W Section 3
National Oil Reserves Agency Act 2007 (7/2007)	Section 48(1)
Communications Regulation Act 2002 (20/2002)	Section 40
European Communities (Conditional Access) Regulations 2000 (357/2000)	Regulation 5
Electricity Regulation Act 1999 (23/1999) as amended by Gas (Amendment) Act 2000 (26/2000) and Gas (Interim) (Regulation) Act 2002 (10/2002)	Section 12 Section 13 Section 18(c)
European Communities (Use of Standards For The Transmission of Television Signals) Regulations 1998 (262/1998)	Regulation 13
Energy (Miscellaneous Provisions) Act 1995 (35/1995) as amended by Energy (Miscellaneous Provisions) Act 2012 (3/2012)	Section 16(5) Section 5

<b>Courts</b>	
<b>Legislation</b>	<b>Provision</b>
Petty Sessions (Ireland) Act 1851	Section 6

<b>Criminal Law and Criminal Justice</b>	
<b>Legislation</b>	<b>Provision</b>
Offences Against the State Act 1939 (13/1939) as amended by Criminal Law Act 1976 (32/1976) and Criminal Justice (Search Warrants) Act 2012 (33/2012)	Section 29 Section 5 Section 1
Criminal Justice (Psychoactive Substances) Act 2010 (22/2010)	Section 12
Criminal Procedure Act 2010 (27/2010)	Section 18(2)
Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (6/2010)	Section 78(1)
Criminal Justice (Surveillance) Act 2009 (19/2009)	Sections 5(2) and 7(2)
Criminal Justice (Mutual Assistance) Act 2008 (7/2008)	Section 74(8)

International Criminal Court Act 2006 (30/2006)	Section 51(5)
Prevention of Corruption (Amendment) Act 2001 (27/2001) as amended by Criminal Justice Act 2006	Section 5(1) Section 191
Criminal Justice (Theft and Fraud Offences) Act 2001 (50/2001) as amended by Criminal Justice Act 2006	Section 48(2) Section 192
Criminal Justice (Miscellaneous Provisions) Act 1997 (4/1997) as amended by Criminal Justice Act 2006 (26/2006)	Section 10 Section 6(1)
Criminal Assets Bureau Act 1996 (31/1996) as amended by Proceeds of Crime (Amendment) Act 2005 (1/2005) and Criminal Justice Act 2006 (26/2006)	Section 14(1) Section 16(1) Section 190
Criminal Justice Act 1994 (15/1994)	Section 55(3) Act
European Arrest Warrant Act 2003 (45/2003)	Section 25(3)
Criminal Justice (Location of Victims' Remains) Act 1999 (9/1999)	Section 8(1)
International War Crimes Tribunals Act 1998 (40/1998)	Section 30(2)
Sexual Offences (Jurisdiction) Act 1996 (38/1996)	Section 10(1)
Criminal Justice (Joint Investigation Teams) Act 2004 (20/2004)	Section 7(9)
Criminal Law (Sexual Offences) Act 1993 (20/1993)	Section 10(2)
Criminal Damage Act 1991 (31/1991)	Section 13(1)
Firearms and Offensive Weapons Act 1990 (12/1990)	Section 15
Criminal Law (Amendment) Act 1935 (6/1935) as amended by Criminal Law (Sexual Offences) Act 1993 (20/1993)	Section 19(1) Section 12
Firearms Act 1925 (17/1925) as amended by Firearms Act 1964 (1/1964)	Section 24 Section 23
Criminal Law Amendment Act 1885 (69/1885)	Section 10
Explosive Substances Act 1883 (3/1883)	Section 8(1)
Explosives Act 1875 as amended by Criminal Justice Act 2006 (26/2006)	Section 73 Section 69

<b>Customs, Excise and Exports</b>	
<b>Legislation</b>	<b>Provision</b>
Customs Act 2015 (18/2015)	Section 29
Control of Exports Act 2008 (1/2008)	Section 7(11)
Customs and Excise (Miscellaneous Provisions) Act 1988 (10/1988)	Sections 3(2) and 5(1)
Customs Consolidation Act 1876 (36/1876) as amended by Finance Act 1936 (31/1936)	Section 205 Section 19



<b>Drugs and Drug Trafficking</b>	
<b>Legislation</b>	<b>Provision</b>
Criminal Justice (Drug Trafficking) Act 1996 (29/1996) as amended by Criminal Justice (Search Warrants) Act 2012 (33/2012)	Section 8 Section 3
Misuse of Drugs Act 1977 (12/1977)  as amended by Misuse of Drugs Act 1984 (18/1984) and Criminal Justice (Drug Trafficking) Act 1996, as amended by Criminal Justice (Search Warrants) Act 2012 (33/2012)	Section 26  Section 13 Section 8 Section 2

<b>Employment Law</b>	
<b>Legislation</b>	<b>Provision</b>
Employment Permits Act 2006 (16/2006)	Section 22(8)
Employees (Provision of Information and Consultation) Act 2006 (9/2006)	Section 18(7)
European Communities (Organisation of Working Time)(Mobile Staff in Civil Aviation) Regulations 2006 (507/2006)	Regulation 13
Safety, Health and Welfare at Work Act 2005 (10/2005)	Section 64(7)
Employment Permits Act 2003 (7/2003)	Section 2(5)
Carer's Leave Act 2001 (19/2001)	Section 32(7)
National Minimum Wage Act 2000 (5/2000)	Section 33(6)
Employment Equality Act 1998 (21/1998)	Section 94(5)
Organisation of Working Time Act 1997 (20/1997)	Section 8(7)
Protection of Young Persons (Employment) Act 1996 (16/1996)	Section 22(6)

<b>Environmental Protection and Geography</b>	
<b>Legislation</b>	<b>Provision</b>
European Union (Household Food Waste and Bio-waste) Regulations 2015 (191/2015)	Regulation 8
European Union (Batteries and Accumulators) Regulations 2014 (283/2014)	Regulation 41
European Union (Waste Electrical and Electronic Equipment) Regulations 2014 (149/2014)	Regulation 38
European Union (Household Food Waste and Bio-waste) Regulations 2013 (71/2013)	Regulation 8
European Union (Installations and Activities Using Organic Solvents) Regulations 2012 (565/2012)	Regulation 22
European Communities (Greenhouse Gas Emissions Trading) Regulations 2012 (490/2012)	Regulation 25

European Communities Mercury (Export Ban and Safe Storage) Regulations 2012 (27/2012)	Regulation 8
European Communities (Plant Protection Products) Regulations 2012 (159/2012)	Regulation 19
Air Pollution Act 1987 (6/1987) as amended by Environment (Miscellaneous Provisions) Act 2011 (20/2011)	Section 14(6A) Section 11
European Communities (Waste Directive) Regulations 2011 (126/2011)	Regulation 46
European Communities (Shipments of Hazardous Waste exclusively within Ireland) Regulations 2011 (324/2011)	Regulation 13
European Communities (Assessment and Management of Flood Risks) Regulations 2010 (122/2010)	Regulation 4
Dumping at Sea Act 1996 (14/1996) as amended by Foreshore and Dumping at Sea (Amendment) Act 2009	Section 6(8A) Section 34
European Communities (Control of Dangerous Substances From offshore Installations) Regulations 2009 (358/2009)	Regulation 12
European Communities (Environmental Liability) Regulations 2008 (547/2008)	Regulation 23(7)
European Communities (Control of Dangerous Substances in Aquaculture) Regulations 2008 (466/2008)	Regulation 12
Ordnance Survey Ireland Act 2001 (43/2001)	Section 10(6)
Waste Management Act 1996 (10/1996)	Section 14(7)
Environmental Protection Agency Act 1992 (7/1992)	Section 13(6)

<b>Equality</b>	
<b>Legislation</b>	<b>Provision</b>
Irish Human Rights and Equality Commission Act 2014 (25/2014)	Section 14(1)
Disability Act 2005 (14/2005)	Section 23(1)
Equal Status Act 2000 (8/2000)	Section 33(4)

<b>Finance and Taxation</b>	
<b>Legislation</b>	<b>Provision</b>
European Union (European Markets Infrastructure) Regulations 2014 (443/2014)	Regulation 8
Central Bank (Supervision and Enforcement) Act 2013 (26/2013)	Section 28
Personal Insolvency Act 2012 (44/2012)	Section 181(14)
European Union (Requirements for Credit Transfers and Direct Debits in	Regulation 8

Euro) Regulations 2013 (132/2013)	
Taxes Consolidation Act 1997 (39/1997) as amended by Finance Act 1997 (11/2007)	Section 908C Section 124
Transparency (Directive 2004/109/EC) Regulations 2007 (277/2007)	Regulation 55
European Communities (Markets in Financial Instruments) Regulations 2007 (60/2007) as amended by Credit Union and Co-operation with Overseas Regulators Act 2012 (40/2012)	Regulation 174(1) Section 70 and schedule , part 4 item 5
Finance Act 2001 (7/2001)	Section 136(5)
Dormant Accounts Act 2001 (32/2001)	Section 23(7)
Stamp Duties Consolidation Act 1999 (31/1999)	Section 140
Taxes Consolidation Act 1997 (39/1997) as amended by Finance Act 2013 (8/2013)	Section 911(2) Section 101
Taxes Consolidation Act 1997 (39/1997) as amended by Finance Act 1997 (11/2007)	Section 908C Section 124
Taxes Consolidation Act 1997 (39/1997) as amended by Finance Act 1999 (2/1999)	Section 905(2A) Section 207
Pensions Act 1990 (25/1990) as amended by Pensions (Amendment) Act, 1996 (18/1996)	Section 18(4D) Section 6
Investment Intermediaries Act 1995 (11/1995)	Section 75(1)
Finance Act 1995 (8/1995)	Section 87(3)
Bankruptcy Act 1988 (27/1988)	Section 28

<b>Food and Food Safety</b>	
<b>Legislation</b>	<b>Provision</b>
European Union (Origin Labelling of Meat) Regulations 2015 (113/2015)	Regulation 10
European Union (Marketing of fruit juices and certain similar products) Regulations 2013 (410/2013)	Regulation 6
European Communities (Spirits Drinks) Regulations 2009 (429/2009) as amended by European Communities (Spirits Drinks)(Amendment) Regulations 2013 (118/2013)	Regulation 4C
European Union (Cereal Seed) Regulations 2013 (217/2013)	Regulation 22
European Communities (Marketing of Seeds) Regulations 2009 (431/2009)	Regulation 12
European Communities (Marketing Standards For Eggs) Regulations 2009 (140/2009)	Regulation 7
European Communities (Control of Salmonella In Broilers) Regulations 2009 (64/2009)	Regulation 11
European Communities (Plastics and Other Materials) (Contact With	Regulation 10

Food) Regulations 2007 (587/2007)	
European Communities (Trade in The Production, Processing, Distribution and Introduction of Products of Animal Origin For Human Consumption) Regulations 2004 (820/2004)	Regulation 11
European Communities (Ethyl Alcohol) Regulations 2004 (30/2004)	Regulation 6
European Communities (Veterinary Checks on Fish and Fishery Products Imported From Third Countries) Regulations 2003 (548/2003)	Regulation 20
European Communities (Marketing of Honey) Regulations 2003 (367/2003)	Regulation 6
European Communities (Marketing of Fruit Jams, Jellies, Marmalades and Sweetened Chestnut Purée) Regulations 2003 (294/2003)	Regulation 6
European Communities (Marketing of Sugar Products) Regulations 2003 (289/2003)	Regulation 6
European Communities (Labelling, Presentation and Advertising of Foodstuffs) Regulations 2002 (483/2002)	Regulation 17
European Communities (Suspending the Placing on the Market, the Importation and the use in Manufacture of Jelly Confectionary Containing the Food Additive E425 Konjac) Regulations 2002 (442/2002)	Regulation 11
European Communities (Additives, Colours and Sweeteners in Food Stuffs) Regulations 2000 (437/2000)	Regulation 27
Food Safety Authority of Ireland Act 1998 (29/1998)	Section 50(4)
Animal Remedies Act 1993 (23/1993)	Section 12(1)
European Communities (Food Imitations (Safety) Regulations 1991 (265/1991)	Regulation 8

<b>Garda Síochána Ombudsman Commission</b>	
<b>Legislation</b>	<b>Provision</b>
Garda Síochána Act 2005 (20/2005) as amended by Criminal Justice Act 2007	Sections 98(1) and 99 Section 43

<b>Health and Health Services</b>	
<b>Legislation</b>	<b>Provision</b>
European Union (Application of Patients Rights in Cross-Border Healthcare) (Amendment) Regulations 2015 (65/2015)	Regulation 17
European Union (Prevention of Sharp Injuries in the Healthcare Sector) Regulations 2014 (135/2014)	Regulation 11
Public Health (Sunbeds) Act 2014(12/2014)	Section 17(6)
European Union (Prevention of Sharps Injuries in the Healthcare Sector) Regulations 2014 (135/2014)	Regulation 11
European Union (Quality and Safety of Human Organs Intended for	Regulation 32

Transplantation) Regulations 2012 (325/2012)	
European Communities (Control of Drug Precursors) Regulations 2009 (558/2009)	Regulation 24
European Communities (Quality and Safety of Human Tissues and Cells) Regulations 2006 (158/2006)	Regulation 22
European Communities (Quality and Safety of Human Blood and Blood Components) Regulations 2005 (360/2005)	Regulation 19
European Communities (Clinical Trials on Medicinal Products For Human Use) Regulations 2004 (190/2004)	Regulation 48
Public Health Tobacco Act 2002 (6/2002) as amended by Public Health (Tobacco)(Amendment) Act 2004 (6/2004)	Section 48(7) Section 17
European Communities (In Vitro Diagnostic Medical Devices) Regulations 2001 (304/2001)	Regulation 18
Regulation 12 of the Medicinal Products (Licensing and Sale) Regulations 1998 (142/1998) as amended by Medicinal Products (Amendment) Regulations 2004 (663/2004)	Regulation 12 Regulation 2
Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995 (5/1995)	Section 9
European Communities (Active Implantable Medical Devices) Regulations 1994 (253/1994)	Regulation 18
European Communities (Medical Devices) Regulations 1994 (252/1994)	Regulation 24

<b>Immigration</b>	
<b>Legislation</b>	<b>Provision</b>
Immigration Act 2004 (1/2004)	Section 15(1)
Aliens Act 1935 (14/1935) as amended by Immigration Act 2003	Section 7 Section 4
Illegal Immigrants (Trafficking) Act 2000 (29/2000)	Section 7(1)

<b>Intellectual Property</b>	
<b>Legislation</b>	<b>Provision</b>
Industrial Designs Act (39/2001)	Section 70(1)
Copyright and Related Rights Act 2000 (28/2000)	Section 261(1)
Copyright and Related Rights Act 2000 (28/2000)	Section 143(1)
Trade Marks Act 1996 (6/1996) as amended by Patents (Amendment) Act 2006	Section 25(2) Section 40

Copyright Act 1963 (10/1963) as amended by Copyright (Amendment) Act 1987 (24/1987)	Section 27(5) Section 2
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<b>Licensed Sale of Alcohol</b>	
<b>Legislation</b>	<b>Provision</b>
Intoxicating Liquor Act 1962 (21/1962)	Section 26(9)
Licensing Act (Ireland) 1874 (69/1874)	Section 24
Beerhouses (Ireland) Act 1864 (35/1864) as amended by Licensing (Ireland) Act 1905 and Intoxicating Liquor Act 1927 (15/1927)	Section 6 Section 63 Act
Spirits (Ireland) Act 1854 (89/1854) as amended by Finance Act 1995 (8/1995) and Finance Act 2001 (7/2001)	Sections 2 and 4 Section 95 and schedule 5 Section 240 and schedule 5
Illicit Distillation (Ireland) Act 1831 (55/1831) as amended by the Intoxicating Liquor Act 1960 (18/1960)	Section 17 Section 22
Illicit Distillation (Ireland) Act 1831 (55/1831) as amended by the Intoxicating Liquor (General) Act 1924	Section 18 Section 27

<b>Local and National Government</b>	
<b>Legislation</b>	<b>Provision</b>
Regulation of Lobbying Act 2015 (5/2015)	Section 19(6)
Local Government Act 2001 (37/2001)	Section 213(7)
Official Secrets Act 1963 (1/1963)	Section 16(1)

<b>National Monuments</b>	
<b>Legislation</b>	<b>Provision</b>
Architectural Heritage (National Inventory) and Historic Monuments (Miscellaneous Provisions) Act 1999 (19/1999)	Section 3(8)
National Monuments (Amendment) Act 1987 (17/1987)	Section 22(1)

<b>Natural Resources</b>	
<b>Legislation</b>	<b>Provision</b>
Forestry Act 2014 (31/2014)	Section 24(6)
European Union (Timber and Timber Products) (Placing on the Market) Regulations 2014 (316/2014)	Regulation 11
Water Services Act 2007 (30/2007)	Section 22(8)

as amended by Water Services (Amendment) Act 2012 (2/2012)	Section 3
European Communities (Marketing of Forest Reproductive Material) Regulations 2002 (618/2002)	Regulation 14
Fisheries (Consolidation) Act 1959 (14/1959) as amended by Fisheries Act 1980 (1/1980)	Section 297(1) Section 71
Foyle Fisheries Act 1952 (5/1952) as amended by the Foyle and Carlingford Fisheries Act 2007 (17/2007)	Section 60 Section 24

<b>Planning and Development</b>	
<b>Legislation</b>	<b>Provision</b>
Housing (Miscellaneous Provisions) Act 2014 (21/2014)	Section 14(5)
Planning and Development Act 2000 (30/2000) as amended by Planning and Development (Amendment) Act 2010 (30/2010)	Section 253(4) Section 73(c)

<b>Product Safety</b>	
<b>Legislation</b>	<b>Provision</b>
European Union (Making Available on the Market of Pyrotechnic Articles) Regulations 2015 (174/2015)	Regulation 28
European Union (Packaging) Regulations 2014 (282/2014)	Regulation 33
European Union (End-of-Life Vehicles) Regulations 2014 (281/2014)	Regulation 32
European Union (Ecodesign Requirements for Certain Energy-related Products) (Amendment) Regulations 2013 (454/2013)	Regulation 19
European Union (Cosmetic Products) Regulations 2013 (440/2013)	Regulation 9
European Union (Construction Products) Regulations 2013 (225/2013)	Regulation 13
European Union (Paints, Varnishes, Vehicle Refinishing Products and Activities) Regulations 2012 (564/2012)	Regulation 21
European Union (Restriction of Certain Hazardous Substances in Electrical and Electronic Equipment) Regulations 2012 (513/2012)	Regulation 31
European Communities (Placing on the Market of Pyrotechnic Articles) Regulations 2010 (1/2010)	Regulation 15
European Communities (Electromagnetic Compatibility) Regulations 2007 (109/2007)	Regulation 19
European Communities (General Product Safety) Regulations 2004 (199/2004)	Regulation 14
European Communities (Radio Equipment and Telecommunications Terminal Equipment) Regulations 2001(240/2001)	Regulation 16
European Communities (Noise Emissions by Equipment for Use Outdoors) Regulations 2001 (632/2001)	Regulation 14

European Communities (Pressure Equipment) Regulations 1999 (400/1999)	Regulation 19
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<b>Property Services</b>	
<b>Legislation</b>	<b>Provision</b>
Property Services (Regulation) Act 2011 (40/2011)	Section 66(14)

<b>Public Safety</b>	
<b>Legislation</b>	<b>Provision</b>
Chemicals Act 2008 (13/2008)	Section 12(8)
Explosives Act 1875 (17/1875) as amended by Criminal Justice Act 2006 (26/2006)	Section 73 Section 69 and sch. 2
Explosives Act 1875 as amended by Criminal Justice Act 2006	Section 80 Section 68
Licensing of Indoor Events Act 2003 (15/2003)	Section 21(40)

<b>Transport</b>	
<b>Legislation</b>	<b>Provision</b>
Vehicle Clamping Act 2015 (13/2015)	Section 24
State Airports (Shannon Group) Act 2014 (27/2014)	Section 55
Taxi Regulation Act 2013 (37/2013)	Section 42
European Union (Railway Safety) (Reporting and Investigation of Serious Accidents, Accidents and Incidents) Regulations 2014 (258/2014)	Regulation 12
Road Safety Authority (Commercial Vehicle Roadworthiness) Act 2012 (16/2012)	Section 26(2)
European Union (Labelling of Tyres) (Fuel Efficiency) Regulations 2012 (342/2012)	Regulation 12
Road Transport Act 2011 (31/2011)	Section 17
European Communities (Carriage of Dangerous Goods by Road and Use of Transportable Pressure Equipment) Regulations 2011 (349/2011)	Regulation 20
European Communities (Road Transport) (Working Conditions and Road Safety) Regulations 2008 (62/2008) as amended by European Union (Road Transport) (Working Conditions and Road Safety) (Amendment) Regulations 2015 (126/2015)	Regulation 33 Regulation 38C
European Communities (Road Transport Activities Checks) Regulations 2007 (545/2007)	Regulation 5



Sea-Fisheries and Maritime Jurisdiction Act 2006 (8/2006) as amended by Criminal Justice Act 2007 (29/2007)	Section 17A Section 44
Railway Safety Act 2005 (31/2005)	Section 73(14)
European Communities (Two and Three Wheel Motor Vehicle Entry into Service) Regulations 2005 (412/2005)	Regulation 10
Aviation Regulation Act 2001 (1/2001)	Section 43
Transport (Railway Information) Act 2001 (55/2001)	Section 36
Carriage of Dangerous Goods by Road Act 1998 (43/1998)	Section 7
Merchant Shipping (Investigation of Marine Casualties) Act 2000 (14/2000)	Section 28(1)
Road Transport Act 1986 (16/1986) as amended by Road Transport Act 1999	Section 16A Section 15
Merchant Shipping (Salvage and Wreck) Act 1993 (34/1993)	Section 57(1)
Irish Aviation Authority Act 1993 (29/1993) as amended by Aviation Act 2006 (7/2006)	Section 57B Section 3(1)
Road Traffic Act 1961 (24/1961)	Section 106(6)

<b>Video and Publications</b>	
<b>Legislation</b>	<b>Provision</b>
Video Recordings Act 1989 (22/1989) as amended by Civil Law (Miscellaneous Provisions) Act 2008	Section 25 Section 69
Censorship of Publications Act 1946 (1/1946)	Section 17(1)
Censorship of Publications Act 1929 (21/1929)	Section 19(1)

<b>Wildlife</b>	
<b>Legislation</b>	<b>Provision</b>
European Union (Birds and Natural Habitats) (Sea-fisheries) Regulations 2013 (290/2013)	Regulation 13
European Communities (Birds and Natural Habitats) Regulations 2011 (477/2011)	Regulation 6
European Communities (Birds and Natural Habitats)(Restrictions on use of Poisoned Bait) Regulations 2010 (481/2010)	Regulation 9
European Communities (Zootechnical and Genealogical Conditions Applicable To Imports From Third Countries) Regulations 1998 (26/1998)	Regulation 7
Wildlife Act 1976 (39/1976) as amended by Wildlife (Amendment) Act 2000 (38/2000)	Section 73(1) Section 67.



## APPENDIX B SELECTED EXAMPLES OF WARRANTLESS POWERS OF ENTRY, STOP AND SEARCH IN ACTS AND STATUTORY INSTRUMENTS

The list of statutory warrantless powers of entry in this Appendix has been prepared by the Commission to illustrate that in a number of instances existing legislation confers both a power of entry based on a judicial search warrant and also a power of entry without a search warrant. This is especially the case where the legislation confers such a power on a statutory regulatory body.<sup>1</sup> For this reason, the Commission recommends in the Report that the proposed Search Warrants Act should provide that its provisions do not alter or affect any rule of law or enactment that confers a power of entry without the need for a search warrant: see section 13 of the draft Bill in Appendix C.<sup>2</sup>

<b>Animals</b>	
<b>Legislation</b>	<b>Provision</b>
Animal Health and Welfare Act 2013	Sections 38(1) and 40
Dog Breeding Establishments Act 2010 (29/2010)	Section 19(1)
Welfare of Greyhounds Act 2011(29/2011)	Section 18(1)
Control of Dogs Act 1986 (32/1986)	Section 16(1)
as amended by Control of Dogs (Amendment) Act 1992 (13/1992)	Section 7
Control of Horses Act 1996 (37/1996)	Section 34(1)
Animal Remedies Act 1993 (23/1993)	Section 11(1)

<b>Betting and Gaming</b>	
<b>Legislation</b>	<b>Provision</b>
Gaming and Lotteries Act 1956 (2/1956)	Section 38

<b>Broadcasting</b>	
<b>Legislation</b>	<b>Provision</b>
Broadcasting Act 2009 (18/2009)	Section 50(4)

<b>Child Care</b>	
<b>Legislation</b>	<b>Provision</b>
Child Care Act 1991 (17/1991)	Section 23T

<sup>1</sup> As with the list of search warrant powers in Appendix A, the subject headings under which the warrantless search powers are listed in this Appendix are based on those in the Classified List of Legislation-In-Force prepared and maintained by the Commission on its website, lawreform.ie.

<sup>2</sup> Whilst every care has been taken in the preparation of this list The Commission does not guarantee that the list is complete.

as amended by Children Act 2001 and Health Act 2004 (42/2004)	Section 16 Section 75 and schedule 7, part 6
Child Care Act 1991 (17/1991) as amended by Child and Family Agency Act 2013 (40/2013)	Section 58J Section 92
Children Act 2001 (24/2001) as amended by Health Act 2004 (42/2004)	Section 254 Section 75 and schedule 7, part 11
Education Act 1998 (51/1998)	Sections 10(2) and 13(3)

<b>Commissions of Investigation</b>	
<b>Legislation</b>	<b>Provision</b>
Commissions of Investigation Act 2004 (23/2004)	Section 28(1)

<b>Competition, Consumer Protection and Consumer Credit</b>	
<b>Legislation</b>	<b>Provision</b>
Competition and Consumer Protection Act 2014 (19/2007)	Sections 36(1) and 37(2)
Consumer Credit Act 1995 (24/1995) as amended by Central Bank and Financial Services Authority of Ireland Act 2003 (12/2003)	Sections 8B and 8N of the Section 35 and schedule 1 part 21
Consumer Credit Act 1995 (24/1995)	Section 105(1)

<b>Communications and Energy</b>	
<b>Legislation</b>	<b>Provision</b>
Communications Regulation Act 2002 (20/2002) as amended by Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (2/2010)	Section 39(3) Section 16

<b>Criminal Law and Criminal Justice</b>	
<b>Legislation</b>	<b>Provision</b>
Criminal Justice (Psychoactive Substances) Act 2010	Section 12(1)
Criminal Justice (Surveillance) Act 2009	Section 7
Criminal Justice Act 1994	Section 35(1)
Firearms and Offensive Weapons Act 1990 (12/1990) as amended by Criminal Justice (Miscellaneous Provisions) Act 2009 (28/2009)	Section 9F Section 40
Firearms and Offensive Weapons Act 1990 (12/1990) as amended by Criminal Law (Miscellaneous Provisions) Act 2009 (28/2009)	Section 16 Section 1

Firearms and Offensive Weapons Act 1990 (12/1990) as amended by Criminal Justice Act 2006 (26/2006)	Section 8A Section 64 and schedule 1
Firearms Act 1925 (17/1925)	Section 21(1)
Explosive Substances Act 1883 (3/1883)	Section 8(1)
Explosives Act 1875 as amended by Criminal Justice Act 2006 (26/2006)	Section 73 Section 69

<b>Customs, Excise and Exports</b>	
<b>Legislation</b>	<b>Provision</b>
Customs Act 2015 (18/2015)	Sections 25 to 35
Customs Consolidation Act 1876 (36/1876) (to be replaced by 2015 Act)	Section 134 and section 203
Finance Act 2001 (7/2001)	Section 136(1)

<b>Drugs and Drug Trafficking</b>	
<b>Legislation</b>	<b>Provision</b>
Misuse of Drugs Act 1977 (12/1977) as amended by Misuse of Drugs Act 1984 (18/1984)	Section 23(1) Section 12

<b>Employment Law</b>	
<b>Legislation</b>	<b>Provision</b>
Safety Health and Welfare at Work Act 2005 (10/2005)	Section 64(1)
Employment Equality Act 1998 (21/1998)	Section 94(2)

<b>Environmental Protection</b>	
<b>Legislation</b>	<b>Provision</b>
Environmental Protection Agency Act 1992 (7/1992)	Section 13(1)

<b>Finance</b>	
<b>Legislation</b>	<b>Provision</b>
Central Bank (Supervision and Enforcement) Act 2013 (26/2013)	Section 26(1)

<b>Food and Food Safety</b>	
<b>Legislation</b>	<b>Provision</b>
Food Safety Authority of Ireland Act 1998 (29/1998)	Section 50(1)

<b>Health and Health Services</b>	
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<b>Legislation</b>	<b>Provision</b>
Irish Medicines Board Act 1995	Section 32B
as amended by Irish Medicines Board (Miscellaneous Provisions) Act 2006	Section 17

<b>Immigration</b>	
<b>Legislation</b>	<b>Provision</b>
Immigration Act 2004 (1/2004)	Section 3
Criminal Law Act 1976	Section 8
as amended by Illegal Immigrants (Trafficking) Act 2000	Section 6

<b>Intellectual Property</b>	
<b>Legislation</b>	<b>Provision</b>
Copyright and Related Rights Act 2000	Section 257

<b>Licensed Sale of Alcohol</b>	
<b>Legislation</b>	<b>Provision</b>
Spirits (Ireland) Act 1854	Section
as amended by Finance Act 1995	Section 95
Refreshment Houses (Ireland) Act 1860	Section 20
as amended by Finance Act 1989	Section 50(2)
Beerhouses (Ireland) Act 1864, section 6	Section 6
as amended by Intoxicating Liquor Act 1927	Section 63 and schedule 2
Licensing Act (Ireland) 1874	Section 23
as amended by Intoxicating Liquor Act 1927 and	Section 22
Intoxicating Liquor Act 1988	Section 51 and schedule

<b>Planning and Development</b>	
<b>Legislation</b>	<b>Provision</b>
Planning and Development Act 2000	Section 253(1)
as amended by Planning and Development (Amendment) Act 2010	Section 73(c)

<b>Product Safety</b>	
<b>Legislation</b>	<b>Provision</b>
European Communities (Machinery) Regulations 2008 (S.I. No.407 of 2008)	Regulation 36

European Communities (Electromagnetic Compatibility) Regulations 2007 (S.I. No.109 of 2007)	Regulation 18
European Communities (General Product Safety) Regulations 2004 (S.I. No. 199 of 2004)	Regulation 14

<b>Transport</b>	
<b>Legislation</b>	<b>Provision</b>
Aviation Regulation Act (1/2001)	Section 42(3)

<b>Wildlife</b>	
<b>Legislation</b>	<b>Provision</b>
Wildlife Act 1976	Section 72(3)
as amended by Wildlife (Amendment) Act 2000 and	Section 65
Wildlife (Amendment) Act 2010	Section 6





**APPENDIX C**

**DRAFT CRIMINAL JUSTICE (SEARCH WARRANTS) BILL 2015**

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National Oil Reserves Agency Act 2007 (No. 7 of 2007)

Misuse of Drugs Act 1977 (No. 12 of 1977)

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## DRAFT CRIMINAL JUSTICE (SEARCH WARRANTS) BILL 2015

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### BILL

*Entitled*

AN ACT TO CONSOLIDATE AND REFORM THE PROCEDURES INVOLVED IN APPLYING FOR, ISSUING AND EXECUTING SEARCH WARRANTS, TO REPEAL VARIOUS STATUTORY PROVISIONS RELATING TO SEARCH WARRANTS AND TO PROVIDE FOR RELATED MATTERS

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

#### **Short title and commencement**

1.—(1) This Act may be cited as the Criminal Justice (Search Warrants) Act 2015.

(2) This Act comes into operation on such day or days as the Minister 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 provisions.

#### ***Explanatory note***

*Section 1* contains standard provisions on the Short Title of the Bill and commencement arrangements.

#### **Interpretation**

2.— In this Act, unless the context otherwise requires—

“applicant” means—

- (a) in the case of an application referred to in *section 3(1)(a)* or *section 9(2)(a)(i)*, a member of An Garda Síochána not below the rank of sergeant,
- (b) in the case of an application referred to in *section 3(1)(b)* or *section 9(2)(a)(ii)*, a person authorised to apply for a search warrant by any enactment specified in *Schedule 1*, and
- (c) in the case of an application referred to in *section 3(1)(c)* or *section 9(2)(a)(iii)*, a person authorised to apply for a search warrant by any enactment specified in *Schedule 2*;

“commission” in relation to an offence, includes an attempt to commit such offence;

“live television link” means any communications technology facility which the Court is satisfied is of sufficient integrity and reliability to enable a person who is not present before the Court to see and hear the Court and to be seen and heard by the Court;

“material” means any tangible or intangible thing and includes a copy of the thing;

“Minister” means the Minister for Justice and Equality;

“occupier” includes the owner of a place;

“place” means a physical location and includes any building or part thereof, dwelling or part thereof, commercial premises, vehicle, whether mechanically propelled or not, vessel, whether sea-going or not, aircraft, whether capable of operation or not, hovercraft or any land or watercourse;

“prescribed” means prescribed by rules of court;

“privileged material” means material which, in the opinion of a court, a person is entitled to refuse to produce or disclose on the grounds of privilege.

***Explanatory note***

*Section 2* contains definitions for terms used in the Bill.

**Application to District Court for search warrant**

**3.—** (1) An applicant may apply to the District Court for a search warrant to be issued under *section 4* where he or she provides information on oath and in writing—

- (a) that there are reasonable grounds for suspecting that evidence of or relating to an indictable offence may be found at a specified place,
- (b) that a search warrant is required to facilitate the applicant in the performance of his or her functions under the provisions of any enactment specified in column 3 of *Schedule 1*, or
- (c) that there are reasonable grounds for suspecting that evidence of or relating to a summary offence under the provisions of any enactment specified in column 3 of *Schedule 2* may be found at a specified place.

(2) Subject to *section 9*, an application for a search warrant shall be made using the prescribed search warrant information form, which may be filed electronically.

(3) The applicant shall provide any additional information which the District Court requests so as to ground the application.

(4) Subject to *section 9*, the applicant shall appear in person before a judge of the District Court to apply for a search warrant.

***Explanatory note***

*Section 3* implements the recommendations in Chapter 2 concerning the scope of the proposed Search Warrants Act and in Chapter 3 regarding the process of applying for a search warrant.

*Section 3(1)* implements the recommendation in paragraph 2.40 that the Act should apply to indictable offences. It also implements the recommendation in paragraph 3.21 that a single phrase, “reasonable grounds for suspicion,” should be used to describe the standard of opinion that the applicant must have when applying for a search warrant. It also requires the applicant to affirm the opinion on oath and in writing.

*Section 3(1)(b)* implements the recommendations in paragraph 2.71 concerning the application of the Act (other than those which refer specifically to the admissibility of evidence in a subsequent criminal trial, as to which see *section 4(7)* and *section 10* of the Bill) to enactments

that authorise entry and search or inspection for the purposes of regulatory supervision or enforcement, rather than where the search is related to suspicion or belief that evidence of or relating to an offence is at a place. Thus *section 3(1)(b)* provides for applications for search warrants to be made under the Act where a search warrant is required to carry out regulatory functions or powers in any enactment listed in *Schedule 1*.

*Section 3(2)* implements the recommendation at paragraph 3.63 that a standard search warrant form should be used when applying for a search warrant, which should replace the array of search warrant forms that currently exist. It also provides that search warrant information forms may be filed electronically.

*Section 3(3)* implements the recommendation at paragraph 3.110 that the power of the District Court to request further information from the applicant should be placed on a statutory footing. This provision does not create a mandatory obligation, but simply acknowledges the power to request additional information where it is necessary and appropriate to do so.

*Section 3(4)* implements the recommendation at paragraph 4.39 that the applicant must appear in person before a judge of the District Court to apply for a search warrant. This is subject to the exception provided for in circumstances of urgency, where an application for a search warrant may be made to the High Court, which does not require an appearance in person: see *section 9* of the Bill.

#### **Search warrant issued by District Court**

**4.—** (1) If a judge of the District Court is satisfied by information on oath and in writing provided by an applicant—

- (a) that there are reasonable grounds for suspecting that evidence of or relating to an indictable offence may be found at a specified place,
- (b) that a search warrant is required to facilitate the applicant in the performance of his or her functions under the provisions of any enactment specified in column 3 of *Schedule 1*, or
- (c) that there are reasonable grounds for suspecting that evidence of or relating to a summary offence under the provisions of any enactment specified in column 3 of *Schedule 2* may be found at a specified place,

the judge may issue a search warrant for the search of that place.

(2) A search warrant issued under this section shall be in the prescribed form.

(3) A judge of the District Court who has issued a search warrant under this section shall cause a copy of the warrant, supplied by the applicant, to be retained on the court file.

(4) A warrant under this section shall be expressed to and shall operate to authorise an applicant (in this Act referred to as “the person acting under the authority of the warrant”), accompanied by such member or members of An Garda Síochána as the person acting under the authority of the warrant considers necessary, or such person, if any, as may be authorised in accordance with *subsection (8)*—

- (a) to enter, at any reasonable time or times (subject to *subsection (5)*), within the validity period of the warrant (if necessary by the use of reasonable force), the place named on the warrant,
- (b) to search the place,

(c) where the person acting under the authority of the warrant is a member of An Garda Síochána, to search any persons present (which power may also be exercised by such person, if any, as may be authorised in accordance with *subsection (8)* who is also a member of An Garda Síochána), and

(d) to seize any material found at that place in the possession of a person present at the place at the time of the search which—

(i) the person acting under the authority of the warrant reasonably believes to be evidence of, or relating to, the commission of an indictable offence (or to a summary offence under the provisions of any enactment specified in column 3 of *Schedule 2*) to which the search warrant relates (and the material so seized may be retained for use in any criminal proceedings, for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings), or

(ii) may be seized in accordance with the provisions of an enactment listed in *Schedule 1*.

(5) If the judge of the District Court is satisfied by information on oath and in writing provided by an applicant that there are grounds for authorising entry at other than a reasonable time or times, the warrant shall specify any such other authorised time or times.

(6) The authority to seize material under this section includes the authority—

(a) to make and retain a copy of any document, record or electronically stored information,

(b) where necessary, to use electronic equipment to copy electronically stored information, and

(c) where necessary, to seize and retain any computer or other storage medium in which any record is kept.

(7) Where in the course of exercising any powers under this Act (other than where the search warrant was applied for under *paragraph (1)(b)*), a person acting under the authority of the warrant comes into the possession of anything which he or she reasonably suspects to be evidence of, or relating to, an offence, other than an offence to which the search warrant relates, it may be seized and retained for use in any criminal proceedings, for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings.

(8) A judge of the District Court, on issuing a search warrant, if he or she believes it is necessary, may by endorsement on the warrant, authorise the person acting under the authority of the warrant to be accompanied and assisted by such other person or persons (not being a member or members of An Garda Síochána).

### ***Explanatory note***

*Section 4(1)* implements the recommendation at paragraph 3.90 that, except in the limited circumstances of urgency described in *section 9* which provides for urgent applications to the High Court, the power to issue a search warrant should be vested in a judge of the District Court. While most existing legislative provisions provide that search warrants are issued by judges of the District Court, a small number provide for the issuing of search

warrants by peace commissioners and members of An Garda Síochána. The Commission recommend that all search warrants should be issued by a court.

*Section 4(1)* also implements the recommendations at paragraphs 2.40, 2.55, and 2.70 that the Search Warrants Act should apply where search warrants are sought: (a) in connection with evidence of or relating to an indictable offence, or (b) where a search warrant is necessary to facilitate a person in carrying out his or her regulatory powers or functions under the provisions of an enactment specified in *Schedule 1* to the Bill, or (c) in connection with evidence of or relating to a summary offence specified in the enactments listed in *Schedule 2*.

*Section 4(2)* implements the recommendation at paragraph 4.56 that the Act should provide for a standard search warrant form, which should replace the current approach whereby each statutory search warrant provision has a corresponding search warrant form.

*Section 4(3)* implements the recommendation at paragraph 4.63 that a copy of each issued search warrant, supplied by the applicant, should be kept on file by the Courts Service.

*Section 4(4)(a)* implements the recommendation at paragraph 5.26 that flexibility as to the time of the execution of a search warrant should remain, with a presumption that in general terms this should occur at a “reasonable time or times”, subject to an exception where a search carried out at other times (broadly speaking, at night, the details of which would be set out in the Code of Practice on Search Warrants: see *section 11* of the Bill) may be justified: this is dealt with in *subsection (5)*, below. It also implements the recommendation at paragraph 5.39 that, by using the term “reasonable time or times” the Act should provide for re-entry of premises following a short break or overnight break where more than one day is needed to execute the warrant. It also implements the recommendation in paragraph 5.44 that where it is necessary to use force during the execution of a search warrant, any force used must be reasonable.

*Section 4(4)(b)* implements the recommendation at paragraph 5.77 that the Search Warrants Act should, where it is necessary and justified in the circumstances, authorise a member of An Garda Síochána executing a warrant to search any persons present at the search location.

*Section 4(4)(c)* implements the recommendation at paragraph 5.94 and provides for the seizure of material found during the execution of a search warrant where there are reasonable grounds for believing that: (i) the material is evidence of the offence or suspected offence with which the search warrant is concerned; or (ii) it may be seized in accordance with the provisions of an enactment listed in *Schedule 1*.

*Section 4(5)* implements the recommendation at paragraph 5.26 that if the applicant satisfies the Court by information on oath and in writing that there are grounds for authorising entry at other than a reasonable time or times, the warrant must provide for this.

*Section 4(6)* implements the recommendation at paragraph 5.77 that the scope of the authority to seize material includes the authority: (a) to make and retain a copy of any document, record or electronically stored information, (b) where necessary, to use electronic equipment copy electronically stored information, and (c) where necessary, to seize and retain any computer or other storage medium in which any record is kept.

*Section 4(7)* implements the recommendation at paragraph 5.94 that the person executing the search warrant should be permitted to seize incidentally discovered material. This may include material related to the offence being investigated, but not listed in the search warrant, or material that does not relate to the offence with which the warrant is concerned, but which is evidence of a separate offence. As this provision refers to the use of such material in a subsequent criminal trial, it is one of the two provisions of the Bill that does not apply to a

search warrant issued for regulatory purposes under *section 4(1)(b)* (see also *section 10* of the Bill).

*Section 4(8)* implements the recommendation at paragraph 5.67 that where a person who is not a member of An Garda Síochána is required to assist with the execution of the search, specific permission should be sought from the District Court; and that where such permission is granted it should be stated on the search warrant.

### **Period of validity of search warrant**

**5.—** (1) The period of validity of a warrant issued under *section 4* shall be 7 days from its date of issue unless that period of validity is later extended under *subsection (3)*.

(2) An applicant may, during the period of validity of a search warrant (including such period as may previously have been extended under *subsection (3)*) apply to the District Court for an order extending the period of validity of the warrant and such an application shall be grounded on information on oath and in writing provided by the applicant stating, by reference to the purpose for which the warrant was issued, the reasons why the applicant considers the extension to be necessary.

(3) If the District Court is satisfied that there are reasonable grounds for believing, having regard to that information so provided, that further time is needed so that the purpose or purposes for which the warrant was issued can be fulfilled, the judge may make an order extending the period of validity of the warrant by a period of 7 days and, where such an order is made, the Court shall cause the warrant to be suitably endorsed to indicate its extended period of validity.

(4) No more than 3 orders extending the validity of a search warrant under *subsection (3)* shall be made.

(5) Nothing in the preceding subsections prevents a District Court from issuing, on foot of a fresh application made under *section 4*, a further search warrant under that section in relation to the same premises.

(6) The periods of validity and extended validity provided for in this section are without prejudice to the periods provided for in—

(a) section 28(2) to (4) of the Central Bank (Supervision and Enforcement) Act 2013, and

(b) section 797(9) to (11) of the Companies Act 2014.

### ***Explanatory note***

*Section 5(1)* implements the recommendation at paragraph 5.05 that the Search Warrants Act should provide for a standard validity period of 7 days for search warrants issued by a judge of the District Court.

*Section 5(2) to (4)* implement the recommendation at paragraph 5.15 that there should be a procedure for extending the validity period of a search warrant, where this is deemed necessary. It requires information on oath as to the reasons why the extension is considered necessary. The period of validity may be extended for up to 7 days, but *section 5(4)* provides that no more than three orders may be made extending the validity period of a search warrant.

*Section 5(5)* provides that the introduction of a procedure for extending the validity period of search warrants does not prevent an applicant for applying for a fresh warrant.



*Section 5(6)* implements the recommendation at paragraph 5.19 that the 7 day validity period and extension of the validity period should be without prejudice to certain legislative provisions which specify longer validity periods where necessary, such as for investigations under financial services legislation or company law enforcement. As discussed in the Report, the two examples given, from the *Central Bank (Supervision and Enforcement) Act 2013* and the *Companies Act 2014*, are not intended to be an exhaustive list.

### **Executing search warrant**

**6.—** (1) A person acting under the authority of a warrant issued under *section 4 or 9* may—

(a) (i) require any person present at the place where the search is carried out to give to him or her his or her name and address,

(ii) request assistance from persons present so as to gain access to material sought under the search warrant,

(iii) operate any computer at the place which is being searched or cause any such computer to be operated by a person accompanying the person acting under the authority of the warrant,

(iv) require any person at that place who appears to him or her to be in a position to facilitate access to the information held in any such computer or which can be accessed by the use of that computer —

(I) to give to him or her any password or encryption key necessary to operate it,

(II) to otherwise enable him or her to examine the information accessible by the computer in a form in which the information is visible and legible,

(III) to produce the information in a form in which it can be removed and in which it is, or can be made, visible and legible; and

(b) where the person acting under the authority of the warrant is a member of An Garda Síochána, he or she may arrest any person—

(i) who obstructs or attempts to obstruct that member in the carrying out of his or her duties,

(ii) who fails to comply with a requirement or request under *paragraph (a)*,

(iii) who gives a name or address which the member has reasonable cause for believing is false or misleading.

(2) A person who obstructs or attempts to obstruct a person acting under the authority of a warrant under this section, who fails to comply with a requirement or request under *paragraph (a) of subsection (1)* or who gives a false name or address to a person acting under the authority of the warrant shall be guilty of an offence and shall be liable on summary conviction to a Class A fine or to imprisonment for a period not exceeding 6 months, or to both.

(3) A person acting under the authority of a warrant shall have the search warrant in his or her possession and show it to the occupier of the place named in the warrant prior to the commencement of the search.

(4) Where a search warrant has been issued following an application to the High Court under *section 9*, the person acting under the authority of the search warrant shall have in his or her possession and show to the occupier of the place named in the warrant either of the following, which shall be deemed for all legal purposes to constitute the search warrant—

(a) a search warrant transmitted from the judge of the High Court to the applicant by reliable electronic means, or

(b) a printout of a search warrant transmitted from the judge of the High Court to the applicant by reliable electronic means.

(5) Subject to *subsection (6)*, a person acting under the authority of a search warrant issued under *section 4 or 9* shall, upon completion of the search authorised by the search warrant, give a copy of the search warrant to the occupier or person in control of the place, unless it is reasonably believed by the person that to do so would frustrate or endanger the investigation concerned, or any other investigation.

(6) Where there is no occupier or person in control of the place present at the time of the search, the person acting under the authority of a search warrant issued under *section 4* or, as the case may be, *9* shall, upon completion of the search, leave a copy of the search warrant in a prominent location at the place.

(7) Where a copy of the search warrant is not given to the occupier or person in control of the place in accordance with *subsection (6)*, the occupier or person in control of the place may apply to the District Court within 7 days for a copy of the warrant.

(8) A person acting under the authority of a search warrant issued under *section 4 or 9* shall—

(a) ensure that any material seized during the search shall be secured and clearly marked before being removed from the place, and

(b) make an inventory of any material seized,

(c) as soon as practicable after any material is seized, provide the occupier or person in control of the place with an inventory of the material seized, and

(d) if some of the material is returned, amend the inventory to reflect this.

### ***Explanatory note***

*Section 6(1)(a)* implements the recommendation at paragraph 5.77 that the Search Warrants Act should, where it is necessary and justified in the circumstances, authorise executing officers to: (i) search persons present at a search location; (ii) request basic personal details from persons present at a search location; (iii) request assistance from persons present so as to gain access to material sought under the search warrant; and (iv) require any person that appears to be in a position to facilitate access to information held in a computer to take certain steps to assist the executing officer to access that information.

*Section 6(1)(b)* implements the recommendation at paragraph 5.82 that the Act should provide that the executing officer may arrest any person who refuses to comply with a permissible request by an executing officer, or who obstructs or attempts to obstruct the execution of a search warrant.

*Section 6(2)* provides that implements the recommendation at paragraph 5.82 that it is an offence to obstruct or attempt to obstruct a person acting under the authority of a warrant, or fail to comply with a requirement under *subsection (1)(a)* or to give a false name or address.

*Section 6(3)* implements the recommendation at paragraph 4.78 that the executing authority should show the search warrant to the owner or occupier.

*Section 6(4)* implements the recommendation at paragraph 4.79 concerning the electronic process for issuing search warrants in urgent circumstances by the High Court: see *section 9* of the Bill. It provides that where the applicant has not personally appeared before the High Court in such urgent circumstances (where the delay applying in person would frustrate the effective execution of the warrant) it is permissible for the search warrant to be transmitted to him or her electronically so that he or she can show the owner or occupier the search warrant on a device or a printed copy of the electronically transmitted warrant.

*Section 6(5)* implements the recommendation at paragraph 5.53 that a copy of the search warrant should be given to the owner or occupier of the property concerned upon the completion of the search.

*Section 6(6)* implements the recommendation at paragraph 5.54 that when the owner or occupier is not present at the place at the time of the execution of the warrant the executing authority should, on completion of the search, leave a copy of the search warrant in a prominent location at the place. It provides for an exception in cases where an executing officer believes that it is not advisable to give a copy of the warrant it may be withheld from the person. *Section 6(7)* allows for an appeal to the District Court from a decision to withhold a copy of the search warrant from the owner or occupier.

*Section 6(8)* implements the recommendation at paragraph 5.122 that an inventory of all seized or copied items should be given to the person concerned upon completion of the search and seizure under warrant. It also provides that if some, but not all, of the seized materials are returned the inventory should be amended to reflect this development.

### **Saving for privileged information**

**7.—(1)** Subject to *subsection (2)*, nothing in *section 6* shall compel the disclosure by any person of privileged material or authorise the seizure or examination of material that is privileged by or under any enactment or rule of law (in this section referred to as privileged material).

(2) The disclosure of material may be compelled, or possession of it seized, pursuant to the powers in *section 6*, notwithstanding that it is apprehended that the material is privileged material, provided the compelling of its disclosure or the seizing of possession is done by means whereby the confidentiality of the material can be maintained pending the determination by the court of the issue as to whether the material is privileged material.

(3) Without prejudice to *subsection (4)*, where, in the circumstances referred to in *subsection (2)*, material has been disclosed or material seized pursuant to the powers in this section, the person—

(a) to whom such material has been so disclosed, or

(b) who has seized possession of it,

shall (unless the person has, within the period subsequently mentioned in this subsection, been served with notice of an application under *subsection (4)* in relation to the matter), securely seize any material, store it in a safe and secure place and apply to the High Court for a determination as to whether the material is privileged material and an application under this subsection shall be made within 7 days after the disclosure or seizing of possession.

(4) A person who, in the circumstances referred to in *subsection (2)*, is compelled to disclose information, or from whose possession material is seized, pursuant to the powers in *section 6*, may apply to the Court for a determination as to whether the material is privileged material.

(5) Pending the making of a final determination on an application under *subsection (3)* or *(4)*, the court may give such interim or interlocutory directions as the court considers appropriate including, without prejudice to the generality of the foregoing, directions as to—

(a) the preservation of the material, in whole or in part, in a safe and secure place in any manner specified by the court,

(b) the appointment of a person with suitable legal qualifications possessing the level of experience, and the independence from any interest falling to be determined between the parties concerned, that the court considers to be appropriate for the purpose of—

(i) examining the material, and

(ii) preparing a report for the court with a view to assisting or facilitating the court in the making by the court of its determination as to whether the material is privileged material.

(6) An application under *subsection (3)* or *(4)* shall be by motion on notice and may, if the court directs, be heard otherwise than in public.

### **Explanatory note**

*Section 7(1)* implements the recommendation at paragraph 5.99 that the Act should include safeguards for material found during a search which is the subject of privilege, including legal privilege or litigation privilege. It provides that where privileged material is found during the course of a search warrant execution, such material may generally not be examined or seized. It also implements the recommendations at paragraphs 5.106 and 5.107 that the Act should include a specific procedure to deal with claims of privilege asserted over material found during the course of a search warrant execution.

*Section 7(2) to (6)* outline the procedure that the executing authority should follow where material which may attract privilege is found, and this is largely based on the comparable provisions in the *Companies Act 2014*. It provides that the material should be securely sealed without being examined by executing officers, and removed from the search location. The sealed material should then be placed in the custody of the High Court for a determination as to whether or not the material is to benefit from the protection of privilege. Where the material is certified as privileged it should not be examined by the investigating authority. If it is determined not to be privileged, the material should be placed with the investigating authority if it is examinable under the scope of the search warrant.

### **Extended power of seizure**

8.— (1) Without prejudice to *subsection (2)*, where—

(a) a person acting under the authority of a search warrant issued under *section 4* or *9* finds anything at or in the custody or possession of any person found on the premises named in the warrant that the person has reasonable grounds for believing may be, or may contain, material which he or she would be entitled to seize in accordance with *section 4(4)(c)* or *4(7)*, and

(b) it is not reasonably practicable for a determination to be made on the premises—

(i) whether what he or she has found is material that he or she is entitled to seize under the warrant, or

(ii) the extent to which what he or she has found contains material that he or she is entitled to seize under the warrant,

the person's power of seizure under the warrant shall include power to seize so much of what he or she has found as it is necessary to remove from the premises to enable that to be determination (referred to subsequently as an "extended power of seizure").

(2) Where—

(a) a person acting under the authority of the warrant finds material at, or in the custody or possession of any person found on the premises named in the warrant which he or she would be entitled to seize in accordance with *section 4(4)(c) or 4(7)* ("seizable material") but for its being comprised in something else that he or she has (apart from this subsection) no power to seize, and

(b) it is not reasonably practicable for the seizable material to be separated, on those premises, from that in which it is comprised,

the person's powers of seizure shall include power to seize both the seizable material and that from which it is not reasonably practicable to separate it (also referred to subsequently as an "extended power of seizure").

(3) Where, for the purposes of *subsections (1) or (2)* an issue arises as to either of the following matters, namely:

(a) whether or not it is reasonably practicable on particular premises for something to be determined; or

(b) whether or not it is reasonably practicable on particular premises for something to be separated from something else,

the issue shall be decided by reference solely to the following matters —

(i) how long it would take to carry out the determination or separation on those premises;

(ii) the number of persons that would be required to carry out that determination or separation on those premises within a reasonable period;

(iii) whether the determination or separation would (or would if carried out on those premises) involve damage to property;

(iv) the apparatus or equipment that it would be necessary or appropriate to use for the carrying out of the determination or separation;

(v) the costs of carrying out the determination or separation on those premises as against the costs of carrying out the separation in another place, and

(vi) in the case of a separation, whether the separation—

(i) would be likely, or

(II) if carried out by the only means that are reasonably practicable on those premises, would be likely,

to prejudice the use of some or all of the separated seizable material for a purpose for which material seized under the warrant is capable of being used.

(4) Save where the person acting under the authority of the search warrant is of the opinion that compliance with this subsection could result in the concealment, falsification, destruction or the disposal otherwise of seizable material, an extended power of seizure shall not be exercised unless the person has first made the following arrangements in relation to the material, the subject of the proposed exercise of that power, namely reasonable arrangements—

(a) providing for the appropriate storage of that material,

(b) allowing reasonable access, from time to time, to that material by the owner, lawful custodian or possessor thereof (including, in the case of documents or information in non-legible form, by the making of copies or the transmission of matter by electronic means), and

(c) providing for confidentiality to be maintained as regards any confidential matter comprised in that material,

being arrangements to apply pending the carrying out of the foregoing separation and the consequent return of anything to the owner, lawful custodian or possessor that is not relevant material.

(5) In deciding what the terms of those arrangements shall be, the person acting under the authority of the warrant shall have regard to any representations reasonably made on the matter by the owner, lawful custodian or possessor of the material and endeavour, where practicable, to secure the agreement of that person to those terms.

(6) Where—

(a) by reason of the person acting under the authority of the warrant being of the opinion referred to in *subsection (4)*, the arrangements referred to in paragraphs (a) to (c) of that subsection are not made in relation to the material the subject of the proposed exercise of the extended power of seizure, or

(b) circumstances arise subsequent to the exercise of the extended power of seizure that make it appropriate to vary the arrangements made under that subsection,

the person shall, as the case may be—

(i) make, as soon as practicable after the exercise of that power of seizure, the arrangements referred to in *subsections (4)(a) to (c)* in relation to the material, or

(ii) vary the arrangements made under that subsection in a manner he or she considers appropriate,

and, in deciding what shall be the terms of those arrangements or that variation, the person shall have regard to any representations on the matter reasonably made by the owner, lawful custodian or possessor of the material and endeavour, where practicable, to secure the agreement of that person to those terms.

- (7) Where an extended power of seizure is exercised, it shall be the duty of the person acting under the authority of the warrant—
- (a) to carry out the separation concerned as soon as practicable, and, in any event, subject to *subsection (8)*, within the prescribed period, after its exercise, and
  - (b) as respects (as the case may be) —
    - (i) any material seized in exercise of the power found not to be relevant material or,
    - (ii) any material separated from any other material in the exercise of the power that is not relevant material, to return, as soon as practicable, and, in any event, subject to *subsection (8)*, within the prescribed period, after that finding or separation, the material to its owner or the person appearing to the person to be lawfully entitled to the custody or possession of it.
- (8) On application to the High Court by an applicant or any person affected by the exercise of an extended power of seizure, the court may, if it thinks fit and having had regard, in particular, to any submissions made on behalf of the applicant with regard to the progress of any investigation being carried on for the purpose of which the powers under this section had been exercised, give one or more of the following —
- (a) a direction that the doing of an act referred to in *subsection (7)(a) or (b)* shall be done within such lesser or greater period of time than that specified in that provision as the court determines,
  - (b) a direction with respect to the making, variation or operation of arrangements referred to in *subsection (4)(a) to (c)* in relation to any specified material or a direction that such arrangements as the court provides for in the direction shall have effect in place of any such arrangements that have been or were proposed to be made,
  - (c) a direction of any other kind that the court considers it just to give for the purpose of further securing the rights of any person affected by the exercise of an extended power of seizure, including, if the exceptional circumstances of the case warrant doing so, a direction that material seized be returned to its owner or the person appearing to the court to be lawfully entitled to the custody or possession of it, notwithstanding that the determination or separation concerned has not occurred,
- and any such direction may—
- (i) relate to some or all of the material the subject of the exercise of the extended power of seizure,
  - (ii) be expressed to operate subject to such terms and conditions as the court specifies, including, in the case of a direction under *paragraph (c)*, a condition that an applicant be permitted, during a specified subsequent period, to re-take and retain possession of the material returned for the purpose of carrying out the relevant separation.
- (9) An application under *subsection (8)* shall be by motion on notice and may, if the court directs, be heard otherwise than in public.
- (10) In *subsection (7)* “prescribed period” means—
- (a) in the case of *paragraph (a)*—

(i) unless *subparagraph (ii)* applies, 3 months, or

(ii) such other period as the Minister prescribes in consequence of a review that may, from time to time, be carried out by or on behalf of the Minister of the operation and implementation of this section, and

(b) in the case of *paragraph (b)*—

(i) unless *subparagraph (ii)* applies, 7 days, or

(ii) such other period as the Minister prescribes in consequence of such a review that may, from time to time, be carried out by or on behalf of the Minister, but no regulations made to prescribe such a period shall be read as operating to affect any direction given by the court under *subsection (8)(a)* in force on the commencement of those regulations.

(11) The Minister may make regulations providing for such supplementary, consequential and incidental matters to or in respect of this section as he or she considers necessary or expedient.

### **Explanatory note**

*Section 8* implements the recommendation at paragraph 5.115 that the Act should identify that in certain circumstances privileged and non-privileged material may be mixed. It provides for the seizure of all of the material to examine the non-privileged material. *Section 8* is based on the detailed provisions regarding privileged material and extended powers of seizure in sections 787 and 788 of the *Companies Act 2014*. In this respect *section 8* includes a procedure to implement the recommendation that the examination process should be strictly controlled so that the privileged material is not compromised.

### **Application to High Court for search warrant in urgent circumstances**

**9.—** (1) The High Court may issue a search warrant, having permitted an application to the Court to be made without the applicant appearing in person, where the Court is satisfied that circumstances of urgency giving rise to the immediate need for a search warrant mean that the delay involved in the applicant appearing in person would frustrate the effective execution of the search warrant.

(2) Where an applicant has been permitted to apply to the Court for a search warrant without appearing in person in the circumstances described in *subsection (1)*, the applicant shall communicate orally with the Court by live television link or telephone and—

(a) provide information on oath—

(i) that there are reasonable grounds for suspecting that evidence of or relating to an indictable offence may be found at a specified place,

(ii) that a search warrant is required to facilitate the applicant in the performance of his or her functions under the provisions of any enactment specified in column 3 of *Schedule 1*, or

(iii) that there are reasonable grounds for suspecting that evidence of or relating to a summary offence under the provisions of any enactment specified in column 3 of *Schedule 2* may be found at a specified place,



and

(b) answer any questions or provide any additional information which the Court requests so as to ground the application.

(3) A warrant under this section shall be expressed to and shall operate to provide an applicant with the same authority as is provided for in *section 4(4) and (7)*.

(4) An applicant who has applied for a search warrant under *subsection (1)* shall prepare a written record of the search warrant application and, as soon as practicable and, in any case, not later than 24 hours after the search warrant has been issued, file the written record with the Court.

(5) The period of validity of a warrant issued following an application under this section shall be 24 hours.

***Explanatory note***

*Section 9* implements the recommendations in Chapter 3 regarding a limited electronic search warrant application process in urgent circumstances.

*Section 9(1)* provides for an exception to the general rule in *section 3(4)* that a person applying for a search warrant should appear personally before a judge of the District Court when applying for a search warrant. It implements the recommendation at paragraph 3.90 that the Act should provide that an application can be made to the High Court without the applicant appearing personally before a judge where circumstances of urgency giving rise to the immediate need for a search warrant means that the delay appearing in person before a judge would frustrate the effective execution of the search warrant.

*Section 9(2)* describes the standard of opinion which an applicant must have when applying for an urgent search warrant, which is the same standard as required in an application under *section 3*. It also implements the recommendation at paragraph 3.104 that in cases where the applicant has not appeared personally before a judge, he or she should be required to communicate with the High Court judge considering the application by video link or telephone to affirm his or her opinion under oath and answer any questions that the issuing authority deems necessary.

*Section 9(3)* clarifies that a warrant under this section shall be expressed to and shall operate to provide an applicant with the same authority as is provided for in *section 4(4) and (7)* of the Bill.

*Section 9(4)* provides that where the applicant has affirmed his or her opinion by video link or telephone, the applicant should be required to file a record of the search warrant application with the High Court as soon as practicable thereafter and not later than 24 hours after the issuing of the search warrant.

*Section 9(5)* provides that notwithstanding the general 7 day validity period in *section 5*, the period of validity of a warrant issued following an application under *section 9* is 24 hours.

### **Effect of failure to comply with Act on admissibility of evidence**

**10.**— A failure by a person applying for or executing a search warrant to comply with any provision of the Act shall not of itself affect the admissibility in evidence of any evidence seized or otherwise obtained under the search warrant.

#### ***Explanatory note***

*Section 10* implements the recommendation in paragraph 6.56 that a failure by a person applying for or executing a search warrant to comply with any provision of the Search Warrants Act shall not of itself affect the admissibility in evidence of any material obtained during a search. In paragraph 6.57, the Commission recommends that the proposed Search Warrant Act should not include any provision as to the tests by which the courts determine whether to admit evidence that has been obtained illegally, or the tests used to determine the admissibility of unconstitutionally obtained evidence (including the 2015 Supreme Court decision in *The People (DPP) v JC<sup>1</sup>*), and that these should remain a matter for the courts to determine and, where required, to develop. As this provision refers to the admissibility of evidence in a subsequent criminal trial, it is one of the two provisions of the Bill that does not apply to a search warrant issued for regulatory purposes under *section 4(1)(b)* (see also *section 4(7)* of the Bill).

### **Code of practice regarding search warrants**

**11.**— (1) The Minister shall, as soon as may be, prepare and cause to be published a code of practice concerning search warrants issued under this Act.

(2) The code of practice shall—

(a) contain practical guidance concerning the requirements of the Act, including the procedural steps involved in the process,

(b) be written in plain, intelligible language and

(c) be easily accessible to all persons, including that it shall be made available on the internet.

(3) All persons involved in the execution of a search warrant issued under this Act shall have regard to the terms of the code of practice, but a failure on the part of any person to observe any provision of the code of practice shall not of itself affect the admissibility of any evidence seized or otherwise obtained under the search warrant.

#### ***Explanatory note***

*Section 11(1)* implements the recommendation in paragraph 6.70 that a code of practice on search warrants be prepared.

*Section 11(2)* implements the recommendation in paragraph 6.70 that the code of practice should provide practical guidance on the main elements of the Search Warrants Act, including the procedural steps involved in the process; that the code of practice should be written in plain, intelligible language; and that it should be easily accessible to all persons, including that it should be made available on the internet.

*Section 11(3)* provides implements the recommendation in paragraph 6.70 that non-compliance with the code should not of itself affect the admissibility of evidence seized or otherwise obtained under a search warrant.

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<sup>1</sup> [2015] IESC 31.

## **Repeals**

**12.—** (1) The enactments referred to in *Schedule 3* are repealed to the extent specified in column 3 of that Schedule.

### ***Explanatory note***

*Section 12* implements the recommendation in paragraphs 2.50 to 2.52 concerning the repeal of existing search warrant provisions applicable to indictable offences. *Schedule 3* contains an indicative list of some of the provisions that could be repealed in this respect. A further analysis of the search warrant provisions listed in Appendix A to this Report may indicate that more provisions could be repealed. Because many of these also contain search warrant powers that do not necessarily involve criminal investigations but concern regulatory enforcement, it may be more suitable to include these in *Schedule 1* of the Bill, which provides that those provisions should be subject to the Search Warrants Act (other than those which refer specifically to the admissibility of evidence in a subsequent criminal trial, as to which see *section 4(7)* and *section 10* of the Bill).

## **Effect of Act on powers to enter property without warrant**

**13.—** Nothing in this Act shall alter or affect any enactment or rule of law that authorises a person to enter property without a search warrant.

### ***Explanatory note***

*Section 13* implements the recommendation in paragraph 2.75 that the Search Warrants Act should not alter or affect any common law rule or statutory provision that authorises a person to enter property without a search warrant. Appendix B of the Report contains an indicative list of statutory provisions that provide for such warrantless search powers.

## **Transitional arrangements**

**14.—** (1) Nothing in this Act shall affect—

- (a) the validity of a search warrant issued under any enactment before the commencement of this Act and such warrant shall continue in force in accordance with its terms after such commencement, or
- (b) any legal proceedings pending at the time of the repeal of any enactment by this Act.

### ***Explanatory note***

*Section 14* implements the recommendation in paragraph 2.84 that the Search Warrants Act should contain transitional provisions to safeguard the validity of search warrants issued under any prior legislative provisions.

## SCHEDULE 1

*Application of this Act where search warrant does not involve criminal investigation*  
*Sections 3, 4 and 9*

(1)	(2)	(3)
Number and Year	Act or Statutory Instrument	Provision
No. 20 of 2002	Communications Regulation Act 2002	Section 40
No. 7 of 2007	National Oil Reserves Agency Act 2007	Section 48(1)
No. 15 of 2013	Animal Health and Welfare Act 2013	Section 45(1)
SI No.239 of 2013	European Union (Protection of Animals at the Time of Killing) Regulations 2013	Regulation 22

***Explanatory note***

The enactments listed in Schedule 1 are indicative examples of legislation (from the list in Appendix A to the Report) which provide for the issuing of a search warrant where suspicion or belief that evidence relating to an offence is at a location is not a requirement, or not the only requirement, for the issuing of a warrant. In accordance with the recommendations in the Report, these search warrants, which usually concern regulatory supervisory and enforcement powers, should be subject to the Search Warrants Act (other than those which refer specifically to the admissibility of evidence in a subsequent criminal trial, as to which see *section 4(7)* and *section 10* of the Bill).

SCHEDULE 2

*Application of this Act to summary offences*

*Sections 3, 4 and 9*

(1)	(2)	(3)
Number and Year	Act or Statutory Instrument	Provision
SI No.102 of 1996	European Communities (Trade in Certain Animal Products) Regulations 1996	Regulation 27
SI No.265 of 1991	European Communities (Food Imitations (Safety)) Regulations 1991	Regulation 8

***Explanatory note***

The enactments listed in Schedule 2 are indicative examples of legislation (from the list in Appendix A to the Report) which provide for the issuing of a search warrant in connection with summary offences, notably pre-2007 Regulations made under section 3 of the *European Communities Act 1972*.

## SCHEDULE 3

### *Repeals*

#### *Section 12*

Number and Year	Act	Provision	Extent of Repeal
	(1)	(2)	(3)
No. 50 of 2001	Criminal Justice (Theft and Fraud Offences) Act 2001	Section 48	The whole section
No. 4 of 1997	Criminal Justice (Miscellaneous Provisions) Act 1997	Section 10	The whole section
No. 12 of 1961	Road Traffic Act 1961	Section 106	Subsection (6)
No. 13 of 1939	Offences against the State Act 1939	Section 29	Subsections (3), (4), (5), (7), (11) and in subsection (12) the definition of “independent”

#### ***Explanatory note***

The enactments listed in Schedule 3 are indicative examples of legislative provisions which could be repealed on the coming into force of the Bill.

The references to section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997* (which provides for issuing search warrants in respect of arrestable offences only) and to section 48 of the *Criminal Justice (Theft and Fraud Offences) Act 2001* (which provides for issuing search warrants in respect of indictable offences under the 2001 Act only) are to provisions that would become redundant on the enactment of the Bill (which extends to all indictable offences, and to the summary offences in the enactments to be listed in *Schedule 2*). Further analysis of the search warrant provisions listed in Appendix A to this Report may indicate that more provisions could be repealed. Because many of these also contain search warrant powers that do not necessarily involve criminal investigations but concern regulatory enforcement, it may be more suitable to include these in *Schedule 1* of the Bill, which in accordance with the recommendations in the Report, should be subject to the Search Warrants Act (other than those which refer specifically to the admissibility of evidence in a subsequent criminal trial, as to which see *section 4(7)* and *section 10* of the Bill).

The reference to section 29 of the *Offences against the State Act 1939* is an example of a provision that empowers a member of An Garda Síochána to issue a search warrant in urgent circumstances, and the reference to section 106(6) of the *Road Traffic Act 1961* is to the comparable power of a peace commissioner to issue a search warrant in urgent circumstances. These are examples of provisions that would be repealed in order to implement the Commission’s recommendations in Chapter 4 that only a court should be empowered to issue a search warrant.