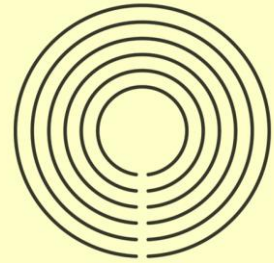


Issues Paper on Search Warrants (LRC IP 4-2014)



LAW REFORM
COMMISSION/COIMISIÚN UM
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INTRODUCTION

The purpose of an Issues Paper is to provide a summary or outline of a project on which the Commission is embarking or on which work is already underway, and to provide readers with an opportunity to express views and to make suggestions and comments on specific questions. The Issues Papers are circulated to members of the legal professions and to other professionals and groups who are likely to have a particular interest in, or specialist knowledge of, the relevant topic. They are also published on the Commission's website (www.lawreform.ie) to ensure they are available to all members of the public.

These Issues Papers represent current thinking within the Commission on the various items mentioned. They should not be taken as representing settled positions that have been taken by the Commission.

Comments and suggestions are warmly welcomed from all interested parties and all responses will be treated in the strictest confidence unless interested parties indicate otherwise. These should be sent to the Law Reform Commission:

via email to consultation.searchwarrant@lawreform.ie with the subject line Search Warrant

or

via post to IPC House, 35-39 Shelbourne Road, Dublin 4, marked for the attention of Sarahrose Murphy.

We would like to receive replies no later than close of business 14 March 2014 if possible.

BACKGROUND

This Issues Paper forms part of the Commission's Third Programme of Law Reform, which includes a project to review the law on search warrants and bench warrants. It follows the publication of the *Consultation Paper on Search Warrants and Bench Warrants*,¹ in which the Commission set out its provisional recommendations on this area.

Before proceeding to complete its *Report on Search Warrants and Bench Warrants* the Commission is seeking the views of interested parties in relation to the following two matters:

1. The scope of offences to which a generally applicable Search Warrants Act should apply: interested parties are asked to consider a single question relating to this issue, which can be found on page 5.
2. Whether such a Search Warrants Act should provide for an electronic and/or online search warrant filing, application and issuing process: this issue is broken up into four questions, which can be found on pages 6, 12, 13 and 14.

ISSUE 1: SCOPE OF GENERALLY APPLICABLE SEARCH WARRANTS ACT

1.01 A search warrant empowers Gardaí or officers of various regulatory authorities such as the Director of Corporate Enforcement, the Environmental Protection Agency and the Health and Safety Authority to search a location. This often involves entering and searching a private dwelling or business premises where corporate offences are being investigated. Execution of a search warrant involves an interference with certain rights and it is important that any such interference be appropriate and proportionate. One of these rights is the inviolability of the dwelling guaranteed by Article 40.5 of the

¹ *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009), referred to as the Consultation Paper in the remainder of this Issues Paper.

Constitution. Where a dwelling or business premises is searched, the protection of property rights and the right to privacy under Articles 40.3 and 43 of the Constitution of Ireland and under Article 8 of the European Convention of Human Rights (ECHR) may be raised. None of these rights is absolute and they may be restricted in certain circumstances.² The applicable constitutional and ECHR rights standards determine what the statutory threshold for issuing a search warrant should be.

1.02 The constitutional rights of the owner or occupier of the premises which is 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. In *Simple Imports Ltd v Revenue Commissioners*³ the Supreme Court stated:

“Search warrants... entitle police and other officers to enter the dwellinghouse or property of a citizen, carry out searches and... remove material which they find on the premises and, in the course of so doing, use such force as is necessary to gain admission and carry out the search and seizure authorised by the warrant. These are powers which the police and other authorities must enjoy in defined circumstances for the protection of society, but since they authorise the forcible invasion of a person’s property, the courts must always be concerned to ensure that the conditions imposed by the legislature before such powers are exercised are strictly met.”

1.03 A large number of statutory powers permit members of the Garda Síochána and officers of various regulatory authorities to enter, search and inspect premises without a warrant.⁴ However, many of these provide that such powers may not be exercised in respect of private dwellings. Warrantless powers of entry in legislation are generally followed by provisions stating that a search warrant is required where the premises in question is a private dwelling. In addition the *Criminal Law Act 1997*⁵ provides that, for the purpose of arresting a person without a warrant *in respect of an arrestable offence*, a member of the Garda Síochána may enter (by use of reasonable force if necessary) and search any premises (including a dwelling) where that person is or where the member, with reasonable cause, suspects that person to be. In such circumstances, where the premises in question is a dwelling, the Garda may not, unless acting with the consent of the occupier or person in charge of the dwelling, enter the 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 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 will either abscond for the purpose of avoiding justice or will commit an arrestable offence, or (d) the person ordinarily resides at that dwelling. Notwithstanding these statutory powers to enter, search and inspect premises without a warrant and powers of entry for the purpose of arresting an individual under the 1997 Act, there are very few statutory powers to search a private dwelling without a warrant.⁶

² See Hogan and Whyte (ed) *J.M. Kelly: The Irish Constitution* (4thed LexisNexis Butterworths 2003) for a discussion of restrictions on constitutional rights generally at paragraphs 7.1.50 – 7.1.53 and 7.1.82 – 7.1.95, restrictions on the right to privacy under Article 40.3 at paragraphs 7.3.124 – 7.3.129, inviolability of the dwelling under Article 40.5 at paragraphs 7.4.422 – 7.4.423, 7.4.429 – 7.4.430 and 7.5.436 and right to private property at paragraphs 7.7.48 – 7.7.84. See also Lester and Pannick, *Human Rights Law and Practice* (3rd ed LexisNexis 2009) at paragraphs 4.8.4, 4.8.5 and 4.8.87 – 4.8.92 for a discussion of the circumstances in which an interference with the right to respect for private and family life protected by Article 8 of the ECHR can be justified.

³ [2000] 2 IR 243 at 250..

⁴ See for example section 50(b) of the *Broadcasting Act 2009* and section 64 of the *Safety, Health and Welfare at Work Act 2005*.

⁵ Section 6(2) of the *Criminal Law Act 1997*.

⁶ Such powers to enter a dwelling without a warrant usually relate to specific areas such as child care, for example, section 23T of the *Child Care Act 1991* as inserted by section 16 of the *Children Act 2001*, which

1.04 Gardaí or other officers who are not acting pursuant to legislation conferring warrantless powers of entry, or pursuant to Garda powers to enter and search for the purpose of arresting an individual for an arrestable offence or pursuant to limited circumstances at common law,⁷ will require a search warrant to enter, search and inspect premises. Currently, over 100 separate Acts and approximately 200 ministerial Regulations contain search warrant provisions. It has been noted that:

“[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.”⁸

1.05 In the Consultation Paper the Commission noted the difficulties this proliferation presents and provisionally recommended that a generally applicable legislative framework on search warrants should be enacted.⁹ In preparing its Report on this matter the Commission is now examining what the scope of such a generally applicable Search Warrants Act should be.

1.06 The Commission seeks views on which of the following three approaches, or indeed 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 outlined above.

1(a) Search Warrants Act applicable to arrestable offences, without prejudice to other existing legislation

1.07 One of the most commonly used search warrant provisions is section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, as amended. 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. An arrestable offence is an offence that carries a sentence of imprisonment of five years or more.¹⁰ 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 is aware that there is other legislation which provides for the issuing of search warrants even where the offences carry a maximum sentence of less than five years imprisonment on conviction (that is, are not arrestable offences). For this reason it could be provided that a Search Warrants Act would apply without prejudice to search warrant powers contained in other legislation which confer powers to issue search warrants in respect of non-arrestable offences and also statutory provisions discussed in paragraph 1(b) below, thereby leaving them in force.

1.08 The Commission notes that such an approach would not involve any fundamental change in the existing law and would clarify the effects of section 10 of the 1997 Act. There is a view that defining the scope of a Search Warrants Act to include only arrestable offences is inadequate because over 100 separate Acts and approximately 200 ministerial Regulations contain search warrant provisions. If arrestable offences were an appropriate threshold, it would be unnecessary to have so many other specific legislative provisions conferring search warrant powers.

allows an authorised officer to enter a dwelling where a child who is the subject of a private foster care arrangement resides.

⁷ See Walsh *Criminal Procedure* (Thomson Round Hall 2002) at 394. Such circumstances include to terminate an actual affray or to prevent an occupant from causing injury to another person on the premises.

⁸ Walsh *Criminal Procedure* (Thomson Round Hall 2002) at paragraph 8-09.

⁹ Consultation Paper at paragraphs 2.02-2.23.

¹⁰ Section 2 of the *Criminal Law Act 1997*, as amended by section 8 of the *Criminal Justice Act 2006*.

1(b) Search Warrants Act applicable to all criminal offences, without prejudice to other existing legislation

1.09 A second option would be that a Search Warrants Act apply to all criminal offences. Such an approach would result in the application of the proposed Act to both summary and indictable offences. The Commonwealth of Australia and Tasmania have adopted such an approach.¹¹ The Commission notes that if this approach were adopted it might be necessary to provide that a Search Warrants Act would be without prejudice to statutory provisions under which search warrants authorise Gardaí and other officials to enter and search premises even where this would not involve the investigation of a criminal offence. For example, section 29 of the *Commissions of Investigation Act 2004* allows a judge of the District Court to issue a warrant which authorises 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. Other legislative search warrant provisions contain requirements specifically tailored for investigatory or regulatory settings. For example section 20 of the *Companies Act 1990*, as amended, allows the individual executing a search warrant to enter and re-enter premises, which is a power that may only be required in the context of search of commercial premises related to suspected complex financial fraud or other corporate offences.¹² The Commission notes that it might be necessary to provide that a Search Warrants Act would also be without prejudice to such legislative provisions.

1.10 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 to apply for and issue search warrants in respect of any criminal offence, whether it is a summary offence, an indictable offence or an indictable offence that can be tried summarily. This would promote standardisation and uniformity in search warrant law, and therefore overcome the current unsatisfactory position of having over 100 separate Acts and approximately 200 ministerial Regulations contain search warrant provisions. However, there is a view that including all criminal offences in 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, such as a minor assault under section 2 of the *Non Fatal Offences Against the Person Act 1997*.

1(c) Search Warrants Act applicable to indictable offences, without prejudice to other existing legislation

1.11 A third option would be for a Search Warrants Act to provide for the issuing of warrants to search for material relating to indictable offences including indictable offences which may be tried summarily ("hybrid 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. It would be necessary to provide that this would be without prejudice to statutory provisions such as those discussed in section 1(b) above and also 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). 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 an offence under sections 3, 4, 5 or 8 of the *Immigration Act 1999*, which creates summary offences only, is to be found at a specified place.¹³ Section 3 of the *European Communities Act 1972*, as amended by the *European Communities Act 2007*,

¹¹ Section 3E of the *Crimes Act 1914* as amended (Commonwealth of Australia); *Search Warrants Act 1997* (Tasmania).

¹² Section 20 of the *Companies Act 1990* as substituted by section 30 of the *Company Law Enforcement Act 2001* and further amended by section 5 of the *Companies (Amendment) Act 2009*.

¹³ Section 9 of the *Immigration Act 1999* contains summary penalties in respect of all offences under the Act.

empowers Ministers to make Regulations for the purposes of implementing EU law which may create indictable offences whereas prior to the 2007 Act the 1972 Act prohibited the creation of indictable offences by such Regulations. A large number of pre-2007 Regulations made under section 3 of the 1972 Act contain search warrant powers and 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.¹⁴

1.12 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* which provides for a power to issue search warrants for arrestable offences as some offences are indictable but not arrestable. For example, the *Safety Health and Welfare at Work Act 2005* provides for a maximum term of imprisonment of two years on conviction on indictment of an offence under the Act, rendering such offences indictable but not arrestable.¹⁵ Another advantage of conferring power to issue search warrants in respect of indictable offences (rather than in respect of all offences) is that it would confine the circumstances in which a warrant could be issued to offences which are considered to be more serious than summary offences. The issuing of a search warrant should involve 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 above.

1.13 Whichever of the above three approaches is taken, a Search Warrants Act would need expressly to provide that it is without prejudice to other specific legislation such as the *Commissions of Investigation Act 2004* or Regulations made under the *European Communities Act 1972*, as discussed above, in order to preserve the powers of search in those Acts.

Q1: Do you agree that a generally applicable Search Warrants Act should:

1(a): apply to all arrestable offences, without prejudice to other existing legislation which permit search warrants to be issued for offences which are not arrestable; or

1(b): apply to all criminal offences, without prejudice to other existing legislation such as section 29 of the *Commissions of Investigation Act 2004*; or

1(c): apply to all indictable offences, without prejudice to other existing legislation which permit search warrants to be issued for offences that are not indictable such as pre-2007 Regulations made under section 3 of the *European Communities Act 1972*?

ISSUE 2: ELECTRONIC PROCESSING OF SEARCH WARRANTS

2(a) *electronic filing of search warrant information forms*

2.01 In the Consultation Paper the Commission noted that, unlike in a number of other jurisdictions, Irish legislation does not provide for the use of information and communication technology (ICT) in the search warrant application process.¹⁶ The Commission discussed the option of introducing a system

¹⁴ 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).

¹⁵ Section 77 of the *Safety, Health and Welfare at Work Act 2005*.

¹⁶ Consultation Paper, at paragraph 3.38.

under which all search warrant information forms could be filed electronically.¹⁷ This approach would involve the applicant for a search warrant saving an "Information for Search Warrant" form to a database.

2.02 Electronic filing of search warrant information forms would mean that there would be a record of every search warrant information form stored electronically. In the Consultation Paper, the Commission noted that an e-filing system would be a natural development of the current practice of the 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.¹⁸ A record of the warrant application is retained on PULSE. If a search warrant is issued, the Garda will note this on the relevant PULSE file. The Commission understands that this electronic database is accessible only to members of the Garda Síochána. 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. At sub-issue 2(b) below 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 either all or limited circumstances and having either an entirely or partially electronic search warrant process. If either of these systems 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.

2.03 The development and operation of an electronic system for filing search warrants would be a matter for the Courts Service. An electronic system would be in line with the current developments within the Courts Service and general eGovernment strategy in Ireland.¹⁹ The *Courts Service ICT Strategy Statement* refers to its commitment to incorporate more ICT into the running of the Courts Service.²⁰ The Commission's 2010 *Report on Consolidation and Reform of the Courts Acts* 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."²¹

Q.2 (a): Do you agree that it should be possible that search warrant information forms could be filed electronically?

2(b) removing the requirement for a personal appearance by the applicant before the issuing authority

2.04 The Commission also seeks views on whether the current search warrant application process should continue to require the applicant to appear personally before the issuing authority (usually, the District Court) formally to affirm his or her opinion under oath.

2.05 Requiring the applicant to appear personally before the issuing authority to affirm his or her opinion under oath may have advantages. It may assist 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

¹⁷ *Ibid* at paragraphs 3.64 – 3.66.

¹⁸ *Ibid* at paragraph 3.65.

¹⁹ Department of Public Expenditure and Reform, *Supporting Public Service Reform: eGovernment 2012-2015* Available at <http://egovstrategy.gov.ie/wp-content/uploads/2012/04/eGovernment-2012-2015.pdf> (last accessed on 31 January 2014).

²⁰ See generally *Courts Service ICT Strategy Statement 2011-2014*. Available at [http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/3F4E96F26823305A802579F400400EA9/\\$FILE/ICT%20Strategy%202011-2014.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/3F4E96F26823305A802579F400400EA9/$FILE/ICT%20Strategy%202011-2014.pdf) (last accessed on 31 January 2014).

²¹ *Report on Consolidation and Reforms of the Courts Acts* (LRC 97-2010) at 198: section 227 of the draft *Courts (Consolidation and Reform) Bill*.

improving their capacity to assess the applicant's veracity. The issuing authority is able to observe what are perceived as "taken to be involuntary physical signs of falsehood"²² such as tone of voice, eye movement, facial gestures and other body language.²³

2.06 However, the Commission notes 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)*:²⁴

"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."

The Commission notes that other law reform bodies have expressed similar views specifically in the context of search warrant applications.²⁵

2.07 A personal appearance by the applicant is more likely to make both the applicant and the issuing authority appreciate the gravity of using a search warrant. An appearance in a formal courtroom setting will remind 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 would be 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 would arguably serve to remind all parties of the solemnity of the occasion.

2.08 A personal appearance by the applicant before the issuing authority is arguably the best means of ensuring confidentiality in the search warrant application process. Section 26 of the *Criminal Justice Act 2009* provides that applications to a court for a search warrant "shall be heard otherwise than in public." In practice, most search warrant applications are made in the private chambers of judges. During the Seanad debate on the 2009 Act the Minister for Justice, Equality and Law Reform observed that making a search warrant application openly and in public carries "a substantial risk that the intended subject might be alerted to the planned search and might avail of the timelag in order to dispose of evidence."²⁶ Section 26 of the 2009 Act therefore seeks to protect evidence and prevent its disclosure or destruction. The introduction of an electronic search warrant application process could arguably increase the risk of information pertaining to the search warrant application being accessed by parties other than the applicant and issuing authority prior to the execution of the search warrant through, for example, a data or security breach. Such an approach might jeopardise the integrity of investigations by allowing information concerning search warrant applications to be disclosed to persons other than the search

²² Roberts and Zucherman *Criminal Evidence* (Oxford University Press 2004) at 299.

²³ *Ibid.*

²⁴ (1924) 20 LI L Rep 140 at 152, cited with approval by Hardiman J in *J O' C v DPP* [2000] 3 IR 478 at 508 and *O'Callaghan v Mahon* [2006] 2 IR 32 at 60.

²⁵ See New Zealand Law Commission, *Search and Surveillance Powers* (Report 98, 2007) at 103 and Law Reform Commission of Canada, *Police Powers: Search and Seizure in Criminal Law Enforcement* (Working Paper 301, 1983) at 205.

²⁶ Seanad Éireann Debates Vol. 196, No. 15, 14 July 2009. Available at <http://debates.oireachtas.ie/seanad/2009/07/14/00010.asp> (last accessed 31 January 2014).

warrant applicant and the issuing authority. It is likely, however, 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*, the Commission discusses 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.²⁷

2.09 Notwithstanding the benefits of requiring the applicant to appear personally before the issuing authority, there may be advantages to dispensing with such a requirement and providing that search warrant applications should be made electronically. This might promote speed and efficiency in the search warrant application process. It has also been 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.

2.10 The Commission also seeks views of interested parties on whether the requirement for the applicant to personally appear before the issuing authority should be dispensed with only in limited circumstances as an exception to the rule requiring an applicant to appear personally before the issuing authority. The Commission also seeks views in relation to what circumstances should allow for removing such a requirement.

2.11 In other jurisdictions, the circumstances in which the requirement for the applicant to appear personally before the issuing authority have been dispensed with are limited. For example, in the Commonwealth of Australia, the *Crimes Act 1914*, as amended in 1994, provides for search warrant applications by telephone, telex, fax or other electronic means in an urgent case or if the delay that would occur if an application were made in person would frustrate the effective execution of the warrant.²⁸ Electronic applications are qualified as the authority to whom the application is being made “may require communication by voice to the extent that it is practicable in the circumstances”.²⁹ The Canadian *Criminal Code 1985* states that, “where a peace officer believes that an indictable offence has been committed and that it would be impracticable to appear personally before a justice to make application for a warrant” the peace officer may submit information on oath by “telephone or other means of telecommunication” to a judge.³⁰ The New Zealand *Search and Surveillance Act 2012* provides that an application for a search warrant must be in writing³¹ and may be made electronically.³² The New Zealand 2012 Act requires the applicant to make a personal 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

²⁷ See generally Chapter 7 of the *Consultation Paper on Documentary and Electronic Evidence* (LRC CP 57-2009).

²⁸ Section 3R(1) of the *Crimes Act 1914*, inserted by section 4 of the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*.

²⁹ *Ibid*, section 3R(2).

³⁰ Section 487.1(1) of the *Criminal Code 1985*.

³¹ Section 100(3) of the New Zealand *Search and Surveillance Act 2012* 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.

³² Section 100(1) of the New Zealand *Search and Surveillance Act 2012*.

information from the applicant.³³ 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.³⁴

2.12 In Ireland, dispensing with the requirement of the applicant to appear personally before the issuing authority to affirm his or her opinion under oath in limited circumstances might have advantages. 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 or impracticability. This issue was raised during the Oireachtas 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.³⁵ 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”³⁶ 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.³⁷

2.13 A small number of legislative provisions allow members of the 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.³⁸ A process enabling the applicant to submit a search warrant application without having personally to appear before the issuing authority would enable members of the Garda Síochána to apply to a judge of the District Court for a search warrant rather than a member of the Garda Síochána of a certain minimum rank. This would ensure the independence of the issuing authority, the importance of which was highlighted by the Supreme Court in *Damache v Director of Public Prosecutions*.³⁹ 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 the 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 the 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.”⁴⁰ Courts in Ireland appear to be satisfied that warrants issued by members of the Gardaí

³³ Section 100(4) of the New Zealand *Search and Surveillance Act 2012*. 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.

³⁴ Section 487.1(1) of the *Canadian Criminal Code 1985*, C-46.

³⁵ Seanad Éireann Debates Vol. 771, No. 1, 3 July 2012. Available at <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2012/4712/document1.htm> (last accessed 31 January 2014).

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ 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*.

³⁹ [2012] IESC 11, [2012] 2 IR 266.

⁴⁰ *Ibid* at paragraph 37.

satisfy the requirement that a warrant be issued by a “competent, detached authority exercising an independent jurisdiction”⁴¹ 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”⁴² 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.”⁴³ 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”.⁴⁴ 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 the Garda Síochána.

2.14 Other jurisdictions use ICT in the search warrant application process to vindicate fundamental rights. The New Zealand Law Commission was of the view that provision allowing 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.”⁴⁵ 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.⁴⁶ 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 interests of each citizen and the safety and security needs of the public.”⁴⁷ In Ireland, the implementation of an electronic search warrant application process in the urgent circumstances that currently permit Garda-issued search warrants would also protect relevant rights by providing for the issuing of all search warrants by a court.

2.15 Gardaí and other officials could use electronic procedures to apply for search warrants without having to attend court in cases where it is impracticable to make a personal appearance due, for example, to geographical constraints. The applicant may physically be at a remote location far away from the nearest District Court in circumstances where it is impracticable to travel to court. This advantage might be more apparent in larger jurisdictions such as Canada and Australia. In addition, the Commission considers that by not requiring the applicant to make a personal appearance, electronic applications could become a useful tool where a member of the Garda Síochána or other body is carrying out surveillance of a location. If an electronic application without the requirement of a personal appearance was permitted, the officer would not be obliged to leave the point of surveillance to make the application.

⁴¹ *The People (DPP) v Balfe* [1998] IR 50.

⁴² 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.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ New Zealand Law Commission *Report on Search and Surveillance Powers* (NZLC 2007) at 103.

⁴⁶ 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 on 31 January 2014); and Smith “Press One for Warrant: Reinventing the Fourth Amendment’s Search Warrant Requirement Through Electronic Procedures” (2002) *Vand L Rev* 1591 at 1605.

⁴⁷ 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.

2.16 A key question that arises is whether only circumstances of urgency should give rise to removing the requirement for a personal appearance or whether something short of urgency, for example, where the delay that would occur if an application were made in person would frustrate the effective execution of the search warrant. As noted above, such circumstances allow for electronic search warrant applications in the Commonwealth of Australia.⁴⁸

2.17 Case law and legislation provide guidance on what might constitute “circumstances of urgency”. For example, the *Criminal Justice (Surveillance) Act 2009* provides that members of the Garda Síochána and Defence Forces may approve surveillance in cases of urgency, where before an authorisation could be issued: (a) it is likely that a person would abscond for the purpose of avoiding justice, obstruct the course of justice or commit an arrestable offence or a revenue offence; (b) information or evidence in relation to the commission of an arrestable offence or a revenue offence, as the case may be, is likely to be destroyed, lost or otherwise become unavailable; or (c) the security of the State would be likely to be compromised.⁴⁹ Further guidance on what circumstances of urgency might be included could be drawn from the Supreme Court decision in *The People (Attorney General) v O’Brien*⁵⁰ where the Court held that evidence obtained in breach of an accused’s constitutional rights is inadmissible in the absence of “extraordinary excusing circumstances.”⁵¹ Such extraordinary excusing circumstances include the imminent destruction of vital evidence or the need to rescue a victim in peril. These examples may also be useful in determining what might constitute circumstances of urgency for the purposes of removing the requirement for the applicant to make a personal appearance when applying for a search warrant.

2.18 A limited number of legislative provisions allow members of the Garda Síochána of a certain minimum rank to issue search warrants in urgent circumstances where it is impracticable for the warrant to be issued by a judge.⁵² One option would be to confine the exceptional circumstances in which the applicant would not be required to personally appear before the issuing authority to this specific type of scenario. This would involve two elements: (i) the existence of circumstances of urgency; and (ii) those urgent circumstances make it impracticable to obtain a search warrant from a judge of the District Court. Courts have interpreted the meaning of “practicable” as contained in the Constitution and legislation. Such interpretation may be useful in considering what circumstances might make it “impracticable” to obtain a search warrant from a judge of the District Court. In *O’Donovan v Attorney General*⁵³ the High Court considered Article 16.2.3° of the Constitution which provides that the ratio between the number of members to be elected to Dáil Éireann at any time for each constituency and the population of each constituency as ascertained at the last preceding census shall “as far as practicable be the same throughout the country.” Budd J cited the English case *Lee v Nursery Furnishings Ltd*⁵⁴ in which Goddard LJ interpreted “practicable” as defined in the Oxford English Dictionary as “capable of being... carried out in action... feasible.” Budd J held that, in relation to Article 16.2.3°, “practicable” means “so far as that is capable of being carried into action in a practical way, having regard to such practical difficulties as exist and may legitimately, having regard to the context and provisions of the Constitution generally, be taken

⁴⁸ Section 3R(1) of the *Crimes Act 1914*, inserted by section 4 of the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*.

⁴⁹ Section 7 of the *Criminal Justice (Surveillance) Act 2009*.

⁵⁰ [1965] IR 142.

⁵¹ *Ibid* at 170.

⁵² 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*.

⁵³ [1961] IR 114.

⁵⁴ [1945] 1 All ER 387 at 389, cited in *O’Donovan v Attorney General* [1961] IR 114 at 132.

into consideration.”⁵⁵ He added that it does not involve “taking mere matters of convenience into consideration.”⁵⁶ The Supreme Court cited this definition of “practicable” with approval in *McC v Eastern Health Board*⁵⁷ when interpreting “as soon as practicable” under section 8(1) of the *Adoption Act 1991*. The Court further held that “as soon as practicable” does not equate with “as soon as possible.”⁵⁸ It might be considered impracticable to apply to a judge of the District Court for a search warrant if it is incapable of being carried out in a practical way having regard to such practical difficulties as exist and may legitimately be taken into consideration.

2.19 Another possible approach would be to extend the circumstances in which a personal appearance could be removed to situations falling short of impracticability, such as where the delay that would occur if an application were made in person would frustrate the effective execution of the warrant. In the Commonwealth of Australia the *Crimes Act 1914*, as amended, allows for search warrant applications by telephone, telex, fax or other electronic means in such circumstances.

Q.2(b)(i): Do you agree that 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?

Q.2(b)(ii): If no, do you agree that the requirement for person applying for a search warrant to appear personally should be dispensed with and all applications should be made, or permitted to be made electronically?

Q.2(b)(iii): Do you agree that the requirement for the applicant to appear personally before the issuing authority could be dispensed with, but only in certain circumstances, such as 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?

2(c) affirming the applicant's opinion

2.20 If search warrants could be applied for by telephone or electronic means in limited or all circumstances without the applicant having to appear personally before the issuing authority, consideration would have to be given to how the applicant would affirm his or her opinion that evidence of or relating to a particular offence may be found at a certain location. Affirming the applicant's opinion under oath 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.⁵⁹ Modern technology provides a number of mechanisms by which the applicant could fulfil such a requirement. For example, 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. Alternatively the applicant could submit an affidavit containing sworn evidence of the information forming the basis of his or her opinion. Another option that has been suggested is 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. In the United States, where the Fourth Amendment requires a search warrant to be issued “upon probable

⁵⁵ [1961] IR 11 at 132.

⁵⁶ *Ibid.*

⁵⁷ [1996] 2 IR 296 at 310.

⁵⁸ *Ibid.*

⁵⁹ Garner (ed) *Black's Law Dictionary* (7th ed, Westgroup 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.”

cause supported by Oath or affirmation”, courts have held that electronic search warrant applications are consistent with the oath requirement.⁶⁰

2.21 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). 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 certified copy with the court clerk.⁶¹ 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.⁶²

Q2(c): Do you agree that an electronic 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

(iii) statutory declaration in writing (or transmitted electronically in exceptional circumstances)?

2(d) electronic issuing of search warrants

2.22 In the Consultation Paper, the Commission also discussed the electronic issuing of search warrants.⁶³ The Commission examined a number of jurisdictions where search warrants may be issued electronically. Legislative provisions permitting the electronic issuing of search warrants generally respond to electronic search warrant application processes.

2.23 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”⁶⁴ or “direct the applicant to sign the judge’s name and enter the date and time on the duplicate original.”⁶⁵ 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.⁶⁶ The applicant must then complete a form of warrant “in terms substantially corresponding to those given by the issuing office”⁶⁷ and record the name of the issuing officer and day and time when the warrant was issued.⁶⁸ 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 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

⁶⁰ *United States v Turner* 558 F. 2nd 46, 50 (2nd Circuit 1977); *People v Snyder* 5449 N.W. 2d 703 (Mich. Ct. App. 1989); *People v Sullivan*, 437 N.E. 2nd 1130 (NY 1982).

⁶¹ Section 487.1(2) of the Canadian *Criminal Code* 1985; section 100(5) of the New Zealand *Search and Surveillance Act* 2012.

⁶² Section 487.1(2.1) of the Canadian *Criminal Code* 1985.

⁶³ Consultation Paper at paragraphs 4.84-4.103.

⁶⁴ Rule 4.1(b)(6)(C) of the US *Federal Rules of Criminal Procedure*.

⁶⁵ *Ibid.*

⁶⁶ Section 3R(5) of the Australian *Crimes Act* 1914 as amended by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act* 1994.

⁶⁷ *Ibid*, section 3R(6).

⁶⁸ *Ibid.*

court clerk.⁶⁹ 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.⁷⁰ 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.⁷¹ 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.

2.24 Drawing from the above procedures, the following two options are possible when the applicant does not physically possess the original search warrant:

- 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 he or she specified.

2.25 It is important that the executing authority, whether a Garda or other person such as an officer of the Director of Corporate Enforcement, can physically show the owner or occupier the search warrant to inform them of the authority for the search. The Commission envisages that difficulties may arise if the executing authority possessed a form of search warrant that he or she had prepared that does not contain a signature of an issuing authority (usually, the District Court). To safeguard fully the fundamental rights to privacy and protection of the dwelling, it may be appropriate for the executing authority to be in physical possession of the original search warrant or where this is not practicable, a facsimile or other electronic copy of the search warrant that was transmitted to him or her by the issuing authority. The *Electronic Commerce Act 2000* provides that information shall not be denied legal effect or enforceability solely on the grounds that it is wholly or partly in electronic form.⁷² The 2000 Act also provides that, where a person is required by law to provide written information, the person may give information in electronic form.⁷³ Section 13 of the 2000 Act provides for the use of e-signatures.

Q2(d)(i): Do you agree that the executing authority, usually a Garda, should generally possess the original search warrant so that he or she can show it to the owner or occupier when executing a search?

Q2(d)(ii): Do you agree that if it is not practicable for the executing authority to obtain the original search warrant from the issuing authority, usually the District Court, 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?

END

⁶⁹ Section 487.1(6) of the Canadian *Criminal Code*.

⁷⁰ Section 487.1(6.1) of the Canadian *Criminal Code*.

⁷¹ Section 105 of the New Zealand *Search and Surveillance Act 2012*.

⁷² Section 9 of the *Electronic Commerce Act 2000*.

⁷³ Section 12 of the *Electronic Commerce Act 2000*.