LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

SEARCH WARRANTS AND BENCH WARRANTS

(LRC CP 58 – 2009)

LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

SEARCH WARRANTS AND BENCH WARRANTS

(LRC CP 58 - 2009)

FIRST PUBLISHED
December 2009

ISSN 1393-3140

LAW REFORM COMMISSION'S ROLE

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 150 documents (Consultation Papers and Reports) containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have led to reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. Its *Third Programme of Law Reform 2008-2014* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in December 2007 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role includes two other areas of activity, Statute Law Restatement and the Legislation Directory.

Statute Law Restatement involves the administrative consolidation of all amendments to an Act into a single text, making legislation more accessible. Under the *Statute Law (Restatement) Act 2002,* where this text is certified by the Attorney General it can be relied on as evidence of the law in question. The Legislation Directory - previously called the Chronological Tables of the Statutes - is a searchable annotated guide to legislative changes. After the Commission took over responsibility for this important source, it decided to change the name to Legislation Directory to indicate its function more clearly.

MEMBERSHIP

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners.

The Commissioners at present are:

President:
The Hon Mrs Justice Catherine McGuinness
Former Judge of the Supreme Court

Full-time Commissioner:
Patricia T. Rickard-Clarke, Solicitor

Part-time Commissioner:
Professor Finbarr McAuley

Part-time Commissioner:
Marian Shanley, Solicitor

Part-time Commissioner:
Donal O'Donnell, Senior Counsel

LAW REFORM RESEARCH STAFF

Director of Research:
Raymond Byrne BCL, LLM (NUI), Barrister-at-Law

Legal Researchers:
Chris Campbell, B Corp Law, LLB Diop Sa Gh (NUI)
Siobhan Drislane BCL, LLM (NUI)
Gemma Ní Chaoimh BCL, LLM (NUI)
Bríd Nic Suibhne BA, LLB (NUI), LLM (TCD), Diop sa Gh (NUI)
Jane O'Grady BCL, LLB (NUI), LPC (College of Law)
Gerard Sadlier BCL (NUI)
Joseph Spooner, BCL (Law with French Law) (NUI), Dip. French and European Law (Paris II), BCL (Oxon)
Ciara Staunton BCL, LLM (NUI), Diop sa Gh (NUI)

STATUTE LAW RESTATEMENT

Project Manager for Restatement:
Alma Clissmann, BA (Mod), LLB, Dip Eur Law (Bruges), Solicitor

Legal Researchers:
John P Byrne BCL, LLM, PhD (NUI), Barrister-at-Law
Catriona Moloney BCL (NUI), LLM (Public Law)

LEGISLATION DIRECTORY

Project Manager for Legislation Directory:
Heather Mahon LLB (ling. Ger.), M.Litt, Barrister-at-Law

Legal Researchers:
Margaret Devaney LLB, LLM (TCD)
Rachel Kemp BCL (Law and German), LLM (NUI)

ADMINISTRATION STAFF

Head of Administration and Development:
Brian Glynn

Executive Officers:
Deirdre Bell
Simon Fallon
Darina Moran
Peter Trainor

Legal Information Manager:
Conor Kennedy BA, H Dip LIS

Cataloguer:
Eithne Boland BA (Hons), HDip Ed, HDip LIS

Clerical Officers:
Ann Browne
Ann Byrne
Liam Dargan
Sabrina Kelly

PRINCIPAL LEGAL RESEARCHER FOR THIS CONSULTATION PAPER

Siobhan Drislane, BCL, LLM (Criminal Justice) (NUI)

CONTACT DETAILS

Further information can be obtained from:

Head of Administration and Development
Law Reform Commission
35-39 Shelbourne Road
Ballsbridge
Dublin 4

Telephone:
+353 1 637 7600

Fax:
+353 1 637 7601

Email:
info@lawreform.ie

Website:
www.lawreform.ie

ACKNOWLEDGEMENTS

The Commission would like to thank the following people who provided valuable assistance:

Ms. Rebecca Coen, Deputy Head of Prosecution Policy Unit, Office of Director of Public Prosecutions
Judge William Hamill, Judge of the District Court
Mr. James Hamilton, Director of Public Prosecutions
Mr. David Keeley, Sea Fisheries Protection Authority
Ms. Claire Loftus, Chief Prosecution Solicitor
Judge Miriam Malone, President of the District Court
Commissioner Fachtna Murphy, Garda Commissioner
Mr. Kevin O'Connell, Office of the Director of Corporate Enforcement
Mr. Dara Robinson, Solicitor
Mr. Noel Rubotham, Director of Reform and Development, Courts Service

Full responsibility for this publication lies, however, with the Commission.

TABLE OF CONTENTS

Criminal Justice (Miscellaneous Provisions) Act 1997	4/1997	Irl
Criminal Justice (Theft and Fraud) Act 2001	50/2001	Irl
Criminal Justice Act 1951	2/1951	Irl
Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987	S.I. 119/1987	Irl
Criminal Justice Act 1994	15/1994	Irl
Criminal Justice Act 2007	29/2007	Irl
Criminal Law (Amendment) Act 1885	48 & 49 Vic. c.69	Irl
Criminal Law (Rape Amendment) Act 1990	32/1990	Irl
Criminal Law Act 1976	32/1976	Irl
Criminal Law Act 1997	14/1997	Irl
Criminal Procedure Act 1967	12/1967	Irl
Customs and Excise (Miscellaneous Provisions) Act 1988	10/1988	Irl
Disability Act 2005	14/2005	Irl
District Court (Bench Warrant) Rules 2007	S.I. 73/2007	Irl
District Court (Bench Warrant) Rules 2008	S.I. 498/2008	Irl
District Court (Search Warrant) Rules 2008	S.I. 322/2008	Irl
District Court (Summonses) Rules 2005	S.I. 167/2005	Irl
District Court Rules 1997	S.I. 93/1997	Irl
District Justices (Temporary Provisions) Act 1923	6/1923	Irl
Electricity Regulation Act 1999	23/1999	Irl
Employment Permits Act 2006	16/2006	Irl
Equal Status Act 2000	8/2000	Irl
Firearms and Offensive Weapons Act 1990	12/1990	Irl
Food and Environment Protection Act 1985	1985 c.48	Eng
Industrial Designs Act 2001	39/2001	Irl
International Criminal Court Act 2006	30/2006	Irl
Larceny Act 1916	6 & 7 Geo 5 c.50	Irl

Law Enforcement (Powers and Responsibilities) Act 2002	2002-103	NSW, Aus
Magistrates' Court Act 1989	51 of 1989	Vic, Aus
Magistrates' Courts Act 1980	1980 c.43	Eng
Medical Practitioners Act 1978	4/1978	Irl
Misuse of Drugs Act 1977	12/1977	Irl
Misuse of Drugs Act 1984	18/1984	Irl
National Monuments (Amendment) Act 1987	17/1987	Irl
National Oil Reserves Agency Act 2007	7/2007	Irl
Offences Against the Person 1861	24 & 25 Vic. c. 100	Irl
Offences Against the State Act 1939	13/1939	Irl
Official Secrets Act 1963	1/1963	Irl
Petty Sessions (Ireland) Act 1851	14 & 15 Vic. c.93	Irl
Police and Criminal Evidence Act 1984	1984 c.60	Eng
Police Powers and Responsibilities Act 2000	5 of 2000	Qld, Aus
Police Reform Act 2002	2002 c.30	Eng
Prevention of Corruption (Amendment) Act 2001	27/2001	Irl
Proceeds of Crime (Amendment) Act 2005	1/2005	Irl
Prohibition of Incitement to Hatred Act 1989	19/1989	Irl
Railway Safety Act 2005	31/2005	Irl
Road Traffic Act 1961	24/1961	Irl
Safety, Health and Welfare at Work Act 2005	10/2005	Irl
Search and Surveillance Bill 2009	45-1	NZ
Treason Act 1939	10/1939	Irl
Video Recordings Act 1989	22/1989	Irl

Duncan v Governor of Portlaoise Prison	[1997] 1 IR 558	Irl
Dunne v D.P.P.	High Court 6 June 1996	Irl
Dunphy v Crowley	Supreme Court 17 February 1997	Irl
Farrell v Farrelly	[1988] IR 201	Irl
Ghani v Jones	[1969] 3 All E.R. 1700	Eng
Gooding v United States	(1974) 416 U.S. 430	US
Greenough v Gaskell	(1833) 1 My & K 98	Eng
Hanahoe v Hussey	[1998] 3 IR 69	Irl
Johnson v U.S.	(1948) 33 U.S. 10	US
Kelly v Hamill	[1997] IEHC 7	Irl
Kennedy v Ireland	[1987] IR 587	Irl
King v Attorney General	[1981] IR 233	Irl
Mc Farlane v D.P.P.	[2008] IESC 7	Irl
McNulty v D.P.P.	[2006] IEHC 74	Irl
Miley v Flood	[2001] 2 IR 50	Irl
Minster v Priest	[1930] A.C 558	Eng
Murphy v Kirwan	[1993] 3 IR 501	Irl
Murphy v Shields	[1998] IEHC 167	Irl
National Authority for Occupational Safety and Health v O'Brien Crane Hire Ltd.	[1997] 1 I.R. 543	Irl
Norris v The Attorney General	[1984] IR 36	Irl
Ochre Ridge v Cork Bonded Warehouses	[2004] IEHC 160	Irl
Olsson v Sweeden (No. 1)	10465/83 [1988] ECHR 2	ECtHR
P.M. v D.P.P.	[2006] IESC 22	Irl
P.M. v Malone	[2002] 2 I.R. 560	Irl
People (D.P.P.) v McEnery	Court of Criminal Appeal, 15 February 1999	Irl
Pringle v Bremner and Stirling	(1867) 5 Macph. (H.of L.) 55	Eng

R v Burnett	[2008] BCPC 104	Can
R v Erikson	[2003] BCCA 693	Can
R v Pedersen	[2004] BCCA 64	Can
R. v Cox and Railton	(1884) 14 Q.B.D. 153	Eng
R. v Crown Court, ex p Baines and Baines	[1987] 3 All E.R. 1025	Eng
R. v Derby Magistrates' Court, ex parte B	[1995] 3 WLR 681	Eng
R. v I.R.C., ERx p. Rossminister Ltd	[1980] A.C. 952	Eng
Redknapp v Commissioner of the City of London Police	[2008] EWHC 1117	Eng
Rock v Governor of St. Patrick's Institution	Supreme Court 22 March 1993	Irl
Ryan v O'Callaghan	High Court 22 July 1987	Irl
Seymane's Case	(1604) 5 Co Rep 91a; 77 Eng Rep 195	Eng
Shadwick v City of Tampa	(1972) 407 U.S. 345	US
Simple Imports Ltd. v Revenue Commissioners	[2000] IESC 40; [2000] 2 IR 243	Irl
Smith -Bird v Blower	[1939] 2 All E.R. 406	Eng
Smurfit Paribas Bank Ltd. v A.A.B. Export Finance Ltd.	[1990] 1 IR 469	Irl
State (Dowling) v Kingston	(1937) 71 I.L.T.R. 131	Irl
Swales v Cox	[1981] 1 All E.R. 1115	Eng
The People (Attorney General) v O'Brien	[1965] IR 142	Irl
The People (Attorney General) v Hogan	(1972) 1 Frewen 360	Irl
The People (D.P.P) v Tallant	[2003] 4 IR 343	Irl
The People (D.P.P.) v Balfe	[1998] 4 IR 50	Irl
The People (D.P.P.) v Barnes	[2007] 3 IR 130	Irl
The People (D.P.P.) v Byrne	[2003] 4 IR 423	Irl

The People (D.P.P.) v Cash	[2008] 1 ILRM 443	Irl
The People (D.P.P.) V Corrigan	[1986] IR 290	Irl
The People (D.P.P.) v Delaney	[2003] 1 IR 363	Irl
The People (D.P.P.) v Dunne	[1994] 2 IR 537	Irl
The People (D.P.P.) v Edgeworth	[2001] IESC 31, [2001] 2 IR 131	Irl
The People (D.P.P.) v Forbes	[1994] 2 IR 542	Irl
The People (D.P.P.) v Gaffney	[1988] ILRM 39	Irl
The People (D.P.P.) v Heaphy	[1999] IEHC 98	Irl
The People (D.P.P.) v Kenny	[1990] 2 IR 110	Irl
The People (D.P.P.) v Laide and Ryan	[2005] IECCA 24	Irl
The People (D.P.P.) v Lawless	(1984) 3 Frewen 30	Irl
The People (D.P.P.) v Madden	[1977] IR 336	Irl
The People (D.P.P.) v McGartland	Court of Criminal Appeal 20 January 2003	Irl
The People (D.P.P.) v Shaw	[1982] IR 1	Irl
The State (Attorney General) v Judge Fawsitt	[1955] I.R. 39	Irl
The State (Attorney General) v Judge Roe	[1951] I.R. 172	Irl
Walsh v Ireland and the Attorney General	Supreme Court 10 November 1994	Irl
Williams v Quebrada Railway, Land and Copper Company Ltd.	[1895] 2 Ch. 751	Eng
Williams v Summerfield	[1972] All ER 1334	Eng

INTRODUCTION

A Background to the project

1. This Consultation Paper forms part of the Commission's *Third Programme of Law Reform 2008-2014*[1] and involves an examination of the law and procedure in respect of two distinct types of warrants, search warrants and bench warrants.

2. The Commission was aware from submissions received during the consultation process leading up to the formulation of the *Third Programme* that this was an area where more efficient and effective procedures could be in place. In making its provisional recommendations in this Consultation Paper, the Commission has in mind this general background.

3. Chapters 1 to 6 of the Consultation Paper deal with search warrants, while Chapter 7 discusses the law concerning bench warrants.

4. It is clear that the law as to search warrants is detailed and complex, and it therefore requires a greater deal of attention in this Consultation Paper. That complexity is also reinforced by the enormous list of Acts and statutory Regulations which provide for powers of search and seizure, and which the Commission has appended to this Consultation Paper. Chapters 1 to 6 address the following matters: the history of the law on search warrants and the rights-based dimension to the law; the case for a broadly-applicable single statutory framework for search warrants; the different application procedures under existing law; the different issuing procedures; the varying execution processes; and the relevant procedural safeguards in the current law, many of which have long historical echoes but which can now also be found in the rights protected under the Constitution of Ireland and the European Convention on Human Rights.

5. As already indicated, in chapter 7 the Commission examines the law and practice concerning bench warrants, which is a long-established arrest warrant procedure in the courts. It is used where a person has, for example, failed to turn up to a court hearing. The Commission notes here that the current arrangements are in need of reform, most especially in terms of the execution process.

6. The Commission now turns to provide a more detailed overview of each chapter in the Consultation Paper.

---

[1] Law Reform Commission, *Third Programme of Law Reform 2008-2014* (LRC 86-2007), Project 3.

B Outline of this Consultation Paper

7. Chapter 1 provides an overview of the law on search warrants, which have been used as a means of search, and seizure, for hundreds of years. The chapter discusses the general warrant, or 'writ', which existed until the decision in *Entick v Carrington* in 1765.[2] Following that decision the general warrant was prohibited and search warrants were required to be far more specific and limited in scope. The chapter then describes the development of the law concerning search warrants up to the foundation of the State. Chapter 1 concludes with a discussion of the fundamental rights of relevance in this area, in particular the right to privacy and to protection of the dwelling under the Constitution of Ireland. The Commission also discusses the influence of the European Convention on Human Rights. These foundational principles have influenced the detailed content of the law on search warrants discussed in chapters 2 to 6, in particular specific procedural protections.

8. In chapter 2, the Commission discusses the need for a broadly-applicable single statutory framework for search warrants. This is influenced by the existence in Irish law of over 100 Acts and statutory Regulations (a list of which, up to 2008, is appended to the Consultation Paper) which provide for search and seizure powers. Many of these share a number of common features, but as chapters 3 to 6 also make clear, they differ in specific respects, not all of which appear to be based on any clear rationale. The result is that each Act requires a specific court form which must be completed, thus leading to unnecessary complexity and potential for error. In simple terms, this can often lead to important evidence being declared inadmissible.

9. The Commission also examines framework statutes in other States, and concludes that there is a strong case for such a law in Ireland. The Commission accepts, of course, that in specific settings there is a need for a separate search warrant law, for example, in the case of complex commercial investigations. The proposed statutory framework would, therefore apply to a general category of situations, but would allow for the continuation of specialised statutory arrangements, such as those deployed by the Office of the Director of Corporate Enforcement.

10. Chapter 3 analyses the procedure involved in applying for a search warrant. The Commission discusses the requirements which must be met by the applicant, such as the evidential threshold he or she must satisfy, as well as other practical aspects, such as requests by the issuing authority for additional information to ground the application and the form of search warrant applications.

---

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

11. In chapter 4, the Commission examines the process of issuing a search warrant where an application has been accepted. The power to issue a search warrant is limited to certain authorities. The Commission notes that there are also a number of conditions which must be met. If a search warrant is not properly issued it may be deemed invalid and so any evidence seized during its execution may be held to be unlawfully obtained and not admissible.

12. In chapter 5 the Commission discusses the law and procedure in respect of the execution of search warrants. The execution of the warrant is a key aspect of the search warrant process as it is the time when premises (whether commercial or private) are entered and searched and when property is often seized. Any such interference with an individual's or an entity's rights is quite a serious matter, and so the law does not confer absolute powers to authorities when executing search warrants. Rather the powers which may be exercised are limited and defined. The Commission therefore discusses the current procedures for the execution of a search warrant and notes that these are not identical.

13. In chapter 6, the Commission discusses two specific protections that apply. First, legal professional privilege, which is more likely to be involved in the context of commercial investigations that require the use of search warrants. The Chapter also discusses the rules concerning the exclusion of evidence obtained under an unlawful search warrant.

14. In chapter 7, the Commission turns to discuss the law on bench warrants in Ireland. As already noted, a bench warrant is commonly used in to securing the appearance of an individual before the courts. The chapter discusses the statutory provisions in respect of issuing bench warrants, notably in respect of failure to answer a summons to appear in court to face a minor criminal charge or as a condition of bail. The chapter discusses the position in respect of unexecuted bench warrants and the arrangements for granting Garda station bail. The Commission makes provisional recommendations which are aimed at ensuring a more efficient and effective procedure concerning bench warrants.

15. Chapter 8 comprises a summary of the provisional recommendations made in this Consultation Paper.

16. The Appendix to the Consultation Paper contains a list of Acts and statutory Regulations, up to 2008, which contain search warrant powers. The large number of these varied legislative provisions has influenced the Commission's provisional recommendations in chapter 2 concerning a single, broadly-applicable, statutory framework law on search warrants.

17. This Consultation Paper is intended to form the basis of discussion and therefore all the recommendations made are provisional in nature. The

Commission will make its final recommendations on the subject of search warrants and bench warrants following further consideration of the issues and consultation with interested parties. Submissions on the provisional recommendations included in this Consultation Paper are welcome. To enable the Commission to proceed with the preparation of its final Report, those who wish to do so are requested to make their submissions in writing by post to the Commission or by email to info@lawreform.ie by **31 March 2010.**

CHAPTER 1 OVERVIEW OF SEARCH WARRANTS

A Introduction

1.01 This chapter provides an overview of the historical development of search warrants. The Commission also discusses the relevant fundamental rights, in particular those in the Constitution of Ireland, which have a direct bearing on this area. In part B, the Commission discusses the early history of search warrants. It will be seen that search warrants have been used since as early as ancient Roman times. Part C outlines the early provisions for search warrants in England and the United States. This contains a discussion of the law of search warrants as it developed in England, including the rejection of the concept of the general search warrant in the 18th century and the development of the requirements of the modern search warrant, subject to procedural protections. The influence of English search warrant law on the United States is also considered, along with the modern warrant, which was placed on a constitutional footing in the Fourth Amendment of the United States Constitution. Part D discusses the comparable development of the law in Ireland up to the 19th century. In part E, the Commission discusses in particular the relevance to the law on search warrants of the right to privacy and to protection of the dwelling under the Constitution of Ireland. The Commission also discusses the influence of the European Convention on Human Rights

B Search Warrants in Early History

1.02 The ancient Roman code of law, entitled the Twelve Tables, was published in the 4th century B.C.[3] Although the Tables were the first formal

[3] The code was called the "Twelve Tables" as it was inscribed on twelve wooden tablets and set up in the forum for the public to see. See Mousourakis, *The Historical and Institutional Context of Roman Law* (Ashgate Publishing Ltd 2003) at 63. See also Borkwoski and du Pleiss, *Textbook on Roman Law* (3rd ed Oxford University Press 2005) at 29-31; Cracknell, *Law students' Companion, No. 4 Roman Law* (Butterworths 1964) at 5; Curzon, *Roman Law* (MacDonald and Evans Ltd 1966) at 21-22.

codification of the law in Roman society, most their contents were based on existing customary law[4] and they did not set out new law.[5]

1.03 It is notable that in Ancient Rome offences against the State were subject to a public form of criminal trial.[6] By contrast, prosecution of an offence against an individual, that is a 'private' offence, was initiated by the private individual himself, rather than by a public authority. Thus when an individual suspected that his stolen goods were on the premises of another, he was authorised to enter that place and carry out the search himself.[7] It seems that witnesses would, however, be present for the execution of the search.[8]

1.04 The procedure for carrying out searches was set out in Table VIII of the code and was specifically related to the offence of theft (called *furtum)*. It required the searcher to conduct the search "wearing only a girdle and holding a plate". It seems that the reasoning behind the requirement that the searcher wear only a girdle or cloth was that it "lessened the possibility of [the searcher] planting property on the premises" and therefore making a false claim of theft.[9]

---

4 Jolowicz, *Historical Introduction to the Study of Roman Law* (2nd ed Cambridge University Press 1952) at 85. Curzon, *Roman Law* (MacDonald and Evans Ltd. 1966) at 22.

5 One of the primary goals of codifying existing customary laws was to ensure that the law was applied to all citizens and to remove any arbitrariness in its administration as "administration of justice was now based upon a publicly verifiable set of rules and procedures." Mousourakis, *The Historical and Institutional Context of Roman Law* (Ashgate Publishing Ltd 2003) at 121.

6 Mousourakis, *The Historical and Institutional Context of Roman Law* (Ashgate Publishing Ltd 2003) at 140.

7 Nicholas, *An Introduction to Roman Law* (Oxford University Press 1962) at 212; Lee, *The Elements of Roman Law* (4th ed Sweet and Maxwell Ltd 1956) at 382.

8 See generally Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (The Johns Hopkins Press 1937) at 15-17; Jolowicz, *Historical Introduction to the Study of Roman Law* (2nd ed Cambridge University Press 1952) at 171; Lee, *The Elements of Roman Law* (4th ed Sweet and Maxwell Ltd 1956) at 381; Nicholas, *An Introduction to Roman Law* (Oxford University Press 1962) at 212.

9 Borkowski and du Pleiss, *Textbook on Roman Law* (3rd ed Oxford University Press 2005) at 335. See also Jolowicz, *Historical Introduction to the Study of Roman Law* (2nd ed Cambridge University Press 1952) at 171 where it is noted that "the reason why the searcher should be naked (or nearly so) is fairly clear – he should not conceal anything about his person and then pretend to have found it in the house". Another protectionist measure was that where a person planted

A number of reasons have been suggested as to why the searcher was required to carry a plate; stolen items found were to be placed upon it,[10] it was to keep the searchers hand's occupied so that he was unable to smuggle anything in,[11] or it was intended to carry an offering to the gods.[12] Where the "prescribed formalities" were not followed the searcher, that is the person whose property had been stolen, would benefit from a lesser standard of remedy in comparison to what would be received had the correct search procedure been conducted.

1.05 In 43 A.D. the Romans successfully invaded and began their colonisation of Britain. Roman law was then, at least in principle, applied by the conquerors.[13] It is presumed that Roman law did have some level of influence upon British law. According to Lee "a number of systems exist which have to some extent at least a Roman law foundation".[14] Therefore it may be possible that the concept of procedural searches travelled with the Romans to Britain. In any event the practice of organised search can be found in early English legal history.

C Early Provisions for Search Warrants in England and the United States

1.06 Legislation providing for search warrants in England was first enacted in the early part of the 14th century. Polyviou suggests that prior to such

---

stolen property in the house of another, the householder was permitted to take "an action for threefold damages" against that person. Borkowski and du Pleiss, *Textbook on Roman Law* (3rd ed Oxford University Press 2005) at 337.

10 Borkowski and du Pleiss, *Textbook on Roman Law* (3rd ed Oxford University Press 2005) at 335. Jolowicz, *Historical Introduction to the Study of Roman Law* (2nd ed Cambridge University Press 1952) at 172.

11 Jolowicz, *Historical Introduction to the Study of Roman Law* (2nd ed Cambridge University Press 1952) at 172.

12 Borkowski and du Pleiss, *Textbook on Roman Law* (3rd ed Oxford University Press 2005) at 335.

13 See Borkowski and du Pleiss, *Textbook on Roman Law* (3rd ed Oxford University Press 2005) at 385; Baker, *An Introduction to English Legal History* (4th ed Butterworths 2002) at 2.

14 Lee, *The Elements of Roman Law* (4th ed Sweet and Maxwell Ltd 1956) at 25. See also Baker, *An Introduction to English Legal History* (4th ed Butterworths 2002) at 40; Thomas, "A Bibliographic Overview of Early English Legal History" (1989) 81 Law Libr. Journal 639, at 640.

legislation "it is probable that [in] the administration of criminal law officials routinely took any action that was considered necessary; this, one assumes, would be done on the strength of the authority they possessed".[15]

1.07 One of the earliest such statutes, enacted in 1335, provided that innkeepers were to search certain guests for imported money.[16] Under this 1335 Act a corresponding provision was made for officials to search the premises of innkeepers. Over time, further search and seizure provisions were enacted in England as a means of enforcing laws relating to licensing of books and printing, suppression of religious freedom, suppression of seditious libel, treason and censorship of publications.[17]

(1) General search warrants

1.08 The search powers which were provided for by early statutes were quite broad in nature. It is notable that at this time they were called 'writs' rather than warrants.[18] Writs were general in form - containing little specification or restriction as to what, where or whom could be searched. In addition, applying for a warrant was quite easily done; little supporting evidence had to be submitted by the applicant. On this point Lasson has commented that warrants "could be issued on the merest of rumour with no evidence to support them and

---

15 Polyviou, *Search and Seizure: Constitutional and Common Law* (Duckworth 1982) at 1.

16 9 Edw. III, St. II, Ch.11 (1335). See Reynard, "Freedom from Unreasonable Search and Seizure – A Second Class Constitutional Right?" (1950) 25 Indiana Law Journal 259 at 264. See Polyviou, *Search and Seizure: Constitutional and Common Law* (Duckworth 1982) at 1.

17 See generally Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (The Johns Hopkins Press 1937) at 24-28; Polyviou, *Search and Seizure: Constitutional and Common Law* (Duckworth 1982) at 1-3; Reynard, "Freedom from Unreasonable Search and Seizure – A Second Class Constitutional Right?" (1950) 25 Indiana Law Journal 259 at 264-266.

18 Reynard explains that 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." 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 Ltd. 1982) at 12.

indeed for the very purpose of possibly securing some evidence in order to support a charge."[19]

1.09 The general search warrant which existed in Britain at this time was also established in the United States, under British rule. Writs were initially provided for by legislation governing customs in the United States. Searches were carried out so as to detect goods imported into the United States in contravention of British tax laws operating there. According to Polyviou they were "much more sweeping in nature and considerably more arbitrary in character" than their English counterparts. Writs afforded customs officials a "blanket authority" to search any location where they suspected smuggled goods to be and to examine any package or container which they saw fit.[20]

1.10 In addition to being quite unspecific as to the persons or places that could be searched under their authority, or the items which could be seized, writs were also hugely general as to the length of time for which they were valid. Once issued, a writ remained "as continuing licences" until six months after the death of the monarch under whose reign they were issued.

(2) Hale's criticisms of general search warrants and his requirements for procedural warrants

1.11 During the 17th century a number of the great chroniclers of English law expressed concern over the broad search powers which could be authorised by general search warrants. Sir Edward Coke expressed the opinion that search warrants were contrary to common law. Sir Matthew Hale disagreed, however, with this complete rejection of warrants and commented that if warrants to search for stolen goods were to be "disused or discontinued, it would be of public inconvenience".[21]

1.12 Instead Hale was of the opinion that the general warrant should be disused and that it should be replaced with a more limited and specific version. In his work on English law, Hale recommended that certain requirements should be met when search warrants were issued and executed. Hale recommended 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 retuning

---

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

20 Polyviou, *Search and Seizure: Constitutional and Common Law* (Duckworth Ltd. 1982) at 10.

21 Hale, *Historia Placitorum Coronae, Volume II* (1736) at 149.

of seized goods and executed warrants to a justice.[22] These requirements heralded the creation of the modern system of search warrants, complete with procedural safeguards.

1.13 Similar dissatisfaction with the general warrant system emerged at the same time in the United States. The death of King George II in 1760 meant that writs issued during the time of his reign were soon to become invalid and new writs would have to be issued under the title of his successor. A number of Boston merchants initiated legal proceedings opposing the issuing of further general warrants.[23] During proceedings general warrants, or writs, were denounced as being "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book" by those challenging their use.[24]

(3) The decision in Entick v Carrington (1765)

1.14 A fundamental change came about in England in 1765 with the case *Entick v Carrington.*[25] Entick had published a leaflet, "Monitor or British Freeholder", which 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 there.

1.15 Delivering a hugely significant judgment, 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

---

22 Hale, *Historia Placitorum Coronae, Volume II* (1736) at 149-152.

23 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 Ltd. 1982) at 10-11.

24 These were the words of James Otis who represented the merchants in their legal action. Despite the fact that the challenge failed, it is commented that this denunciation was principal to the revolution against the oppressive writ. See *Boyd v United States* 116 U.S. 616 (1886) at 652; Reynard, "Freedom from Unreasonable Search and Seizure – A Second Class Constitutional Right?" (1950) 25 Indiana Law Journal 259, at 272.

25 (1765) 2 Wils 275, 19 State Tr 1029; [1558-1774] All ER Rep 41.

comforts of society".[26] Reynard has commented that "[i]n the main it was England's judges, not its legislators, who fashioned the principle of freedom from the oppressive practices" of the general search warrant.[27]

1.16 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."[28] Thus if a search is carried out without the authority of a warrant, it is likely that the searcher will have committed an offence of trespass against the property owner. The search of one's property, without consent, must always be authorised by law.

1.17 Lord Camden CJ went on to note that where a warrant was to be granted for the search of stolen goods, the justice and informer involved should abide by certain safeguards and "proceed with great caution". The procedure recommended by Lord Camden, reflecting the suggestions of Sir Matthew Hale, was that there should be an oath sworn that an individual has had his goods stolen and there should be a strong reason to believe that the goods are concealed in such a place. Thus the Court in *Entick v Carrington* rejected the concept of general warrants, but it accepted the principle of search warrants subject to procedural safeguards.

(4) Prohibition of general warrants in the United States

1.18 The decision in *Entick v Carrington*[29] also served to resolve the issue of the use of general warrants in the United States. In 1789 the United States effectively codified the principle that general warrants were not lawful when it enacted the Fourth Amendment of the Constitution. It has been noted that the Fourth Amendment was "primarily a reaction to the evils associated with the use of the general warrant in England and the writs of assistance in the colonies".[30]

---

26 *Entick v Carrington* (1765) 2 Wils 275, 19 State Tr 1029; [1558-1774] All ER Rep 41.

27 Reynard, "Freedom from Unreasonable Search and Seizure – A Second Class Constitutional Right?" (1950) 25 Indiana Law Journal 259, at 266.

28 (1765) 2 Wils 275, 19 State Tr 1029; [1558-1774] All ER Rep 41.

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

30 Scarboro and White, *Constitutional Criminal Procedure* (The Foundation Press Inc. 1977) at 86. See also Shapiro and Tresolini, *American Constitutional Law* (3rd ed The Macmillan Company 1970) at 658.

The framers of the Fourth Amendment were also influenced greatly by Sir Matthew Hale's comments.[31]

1.19 Procedural rules relating to search warrants were established in the United States which reinforced the constitutional requirement that searches had to comply with certain limitations.[32] The English rejection of the general warrant was also relied on as an authority to end the use of the writ. In *Boyd v United States*[33] the United States 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." Speaking for the Court, Bradley J went on to say that *Entick* was "regarded as one of the permanent monuments of the British Constitution."[34]

D The Evolution of Search Warrants in Irish Law

1.20 By the 19th century, the procedural search warrant system, which had by that time become established in both England and the United States following the rejection of the general search warrant, was similarly well-established in Ireland. As Hayes noted in a text published in 1842, it was accepted that "[a] general warrant to search all suspected places is decidedly illegal".[35]

1.21 Thus a number of procedural rules in line with those recommended in the work of Sir Matthew Hale and the judgment of *Entick v Carrington*,[36] had come to be applied in Irish law in the 19th century. For example, the law in Ireland required that there be sworn information of suspicion given to a justice when making an application for a warrant,[37] that the place intended to be

---

31 Scarboro and White, *Constitutional Criminal Procedure* (The Foundation Press Inc. 1977) at 10.

32 See Chitty, *Riley's Edition. A Practical Treatise on the Criminal Law* (Issac Riley 1819) at 52.

33 116 U.S. 616 (1886).

34 *Boyd v United States* 116 U.S. 616 (1886) at 626.

35 Hayes, *A Digest of the Criminal Statute Law in Ireland, Volume II* (Hodges and Smith 1842) at 788.

36 (1765) 2 Wils 275, 19 State Tr 1029; [1558-1774] All ER Rep 41.

37 According to Hayes "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.

searched "be stated with convenient certainty",[38] that no search could be made beyond the premises that was specified in the warrant,[39] and that in executing a warrant of search and seizure the officer(s) "should strictly obey its directions".[40] Further rules concerning issues such as the time at which the warrant should be executed, the use of force, who the warrant should be addressed to and what to do once execution was completed, were also set out.[41]

1.22 The approach developed in the 19th century in Ireland formed the basis for the law as it stood on the foundation of the State. Since then, as discussed in chapters 2 to 6, a complex series of Acts and statutory Regulations conferring powers of search and seizure have been put in place. The content of these statutory powers has been greatly influenced by the need to ensure that they conform to relevant fundamental rights in the Constitution of Ireland the European Convention of Human Rights. The Commission now turns to discuss these.

E Fundamental Rights and Search Warrants

1.23 In this part the Commission discusses in particular the relevance to the law on search warrants of the right to privacy and to protection of the dwelling under the Constitution of Ireland. The Commission also discusses the influence of the European Convention on Human Rights

(1) The right to privacy

1.24 The execution of a search warrant naturally involves an interference with one's privacy, be it the individual's home, workplace, vehicle, documents, or otherwise. The right to privacy is not, however, absolute. Therefore, while it exists as a safeguard which may be relied upon to prevent or challenge an undue interference with one's privacy, it will not necessarily prevent *all* interferences.

---

38 Hayes, *A Digest of the Criminal Statute Law in Ireland, Volume II* (Hodges and Smith 1842) at 788.

39 O'Connor, *The Irish Justice of the Peace* (E. Ponsonby Ltd 1911) at 145.

40 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.

41 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.

(2) Privacy and the Irish Constitution

1.25 Although there is no express provision within the Irish Constitution in respect of a general right to privacy, the Irish Courts have in fact recognised it as one of the fundamental rights protected by the Constitution. *McGee v Attorney General*[42] was the first case where the constitutional right to privacy was recognised. The case was concerned with marital privacy rather than with a general right. The Supreme Court here held that the right was derived from Article 40.3 of the Constitution, which refers to personal rights. Article 40.3 states

> 1:-"The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."
>
> 2:- "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

Budd J. stated that while the personal rights guaranteed by the provision:

> "are not described specifically, it is scarcely to be doubted in our society that the right to privacy is universally recognised and accepted with possibly the rarest of exceptions".[43]

Henchy J. observed that the unspecified personal rights guaranteed by 40.3.1 are not necessarily confined to those specified in 40.3.2.[44] Therefore, although the right to privacy was not expressly referred to within the article, the Court was satisfied to recognise it as an unspecified right within the scope of protection offered by Article 40.3.

1.26 In *Norris v The Attorney General I*[45] the plaintiff challenged provisions of the *Offences Against the Person 1861*[46] and the*Criminal Law (Amendment) Act 1885*,[47] which criminalised homosexual acts between males. The plaintiff claimed that the provisions interfered with his constitutional right to privacy. Although the action failed, the right to privacy was accepted by the Court.

---

42 [1974] IR 284.

43 *Ibid*, at 322.

44 *Ibid*, at 325.

45 [1984] IR 36.

46 Sections 61 and 62.

47 Section 11.

However, the right was not held to be unlimited. O'Higgins C.J. stated that "[a] right of privacy...can never be absolute".

1.27 The issue was clarified further by the decision of *Kennedy v Ireland.*[48] In this case the High Court observed that although the right to privacy was not specifically guaranteed within the text of the Constitution, "it is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State."[49] In light of this, the Court noted the concepts of dignity and freedom of the individual, as referred to in the Preamble of the Constitution. Hamilton P. explained 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".[50]

1.28 The limitation of the right was also noted by the High Court; it explained 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".[51]

(3) Privacy and the European Convention on Human Rights

1.29 The constitutional right to privacy is now well established and accepted in Ireland. It has been further supplemented by the *European Convention on Human Rights*.[52] Article 8 of the Convention is expressly concerned with the right to private and family life.[53] Article 8 states

---

48 [1987] IR 587.

49 *Ibid*, at 592.

50 *Ibid*, at 593.

51 *Ibid*, at 592.

52 The *European Convention on Human Rights Act 2003* states that in interpreting or applying any statutory provision or rule of law, the Irish courts must do so in a manner which is compatible which the State's obligations under the Convention. Thus regard must always be had for the provisions of the Convention and the decisions, declarations and opinions of the European Court of Human Rights.

53 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.

1:- “Everyone has the right to respect for his private and family life, his home and his correspondence.”

2:- “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Although Article 8.1 is quite broad in scope, relating to an individual’s privacy, family life, home and correspondence, Article 8.2 makes it clear that the rights afforded by Article 8 are not absolute.

1.30 In examining Article 8 of the ECHR, Harris *et al*. have noted that its “core idea is one of sanctuary against intrusion by public authorities”.[54] They observe that the weight attached to the strong interest which a person has in the sanctuary of his or her home “puts the burden on the State to justify such interventions” as being for the good of public purposes.[55] Article 8.2 itself 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. In *Olsson v Sweeden (No. 1)*[56] the European Court of Human Rights identified the requirements flowing from the phrase “in accordance with law”. It held that[57]

i) to be considered a ‘law’ a rule or norm must be formulated with sufficient precision so that the citizen can forsee, to a degree, that it is reasonable in the circumstances;

ii) the phrase does not merely refer to domestic law, but also to “the quality of the law”, thereby requiring it to be compatible with the rule of law. The Court interpreted this as implying that there must be a measure of protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by Article 8;

iii) a law which confers a discretion to the State is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the

54 Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights* (Butterworths 1995), at 319.

55 *Ibid*, at 319.

56 10465/83 [1988] ECHR 2.

57 *Ibid*, at 61.

measure in question, to give the individual adequate protection against arbitrary interference.

iv) The Court then went on to consider the meaning of "necessary in a democratic society". It stated that the notion of necessity "implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued". The Court commented that in determining whether an interference is necessary in a democratic society, the Court will take into account that a margin of appreciation is left to the contracting States.[58]

1.31 It appears that reliance on the Article 8.2 necessarily involves a balancing exercise. While the State is expected to guarantee respect for the individual's privacy, it is also permitted to limit the rights, to a certain extent, by its laws.

(4) The Scope of Article 8 of the ECHR

1.32 In *Niemietz v Germany*[59] the European Court of Human Rights considered a claim that Article 8 had been offended by the execution of a search warrant. The plaintiff was a lawyer and the search was carried out at his office. Firstly, the Court considered the notion of 'private life'. The Court held that it did not consider it possible or necessary to provide an exhaustive definition of the phrase. However, it refused to take a narrow view, commenting that it would be

> "too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life and to exclude therefrom entirely the outside world not encompassed within that circle."[60]

1.33 The Court held that respect for private life must also comprise, to a certain degree, the right to establish and develop relationships with other human beings. It concluded that there appeared to be no reason of principle why the understanding of 'private life' should be taken to exclude activities of a professional or business nature, as it is often within a person's working life that they would have the opportunity to develop relationships with the outside world. The Court further noted that for some people work may form "part and parcel" of their lives, to the extent that it may be impossible to distinguish between their private and professional aspects. Secondly, the Court interpreted what was intended by the word 'home', as contained in Article 8. It again showed favour for a broad interpretation. Reference was made to the French version of the

---

58 *Ibid*, at 67.

59 13710/88 [1992] ECHR 80.

60 *Ibid*, at 29.

Convention, where the word "domicile" is used in Article 8. The Court noted that the word 'domicile' has a broader connotation than the word 'home' and "may extend, for example, to a professional person's office."[61] According to the Court a broader interpretation would be more appropriate, as activities which are related to a profession or business "may well be conducted from a person's private residence and activities which are not so related may well be carried out in an office or commercial premises."[62]

1.34 The Court concluded that to interpret the words 'private life' and 'home' as including certain professional or business activities or premises "would be consonant with the essential object and purpose of Article 8, namely to protect against arbitrary interferences by the public authorities".[63] It held that a breach of Article 8 had occurred in the case at hand. The Court therefore offered quite a broad interpretation of the scope of Article 8. It looked beyond purely personal aspects of the individual's life to include other areas incorporated within the individual's life.

(5) Privacy as a Safeguard

1.35 As the right to privacy is well established in Ireland, both in terms of the Constitution and under the European Convention on Human Rights, the State is obliged to respect this right in exercising its powers and functions. However, the right does have it limits and the State is permitted to impose upon the individual's privacy in certain circumstances; generally where the common good and interests of the State require it. In respect of search warrants, they 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 regulations, amongst other things. These purposes would generally be considered to be in the interests of the State and the common good. Therefore, interference with a person's right to privacy by the execution of a search warrant may well be justified. What is essential is that the interference is necessary and does not go beyond what is justified and permissible. In the event that these requirements are not complied with, or that a search warrant is not itself a valid authority, the individual subjected to the search may establish that his or her constitutional and/or convention 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.

---

61 *Ibid*, at 30.

62 *Ibid*, at 30.

63 *Ibid*, at 31.

(6) Constitutional Protection of the Dwelling

1.36 At Common Law it was traditionally recognised that a man's home was his castle, and as such it should not be unduly interfered with. This protection was understood to be quite far reaching and open to all persons. As the Court in *Seymane's Case*[64] explained

> "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – but the King of England cannot enter – all his force dare not cross the threshold of the ruined tenement."

The Irish Constitution enshrined this traditional protection of the dwelling expressly within it terms as one of the fundamental rights it guarantees. Article 40.5 states

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

In *The People (D.P.P.) v Barnes*[65] 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 dwelling-house 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."[66] The Court in *The People (D.P.P.) v Dunne*[67] observed that the protection of the dwelling afforded by Article 40.5 "is one of the most important, clear and unqualified protections given by the Constitution to the citizen."[68]

(7) Meaning of 'Dwelling'

1.37 The Supreme Court in *The People (Attorney General) v O'Brien*[69] offered an interpretation of what the 'dwelling', as protected by Article 40.5, should be taken to mean. It explained that where members of a family live together in the family house, "the house as a whole is for the Constitution the

---

64 (1604) 5 Co Rep 91a; 77 Eng Rep 195.

65 [2007] 1 ILRM 350.

66 *Ibid* at 362.

67 [1994] 2 IR 537.

68 *Ibid*, at 540.

69 [1965] IR 142.

dwelling of each member of the family".[70] And if a member of a family occupies a clearly defined portion of the house, apart from the other members of the family, "then it may well be that the part not so occupied is no longer his dwelling and that the part he separately occupies is his dwelling". The Court explained that this latter interpretation would apply in the circumstances where a person not a member of the family occupied or was in possession of a clearly defined portion of the house.[71]

1.38 In *The People (D.P.P.) V Corrigan*[72] the High Court considered Article 40.5 and the *O'Brien* decision. Blayney J held that 'dwelling' means "a house, or part of a house, and that this is what is made inviolable by the Constitution. The protection would not extend accordingly to a garden surrounding the dwelling, or leading to it".[73] He concluded, therefore, that Article 40.5 did not extend to the driveway of the defendant's house. A similar line of thought appeared in *The People (D.P.P.) v Forbes.*[74] Here the Supreme Court distinguished between the forecourt of a premises and the structure of the dwelling itself. The Court considered that it must be regarded that any householder "gives an implied authority to a member of the Garda Siochana to come onto the forecourt of his premises to see to the enforcement of the law or prevent a breach thereof."[75] By contrast, due to the protection offered by Article 40.5, an implied authority could not be held to exist in respect of the dwelling. Thus the Court made it clear that the forecourt of a premises does not fall within the definition of 'dwelling' by allowing for this implied authority.[76]

(8) Occupation

1.39 The explanation of the term 'dwelling' offered by the Supreme Court in *The People (Attorney General) v O'Brien*[77] was quite focused on the element of occupation of a premises by the individual who benefits from the constitutional right. In this case the Court observed that the applicants were

---

70 *Ibid*, at 169.

71 *Ibid*, at 169.

72 [1986] IR 290.

73 *Ibid*, at 296.

74 [1994] 2 IR 542.

75 *Ibid*, at 548.

76 It is noted that the Court did not provide that this implied authority would be absolute in nature. As O'Flaherty J. explained "like any implied authority, it is an implication which the evidence may, on occasion, rebut." *Ibid*, at 548.

77 [1965] IR 142.

members of a family living in the family home, with each of them having their own separate bedrooms. It concluded that each of the applicants would have a constitutional right to the inviolability of the dwelling-house.[78]

1.40 The requirement for occupation has been made clear by the courts in other cases. In *The People (D.P.P.) v Lawless*[79] the applicant did not live at the address concerned. The Court of Criminal Appeal noted that the constitutional right relating to the dwelling "was not the right of the applicant but of the tenant of the flat in question and persons residing with him."[80] Therefore the applicant could not rely on the protection of Article 40.5. A similar issue arose in *The People (D.P.P.) v Delaney.*[81] Here the defendant had been arrested under the *Road Traffic Act 1961* at a dwelling where he did not reside. The Court held that "[a]s the dwelling house was not that of the defendant, he cannot plead the constitutional inviolability of the dwelling house."[82]

1.41 A dwelling must also be personal in nature; the protection does not extend to commercial premises. This was made clear by the judgment in *The People (D.P.P.) v McMahon.*[83] In that case members of the Garda Siochana 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." Therefore it held that the constitutional protection of Article 40.5 was not involved.[84]

(9) The Scope of the Protection

1.42 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*[85] held that the guarantee is

---

78 *Ibid*, at 169.

79 [1984] 3 Frewan 30.

80 *Ibid* at 33.

81 [2003] 1 IR 363.

82 *Ibid*, at 369.

83 [1986] IR 393.

84 *Ibid*, at 398.

85 1 Frewan 360.

"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".[86]

1.43 The High Court in *Ryan v O'Callaghan*[87] considered what was meant by the phrase "save in accordance with law". It followed the explanation provided by the Supreme Court in *King v Attorney General*[88] that the phrase means "without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution". In seeking to determine what the "legal order postulated by the Constitution" would encompass, it is perhaps the preamble of the Constitution which should be consulted. The Preamble to the Constitution states that the Constitution seeks to promote the common good, with due observance of prudence, justice and charity, so that the dignity and freedom of the individual may be assured and true social order attained. In light of this statement it may be observed that by complying with the various legal requirements in acquiring and executing a search warrant, entry into a dwelling which is carried out under the authority of a warrant should be sufficient to respect the demands of the preamble. Furthermore, there may be occasions where entry into a dwelling may be justified for the sake of the common good, for example for the purposes of the prevention or detection of crime or to prevent injury to an individual who is within the dwelling. The inviolability of the dwelling may be set aside in such circumstances where the right is outweighed by requirements of the common good.

1.44 Essentially, 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 individual's constitutional right to the inviolability of the dwelling. The importance of upholding the individual's constitutional right was clearly noted by the Court in *The People (Attorney General) v O'Brien.*[89] 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

---

1.01 [86] This aspect of Article 40.5 was also considered by the Supreme Court in *The People (Attorney General) v O'Brien.* Walsh J. expressed his 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." [1965] IR 142, at 169.

[87] High Court, 22 July 1987.

[88] [1981] IR 233.

[89] [1965] IR 142.

paramount position of constitutional rights".[90] On the other hand is the interest of the State to prevent, detect and prosecute criminal offences, or to ensure adherence to the law.

1.45 In order that the rights of the individual are not unduly interfered with, the authority who enters the dwelling must be careful to act in accordance with the law. He or she should be careful to comply with the relevant legal requirements, as well as keeping the constitutional right of the individual in mind. In *Byrne v Grey*[91] Hamilton P. observed where an authority was sought to enter an individual's dwelling, "the courts should construe a statute which authorises such encroachment so that it encroaches on such rights no more than the statute allows, expressly or by necessary implication."[92] Hamilton P. referred to the views of Lord Diplock in the U.K. House of Lords in *R. v I.R.C., Ex p. Rossminster Ltd*[93] where it was explained that when a Court is faced with a request for the authority to enter and search a private premises, the court should "remind itself, if reminder should be necessary, that entering a man's house or office, searching it and seizing his goods against his will are tortious acts against which he is entitled to the protection of the court unless the acts can be justified either at common law or under some statutory authority."[94] Lord Diplock went on to say that if there is any ambiguity or obscurity within the statute upon which the authority to enter and search was sought, "a construction should be placed upon them which is the least restrictive of individual rights, which would otherwise enjoy the protection of the common law."[95] Having noted the words of Lord Diplock, Hamilton P. added that in Ireland the "individual rights referred to as enjoying the protection of the common law also enjoy the protection of the Constitution".[96]

1.46 Similarly in *The People (D.P.P.) v Gaffney*[97] Henchy J. stated that where an act (in this case an arrest) would invade upon an individual's dwelling, the power to do so "must be construed subject to the defendant's right to the inviolability of his dwelling."[98] The need for caution was also observed by the

---

90 *Ibid*, at 170.

91 [1988] IR 31.

92 *Ibid*, at 38.

93 [1980] A.C. 952.

94 *Ibid*, at 1008.

95 *Ibid*, at 1008.

96 [1988] IR 31, at 39.

97 [1988] ILRM 39.

98 *Ibid*, at 44.

Court in *Simple Imports Ltd. v Revenue Commissioners.*[99] The Supreme Court noted in that case that the powers which are afforded to authorities under search warrants to enter and search "the dwelling house or other property of a citizen" must be enjoyed in defined circumstances for the protection of society. Thus, the Court noted that courts must ensure that the conditions imposed by the legislature are strictly met.

1.47 It is therefore notable that although the Constitution protects the inviolability of an individual's dwelling, this protection is not absolute. There may be occasions where it is justifiable to set this right aside. However, the courts have made it clear that the constitutional right under Article 40.5 should not be set aside easily. This must be done in accordance with the law so that the constitutional right is not offended and, furthermore, the invasion upon the right must be as limited as possible, never going beyond what is necessary to achieve the greater good.

1.48 As with the right to privacy, the protection of the dwelling under Article 40.5 has influenced the reach and scope of the law on search warrants, at least to the extent that a search warrant applies to a dwelling.

[99] [2000] 2 IR 243; [2000] IESC 40.

CHAPTER 2 A GENERAL FRAMEWORK FOR SEARCH WARRANTS

A Introduction

2.01 As already noted, the law on search warrants has developed to become a complex and extensive legal process. There is now a vast amount of legislation in Ireland, both Acts and statutory Regulations, which make provision for search warrants to be issued under their authority. A list of Acts and Statutory Regulations containing search warrant provisions has been appended to this Consultation Paper. This chapter is concerned with an overall view of the modern search warrant framework. There is an array of search warrant provisions in Ireland, but they are not currently supplemented by a governing framework. Part B briefly describes how the current scheme is set out and identifies some of the disadvantages which flow from not having a governing framework. Part C considers the law in a number of other jurisdictions where legislation has been enacted to act as the principal authority with regard to search warrants. In part D the Commission discusses the implementation of a general search warrant framework in Ireland.

B The Current Search Warrant Scheme in Ireland

2.02 The large number of Acts and Statutory Regulations which make provision for search warrants in Ireland has been set out in the Appendix. It is notable that the search warrant process may be utilised in respect of both criminal and civil matters, as search warrant provisions expand over a great variety of laws. Each statutory provision sets out its own particular requirements and conditions to be satisfied so that a search under warrant is deemed lawful. Specifications are made within each provision in respect of application for, issuing of and execution of search warrants under its authority. Variations of these requirements can be found from one Act to another, so that what will satisfy the provisions of one may not be sufficient to satisfy another. As Walsh explains a search warrant may be issued and executed under an Act "only when its own peculiar requirements have been satisfied."[1]

[1] Walsh, *Criminal Procedure* (Thomson Round Hall 2002) at 402.

2.03 Therefore, each piece of legislation essentially sets out and regulates its own search warrant process. There is no single governing authority in respect of search warrants in Ireland. Consequently, for the purpose of determining what the law is with regard to a search warrant, one has to examine the distinct provision which authorises its existence; there is no standard framework which sets out the law in Ireland in respect of search warrants. The Commission notes that there are at least five identifiable disadvantages to not having a single Search Warrant Act or framework. Firstly, not having a single Act or framework means that there is generally a lack of consistency and standardisation, as provisions vary from one piece of legislation to another. Secondly, there is a lack of guidance in respect of the search warrant process. As there is no primary authority to be consulted in respect of the law on search warrants, persons are required to determine what the relevant law is by examining the distinct search warrant provisions, as well as considering case law in certain circumstances. Thirdly, not having a standard framework can be inefficient and time consuming. That is, applicants, issuing officers or any other party to the search warrant process cannot simply look to a standard authority so as to ascertain the relevant law, rather they are required to identify the particular provision within the legislation and then determine the necessary points of law. Fourthly, having a multiplicity of search warrant provisions can lead to uncertainty. As already noted, each provision has its own particular requirements to be satisfied and these often vary from one provision to another. This essentially results in a lack of uniformity. Therefore, persons involved in the search warrant procedure may find it difficult, or at the very least challenging, to be certain of the precise elements of particular provisions.

2.04 By contrast, if there was a standard authority in respect of search warrants an individual could familiarise himself or herself with the conditions contained therein and then rely on this information to apply to all, or at least the majority of, search warrants. Fifthly, the current approach is wasteful f legislative resources. Thus, when a new search warrant provision is created the legislature is required to draft a new section which sets out all aspects of the provision, including the application, issuance and execution procedures in respect of the search warrant. If a standard search warrant Act or framework existed the legislature would simply need to refer to that as the legal authority in respect of a new search warrant provision. As a result persons concerned with the search warrant process, such as the Garda Siochana, the judiciary and lawyers are required to have a multitude of legislative provisions and legal materials available to them for the purpose of establishing the law regarding search warrants. If a single legislative framework existed which set out the substantial aspects of the law relating to search warrants in Ireland, the volume of resources required would be reduced.

(1) Potential Reform in Ireland

2.05 The Commission believes that it may be advisable to develop a standard search warrant framework in Ireland. This would act as the primary authority in respect of the law on search warrants, so that each search warrant would be considered in light of its provisions. In part C the Commission examines other jurisdictions where such frameworks have been enacted. The Commission then discusses in part D whether this approach should be adopted in Ireland.

C Search Warrant Frameworks in Other Jurisdictions

(1) United Kingdom

2.06 The *Police and Criminal Evidence Act 1984* is concerned with the powers and duties of the police in respect of investigating offences and compiling evidence. As the U.K. Home Office Consultation Paper, *Modernising Police Powers: Review of the Police and Criminal Evidence Act (PACE) 1984*, explains "[i]t provides a core framework of powers and safeguards around arrest, detention, investigation, identification and interviewing of suspects".[2] The leading textbook Archbold comments that PACE "defines the limits of the powers of police in [certain] areas and provides a series of checks and controls on the exercise of those powers".[3]

2.07 Part II of the 1984 Act specifically deals with the powers of entry, search and seizure. Like Ireland, the United Kingdom has a variety of legislation which makes provision for search warrants to be issued and executed. PACE acts as an umbrella Act regulating many of these search warrants. As the name of the Act suggests, the PACE framework deals with the exercise of powers and duties of police. Thus, the scope of the Act's provisions in respect of search warrants was initially limited to those warrants applied for, issued to and executed by members of the police force. However, over time there has been an extension of powers so that non-police officers can rely on, and also be subject to, Part II of PACE. Stone notes that following the enactment of the 1984 Act the scope of the search warrant provisions was extended to include Customs and Excise officers and officers enforcing the *Food and Environment Protection Act 1985*.[4] Subsequently, the enactment of the *Police Reform Act*

---

2 United Kingdom Home Office. *Modernising Police Powers: Review of the Police and Criminal Evidence Act (PACE) 1984* (2007) at 3.

3 Archbold, *Criminal Pleading, Practice and Evidence 2009* (Sweet and Maxwell 2009) at 1589.

4 Stone, *The Law of Entry, Search and Seizure* (4th ed Oxford University Press 2005) at 105-106.

2002 extended the reach of the Part II provisions even further. Zander has commented that the 2002 Act "gives unprecedented powers to civilians acting in support of the police". Schedule 4, Part 2 of the *Police Reform Act 2002* provides that where a person is designated as an investigating officer, he or she will be similarly affected by many of the entry, search and seizure powers and limits afforded to police officers by Pace.[5] Thus an investigating officer may apply for a search warrant under PACE, may have a search warrant issued to him or her under PACE, may seize and retain material in the course of his or her duties, PACE section 15 safeguards will apply to him or her, and PACE section 16 procedures in respect of execution of warrant will apply to him or her.[6] Therefore, the provisions of PACE in respect of entry, search and seizure no longer exclusively apply to the police.

2.08 PACE includes provisions in respect of the following aspects of the search warrants procedure:

i) The power of the issuing authority to authorise entry and search of a premises; section 8 relates to matters such as what the issuing authority must be satisfied of, issuing multiple execution search warrants and issuing all-premises search warrants.

ii) Legal professional privilege; section 10 explains what the privilege is.

iii) The meaning of 'excluded material', 'personal records', 'journalistic material' and special procedure material'; definitions are set out in sections 11, 12, 13 and 14.

iv) Search warrant safeguards; safeguards set out in section 15 include what must be stated in the search warrant application, that the issuing authority may require the applicant to give further evidence

---

5 Section 38 of the *Police Reform Act 2002* explains the process of 'designation'. Section 38(1) provides that the chief officer of police of any police force may designate any person who a) is employed by the police authority maintaining that force and b) is under the direction and control of that chief officer, as a designated officer. Under section 38(2) a 'designated officer' may be a i) community support officer, ii) investigating officer, iii) detention officer, or iv) escort officer. Section 38(4) states that the designating officer must be satisfied that the individual i) is a suitable person to carry out the functions for the purposes of which he is designated, ii) is capable of effectively carrying out those functions, and iii) has received adequate training in the carrying out of those functions and in the exercise and the performance of the powers and duties to be conferred on him by virtue of the designation.

6 *Police Reform Act 2002*, Schedule 4, Part 2, section 16.

on oath so as to ground the application and what the warrant itself must state.

v) Execution of search warrants; section 16 includes provisions with regard the time limit on execution, that the warrant may authorise any person to accompany the executing officer, the procedure to be followed by officers at the time of execution and the duty to return the search warrant to the appropriate office upon execution or otherwise.

vi) The general power of seizure and seizure of computerised information; sections 19 and 20.

vii) Access to and copying of material; section 21 sets out the procedures permitted in respect of photographing or photocopying materials seized, as well as allowing access to the occupier or custodian of the place from which material was seized, for the purpose of making copies of the materials so seized.

viii) Retention of materials seized; section 22 is concerned with returning materials which have been seized under search warrant, or providing copies in place of returning seized material where such is appropriate.

ix) Definition of premises; section 23 explains what is meant by the term 'premises' in respect of search warrants.

2.09 PACE therefore provides a substantial guide to be followed with regard to applying for, issuing and executing search warrants. It also offers a number of explanations and definitions to assist those concerned with search warrants.

(2) Australia

(a) Commonwealth

2.10 The Commonwealth *Crimes Act 1914*, as amended by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*, sets out the law in respect of a number of issues, including searches, information gathering, investigation of offences, arrest and forensic procedures. Part IAA, Division 2 of the 1914 Act, as amended, is concerned with search warrants. Provisions contained in the Act with regard to search warrants include:

i) When a search warrant may be issued; section 3E sets out the grounds that must be satisfied in the application, that the application must state if execution of the search is expected to involve the use of firearms, information of any previous applications, and the details to be stated on the warrant.

ii) What the warrant authorises; section 3F includes provisions with regard to the entry and search of a premises, search of persons at or near the premises, seizure of material to which the search warrant relates, seizure of material found in the course of the search for which the warrant has not been issued, the power to make seized materials available to other agencies for the purpose of investigating or prosecuting an offence to which the material relates, and the time at which the execution of the warrant is carried out.

iii) The availability of assistance when executing the search and the use of force; section 3G sets out the law on these matters.

iv) Details of warrant to be given to an occupier; section 3H sets out a requirement that a copy of the warrant must be given to the occupier, as well as the requirement that the executing officer must identify himself or herself to persons present at a place being searched.

v) Specific powers available to officers executing search warrants; section 3J makes provision for electronically recording the execution of warrants.

vi) The use of equipment to examine or process things; section 3K explains that the executing officer may use any equipment reasonably necessary to examine or process materials found during the search, that material may be removed from the scene to be examined elsewhere, the procedure to be followed if material is in fact removed to be examined elsewhere and the power of executing officers and assisting officers to operate equipment which is at the premises being searched under the warrant.

vii) The use of electronic equipment at the premises; section 3L is concerned with searching, seizing and making copies of electronic data. Section 3M makes provision for compensation to be paid in circumstances where damage is caused to electronic equipment on the premises during the search.

viii) Copies of seized things to be provided; section 3N provides that an occupier may request copies of materials which have been seized under warrant. This provision does not apply where possession of the material concerned by the individual is an offence.

ix) The occupier is entitled to be present during the search; provision for this is made by section 3P.

x) Receipts for things seized; section 3Q provides that a receipt must be provided by executing officers to the occupier for materials seized.

xi) Warrants by telephone or other electronic means; section 3R sets out the law in respect of electronic applications and issuing of search warrants.

(b) Tasmania

2.11 Tasmania has enacted specific legislation which relates to search warrants in that jurisdiction. The *Search Warrants Act 1997* states that its provisions are not intended to limit or exclude the operation of another law in the State, but where another State law provides a power to do one or more of the things dealt with in the Act, the power conferred by the 1997 Act may be used, despite the existence of the power under the other law. The *Search Warrants Act 1997* sets out the law and procedure to be complied with in respect of each step of the search warrant process. The following provisions are contained within the Act:

i) When search warrants can be issued; section 5 explains the requirement for the applicant to provide information on oath and the details to be stated on the search warrant.

ii) Things authorised by the search warrant; section 6 deals with the power to enter and search a premises under a warrant, to seize evidential material specified in the warrant, to seize material in relation to another offence (to which the warrant does not relate) and the powers afforded to non-police officers assisting with the search.

iii) The availability of assistance and the use of force in executing a search warrant; section 7 sets out the law in respect of the executing officer obtaining assistance which is reasonable and necessary and the use of force during execution of a search warrant where such is necessary and reasonable in the circumstances.

iv) Details of the warrant to be given to the occupier; section 8 provides that the occupier must be shown a copy of the search warrant and that the executing officer must identify himself or herself to persons present at a premises to be searched under warrant.

v) Specific powers available during execution of a search warrant; section 9 sets out the power of executing police officers or persons assisting to take photographs and/or video recording of the premises or things at the premises.

vi) The use of equipment to examine or process things during search; section 10 makes provision in respect of this matter.

vii) Use of electronic equipment at the premises; section 11 provides that executing officers or persons assisting may operate electronic

equipment, seize equipment or data contained thereon, or copy data contained on electronic equipment found at the premises.

viii) Copies of thing seized; section 12 provides that, where requested to do so by the occupier or owner, executing officers must provide copies of materials of information seized as soon as practicable after seizure.

ix) The occupier is entitled to be present during the search; section 13 establishes that the occupier may observe the search provided that he or she does not impede the search.

x) Receipts for thing seized; section 14 sets out the requirement for receipts to be given to occupiers where materials are seized under search warrant.

xi) Warrants by telephone or other electronic means; section 15 provides for electronic application and issuing of search warrants.

xii) Announcement before entry; section 19 provides that the executing officer must announce his or her presence and authority to enter the premises and that he or she must give the occupier an opportunity to allow entry to the premises.

xiii) Retention of things seized; section 20 sets out the law on this point.

xiv) Refusal, delay or obstruction of entry by executing officers under a search warrant; section 21 provides that such conduct may be an offence and the penalties that may be incurred by persons guilty of such.

(c) New South Wales

2.12 The *Law Enforcement (Powers and Responsibilities) Act 2002* was enacted to "consolidate and restate the law relating to police and other law enforcement officers' powers and responsibilities [and] to set out the safeguards applicable in respect of persons being investigated for offences".[7] The 2002 is the primary authority with regard to search warrants.[8]

2.13 Search warrants may be authorised under the 2002 Act in respect of the following offences, or suspected offences: i) an indictable offence, ii) a firearms or prohibited weapons offence, iii) a narcotics offence, iv) a child

---

7 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), Long title.

8 The law on search warrants was previously set out and regulated by the *Search Warrants Act 1985*. The provisions of the 1985 Act were repealed by the 2002 Act.

pornography offence, v) an offence involving a thing being stolen or otherwise unlawfully obtained. The scope of the 2002 Act is, therefore, quite broad.

2.14 The matters addressed by the Act include:

i) The application procedure; section 47 sets out the grounds that must be satisfied so as to make an application, while section 60 provides that the application must be made in writing and by the applicant in person.

ii) The general authority conferred by search warrant; section 47A explains what is permitted by the search warrant.

iii) Issuing search warrants; section 48 provides that the issuing authority must be satisfied of grounds to issue a search warrant.

iv) Seizure of things pursuant to the search warrant; section 49 makes provision for seizure of material referred to in the warrant, and seizure of materials which are not referred to but which are consequently found during the search.

v) Obstruction or hindrance of persons executing search warrants; section 52 provides obstruction or hindrance of the person executing the search warrant is an offence and sets out the penalty that applies for such an offence.

vi) Electronic applications and issuing of search warrants; this is provided for in section 61.

vii) The information to be contained within an application; section 62 makes provision as to the information that must be contained in an application and what the issuing authority must consider.

viii) False or misleading information in applications; section 63 provides that giving false or misleading information within the application is an offence and sets out the applicable penalty.

ix) Further application after refusal; section 64 provides for a procedure to make a subsequent search warrant application where the initial application has been refused.

x) The form of the search warrant; section 66 sets out the law on this point.

xi) Provision for occupier's notice; section 67 provides that an occupiers notice shall be given by the executing officer, what the notice must state and when it is to be given to the individual concerned.

xii) Announcement before entry; section 68 requires the executing officer to announce his or her presence and authority under the search warrant prior to entry.

xiii) Duty to show the search warrant; section 69 is concerned with this requirement.

xiv) Use of force; section 70 sets out the law with regard to the use of force during execution of the warrant.

xv) Use of assistants to execute the warrant; section 71 provides that executing officers may be assisted by other persons where necessary.

xvi) The time at which the warrant is executed; section 72 makes provision as to the hours during which a warrant may be executed.

xvii) Expiry of the search warrant; section 73 explains the validity period applicable to a search warrant and makes provision for the extension of that period where appropriate.

xviii) Reporting to the issuing officer; section 74 provides that the executing officer must report to the issuing officer with regard to the execution, or non-execution, of the issued search warrant.

xix) Operation of electronic equipment at the premises; sections 75A and 75B provide that executing officers may bring equipment to the premises and operate such for the purpose of examining materials, may operate equipment found at the premises, may access data contained on equipment found on the premises, and may make copies of and/or seize data found on equipment at the premises.

xx) Procedure to be followed by executing officers; section 201 makes provision as to the processes to be complied with by officers at the time of execution of a search warrant.

(d) Western Australia

2.15 The *Criminal Investigation Act 2006* provides powers for the investigation and prevention of offences and for related matters. The Act sets out the law and procedures to be complied with in respect of search warrants. The Act makes provision with regard to the following matters:

i) Application for search warrants; section 41 makes provision as to who may apply for a warrant, what an application must state and that an application may not be made if an application in respect of the same place has been made in the previous 72 hours.

ii) Issuing search warrants; section 42 sets out the grounds of which the issuing authority must be satisfied and the information which must be contained in the search warrant.

iii) The effect of the search warrant; section 43 sets out when a search warrant comes into effect, the time during which the warrant may be executed, what is authorised by the warrant and the procedure with regard to finding materials for which the warrant was not issued.

iv) Ancillary powers under a search warrant; section 44 makes provision in respect of a number of matters, including that executing officers may use equipment so as to assist with the search, may take photographs or make recordings of materials at the premises, may operate equipment which is at the premises and may order an occupier to assist with accessing records.

v) Execution of the search warrant; section 45 sets out the procedure to be followed by executing officers.

vi) Occupier's rights; section 31 makes provision for giving a copy of the search warrant to the occupier and for the procedure to be followed by the executing officer during the search in respect of occupier's rights.

(3) New Zealand

2.16 The New Zealand Parliament developed the *Search and Surveillance Bill 2009* to implement legislative reform of search and surveillance powers. These reforms are largely based on the recommendations of the New Zealand Law Commission Report *Search and Surveillance Powers*.[9] With regard to search warrants the Bill includes provisions on the following:

i) Applications for search warrant; section 96 of the Bill sets out the information which must be contained in an application and requires the applicant to disclose information in respect of other applications made in the previous 3 months.

ii) Mode of application; section 98 provides that an application must generally be in writing but may be made orally where permitted by the issuing officer. The section also makes provision for electronically transmitting an application.

iii) Retention of documents; section 99 requires the issuing authority to retain copies of applications, or record of oral applications, and the duration for which records must be retained.

---

[9] New Zealand Law Commission, *Search and Surveillance Powers* (Report 97, 2007).

iv) Form and content of the warrant; section 100 sets out the details which must be included in the issued search warrant, including information as to the permissible time of execution, the power to use force, the validity period of the warrant and whether multiple executions of the warrant are permitted.

v) Search warrant report; section 102 provides that the issuing officer may impose a condition that a search warrant report, that is details in respect of the execution or non-execution of the warrant, must be provided and the time period within which it must be done.

vi) Transmission of search warrant; section 103 provides that a copy of the issued warrant may be transmitted electronically to an executing officer if he or she does not have the document in his or her possession at the time of execution.

vii) Search powers; section 108 sets out the powers which are afforded to executing officers under the authority of a search warrant, such as the power to enter and search, to request assistance, to use force that is reasonably necessary, to seize material, to access computers or other data storage devices and to take photographs and sound or video recordings of the place being searched and of items found there.

viii) Powers of persons called to assist; section 110 sets out the powers which may be used by persons assisting an executing officer during the execution of a search warrant.

ix) Recognition of privilege; section 130 sets out the privileges which are recognised by the Bill.

x) Search warrants that extend to lawyers' premises or material held by lawyers; section 136 explains the procedure to be followed where a search warrant is to be executed on a lawyer's premises or in respect of material in the possession of a lawyer.

xi) Claims for privilege; section 104 makes provision as to the procedure to be followed by a person who wishes to make a claim of privilege in respect of material seized or sought to be seized by an officer executing a search warrant.

xii) Application for access to things seized or produced; sections 149 and 151 make provision for the owner of, or a person with a legal or equitable interest in, material which has been seized or produced to apply to have access to that material while it is in custody.

(4) Canada

2.17 Although Canada's *Criminal Code 1985* is not exclusively concerned with search warrants, it sets out the law to be complied with in respect of applying for, issuing and executing a warrant. Provisions made throughout the Act with regard to search warrants relate to the following:

i) Applications for warrants to search and seize; section 117.04.

ii) The information required in an application for a search warrant and to be contained in the search warrant; section 487(1).

iii) Powers to search a computer system and to reproduce and seize data contained on that system; section 487(2.1).

iv) The duty on persons in possession or control of property to permit execution of the search warrant; section 487(2.2)

v) Form of the search warrant; section 487(3).

vi) The procedure in respect of electronic search warrant applications; section 487.1.

vii) The procedure in respect of electronically issuing search warrants; section 487.1.

viii) Execution of the search warrant; section 488, including provisions regarding the time of execution and dealing with claims of privilege.

ix) Seizure of materials not specified in the search warrant; section 489.

x) Detention of materials seized during execution of the search; section 490.

D Implementing a Standard and Principal Search Warrant Framework in Ireland

2.18 Having considered the current search warrant scheme and, most notably, identifying the vast array of search warrant provisions which exist in Ireland, the Commission is of the view that a standard search warrant framework should be implemented in Ireland. In part A the Commission identified a number of disadvantages as a result of not having a standard authority in respect of the law on search warrants. The Commission is of the view that such disadvantages may be effectively addressed by developing a standard statutory framework.

2.19 The Commissions has approached a number of other jurisdictions where the search warrant process is regulated by a single, generally applicable Act. The Commission notes that the Acts providing this authority contain provisions with regard to all aspects of the search warrants procedure, including

application for, issuing of and executing search warrants, the particular powers afforded by search warrants, the procedures which officers must comply with and the safeguards that apply to search warrants, amongst other things. The scope of these Acts is therefore quite broad; essentially their provisions address all aspects of the search warrant process. The Commission provisionally recommends that all aspects of the search warrant system in Ireland should be similarly set out in a standard search warrant framework.

2.20 The Commission is of the view that as the search warrant process is necessarily technical in nature a framework would need to set out clear and well defined rules. Thus a framework in the form of legislation, rather than for example a statutory code of practice, should be implemented. Legislation would also hold greater force than a code with regard to demanding compliance and responding to a failure to comply. This legislative framework may be either enacted as a Search Warrant Act, that is an Act exclusively concerned with the search warrant process, or alternatively it may be worked into another Act.

(1) The scope of a standard search warrant framework

2.21 In chapters 3 to 6 the Commission discusses Consultation Paper will set out and discuss each step of the search warrant procedure in Ireland: i) application for search warrants, ii) issuing search warrants, and iii) executing search warrants. The Commission makes provisional recommendations, or invites submissions, with a view to reforming the search warrant system in Ireland. Some of these recommendations are concerned with varying the current law, while others involve entirely new elements. The Commission is of the view that it would be appropriate that these recommendations, as well as the existing fundamental law on search warrants, should be set out within the proposed general statutory framework governing search warrants.

(2) Standardisation

2.22 Another matter which the Commission notes in the Consultation Paper is the great variation which exists between existing search warrants provisions. Thus there is a general lack of consistency. An effective search warrant framework would require far greater standardisation within the law on search warrants. For example, rather than having a variety of provisions with regard to an applicant affirming his or her opinions, it would be necessary to introduce a single standard that would apply to all provisions. The Commission recognises that there are of course certain matters where a single standard is not practicable in respect of all provisions. Naturally the scope and context of a provision would need to be considered when determining the law to apply. Thus the Commission considers that the generally applicable standards should be put in place where possible and that, where this is not practicable, some variations should be permitted.

2.23 *The Commission provisionally recommends the implementation of a generally applicable statutory framework for search warrants. The Commission also provisionally recommends that this statutory framework should make provision in respect of each step of the search warrant process, including applications for, issuing of, execution of and safeguards in respect of search warrants. The Commission also provisionally recommends that this framework should have general application, subject to variations where this is required as a matter of practicability.*

CHAPTER 3 APPLICATION FOR SEARCH WARRANTS

A Introduction

3.01 This chapter focuses on the application process for search warrants and the procedures which are relevant to it. Part B considers who may apply for a search warrant. It is notable that persons who have the authority to make applications vary between Acts. Part C examines the evidential threshold which must be met by the applicant if a search warrant is to be issued. The power of an issuing authority to request information in addition to what has been presented in the application is noted in part D. Part E refers to the form of a search warrant application. Part F refers to the legislative requirement and general practice of applications being made otherwise than in public. The concept of electronic search warrant applications is discussed in part G. Part H is concerned with anticipatory search warrants and the application for such. Part I discusses a requirement to give notice of previous search warrants applications at the time of making an application.

B Who May Apply for a Search Warrant

3.02 In earlier times in Ireland it appears that there was no great specification as to who may apply for a warrant. According to commentary by Montgomery on search warrants in the 19th century, if "any credible witness proves upon oath before a justice of the peace" that there was cause to suspect that a person had in his possession or on his premises "any property with respect to which any offence, punishable either upon indictment or upon summary conviction...has been committed" the justice could grant a search warrant.[1] While Hayes explained that where theft of an individual's property occurred and there was suspicion that it was concealed in a certain place, "he, or someone on his behalf, should make application to a magistrate" for a search warrant.[2]

---

1 Montgomery, *The Justice of the Peace for Ireland* (3rd ed Hodges, Foster and Co. 1871) at 64. See also Humphreys, *The Justice of the Peace for Ireland* (Hodges, Figgis and Co. Ltd. 1897) at 147-148, 458; O'Connor, *The Irish Justice of the Peace* (Ponsonby Ltd. 1911) at 144.

2 Hayes, *A Digest of the Criminal Statute Law in Ireland, Volume II* (Hodges and Smith 1842) at 788.

3.03 As the law on search warrants developed however, greater specifications as to applications emerged. Particular requirements can be seen throughout Irish provisions as to who may apply for a search warrant under each Act. Some Acts find it sufficient that any member of the Garda Siochana applies for a search warrant; such Acts include the *Firearms and Offensive Weapons Act 1990*,[3] *Criminal Justice (Theft and Fraud) Act 2001*[4] and *Prevention of Corruption (Amendment) Act 2001*.[5] Other Acts require that the applicant be a member of the Garda Siochana of a certain minimum rank. For example the *Prohibition of Incitement to Hatred Act 1989*,[6] *Video Recordings Act 1989*,[7] *Criminal Law (Sexual Offences) Act 1993*,[8] *Criminal Justice (Miscellaneous Provisions) Act 1997,*[9] *Immigration Act 2004*[10] and *Criminal Justice Act 2006*[11] all require that an officer not below the rank of sergeant apply.[12]

3.04 Other provisions enable persons who are not members of the Garda Siochana, but who hold a particular office, to apply for a search warrant. The *Aviation Regulation Act 2001* provides that an "authorised officer" may apply.[13] The *Company Law Enforcement Act 2001* refers to a "designated officer" as a suitable applicant.[14] Both the *Adventure Activities Standards Authority Act 2001*[15] and the *Railway Safety Act 2005*[16] state that an individual appointed as an "inspector" under their provisions can make an application. The *Sea*

---

3 *Firearms and Offensive Weapons Act 1990,* section 15.

4 *Criminal Justice (Theft and Fraud) Act 2001,* section 5.

5 *Prevention of Corruption (Amendment) Act 2001,* section 48.

6 *Prohibition of Incitement to Hatred Act 1989*, section 9.

7 *Video Recordings Act 1989*, section 25.

8 *Criminal Law (Sexual Offences) Act 1993*, section 10.

9 *Criminal Justice (Miscellaneous Provisions) Act 1997*, section 10.

10 *Immigration Act 2004*, section 15.

11 *Criminal Justice Act 2006*, section 6.

12 *Criminal Law (Amendment) Act 1935*, section 19.

13 *Aviation Regulation Act 2001,* section 43.

14 *Company Law Enforcement Act 2001*, section 30.

15 *Adventure Activities Standards Authority Act 2001*, section 37.

16 *Railway Safety Act 2005*, section 73.

Fisheries and Maritime Jurisdictions Act 2006 authorises "sea-fisheries protection officers" to apply.[17]

3.05 Therefore, in comparison to early Irish law on the matter, it can be seen that the scope for applicants is no longer as broad as it once was. Rather, the law seeks to restrict application powers to officials with suitable experience and knowledge.

C The Evidential Threshold to be Met by Applicants

3.06 In making an application for a search warrant the applicant must satisfy two requirements. The first is that he or she is of the opinion that evidence of or material relating to an offence may be found at a certain location. Thus a warrant is necessary so as to gain lawful access to and carry out a search of that place for the benefit of an investigation or prosecution. The second is that the applicant must stand over this opinion by affirmation. Variations can, however, be found within the provisions as to wording of these requirements.

(1) The opinion of the applicant

3.07 With regard to the opinion of the applicant, many Irish provisions state that the applicant should have reasonable grounds for suspecting that evidence or material can be found at an identified location. Legislation which uses this wording includes the *Censorship of Publications Act 1946*,[18] *Criminal Law (Sexual Offences) Act 1993*,[19] *Criminal Assets Bureau Act 1996*,[20] *Control of Horses Act 1996*,[21] *Illegal Immigrants (Trafficking) Act 2000*,[22] *Aviation Regulation Act 2001*,[23] *Company Law Enforcement Act 2001*,[24] *Employment Permits Act 2006*[25] and *Sea Fisheries and Maritime Jurisdiction Act 2006*[26]

---

17 *Sea-Fisheries and Maritime Jurisdiction Act 2006*, section 17, as amended by the *Criminal Justice Act 2007*, section 44.

18 *Censorship of Publications Act 1946*, section 17.

19 *Criminal Law (Sexual Offences) Act* 1993, section 10.

20 *Criminal Assets Bureau Act 1996*, section 14.

21 *Control of Horses Act 1996*, section 35.

22 *Illegal Immigrants (Trafficking) Act 2000*, section 7.

23 *Aviation Regulation Act 2001*, section 43.

24 *Company Law Enforcement Act 2001*, section 30.

25 *Employment Permits Act 2006*, section 22.

26 *Sea Fisheries Maritime Jurisdiction Act 2006*, section 17, as amended by the *Criminal Justice Act 2007*, section 44.

Slightly different phrasing is used in the *Equal Status Act 2000*[27] and the *Disability Act 2005*[28] as their provisions state there should be reasonable cause to suspect.

3.08 By contrast, some search warrant provisions refer to belief rather than suspicion. The *Broadcasting Act 1990*,[29] *Control of Dogs Act 1986,*[30] *Sexual Offences (Jurisdiction) Act 1996,*[31] *Safety, Health and Welfare at Work Act 2005,*[32] and the *Health Act 2007*[33] all state that the applicant should have reasonable grounds for believing. Meanwhile the *Criminal Damage Act 1991* refers to "reasonable cause to believe".[34] Other provisions which refer to reasonable grounds for believing are contained in certain Acts which enable members of the Garda Siochana themselves to issue a search warrant, relieving them of the need to apply to a peace commissioner or judge of the District Court.[35] These include the *Offences Against the State Act 1939 (*as amended by the *Criminal Law Act 1976*)[36] and the *Official Secrets Act 1963*.[37]

(a) Reasonableness

3.09 What is notable is that generally all provisions have the requirement of reasonableness, thereby setting a standard of objectivity. Whether something is reasonable is generally expected to be judged by looking to the ordinary, reasonable person. The question is not what the personal and subjective understanding of the individual is, but what the assessment of the reasonable person, with the same expertise and experience as the applicant, would be when faced with the same circumstances and information. Therefore, the opinion of the applicant is expected to go beyond simply his or her own perception, it should be based on tangible and objective information.

---

27 *Equal Status Act 2000*, section 33.

28 *Disability Act 2005*, section 23.

29 *Broadcasting Act 1990*, section 14.

30 *Control of Dogs Act 1986*, section 26.

31 *Sexual Offences (Jurisdiction) Act 1996*, section 10.

32 *Safety, Health and Welfare at Work Act 2005,* section 64.

33 *Health Act 2007*, section 75.

34 *Criminal Damage Act 1991* , section 13.

35 Chapter 4 deals with the powers of Gardai to issue a warrant, rather than applying to a judge to do so.

36 *Offences Against the State Act 1939*, section 29, as amended by *Criminal Law Act 1976*, section 5.

37 *Official Secrets Act 1963*, section 16.

(b) Suspicion v. Belief

3.10 The question that arises is whether there is any difference between the standards of "reasonable suspicion" and "reasonable belief". It may be suggested that the nature of suspicion is more vague than belief. Suspicion relates more to concepts of suggestion, hints or inklings. While belief tends to be perceived as more positive and confident in form. A greater sense of conviction may be said to attach to belief.

3.11 The New Zealand Law Commission has considered the difference between the two standards; reasonable belief and reasonable suspicion; with respect to New Zealand search warrant provisions. The opinion of the Commission was that "the distinction is better expressed in terms of likelihood."[38] It argues that belief requires something akin to a high or substantial degree of likelihood, whereas suspicion may require no more than medium or moderate likelihood.[39]

(c) The standard of opinion in other jurisdictions

(i) United Kingdom

3.12 In the United Kingdom the *Police and Criminal Evidence Act 1984* (PACE) acts as an umbrella authority, offering guidance and procedural rules, with regard to search warrant provisions contained in various legislation. Part II of the 1984 Act deals with powers of entry, search and seizure. According to PACE, an application for a search warrant should be concerned with "reasonable grounds for believing" that material likely to be of substantial value to an investigation can be found at specified premises.[40]

(ii) Australia

3.13 In Australia the *Crimes Act 1914*, as amended by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*, refers to the standard of reasonable grounds for suspecting.[41] The Tasmanian *Search Warrants Act 1997* also refers to reasonable grounds for suspecting.[42] While both the New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002*[43] and

---

38 New Zealand Law Commission, *Search and Surveillance Powers* (Report 97 2007) at 57.

39 *Ibid*, at 57. The Commission goes on to explain that these degrees cannot be expressed in precise terms or percentage figures.

40 *Police and Criminal Evidence Act 1984*, section 8.

41 *Crimes Act 1914*, section 3E.

42 *Search Warrant Act 1997* (Tas), section 5.

43 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), section 47.

Victoria *Crimes Act 1958*[44] state that there should be reasonable grounds for believing.

(iii) New Zealand

3.14 In its report *Search and Surveillance Powers* the New Zealand Law Commission noted that statutory provisions in New Zealand commonly use the two thresholds; "reasonable grounds" or "good cause to suspect" and "reasonable grounds to believe", and that these are often used interchangeably.[45] The opinion of the Commission was that a standard statutory threshold should be put in place and it favoured the standard of reasonable belief. As noted above at paragraph 3.11, the New Zealand Commission felt that the threshold of belief required a greater degree of likelihood. Having regard to the intrusiveness caused by search warrants they concluded that the higher threshold should have to be met by applicants before a warrant is issued.[46]

3.15 The New Zealand's *Search and Surveillance Bill 2009*, which is largely based on the recommendations put forward by the Law Commission in the *Search and Surveillance Powers Report*, has not made any specification as to the threshold of the applicant's opinion. The Bill states that an application must set out in reasonable detail the grounds on which the application is made, "including the reasons why the legal requirements for issuing the warrant are believed by the applicant to be satisfied".[47] The Bill has therefore not established a standard threshold to be satisfied. It remains that the particular "legal requirements" of the provision under which a warrant is applied for, such as the standard of opinion, must be satisfied by the applicant.

(iv) Canada

3.16 In Canada the *Federal Law Criminal Code 1985* refers to reasonable grounds to believe.[48]

---

44 *Crimes Act 1958* (Vic), section 465.

45 New Zealand Law Commission, *Search and Surveillance Powers* (Report 97 2007) at 56-59.

46 The New Zealand Commission did, however, note that a lower threshold may be justified in certain circumstances. Thus they recommended that the higher threshold could be departed from where there are compelling reasons to do so. New Zealand Law Commission *Search and Surveillance Powers* (Report 97 2007) at 58-59.

47 *Search and Surveillance Bill 2009* (NZ), section 96(1)(c).

48 *Criminal Code. R.S.C. 1985, c. C-46*, s. 487.

(v) United States

3.17 In the United States the Fourth Amendment of the U.S. Constitution is the foundation of the law on search and seizure. The Fourth Amendment states that no warrant shall issue "but upon probable cause". La Fave et al explain that probable cause is an objective test. They note that "for there to be probable cause, the facts must be such as would warrant a belief by a reasonable man".[49] In *Brinegar v United States*[50] the U.S. Supreme Court explained that "[i]n dealing with probable cause...we deal with probabilities...they are factual and practical consideration of everyday life on which reasonable and prudent men act".[51] It is clear that a subjective opinion will therefore not be sufficient to ground an application.

(d) Discussion

3.18 The Commission invites submissions as to whether a single standard of opinion should be established in respect of all search warrant provisions in Ireland. This would ensure greater consistency and certainty regarding the standard of opinion required of an applicant when applying for a search warrant under any provision. The Commission also invites submissions as to what threshold should be introduced as the standard requirement; that is whether 'reasonable suspicion' or 'reasonable belief' is preferable, or alternatively whether new phrasing should be recommended. A single standard in respect of the opinion of the applicant could be appropriately placed within the principal search warrant framework which has been recommended by the Commission in chapter 2 so that it would be the general authority to apply to all provisions.

3.19 The Commission invites submissions as to whether a single standard of opinion should be established in respect of all search warrant applications. The Commission also invites submissions as to whether that standard should be 'reasonable suspicion', 'reasonable belief', or another standard.

(2) Affirmation of the submitted opinion

3.20 In the 18th century work of Hale, he recommended that search warrants should "not be granted without oath made before the justice".[52] It is likely that the logic behind this suggestion was the prevention of unjustified or malicious requests for warrants. In requiring an applicant to make an oath, the legal system is essentially demanding truth of the applicant and holding him or

---

49 La Fave, Israel and King, *Criminal Procedure* (4th ed Thomson West 2004) at 143-144.

50 338 U.S. 160 (1949).

51 *Ibid*, at 175.

52 Hale, *Historia Placitorum Coronae Volume II* (1736) (Reprinted. Professional Books Ltd. 1971) at 150.

her subject to liability should it be discovered that statements made were untrue.

3.21 Varying specifications can be found within Irish provisions on this point. Many state that in making an application "information on oath" should be provided by the applicant. This wording can be found, for example, in the *Customs and Excise (Miscellaneous Provisions) Act 1988*,[53] *Criminal Damage Act 1991*,[54] *Equal Status Act 2000*,[55] *Company Law Enforcement Act 2001*,[56] and *Disability Act 2005.*[57] By contrast, a number of Acts state that there should be "sworn information" of the grounds for the application.[58] Examples of this wording can be seen in the *Prohibition of Incitement to Hatred Act 1989*,[59] *Child Trafficking and Pornography Act 1998*,[60], *Electricity Regulation Act 1999*[61] *Aviation Regulation Act 2001*,[62] *Communications Regulation Act 2002*,[63],*Containment of Nuclear Weapons Act 2003*[64] *Immigration Act 2004*[65] and *National Oil Reserves Agency Act 2007*[66].

3.22 It is notable that some search warrant provisions make no demand as to information being sworn or provided on oath. For example, a small number of Acts enable members of the Garda Siochana of a minimum rank to issue a search warrant themselves, rather than having to apply to a District

---

53 *Customs and Excise (Miscellaneous Provisions) Act* 1988, sections 3 and 5.

54 *Criminal Damage Act 1991*, section 13.

55 *Equal Status Act 2000*, section 33.

56 *Company Law Enforcement Act 2001*, section 30.

57 *Disability Act 2005*, section 23.

58 Connery and Hodnett explain that "sworn information" is akin to an affidavit. "Information on oath" could similarly be described as such. Connery and Hodnett, *Regulatory Law in Ireland* (Tottel Publishing Ltd. 2009) at 80 (fn. 85).

59 *Prohibition of Incitement to Hatred Act 1988, s*ection 9.

60 *Child Trafficking and Pornography Act 1998*, section 7.

61 *Electricity Regulation Act 1999*, section 12.

62 *Aviation Regulation Act 2001*, section 43.

63 *Communications Regulation Act 2002*, section 40.

64 *Containment of Nuclear Weapons Act 2003*, section 7.

65 *Immigration Act 2004*, section 15.

66 *National Oil Reserves Agency Act 2007*, section 48.

Court judge or peace commissioner.[67] Under both the *Offences Against the State Act 1939*[68](as amended by the *Criminal Law Act 1976*) and the *Official Secrets Act 1963*[69] a Garda Superintendent can issue a warrant based on his or her own belief that such is required. While the *Criminal Justice (Drug Trafficking) Act 1996*[70], *Criminal Assets Bureau Act 1996*[71] and *Prevention of Corruption (Amendment) Act 2001*[72] provide that a superintendent, if satisfied that circumstances of urgency give rise to the need for the immediate issue of a search warrant and that as a result it would be impractical to apply to a judge of the District Court or peace commissioner, may issue a warrant. Under none of these provisions is there a requirement that the issuing member swears on information or takes an oath. Meanwhile provisions contained in the *Official Secrets Act 1963*,[73] *Criminal Justice Act 1994*[74] and the *Sexual Offences (Jurisdiction) Act 1996*[75] state that a District Court judge can issue a warrant on the basis of an application where no oath or sworn information is required.[76]

(a) Discussion

3.23 Although different phrasing can be found when comparing legislation, there may be little practical difference between the provisions. Whether an Act requires an oath to be made or an act of swearing, the effect amounts to the same thing; the applicant affirming his or her belief that the information provided in the application is truthful. Nonetheless the Commission provisionally recommends that a standard phrase be used. This would create greater consistency and clarity within the provisions and would help to establish a standard procedure; whether swearing or taking an oath; to be satisfied by applicants. This Commission is of the view that that a standard protocol should

---

67 This power will be discussed in full in part B of chapter 4CHAPTER 4, "Issuing search warrants".

68 *Offences Against the State Act 1939*, section 29.

69 *Official Secrets Act 1963*, section 16.

70 *Criminal Justice (Drug Trafficking) Act 1996*, section 8.

71 C*riminal Assets Bureau Act 1996*, section 14.

72 *Prevention of Corruption (Amendment) Act 2001*, section 5.

73 *Official Secrets Act 1963*, section 16.

74 *Criminal Justice Act 1994*, sections 55 and 64.

75 *Sexual Offences (Jurisdiction) Act 1996*, section 10.

76 It is noted that warrants issued under section 55 of the *Criminal Justice Act 1994* and under section 10 of the *Sexual Offences (Jurisdiction) Act 1996* relate to the search for evidence in respect of offences committed outside the State.

be set out in the principal search warrant framework which has been recommended by the Commission.[77]

3.24 The Commission provisionally recommends that, for purposes of consistency, a standard procedure of either swearing information or taking an oath be implemented in respect of all search warrant provisions.

3.25 With regard to situations where Gardai can themselves issue warrants on the basis of their own belief or satisfaction and do not need to affirm this opinion, the Commission invites submissions as to whether a requirement for swearing on oath should be introduced. This approach would go towards showing that the Garda is willing to stand by the veracity of his or her belief or satisfaction that the warrant should be issued. One approach might be that the member of the Garda Siochana make the affirmation before a member more senior in ranking. Alternatively it may be deemed sufficient for Gardai to swear on the information before any other member, regardless of ranking. This latter approach may be particularly suitable for situations where the warrant is being issued by the Garda, instead of an application being made to a judge, because the warrant is needed quickly. Thus, rather than spending time finding a senior Garda to be present for the swearing, the issuing Garda could rely on an individual nearby.

3.26 *The Commission invites submissions as to whether members of the Garda Siochana should be obliged to affirm their opinion on oath when issuing a search warrant.*

D Requests for Additional Information

3.27 As well as the requirement that applications meet a certain evidential threshold, it is also possible for the issuing officer to make a request for additional information to ground the application. In *Hanahoe v Hussey*[78] the High Court made it clear that such a request is both an acceptable and desirable approach to be taken where further information is necessary for the issuing officer to make a decision. Therefore, when making an application the applicant should strive to have as much information as possible contained in the application, or at the very least have such information available should it be requested. The ability of the issuing authority to request further information is a natural corollary of the condition that the applicant must satisfy the issuing officer that a search warrant is required. Clearly if the application has not sufficiently satisfied the issuing authority, the applicant must be prepared to go further so as to meet this condition.

(1) Discussion

3.28 In some other jurisdictions specific legislative provisions refer to requests for additional information. In the U.K. the *Police and Criminal Evidence*

---

77 See generally chapter 2CHAPTER 2.

78 *Hanahoe v Hussey* [1998] 3 IR 69, at 89-90.

Act 1984 states that an "applicant shall answer on oath any question that the justice of the peace or judge hearing the application asks him."[79] 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".[80] While in Queensland the *Crime and Misconduct Act 2001* states 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."[81] Therefore it appears necessary for an applicant under this Act to provide additional information where the issuing officer does not feel that what has been submitted in application is sufficient.

3.29 The Commission invites submissions as to whether the power for an issuing authority to request further information from an applicant so as to ground a search warrant application should be set out in legislation in Ireland. The power has been accepted by the courts and the Commission is of the view that incorporating the point into the legislative framework on search warrants would make the power clearly known to applicants. This may be particularly beneficial where an applicant does not have a great amount of experience with making search warrant applications. By making this power known to an applicant from the outset, he or she is likely to be better prepared for a request for additional information if such is put forward by the issuing authority during the application process. This in turn would make the application procedure more time efficient.

3.30 The Commission invites submissions as to whether the power for an issuing authority to request further information from an applicant so as to ground a search warrant application should be set out in legislation in Ireland.

E Form of Search Warrant Applications

3.31 Although the evidential threshold to be met by applicants is determined by the provisions of each Act, the provisions generally do not specify a form for the presentation of the application.[82] Despite this, search warrant provisions generally have corresponding information forms which are to be completed by the applicant seeking a search warrant and submitted to the

---

79 *Police and Criminal Evidence Act 1984*, section 15(4).

80 *Law Enforcement (Powers and Responsibilities) Act 2002*, section 62.

81 *Crime and Misconduct Act 2001*, section 86(6)

82 An exception to this is the *National Monuments (Amendment) Act 1987*. Section 22 of the 1987 Act specifies that the information on oath is to be presented "in writing".

issuing authority. Thus the information grounding an application for a warrant under these Acts will be in writing, even though the requirement for a written application is not stipulated within an Act's provisions. A number of such information forms are provided for by the District Court Rules 1997. Acts which have a corresponding form within the 1997 Rules include the *Misuse of Drugs Act 1977*,[83] *National Monuments (Amendment) Act 1987*,[84] *Prohibition of Incitement to Hatred Act 1989*,[85] *Broadcasting Act 1990*,[86] *Criminal Damage Act 1991*[87] and *Criminal Law (Sexual Offences) Act 1993*.[88] When new Acts are enacted which contain provisions for search warrants, new information forms may be introduced to correspond with these new provisions. For example, the *District Court (Search Warrant) Rules 2008* provided information and search warrant forms to be added to Schedule B of the District Court Rules 1997 in respect of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, *Criminal Assets Bureau Act 1996*, *Prevention of Corruption (Amendment) Act 2001* and *Criminal Justice (Theft and Fraud) Act 2001*.

(1) Discussion

3.32 The Commission has considered the current scheme of search warrant information forms. The Commission is of the view that it is quite inefficient to have a large number of information forms, from which the relevant form must be selected. Furthermore, the legislature's task of amending existing provisions so as to incorporate a new information form to correspond with each new search warrant provision it is wasteful of resources and time-consuming. Therefore the Commission provisionally recommends that the various different information forms used when applying for search warrants be replaced by a generic application form to be used in respect of all search warrant applications. The applicant would be required to specify certain details on the face of the application form, such as the Act and section of the Act under which the application is being made and the office which the applicant holds, for example member of the Garda Siochana or officer of Customs and Excise. Overall a standard application from would be a more efficient and effective system.

3.33 The approach taken in Canada may be looked to as guidance on this matter. The Canadian *Criminal Code 1985* contains an "Information to Obtain a

---

83 Form 32.1, Schedule B, *District Court Rules 1997*.

84 Form 34.3, Schedule B, *District Court Rules 1997*.

85 Form 34.5, Schedule B, *District Court Rules 1997*.

86 Form 34.13, Schedule B, *District Court Rules 1997*.

87 Form 34.17, Schedule B, *District Court Rules 1997*.

88 Form 34.20, Schedule B, *District Court Rules 1997.*

Search Warrant" form, which is a standard application form.[89] In completing the form the applicant must describe the items to be searched for and the offence in respect of which the search is to be made. The applicant must then set out the grounds for his or her belief that the items will be found at the named address. Thus, rather than having a separate form in respect of each search warrant provision, this form enables the applicant to specify the particular suspected offence and materials sought by investigating officers so that it can be used to apply for a search warrant under any provision.

3.34 This Commission is of the view that it would be appropriate to include a standard application form within the provisions of the principal search warrant framework which has been recommended by the Commission in chapter 2CHAPTER 2. As a principal framework would be the primary authority in respect of all search warrant procedures, it would be suitable for a generic application form to be contained within this framework.

3.35 The Commission provisionally recommends that a standard search warrant application form be put in place. Under this an applicant could refer to the particular Act under which he or she is applying, the grounds for making the application and the materials to be searched for in the standard form.

F Applications for Search Warrants to be made in Private

3.36 The *Criminal Justice (Amendment) Act 2009* has provided that applications for search warrants shall not be made in open court. Section 26 of the 2009 Act states

> "An application under any enactment to a court, or a judge of a court, for a search warrant, shall be heard otherwise than in public".

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".[90] The provision therefore seeks to protect evidence and prevent its disclosure or destruction. The risk that an individual might interfere with material if the potential search became known to him or her can be a real concern in practice. For example, the Commission is aware that the provisions in section 384 of the *Companies Act 1963* have not been greatly relied upon due to such concerns. Section 384 of the 1963 Act provides that an application may be made to the High Court for an order authorising inspection or production of books or papers

---

89 Form 1 of the list contained in the *Criminal Code 1985*.

90 Parliamentary Debates (Seanad Debate). Vol. 196, No. 15, 14th July 2009. Available at www.debates.oireachtas.ie/Main.

where it is reasonably believed that these may be evidence of an offence committed by an officer of a company. Under Order 75, Rule 5(gg) of the *Rules of the Superior Courts 1986* an application for an order under section 384 of the 1963 Act must be made by originating notice of motion. Thus the matter is brought to the High Court on notice to the person in control of the documents. It is not apparent from the provision that a section 384 application could be heard otherwise than in public. Therefore, the section 384 provision has been an unattractive option.

3.37 The Commission has been informed that, in practice, search warrant applications are often made in a judge's chambers. Thus, as well as establishing a more secure approach with regard to preserving evidence, the 2009 Act brings the application process more in line with practice.

G Electronic Applications

3.38 There is no Irish Act which makes provision for electronic search warrant applications. Provision for the use of technology in the application process is, however, found in other jurisdictions.

(1) Australia

(a) Commonwealth

3.39 Under the *Crimes Act 1914*, as amended by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*, provision is made for the application for a search warrant by telephone, telex, fax or other electronic means.[91] The Act states that electronic applications may be made where an urgent case for a search warrant arises or if the delay which would come about by applying in person would frustrate the effective execution of the warrant. A further qualification to the electronic application method is that the authority to whom the application is made "may require communication by voice to the extent that it is practicable in the circumstances".[92] Thus the issuing authority may request that there be an element of personal communication with the applicant, rather than simply dealing with a written electronic application where there is no discussion with the applicant.

3.40 An application made by electronic means must include all information required to be provided in an ordinary application. However, the applicant "may, if necessary" make the application before the information on which the application is based is sworn by him or her.[93] If the search warrant is issued on the basis of the electronic application where information has not yet been sworn, the Act provides that the applicant must, not later than the day of the

---

91 *Crimes Act 1914*, as amended by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* (Cth), section 3R(1).

92 *Ibid*, section 3R(2).

93 *Ibid*, section 3R(3).

expiry of the warrant or the day after the day on which the warrant was executed, whichever is the earlier, "give or transmit to the issuing officer...that information duly sworn".[94]

(b) New South Wales

3.41 Section 61 of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides that an application for a search warrant may be made by telephone. The section states that 'telephone' includes radio, facsimile or any other communication device. However, the provision shows preference for applications to be made by fax, stating that an application must be made by facsimile "if the facilities to do so are readily available for that purpose".[95] This method is presumably favoured because it would provide written copy of the application and the signature of the applicant can be transmitted by this means. The section also allows that, if it is not practicable for an applicant to electronically apply for a warrant directly to an eligible issuing officer, the application may be transmitted to the eligible issuing officer by another person on behalf of the applicant.[96]

3.42 The conditions under which an electronic application may be made are that the warrant is required urgently and that it is not practicable for the application to be made in person. The issuing officer must be satisfied of this matter.[97]

(c) Queensland

3.43 The *Police Powers and Responsibilities Act 2000* enables a police or law enforcement officer to apply for a warrant by phone, fax, radio, email or other similar facility if the officer considers it necessary because of urgent circumstances[98] or due to "other special circumstances", such as the officer's remote location.[99] The Act states that if application by fax is available, then the applicant "must transmit a copy of the application" by this method.[100] Therefore, like New South Wales, the law in Queensland shows preference for an electronic means which produces a written form of the application.

3.44 The Act states that if the application is required to be sworn, the police or law enforcement officer may apply for the warrant before the

---

94 *Ibid*, section 3R(7).

95 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), section 61(3).

96 *Ibid*, section 61(4).

97 *Ibid*, section 61(2).

98 *Police Powers and Responsibilities Act 2000*, section 800(2)(a).

99 *Police Powers and Responsibilities Act 2000*, section 800(2)(b).

100 *Police Powers and Responsibilities Act 2000*, section 800(5).

application is sworn.[101] A procedure similar to that required under the New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002* must then be followed, in that if the warrant is issued the applicant must send the sworn application to the issuing authority.[102] Unlike the New South Wales Act, however, the Queensland Act does not set a time limit for when this submission must be completed by.

(d) Tasmania

3.45 Tasmania's *Search Warrants Act 1997* provides that an application may be made by telephone, telex, fax or other electronic means.[103] The Act further provides that the officer receiving the application "may require communication by voice" where it is practicable in the circumstances.[104] The conditions required so that an electronic application can be made mirror that of the Commonwealth *Crimes Act 1914*, as amended. There must be an urgent case for the application or the delay that would occur if the application was made in person would frustrate the effective execution of the warrant.

3.46 The Act expressly notes that an electronic application is to include all information required to be provided in an ordinary application. However, the application itself may be made before the information is sworn.[105] In the circumstances where the information has not been sworn before the application is made, the applicant must give or transmit the information duly sworn to the issuing officer not later than the day after date of the expiry of the warrant, or the day after the day on which the warrant was executed, whichever is the earlier.[106]

(e) Victoria

3.47 The *Confiscation Act 1997* provides that a search warrant under its authority may be applied for by telephone. The Act states that such application may be made if a member of the police force, by reason of circumstances of urgency, considers it necessary to do so.[107] The applicant is required, before making the application, to prepare an affidavit setting out the grounds on which the warrant is sought, however the applicant is permitted by the Act to make the

---

101 *Ibid*, section 800(4).

102 *Ibid*, section 801(4).

103 *Search Warrants Act 1997* (Tas), section 15(1).

104 *Search Warrants Act 1997*, section 15(2).

105 *Search Warrants Act 1997*, section 15(3).

106 *Ibid*, section 15(7).

107 *Confiscation Act 1997* (Vic), section 81(1).

application before the affidavit is sworn if it is necessary to do so.[108] If there are fax facilities available, a copy of the affidavit, whether sworn or unsworn, must be transmitted by this means to the magistrate or judge who is to hear the application by telephone.[109] It appears, therefore, that an electronic application will always involve a telephone conversation. It is notable, in support of this point, that the Act does not provide a variety of electronic options to fall within the scope of the term 'telephone', as occurs in other jurisdictions. Thus it seems that a literal and plain interpretation should be applied to the term 'telephone' in respect of the 1997 Act's provisions.

3.48 If a search warrant application is made by telephone the applicant must, not later than the day following the making of the application, send the original affidavit duly sworn to the magistrate or judge who heard the application. This provision applies whether or not a search warrant was issued in response to the application.[110]

(2) Canada

3.49 Before the Canadian *Criminal Code 1985* was enacted, the Law Reform Commission of Canada had recommended that a telephone warrant procedure be instituted in Canada which could be relied upon where conventional procedure was "impracticable".[111]

3.50 Canada's *Criminal Code 1985* states that where an officer believes that an indictable offence has been committed and "that it would be impracticable to appear personally before a justice" to make an application, the officer may "submit information on oath by telephone or other means of telecommunications".[112] The Act does not offer a definition of the term "impracticable". The Canadian Courts have, however, interpreted this provision. The Court of Criminal Appeal of British Columbia held in *R v Erikson*[113] that "impracticable" means something less than impossible and imports a large measure of practicality.[114] The Court in *R v Pedersen*[115] stated that the issue was one of impracticality not impossibility and that the word "impractical"

---

108 *Ibid*, section 81(2).

109 *Ibid*, section 81(3).

110 *Confiscation Act 1997* (Vic), section 81(7).

111 Law Reform Commission of Canada, *Police Powers – Search and Seizure in Criminal Law Enforcement* (1983 WP 30) at 202.

112 *Criminal Code 1985*, section 487.1(1).

113 [2003] BCCA 693.

114 *Ibid*, at paragraph 33.

115 [2004] BCCA 64.

connotes a degree of reason and involves some regard for practice.[116] In *R v Burnett*[117] the Provincial Court of British Columbia noted that the "process set out in the Code for obtaining telewarrants seems to suggest that they should be the exception and should be issued only if a justice or judge is not reasonably available and the warrant shouldn't wait".[118]

3.51 In respect of information submitted electronically the *Criminal Code 1985* sets out the procedure to be followed by the authority who receives the application. Where information is submitted by telephone or another means of communication which does not produce writing, the information should be recorded verbatim by the justice, the record certified by him or her and then filed with the clerk of the court.[119] Where the information in application is submitted by an electronic means which does produce writing, that document of information must be certified by the justice and then filed with the court clerk.[120] The Act also provides that where an electronic application is made, "an oath may be administered by telephone or other means of telecommunication".[121] Where the electronic method used produces writing, the applicant may submit a statement in writing that he or she believes the information to be true and this will be deemed to be a statement made under oath.[122]

(3) United States

3.52 The United States *Federal Rules of Criminal Procedure* makes provision for electronic search warrant applications.[123] Under the rules, information grounding an application for a search warrant may be communicated "by telephone or other appropriate means, including reliable electronic means."[124] The procedure to be followed in such circumstances is that the judge to whom the application is made must firstly place the applicant under oath, as well as any person on whose testimony the application is based, and secondly make a "verbatim record of the conversation with a suitable

---

116 *Ibid* at paragraph 21.

117 [2008] BCPC 104.

118 *Ibid*, at paragraph 9.

119 *Criminal code 1985,* section 487.1(2).

120 *Criminal Code 1985*, section 487.1(2.1).

121 *Criminal Code 1985*, section 487.1(3).

122 *Criminal Code 1985*, section 487.1(3.1).

123 Rule 1 of the Code explains that the *United States Federal Rules of Criminal Procedure* govern all criminal proceedings in U.S. District Courts, Courts of Appeals and in the Supreme Court.

124 *United States Federal Rules of Criminal Procedure*, rule 41(d)(3)(a).

recording device, if available, or by a court reporter, or in writing."[125] The judge is then required to certify and file this record. Any written verbatim record of the conversation must also be signed by the judge and filed with the clerk. It is notable that the procedural rule specifically refers to "conversation" rather than communication, thereby suggesting that this is the procedure to be followed where the application is made orally. It is, however, presumed that where an electronic method which produces a written record is used, that record of communication should be certified and filed in the same way.

(4) New Zealand

3.53 The issue of electronic applications has been considered by the New Zealand Law Commission, where it observed that an electronic process is not provided for in New Zealand. Although the Commission expressed the view that applications should usually be made in writing and should require the personal presence of the applicant, it recommended that electronic applications should be permitted in a limited form. According to the New Zealand Commission, it should be possible for written applications to be transmitted electronically to the issuing officer where the issuing officer is satisfied to dispense with a personal appearance on the part of the applicant.[126] The transmission of a written application was favoured over a telephone application as there would be a "more accurate written record of the grounds upon which the application is being made."[127] The primary advantage of this approach, in the view of the Commission, would be the ability for warrant applications to be made from remote locations.

3.54 An alternative suggestion by the Commission was that electronic transmissions of an application should commence the application process so that the issuing officer could "consider the application and supporting material" before the applicant arrived.[128] This approach would still involve a personal appearance by the applicant but, the Commission noted, it would make the application procedure more time-efficient.

3.55 The New Zealand Law Commission recognised that it may be argued that warrant applications made without a personal appearance would make it difficult for the issuing authority to assess the applicant's veracity through observing his or her demeanour. However the Commission doubted that veracity could be readily assessed by viewing the applicant's demeanour. The Commission expressed the view that veracity "is more readily determined

---

125 *United States Federal Rules of Criminal Procedure*, rule 41(d)(3)(b).

126 New Zealand Law Commission, *Search and Surveillance Powers* (Report 97, 2007) at 105.

127 New Zealand Law Commission, *Search and Surveillance Powers* (Report 97, 2007) at 102.

128 New Zealand Law Commission. *Search and Surveillance Powers* (Report 97, 2007) at 102.

through the quality of the application and the consistency of the grounds that the applicant puts forward". Therefore the Commission noted that an issuing officer may dispense with the applicant's personal appearance where the issuing officer is satisfied that i) the delay that would be caused by requiring a personal appearance would compromise the effectiveness of the search, and ii) that the merits of the application could be adequately determined in the circumstances.[129]

3.56 The *Search and Surveillance Bill 2009*, section 98(1), has set out that an application for a search warrant must be in writing and may be transmitted to the issuing officer electronically. Thus the Bill has incorporated the preferred recommendation of the Law Commission that an electronic application be in writing. However, the Bill also provides for the more exceptional case where an electronic application may be made which is not in writing. Section 98(3) of the Bill states that an issuing officer may allow an application for a search warrant "to be made orally (for example, by telephone call)" if the issuing officer is satisfied that i) the delay that would be caused by requiring a written application would compromise the effectiveness of the search, and ii) the question as to whether the warrant should be issued can be properly determined on the basis of that oral communication.

(5) Discussion

3.57 It is notable with regard to the electronic application systems that exist in the jurisdictions discussed above that such applications may only be made in limited circumstances. That is, electronic applications are not the standard method employed in these jurisdictions, rather they are the exception. It is generally required that the matter is urgent, that it is impracticable to make a personal application, or that the delay that would arise if the application were made by ordinary means could jeopardise the investigation, if the application may be made by electronic means, rather than in person, to the issuing authority. The Commission has considered whether an electronic application system would be suitable in Ireland and has identified a number of possible approaches. These will be set out in the following text.

(a) Possible reform options

(i) An entirely electronic search warrant application system

3.58 The Commission has considered whether an electronic application system in Ireland should go beyond the scope of urgent or practical applications so that *all* applications would be made electronically. The Commission is of the view that if this system were implemented, applications should be made by an electronic means which would produce a written format. This could be achieved by means of a dedicated database where applicants would complete the application on the database and then transmit it to the relevant issuing authority.

---

129 *Ibid*, at 103.

As applications would often be by An Garda Siochana and would often be made to the District Court, the Commission considers that the detailed operational arrangements for such a system would primarily be a matter for An Garda Siochana and the Courts Service.

3.59 The Commission identifies that the primary advantage of this approach is the speed and efficiency that would result from making applications in this way. Another major advantage of this approach is that the system could retain records of all electronic applications being made, thus there would be a central repository of all search warrant applications. This would be particularly useful if an issue in respect of the application later arose, as it would be both possible and easy to obtain a copy of the application from records. Furthermore, it would be possible for issuing authorities to check records so as to ascertain whether a previous search warrants application has been made in respect of the same premises, property or individual.[130] An entirely electronic system would also be resource friendly, in that it would save on the cost of printed application forms.

3.60 The Commission emphasis that an electronic search warrant application system could not extend to the point of the actual application in front of the issuing authority, such as the District Court.

(ii) Provision for electronic search warrant applications only in limited circumstances

3.61 An alternative to having an entirely electronic application system would be provision for applications to be made electronically in limited circumstances. This is the approach taken in many other jurisdictions, as noted above. Electronic applications may be provided for in cases of urgency or when the application must be made out of office hours, for example at the weekend. Such applications may also be relied upon in cases where it is impracticable to make a personal application, although it is notable that the issue of the vast size of other jurisdictions may be more relevant to impracticability than in comparison to Ireland. Thus, due to Ireland's smaller size and the fact that there are some 24 District Courts it may be far easier for an applicant in Ireland to appear before an issuing authority than it may for applicants in other jurisdictions.

3.62 A considerable advantage of this approach is that it would enable the majority of search warrants to be issued by judges, as there would be fewer

---

130 In paragraph 3.88 of this chapter the Commission provisionally recommends the introduction of a requirement that a search warrant application should disclose details of previous search warrant applications, if any, made in respect of the same premises, materials or person to which the present application relates.

cases of other individuals, such as members of the Garda Siochana, having to issue a warrant due to urgency, time constraints or the fact that the warrant application must be made out of office hours. Furthermore, the Commission is of the view that an electronic application system could prove to be a useful tool where a member of the Garda Siochana, or indeed a member of any other authorised body, is carrying out surveillance of a location. Surveillance may lead the relevant officer to decide that a search warrant is necessary in the circumstances. If an electronic application were possible, the officer would not be obliged to leave the point of surveillance so as to make an application. Thus the officer would not be in danger of being unavailable to witness something at the location which may be of use to the investigation or prosecution.

3.63 In respect of the issue of the matter of taking an oath or swearing information, the limited electronic application system may require the applicant to transmit an affidavit to the issuing authority by an electronic means that produces a written format, or to take an oath over the telephone. This method could be supplemented by a requirement for the applicant to appear personally before the issuing authority within 24 hours, or perhaps 48 hours where it is the weekend, to take the oath in person.

(iii) All applications to be filed electronically (e-filing)

3.64 This approach would involve search warrant applications being electronic in so far as they would all be recorded and filed electronically, but the requirement for a personal appearance would be retained. This approach would simply involve the applicant completing and saving the search warrant application on a database, and then producing a hardcopy of the file to be given to the issuing authority when making the application in person. The Commission notes that the main advantage of this approach is that there would be a record of every search warrant application stored electronically, preferably on a central database. Having a central repository of warrant applications would be beneficial where a record is later required in respect of legal proceedings or otherwise, and it would also enable an issuing authority to determine whether a previous search warrant application has been made in relation to the same person, premises or property.

3.65 An e-filing search warrant application system would, in fact, be a natural progression of the current approach of the Garda Siochana when making applications. Where a member of the Garda Siochana is making a search warrant application he or she will complete the information (application) form on the Garda Siochana database PULSE. He or she then prints this form and brings it to the issuing authority. A record of the warrant application is retained on PULSE. If and when the warrant is issued by the authority, the Garda applicant will note this on the relevant PULSE file, thus recording that the application resulted in a search warrant being issued. As Garda applicants

already complete the information form electronically on PULSE, it may be suitable to enable the PULSE record to be transmitted, and therefore e-filed, on a courts database. This approach could also be implemented by other bodies who make search warrant applications. Thus, for example, authorities such as the Office of the Director of Corporate Enforcement, the Revenue Commissioners Customs and Excise, the Sea Fisheries Protection Authority, or the Commission for Aviation Regulation, could be required to complete a search warrant application on their own electronic systems and then transmit this to be e-filed on a standard courts application database.

3.66 An e-filing search warrant application scheme would also be in line with developments within the Courts Service. Over the last number of years the Court Service has incorporated more Information and Communication Technology (ICT) into the everyday running of the Service.[131] The Courts Service's *Strategic Plan 2008-2011* reiterates its commitment to this.[132] The Commission considers that introducing an e-filing search warrant application system would be another positive development in that respect, although it acknowledges that this is primarily an operational and resources matter for the Courts Service.

(iv) Conclusion

3.67 The Commission invites submissions as to the form and nature of an electronic process for applying for search warrants.

H Anticipatory Search Warrant Applications

3.68 The provisions contained within Irish legislation generally establish that an authorised individual may apply for a search warrant where he or she has 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. What is noticeable in respect of these provisions is that they are essentially concerned with the present condition. Thus, the applicant must have a suspicion or belief that evidence is to be found in the place at that present point in time. In some other jurisdictions provision has been made for anticipatory search warrants. An application for a search warrant may be 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.

---

131 See generally Courts Service Report *eCourts – a 5 Year Strategy for Information Technology*(2001). Available at http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/9E9F6C5D0DB24B6B80256DA60044747A/$FILE/Strategy.pdf.

132 See generally Courts Service Report Courts Service Strategic Plan 2008-2011. Available at http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/EF10878F58250E908025756800579524/$FILE/Strategic%20plan%202008%20-%202011%20LR.pdf.

(1) Australia

3.69 In Australia a number of jurisdictions have made provision for anticipatory warrants. The Commonwealth *Crimes Act 1914*, as amended by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*, enables an applicant to submit information that there are reasonable grounds for suspecting that "there is, or there will be within the next 72 hours, any evidential material at the premises."[133] The exact same wording is used in Tasmania's *Search Warrants Act 1997*.[134] Similar wording is found in the New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002*, where it is stated that an application can be made where an officer has "reasonable grounds for believing that there is, or within 72 hours, will be" something connected with an offence in relation to the warrant.[135] Legislation in Queensland is perhaps more elastic. Rather than requiring a suspicion or belief that there *will* be evidence available at a location, both the police *Powers and Responsibilities Act 2000* and the *Crime and Misconduct Act 2001* state that an application can be made where it is suspected that evidence is at a place or "is likely to be taken to the place within the next 72 hours". Thus the provisions do not require the suspicion that the evidence will be there, but the lesser standard that it is likely to be taken there.

(2) United States

3.70 In *United States v Grubbs*[136] the U.S. Supreme Court considered the constitutionality of anticipatory search warrants. An application for a search warrant was made on the basis of an affidavit that a controlled delivery of a package had been organised by the police to a certain premises, the home of the defendant. The affidavit expressly noted that execution of the warrant would not occur unless and until the parcel had been received by a person and physically taken into the residence.

3.71 The defendant challenged the constitutionality of the warrant by claiming that it was in contravention of the Fourth Amendment provision that no warrant shall issue but upon probable cause. He claimed that as the event had not occurred when the warrant was applied for, and subsequently issued, probable cause did not exist. The Supreme Court rejected this challenge. The Court observed that all warrants are, in a sense, "anticipatory", as the probable-cause requirement necessary for their issuance looks to whether evidence will

---

133 *Crimes Act 1914*, as amended (Cth), section 3E(1).

134 *Search Warrants Act 1997* (Tas), section 5(1).

135 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), section 47.

136 547 U.S.90 (2006).

be found when the search is conducted.[137] It concluded that anticipatory warrants are "no different in principle from ordinary warrants."[138]

3.72 The Supreme Court then set out three elements which must be established 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,

iii) when the warrant is executed.

iv) The Court further clarified that for an anticipatory warrant to comply with the probable cause test of the Fourth Amendment two prerequisites of probability must be satisfied. The first is that *if* the triggering condition occurs, there is a fair probability that contraband or evidence will be found in a particular place. The second is that there is probable cause to believe that the triggering condition *will*, in fact, occur.[139]

(3) New Zealand

3.73 The New Zealand Law Commission considered the issue of anticipatory search warrants in its report *Search and Surveillance Powers*[140] and noted that there was no provision in New Zealand law for this type of warrant. The view of the Commission was that it "seems to be unnecessarily restrictive to confine the issue of search warrants to only those things that are at the place to be searched at the time the application is made." The Commission went on to observe that an officer should be able to apply for a search warrant for evidential material that "is not at the place to be searched at the time of the application, but which there are reasonable grounds to believe will be found there in the near future."[141] Thus the report recommended that provision for anticipatory warrants should be introduced.

3.74 It appears that the primary reasoning behind the New Zealand Commission's recommendation is greater time efficiency. According to the Commission, allowing for anticipatory applications would help to avoid the delay of waiting to confirm the existence of an object before applying for a warrant. This would be of particular benefit where there was a risk of the evidential material being destroyed or moved to another location, and also in cases of

---

137 *United States v Grubbs* 547 U.S. 90 (2006) at part II.

138 *Ibid*.

139 *Ibid*.

140 New Zealand Law Commission, *Search and Surveillance Powers* (Report 97 2007).

141 New Zealand Law Commission, *Search and Surveillance Powers* (Report 97 2007) at 119.

intangible material, such as emails or text messages, which may be easily altered or deleted.[142]

3.75 The New Zealand *Search and Surveillance Bill 2009* has not, however, included a provision for anticipatory search warrant. With regard to applying for a search warrant, the Bill provides that the application must contain "a description of the item or items or other evidential material believed to be in or on part of the place, vehicle, or other thing that are sought by the applicant".[143] It is notable that this provision remains concerned with the present location, and not the anticipated future location, of evidential material.

(4) Discussion

3.76 The Commission invites submissions regarding the introduction of anticipatory search warrant applications in Ireland. As well as assisting time management, such warrants could enable greater planning and organisation of searches. Anticipatory search warrants would be useful in preparation for an investigation based on information given to the Garda Siochana by an informer, for example that stolen property is likely to be taken to a particular address or that a consignment of drugs will be delivered to a certain location on a certain date. They may also afford issuing authorities greater time to consider the application and supporting information, rather than having to rush the issuing of the warrant where there is a belief that if the search is not executed quickly there will be a destruction or movement of evidence.

3.77 If anticipatory warrants were to be introduced, a corresponding set of procedural rules and safeguards would also have to be implemented. A time limit as to the period of anticipation would need to be established, that is how far in advance an anticipatory application could be made. For example the applicant may be required to hold the belief that the material will be, or is likely to be found at the named location within 48 hours of the application being made. There would also need to be a clear time-limit on how long an anticipatory warrant could remain alive for, so that these warrants could not simply be applied for to enable a fishing-expedition to support an investigation or prosecution. Without this limitation warrants could be obtained and simply held on file indefinitely until the expected circumstances occurred; this would essentially mirror the general writ which has long been rejected by the common law. Further possible safeguards may be that only an officer of a certain minimum rank could make an application for an anticipatory warrant or that an application for this type of warrant may only be made to a judge and not to any other authority. It might also be advisable to require a reasonably high standard of information to be afforded to support the application.

---

142 New Zealand Law Commission, *Search and Surveillance Powers* (Report 97 2007) at 119.

143 *Search and Surveillance Bill 2009* (NZ), section 96(1)(e).

3.78 The Commission invites submissions as to whether a provision enabling anticipatory applications for search warrants should be introduced in Ireland.

I Notice of Previous Search Warrant Applications

3.79 There is no requirement contained within current Irish legislation that the applicant must inform the issuing authority of previous search warrant applicants made in respect of the property or location concerned. By contrast, the law in other jurisdictions sets out certain conditions on the matter.

(1) United Kingdom

3.80 Code of Practice B which supplements the *Police and Criminal Evidence Act 1984* states that before making an application the applicant officer shall make "reasonable enquiries" to establish if premises concerned "have been searched previously and how recently".[144]

(2) Australia

(a) Commonwealth

3.81 The *Crimes Act 1914*, as amended by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*, states that if the person applying for a search warrant "is a member or special member of the Australian Federal Police" and has at any time in the past "applied for a warrant relating to the same person or premises" the applicant must state the particulars of those applications and the outcome within the information submitted to the issuing authority.[145] This provision appears to be concerned with previous applications by the particular applicant, rather than with any previous application in respect of the premises or individual that the applicant wishes to search. It may be the case that this provision seeks to prevent an officer who has been refused a search warrant by one authority going to another issuing authority in the hope that he or she will grant the search warrant on the basis of the same application.

(b) Queensland

3.82 The *Police Powers and Responsibilities Act 2000* sets out that an application must include information "required under the responsibilities code about any search warrants issued within the previous year" in relation to i) the place or person suspected of being involved in the commission of the offence or suspected offence to which the present application relates, or ii) the confiscation

---

144 *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).

145 Section 3E(4).

related activity to which the present application relates.[146] The same wording can be found in the *Crime and Misconduct Act 2001*, with the exception that it refers to information "required under a regulation" rather than under the "responsibilities code".[147] In order that an unreasonable burden is not placed upon the applicant, both Acts provide that the requirement to give information as to previous applications applies only to i) information kept in a register that the applicant may inspect, or ii) information that the applicant otherwise actually knows.[148]

(c) New South Wales

3.83 *The Law Enforcement (Powers and Responsibilities) Act 2002,* section 62, requires that if a previous application for the same warrant was refused, details of the refusal must be included in the information provided to ground an application. This provision ties in with section 64. Section 64(1) states that if a warrant application is refused by an eligible issuing officer, the applicant, or any other person who is aware of the application, may not make a further application for the same warrant may not be made to that or any other eligible issuing officer unless there is additional information which justifies the subsequent application being made. However, section 64 further provides that where a warrant application is refused by an eligible issuing officer who is not a Magistrate, the applicant may make a further application to a Magistrate following a refusal whether or not additional information is provided in the subsequent application. Only one such further application may be made in any case. Therefore, the applicant has a second opportunity to make the application where he or she did not apply to a Magistrate in the first instance.

3.84 The *Law Enforcement (Powers and Responsibilities) Act 2002* does not, however, make any requirement as to informing the authority of a previous search warrant application where such application has been successful.

(d) Western Australia

3.85 The *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 search warrant for the same place has been made to any other justice of the peace within the previous 72 hours and if so whether a warrant was issued or not".[149] This provision is somewhat narrower in scope

---

146 Section 150(5).

147 Section 86(4)(c).

148 *Police Powers and Responsibilities Act 2000* (Qld), section 15(6) and *Crime and Misconduct Act 2001* (Qld), section 86(5).

149 Section 41(3)(h).

than provisions in other jurisdictions in that it is concerned with quite a limited time period in respect of previous applications. Section 42(4) of the Act states that if a justice refuses to issue a warrant, he or she must record on the application "the fact of, the date and time of, and the reasons for, the refusal". The Act does not set out any requirement as to retaining and filing search warrant applications. However, if applications are filed as a matter of practice in this jurisdiction it would be possible for a justice to carry out a search of files so as to check whether a previous application has been made in respect of the place or person concerned. Therefore, it may not be necessary for the legislation to require an applicant to inform the issuing justice of a previous application made more than 72 hours prior to the present application, as this information may be easily available to the justice.

(3) New Zealand

3.86 In its 2007 Report, "*Search and Surveillance Powers*", the New Zealand Law Commission explained that several of New Zealand's search warrant regimes required that the applicant disclose details of any previous applications to search the same place that he or she is aware of, having made reasonable inquiries.[150] The Commission concluded that the requirement to disclose previous applications should extend to all search warrant provisions. It recommended that an applicant "should be required to disclose in the warrant application, after having made reasonable inquiries, details of any warrant application made by his or her enforcement agency to search the same place or thing in respect of the same or a similar matter in the previous three months, and the results of any such application".

3.87 The New Zealand *Search and Surveillance Bill 2009*, includes the above recommendation of the Law Commission almost verbatim. Section 96(3) of the 2009 Bill states that the applicant must disclose i) details of any other application for a search warrant that the applicant knows to have been made within the previous 3 months in respect of the place, vehicle, or other thing proposed to be searched, and ii) the result of that application or those applications. Section 96(4) states that the applicant must "before making an application for a search warrant, make reasonable inquiries within the law enforcement agency in which the applicant is employed or engaged, for the purpose of complying with subsection (3)". The Bill does not require the applicant to look beyond his or her own agency for records of previous applications. Therefore if a search warrant was previously applied for by another agency in respect of the same place or item(s), the applicant is not obliged to bring this to the attention of the issuing officer. In this respect the Bill

150 New Zealand Law Commission *Search and Surveillance Powers* (Report 97) at 107-108.

has again mirrored the recommendation of the Law Commission. The Commission considered extending the disclosure obligation to applications made by all other agencies but then concluded that "the number of cases in which applications will be made by more than one enforcement agency in respect of the same investigation are exceedingly small". Thus, it decided that the significant resources that would be required to make inquiries of all other relevant agencies could not be justified.[151]

(4) Discussion

3.88 The Commission provisionally recommends the introduction of a requirement that an applicant must disclose previous search warrant applications in respect of the premises, material or person to which the search warrant application relates. This provision could be included in the principal search warrant framework which has been recommended by the Commission in this Consultation Paper.[152] The requirement would essentially afford an additional safeguard to the application procedure. Disclosure of previous applications would enable the issuing authority to be more fully informed in making the decision as to whether to issue the warrant. It could also prevent cases of subsequent applications being granted without sufficient grounds; that is where there does not appear to be any additional information from the time when the last application was made, the issuing authority may decide this new application is not justified. In addition, the requirement would prevent an applicant whose application has been refused by one judge applying with the same form to another judge in the hope that the second judge may issue a warrant. The requirement could also reduce the risk of harassment or undue targeting of an individual by authorities; that is an applicant or agency applying for a number of warrants in respect of the same premises or person over a short period of time where there are not reasonable grounds for doing so.

3.89 A previous application disclosure provision would need to identify a time period regarding how far back the applicant would be obliged to check for earlier applications. It can be seen that periods in other jurisdictions vary from 72 hours, to one year, to no specification as to the limit. The Commission invites submissions as to what period should be set in Ireland, or whether the provision should remain open so that any and all previous applications would have to be noted in the information. It is acknowledged, however, that this latter approach may be quite onerous on applicants in certain cases.

3.90 The Commission provisionally recommends the introduction of a requirement that a search warrant application should disclose details of

---

151 *Ibid*, at 108.

152 See generally chapter 2CHAPTER 2.

previous search warrant applications made in respect of the premises, material or person to which the present application relates.

3.91 The Commission invites submission as whether notice of any and all previous applications should be required, or whether notice need only relate to applications made within a certain past period.

CHAPTER 4 ISSUING SEARCH WARRANTS

A Introduction

4.01 Ryan and Magee have commented that it is "almost impossible to schematise the conditions under which search warrants may be issued as the empowering statutes differ so widely in their provisions".[1]

4.02 In this chapter the Commission discusses the process involved in issuing search warrants. Part B examines who has the authority to issue search warrants. It will be noted that this authority varies between Acts. Part C refers to the grounds for issuing search warrants and what the issuing authority must be satisfied of. The concept of a neutral and detached issuing authority is set out in part D. Part E refers to the law regarding the location of a judge of the District Court when issuing a search warrant. Part F discusses the contents of an issued search warrant. The concept of a standard search warrant form to be issued in respect of all search warrant provisions is discussed in part G. Part H refers to keeping records of issued search warrants. Part I discusses electronically issued search warrants.

B Who May Issue a Search Warrant

4.03 Each of the legislative search warrant provisions specifies who may issue the warrant.[2] While the majority of provisions empower a Judge of the District Court to issue a warrant, some provisions allow a peace commissioner or a member of the Garda Siochana not below a certain rank to do so.

(1) Warrants issued by Judges of the District Court

4.04 Issuing search warrants was traditionally a function of justices of the peace.[3] Subsequently, section 77 of *The Courts of Justice Act 1924* provided that the District Court would have and exercise "all powers, jurisdictions, and

---

1 Ryan and Magee, *The Irish Criminal Process* (Mercier Press Ltd. 1983) at 148.

2 In chapter 3CHAPTER 3 the Commission noted that provisions also specify who may apply for a search warrant.

3 See Hayes, *A Digest of the Criminal Statute Law in Ireland, Volume II* (Hodges and Smith 1842) at 494, 570, 788, 791; Humphries, *The Justice of the Peace for Ireland* (Hodges, Figgis & Co. Ltd. 1897) at 458, 759, 817; O'Connor, *The Irish Justice of the Peace* (Ponsonby Ltd. 1911) at 144-146.

authorities which immediately before the 6th day of December, 1922, were vested by statute or otherwise in Justices or a Justice of the Peace sitting at Petty Sessions".

4.05 In *Attorney General (Burke) v Doherty*[4] the High Court held that the transfer of the jurisdiction formerly exercised by the Justice of the Peace to the District Justice was "effected, and additional jurisdiction conferred, by sections 77 and 78 of the Courts of Justice Act 1924".[5] The Supreme Court in *State (Dowling) v Kingston* also observed that the functions of Justices of the Peace are now vested in District Justices.[6] Similarly, it was accepted by the Supreme Court in *Application of Tynan* that the effect of the *Courts of Justice Act 1924* and the *Courts (Supplemental Provisions) Act 1961* was that the District Court had and exercised "all powers, jurisdictions and authorities which immediately before the 6th December 1922 were vested by statute or otherwise in Justices or a Justice of the Peace sitting at petty sessions".[7]

4.06 It is therefore clear that the power to issue search warrants is one which can be carried out by judges of the District Court and, in fact, the majority of search warrants are now issued in this way.

(2) Warrants issued by members of the Garda Siochana

4.07 A limited number of provisions enable a member of the Garda Siochana to issue search warrants. Under these provisions the issuing Garda must be of a certain minimum rank, either superintendent or chief-superintendent. Acts which provide for this power include the *Offences Against the State Act 1939* (as amended by the) *Criminal Law Act 1976*,*Official Secrets Act 1963*[8][9],*Criminal Assets Bureau Act 1996*[10],*Criminal Justice (Drug*

---

4 [1934] IR 499.

5 [1934] IR 499, at 503.

6 [1937] IR 699, ILTR 131.

7 [1969] IR 1.

8 *Offences Against the State Act 1939*, section 29, as amended by *Criminal Law Act 1976*, section 5. The 1936 Act had provided that a search warrant could be issued under its authority by a member of the Garda Siochana 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.

9 *Official Secrets Act 1963*, section 16.

10 *Criminal Assets Bureau Act 1996*, section 14. This Act provides that only a superintendent who is a "bureau officer" member may issue a search warrant. t a

Trafficking) Act 1996[11] and the *Prevention of Corruption (Amendment) Act 2001*[12].

4.08 Search warrants issued by Garda members are often more limited in terms of the period for which they remain valid in comparison to a search warrant issued by a judge of the District Court. For example, under the *Criminal Assets Bureau Act 1996* a search warrant issued by a Criminal Assets Bureau officer who is a member of the Garda Siochana remains valid for 24 hours[13], whereas a warrant issued by a judge of the District Court under the same Act is valid for one week.[14] Under the *Prevention of Corruption (Amendment) Act 2001* a Garda issued search warrant is valid for 24 hours[15] while a warrant issued by a judge of the District Court is valid for one month.[16] Similarly, the *Criminal Justice (Drug Trafficking) Act 1996*, which amended the *Misuse of Drugs Act 1977* to allow a member of the Garda Siochana to issue a search warrant in certain circumstances, provides that a warrant issued by a Garda will cease to have effect after 24 hours.[17] By contrast a warrant issued by a judge of the District Court under the *Misuse of Drugs Act 1977* remains valid for a period of one month.[18] A validity period of one week is provided in respect of a warrant issued by a Garda under the *Official Secrets Act 1963.* It is notable that this period is the same as that for a search warrant issued by a judge of the District Court under the 1963 Act. It may be noted, however, that the *Official Secrets Act 1963* requires the issuing Garda to hold a position "not below the rank of chief superintendent".[19] In respect of warrants issued by a Garda issued warrants this is, as noted, the highest rank required in the legislative provisions discussed.

(3) Warrants issued by peace commissioners

4.09 The office of peace commissioner is an honorary appointment made by the Minister for Justice, Equality and Law Reform.[20] Provision for the

---

11 *Criminal Justice (Drug Trafficking) Act 1996*, section 8.

12 *Prevention of Corruption (Amendment) Act 2001*, section 5.

13 *Criminal Assets Bureau Act 1996*, s. 14(5).

14 *Criminal Assets Bureau Act 1996*, s.14(4).

15 *Prevention of Corruption (Amendment) Act 2001*, s.5(4).

16 *Prevention of Corruption (Amendment) Act 2001*, s.5(3).

17 *Criminal Justice (Drug Trafficking) Act 1996*, s.8(3).

18 *Misuse of Drugs Act 1977*, s.26(2).

19 *Official Secrets Act 1963*, s.16(3).

20 There are no particular qualifications or educational standards to be met by an individual before becoming a peace commissioner, however the individual must

appointment and the scope of authority of a peace commissioner was first made in the *District Justices (Temporary Provisions) Act 1923*. Section 4(1) of the 1923 Act stated that the Minister for Justice may

> "from time to time by warrant under his hand appoint and remove such and so many fit and proper persons as he shall think expedient in each County to be called "peace commissioners" to perform and exercise within such County the duties and powers prescribed by this Act."

Section 4(2) listed signing warrants as one of these powers.[21] The *Courts of Justice Act 1924* subsequently confirmed the provisions of the 1923 Act in respect of peace commissioners.[22]

4.10 A small number of Acts enable a peace commissioner to issue search warrants. These include the *Road Traffic Act 1961*[23]*, Misuse of Drugs Act 1977*[24]*,Control of Dogs Act 1986*[25], *Customs and Excise (Miscellaneous Provisions) Act 1988*[26],*Prohibition of Incitement to Hatred Act 1989*[27],*Video Recordings Act 1989*[28] and the *Firearms and Offensive Weapons Act 1990*[29]. It

---

be of good character. There is no remuneration for the role, nor is a peace commissioner entitled to charge a fee for his or her services. The Department of Justice, Equality and Law Reform maintains a roll of the State's peace commissioners and the name of a local peace commissioner can be obtained from a local Garda station.

21 The other powers of peace commissioners provided for by the 1923 Act included signing summonses; administering oaths and taking declarations, affirmations and informations; committing dangerous lunatics and idiots to lunatic asylums under section 10 of the *Lunacy (Ireland) Act 1867* (30 & 31 Vict., c. 118); signing certificates for the admission of lunatics and idiots to lunatic asylums and signing certificates required by section 2 of the *Registration of Clubs (Ireland) Act 1904*.

22 The 1924 Act included an additional power for peace commissioners to order the destruction or disposal of food which appeared to be diseased or unsound or unwholesome or unfit, under Section 133 of the *Public Health (Ireland) Act 1878*, (as amended by Section 28 of the *Public Health Acts Amendment Act 1890*).

23 Section 106.

24 Section 26.

25 Section 26.

26 Section 3.

27 Section 9.

28 Section 25.

is notable that the 1990 Act is the most recent Act where the power to grant a search warrant is afforded to a peace commissioner.[30] This may indicate an unwillingness by the Oireachtas to extend the role of peace commissioners in issuing search warrants. Some of this reluctance may have arisen from a number of cases where warrants issued by peace commissioners were challenged in respect of their constitutional validity, although it is notable that none of these claims have been accepted. These decisions are discussed below.

4.11 In addition to challenges based on constitutional grounds, the courts have also considered challenges on procedural grounds. In *The People (D.P.P.) v Edgeworth*[31] the validity of a search warrant issued by a peace commissioner was challenged where she had completed and issued a warrant headed with the words "The District Court" and under her signature had crossed out the printed words "Judge of the District Court" and wrote the words "peace commissioner" in capital letters next to the crossed out words. The Supreme Court observed that "[n]o special form seems to have been provided by the authorities for use when the application for a warrant is made to a peace commissioner and not to a Judge of the District Court."[32] The Court went on to say that while this was a "regrettable omission" it was not a matter which would render a warrant in the present form invalid. Furthermore, the Court stated that although the warrant was not in any statutorily prescribed form, it complied with section 26 of the *Misuse of Drugs Act 1977* under which it had been issued. It held that the use of the heading "The District Court" on the warrant was simply a misdescription and was not a breach of any condition or criterion imposed by the Oireachtas. In respect of the peace commissioner's signature, the Court held that it was clear the document was signed by a person "describing herself as a peace commissioner and not as Judge of the District Court."[33] There was therefore no statement on the search warrant which was "calculated to mislead" and, in addition, no evidence before the trial judge that any person was in fact misled. On that basis the Court concluded that the warrant was valid.

---

29 Section 15.

30 There have, however, been a small number of Statutory Instruments enacted after 1990 which empower peace commissioners to issue search warrants. These are: *European Communities (Application of the Rules of the Competition to Air Transport) Regulations 1992*, regulation 6; *European Communities (Rules on Competition) Regulations 1993*, regulation 6; *European Communities (Application of the Rules to Competition to Maritime Transport) Regulations 1993*, regulation 6; *European Communities (Application of Rules on Competition to Rail and Road Transport) Regulations 1993*, regulation 6.

31 [2001] IESC 31, [2001] 2 IR 131.

32 [2001] IESC 31, at 4; [2001] IR 131, at 136.

33 [2001] IESC 31, at 4; [2001] 2 IR 131, at 135-136.

(4) The Constitutionality of search warrants issued by persons other than judges

4.12 In *Ryan v O'Callaghan*[34] the constitutional validity of a search warrant issued by a peace commissioner was challenged. The applicant claimed that the power of the peace commissioner to issue a search warrant was in breach of the constitution for two reasons. First, it was claimed that because a search warrant "necessarily involves the invasion of the constitutional right" to privacy of one's home, authorising such an invasion should be a power exercisable only by a judicial authority appointed under the constitution. Secondly, it was argued that issuing a search warrant is "part of the process of prosecuting a crime" and should therefore be a function solely exercised by judges appointed under the Constitution.

4.13 In respect of the first matter, Barr J. referred to Article 40.5 of the Constitution, which states that the dwelling of every citizen is inviolable, and also provides that it shall not be forcibly entered "save in accordance with law".[35] Barr J. then noted the judgment of Henchy J. in *King v Attorney General*[36] where he held that "save in accordance with law" means "without stooping to methods which ignore the fundamental norms of the legal order postulated by the constitution".[37] In light of this, Barr J. held that the procedure of a peace commissioner issuing a search warrant did not ignore the fundamental norms of the legal order sought by the Constitution where the warrant had been "bona fide sought and obtained" from a peace commissioner pursuant to the procedure laid out in the relevant Act. In that respect, the procedure was not tainted with any constitutional illegality.

4.14 On the second point, Barr J. concluded that searching a premises under the authority of a search warrant "is no more than a part of the investigative process" which may or may not lead to the charging of an individual in respect of an offence. He considered that that the prosecution of an offence commences when a decision is made to issue a summons or to charge a person in respect of the particular offence alleged. Therefore he held that as the issue of a search warrant occurs prior to the commencement of prosecution, it forms part of the investigative process, and as such was "executive rather than judicial in nature".

---

34 High Court, 22 July 1987.

35 For further discussion on the Constitutional protection of the dwelling see chapter 6.

36 [1981] IR 233.

37 *Ibid*, at 257.

4.15 A similar challenge arose in *Berkeley v Edwards*[38] where the applicant claimed that section 88(3)(b) of the *Courts of Justice Act 1924*, which established the authority of a peace commissioner to sign a warrant, was inconsistent with the Constitution and that in issuing the warrant the peace commissioner had been purporting to administer justice. In the High Court, Hamilton P. expressly approved the decision of *Ryan v O'Callaghan*[39] and held that, consequently, the section of the 1924 Act being challenged was "not in contravention of, or void having regard to" the provisions of the Constitution. The decision in *Ryan* regarding the constitutionality of warrants issued by peace commissioners was also approved by the High Court in *Farrell v Farrelly.*[40] More recently in *Simple Imports Ltd. v Revenue Commissioners*, the Supreme Court held that a judge of the District Court was "performing a purely ministerial act" in issuing a search warrant.

4.16 In light of this case law, it appears to be well established that issuing search warrants is an administrative, as opposed to a judicial, function. Therefore issuing can be carried out by a person other than members of the judiciary, such as peace commissioners and members of the Garda Siochana, and this does not offend the Constitution.

C Grounds for Issuing a Search Warrant

4.17 In chapter 3CHAPTER 3 the Commission observed that in applying for a search warrant the applicant must meet a certain evidential threshold to establish that the warrant is in fact required. There are two elements to meeting this threshold. First, the applicant must establish that he or she holds an opinion (such as suspicion or belief) based on reasonable grounds that evidence of, or relating to, an offence may be found at a certain location. Second, the applicant must affirm this opinion by swearing the information or taking an oath. The corollary to this is that before issuing a search warrant, the issuing officer or court must fully accept that the information given by the applicant is a sufficient and justified basis for a search warrant. As the Court in *Williams v Summerfield*[41] explained, "generations of justices have...been brought up to recognise that the issue of a search warrant is a very serious interference with the liberty of the subject, and a step which would only be taken after the most mature, careful consideration of all the facts of the case".[42]

---

38 [1988] IR 217.

39 High Court, 22 July 1987.

40 [1988] IR 201.

41 [1972] 2 All ER 1334.

42 *Ibid*, at 1338.

4.18 Most of the relevant legislative provisions set the benchmark to be met: that the issuing authority must be satisfied on the basis of the sworn information of the applicant, that there are reasonable grounds or cause, for suspecting or believing that evidence is to be found at a named location. Where the issuing officer or court is satisfied of this, he or she may issue the requested search warrant. A number of cases have come before the Irish courts which have further clarified what is required of the issuing authority when assessing the applicant's information.

(1) The need for the issuing authority to be satisfied of the requirement for a search warrant

4.19 In *Byrne v Grey*[43] it was claimed that the peace commissioner who issued a search warrant under section 26 of the *Misuse of Drugs Act 1977* was not and could not have been reasonably satisfied of the grounds of suspicion on the basis of the information provided on oath by the applicant Garda. The High Court observed that the warrant stated on its face that the peace commissioner was "satisfied by the information on oath" of the applicant that there was a reasonable ground to suspect that cannabis was being cultivated contrary to the *Misuse of Drugs Act 1977.* The Court went on to note that section 26 of the 1977 Act made it "a condition precedent" to the issuing of a warrant that the peace commissioner "should himself be satisfied by information on oath that facts exist which constitute reasonable grounds for suspecting" that an offence has been or is being committed. The Court then referred to the English decision *R. v I.R.C., Ex p. Rossminster Ltd.*[44] Here the House of Lords held that where an issuing officer recites that the applicant stated on oath the there are reasonable grounds for suspecting an offence as the reason for issuing the warrant, such a warrant would not be valid. Lord Salmon stated that the issuing officer would himself have to be satisfied of the necessity for the search warrant on the basis of the facts ascertained and explained by the applicant; this requirement would not be met simply by the issuing officer relying on the belief of the applicant. In *Byrne v Grey*[45] the High Court accepted this view and held that a peace commissioner, or judge of the District Court, must himself or herself be satisfied of reasonable grounds for suspicion and is "not entitled to rely on the suspicion of the member of the Garda Siochana applying for the warrant".[46]

---

43 [1988] IR 31.

44 [1980] A.C. 952.

45 [1988] IR 31.

46 [1988] IR 31, at 40.

4.20 The High Court concluded that it was "quite clear from the terms of the warrant" that the issuing peace commissioner relied on the information of the applicant Garda and that "he personally had no information before him which would enable him to be satisfied that there were reasonable grounds for suspicion".[47] Therefore, the Court held that the peace commissioner had acted without jurisdiction in issuing the warrant.

4.21 In *The People (D.P.P.) v Kenny*[48] the validity of a search warrant was questioned on similar grounds. The warrant, issued and signed by a peace commissioner, stated that the peace commissioner was "satisfied on the information on oath" of the applicant Garda that there were reasonable grounds for suspecting that an offence under the *Misuse of Drugs Act 1977* was being committed. The Court of Criminal Appeal observed that there was no evidence that the peace commissioner inquired into the basis of the Garda's suspicion, rather it appeared on the evidence that "the only conclusion is that the peace commissioner...acted purely on the say-so" of the applicant.[49] The Court concluded that the peace commissioner had failed to carry out his function properly and that as a result the warrant was void. On appeal to the Supreme Court, (where the case turned on the application of the exclusionary rule of evidence)[50], Finlay CJ. stated that the decision of the Court of Criminal Appeal on this point was correct.

4.22 The Court of Criminal Appeal in *The People (D.P.P.) v Balfe*[51] clearly noted the requirement that the officer must direct his or her mind to satisfying himself or herself as to the existence of facts justifying the issuing of a warrant. The Court warned that "[h]owever urgent or important" an application for a warrant may be, the issuing officer "must never permit themselves to endorse automatically the decisions of others".[52]

4.23 In *Hanahoe v Hussey*[53] the High Court held that the judge of the District Court who had issued the search warrant concerned did not accept the information provided to her in the application at face value or simply rely on what she had been told. Rather she "probed and put questions to the Gardai" so as to gain further insight into the matter. The Court found that the procedure

---

47 *Ibid*, at 40.

48 [1990] 2 IR 110.

49 *Ibid*, at 117.

50 For further discussion on this point see part C of chapter 6.

51 [1998] 4 IR 50.

52 *Ibid*, at 61.

53 [1998] 3 IR 69.

contemplated in *The People (D.P.P.) v Kenny*[54] had been followed and thus dismissed the challenge on this ground. In addition, the Court noted that there is a presumption in favour of the legality of a search warrant issued by a court of record, such as the District Court. In light of this, the onus of proving that the issuing court had not exercised an independent decision making process "lies firmly with the applicant".[55]

4.24 In *Simple Imports Ltd. v Revenue Commissioners*[56] the Supreme Court reiterated that the issuing officer, or court, must be satisfied "on the basis of the information provided by the [applicant], that, viewed objectively, the cause or ground relied on by the [applicant] for his suspicion was reasonable".[57] Keane J. made two further points of note in this judgment. The first echoed the view in *Hanahoe v Hussey*[58] in respect of the onus of proof. Keane J. stated that it is to be presumed that, in issuing a warrant, a District Court Judge "will act in accordance with the requirements of the relevant legislation" and so the "onus of establishing that he or she failed to do so rests on the person challenging the validity of the warrant".[59] The second was to reiterate that issuing a warrant is "purely a ministerial act" and does not involve an adjudication of the matter itself. In light of this, Keane J. noted that an issuing officer would "clearly be entitled to rely on material, such as hearsay, which would not be admissible in legal proceedings".[60]

4.25 The principles in these cases have been applied in many cases involving unsuccessful challenges to the validity of search warrants, where the courts have found that proper procedures have been followed by issuing officers. By way of example, in *The People (D.P.P.) v Heaphy*[61] McGuinness J., in the High Court, observed that she was "clearly bound" by the decision of the Court of Criminal Appeal in *The People (D.P.P.) v Kenny* and she accepted that the legislation "should be construed strictly". The Court considered that information supplied by the applicant Garda, which was based on information he obtained "from a usually reliable source" and of his surveillance of the premises, was sufficient material on which the peace commissioner could

---

54 [1990] 2 IR 110.

55 [1998] 3 IR 69, at 99.

56 [2000] 2 IR 243; [2000] IESC 40.

57 [2000] 2 IR 243, at 251; [2000] IESC 40, at 15.

58 [1998] 3 IR 69.

59 [2000] 2 IR 243, at 251.

60 [2000] IESC 40, at 14-15; [2000] 2 IR 243, at 251.

61 [1999] IEHC 98.

satisfy himself of grounds to justify issuing a search warrant. McGuinness J. went on to say that, provided the peace commissioner had sufficient material before him to enable him to satisfy himself of the need to issue a warrant, "it must be assumed that he carried out his functions properly and was so satisfied".[62] Similarly, the Court of Criminal Appeal in *The People (D.P.P.) v Tallant*[63] considered the validity of two search warrants issued under the *Misuse of Drugs Act 1977* . The applicant claimed that there had been insufficient evidence before the District Court judge to issue the warrants. The Court noted that the judge had questioned the officer in both cases as to his belief of the correctness of the information, and that this amounted to the judge taking care to ensure that a warrant was not issued without the minimum question of reasonable belief being addressed. The Court concluded that the Judge had not simply "rubber-stamped" the application and the warrants had been validly issued.

(2) Reliance on the information afforded by the applicant

4.26 In *The People (D.P.P) v Tallant* the Court observed that the District Court judge concerned was entitled to accept the evidence of a member of the Garda Siochana and to rely on that in issuing the warrant. Similarly, the Court of Criminal Appeal in both *The People (D.P.P.) v McEnery*[64] and in *The People (D.P.P.) v McGartland*[65] held that reliance could be placed on the applicant's information. In the *McEnery* case the Court held that a peace commissioner had been afforded sufficient information on which to base his decision and that he was under no obligation to ask further questions. Therefore, it was acceptable for the peace commissioner to rely on the application as the source grounding the warrant's issue. In *McGartland* the Court held that there was "no further requirement or obligation on the peace commissioner to make further enquiries" where the information provided was satisfactory to base a warrant upon. This reflects the approach of the High Court in *Berkeley v Edwards*[66] where Hamilton P. held that the information provided on oath by the applicant Garda was sufficient "to make it appear to the [issuing peace commissioner] that there was reasonable cause to believe" that the stolen property being sought would be found at the named premises.[67] Here the High Court held that the peace

---

62 *Ibid*, at 14.

63 [2003] 4 IR 343.

64 Court of Criminal Appeal, 15 February 1999.

65 Court of Criminal Appeal, 20 January 2003.

66 [1988] IR 217.

67 *Ibid*, at 224.

commissioner had acted reasonably and within his jurisdiction in granting the search warrant.

(3) Discussion

4.27 It is clear from the case law, therefore, that issuing officers must consider the evidence and information brought before them by the applicant and must form their own opinion as to whether issuing a search warrant is necessary and justified. Although the issuing officer is permitted to rely on the information afforded by the applicant, he or she is by no means prevented from making further inquiries so as to form a fully-informed opinion on the matter. What is essential is that the officer does not 'rubber stamp' the application. The issuing of a warrant should be based on a complete assessment of the facts and not simply performed as a matter of course. Should such 'rubber-stamping' occur there is a possibility that the warrant will be deemed invalid and a search conducted on its basis may be held unlawful.

4.28 Where the requisite preconditions are not met by the applicant, that is, where he or she has not established that there are sufficient grounds for issuing a search warrant, the application may be refused by the issuing authority on the basis of his or her discretion. As Walsh notes "the issuing authority will not normally be obliged to issue" a warrant.[68] The relevant legislative provisions empower an officer to issue a warrant by stating that he or she "may" issue a warrant, but by no means demand that the act be carried out. Thus the requisite preconditions act as a filter of control in this respect.

D The 'Neutral and Detached' Issuing Authority

4.29 The concept of a 'neutral and detached' issuing authority has emerged in United States case law on search warrants. In *Shadwick v City of Tampa*[69] the U.S. Supreme Court held that a magistrate issuing a warrant must meet two tests, "he must be neutral and detached, and he must be capable of determining whether probable cause exists".[70] The Supreme Court stated that neutrality and detachment requires "severance and disengagement from activities of law enforcement".[71] Thus the issuing officer must be independent of

---

68 Walsh, *Criminal Procedure* (Thomson Round Hall 2002) at 408.

69 407 U.S. 345 (1972).

70 *Ibid*, at 350. Although this case was concerned with the issuance of an arrest warrant, the principle of neutral and detached magistrate and the determination of probable cause also extends to the issuing of search warrants.

71 *Ibid*, at 350.

the matter at hand, so as not to be influenced by the potential outcome of the matter when deciding whether or not to issue a warrant.

4.30 Polyviou comments that the fundamental reasoning for the requirement of a neutral and detached magistrate is that

> "the protection intended to be secured by the Fourth Amendment only becomes meaningful if the determinations of probable cause on which invasions of privacy and intrusions into personal security are [based] are drawn not by law enforcement officers or others entrusted with the tasks of investigating crime...but by persons who can be trusted to reach neutral, unbiased and trustworthy determinations" on the basis of the information before them.[72]

Polyviou contends that as police officers are generally involved in investigation and prosecution of crime, they are not sufficiently independent and impartial to issue search warrants.

(1) United States case law

4.31 In *Johnson v United States*[73] the U.S. Supreme Court held that the protection of the Fourth Amendment of the U.S. Constitution required the determination of a warrant application to be made by a neutral and detached magistrate, "instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime". The Court stated that where an individual was involved in the process of law enforcement, he was not sufficiently detached. Thus the role of assessing information should be left to an uninvolved party.

4.32 The decision in *Johnson* was expressly approved by the Court in *Coolidge v New Hampshire*[74] where it described the decision in *Johnson* as the "classic statement of the policy underlying the warrant requirement of the Fourth Amendment". In *Coolidge* the State Attorney General had issued a search warrant on grounds of probable cause. The Attorney General had been actively in charge of the investigation and later became the chief prosecutor at trial. The State argued that the Attorney General was authorised as a justice of the peace to issue warrants, that he did in fact act as a neutral and detached magistrate and that that any magistrate confronted with the evidence and case of probable cause that had been made here would have issued the search warrant. In response, the Supreme Court observed that the "whole point" of the decision in

---

72 Polyviou, *Search and Seizure. Constitutional and Common Law* (Duckworth Ltd. 1982) at 95.

73 333 U.S. 10 (1948).

74 403 U.S. 443 (1971).

Johnson was that "prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations". The Court concluded that as the Attorney General was not the neutral and detached magistrate required by the Constitution, "the search stands on no firmer ground than if there had been no warrant at all".

4.33 In *Lo-Ji Sales Inc. v New York*[75] the U.S. Supreme Court held that where a town justice had issued a search warrant, he had not acted as a fully neutral and detached issuing officer. The justice had issued an open warrant and then accompanied police officers during the search so that he would determine whether there was probable cause in respect of particular items when they were actually in front of him. The Court observed that by taking part in the search itself, the justice had "allowed himself to become a member, if not the leader, of the search party which was essentially a police operation" and that as a result he was not a detached officer.[76]

4.34 In *Connally v Georgia*[77] the neutrality of a justice of the peace who had issued a search warrant was challenged. Under the relevant legislation a fee of $5 was payable when a search warrant was issued by a Georgia justice of the peace. Although the role of a justice of the peace was unpaid, this fee was acceptable as a form of 'compensation' for the task. However if a search warrant was refused, the justice of the peace would not collect any fee for reviewing and denying the application. The U.S. Supreme Court concluded that as the issuing of a search warrant involved a pecuniary benefit to the justice of the peace, this had the result that the justice may have a personal interest in the issuance, rather than refusal, of search warrants and so may not be entirely neutral.

(2) The 'neutral and detached' principle in Ireland

4.35 The Court of Criminal Appeal in *The People (D.P.P.) v Balfe*[78] stated that the protection and vindication of rights in respect of search warrants "is achieved by the introduction of a competent, detached authority" exercising the function of determining whether a search warrant should be issued.[79] For the most part, search

---

75 442 U.S. 319 (1979).

76 *Ibid*, at 327.

77 429 U.S. 245 (1977).

78 [1998] 4 I.R. 50.

79 *Ibid*, at 61. It is noted that the case itself was not concerned with the independence or impartiality of the judge of the District Court who had issued the search warrant. Rather the challenge as to the validity of the warrant was based on errors in details which appeared on the face on the warrant. The point noted

warrants are issued by a District Court judge or peace commissioner, thus a detached authority is involved. However, where a warrant is issued by a member of the Garda Siochana the question may arise as to whether the issuing authority is independent and detached.

4.36 The line of authority that emerges from the United States case law is that where an individual has a role in law enforcement or the prosecution of offences, he or she will generally not be considered 'neutral and detached'. The concern of the U.S. courts appears to be that if an issuing authority also has a role in enforcement or prosecutions, he or she may be influenced (whether consciously or otherwise) by matters which are beyond simply the evidence and information provided to them by the applicant for a search warrant. In light of this interpretation, one may question whether members of the Garda Siochana are sufficiently independent and detached for the task of issuing warrants. Fennell has referred to the "gradual diminishing in importance of the role of the judiciary as a 'brake' on police action".[80] She has expressed some concern as to the powers of Gardai to issue search warrants, and in doing so, their ability to avoid "independent (ie. judicial) scrutiny of the justification" for a warrant.[81]

4.37 Legislative provisions that empower particular members of the Garda Siochana to issue warrants in certain circumstances contain no limitation as to the level of involvement of the issuing Garda in the matter at hand. There does not, therefore, appear to be any express impediment to prevent a Garda who is primarily involved in an investigation from issuing a warrant to allow for a search in respect of that investigation. However in *The People (D.P.P.) v Byrne*[82] the Court of Criminal Appeal noted that:

> "it is not the case that An Garda Siochana are free to choose whether they will apply for a warrant to a judge, to a peace commissioner or to a superintendent. They *must* apply to a judge or a peace commissioner unless the very limited circumstances which permit them to apply to a superintendent are present".[83]

---

above in respect of a detached authority was made in the context of a general discussion on the need to protect an individual's constitutional rights. The Court of Criminal Appeal commented that the assessment of the facts by an authority before the warrant may be issued is part of the process which protects and vindicates rights.

80 Fennell, *The Law of Evidence in Ireland* (2nd ed Butterworths 2003) at 110.

81 *Ibid*, at 110.

82 [2003] 4 IR 423.

83 *Ibid*, at 427-428.

This statement by the Court reinforced the position that the occasions when Gardai are permitted to issue search warrants are limited; they are usually the consequence of necessity and/or time constraints. As explained by Hardiman J., members of the Garda Siochana must generally apply to an outside authority for a warrant. This suggests that, generally, a neutral and detached requirement, comparable to that found in the United States, should and will be satisfied in Ireland. The principle is not, however, absolute in Ireland due to the powers, albeit limited, of members of the Garda Siochana to issue search warrants.

(3) Discussion

4.38 The Commission invites submissions as to whether a protocol should be implemented establishing that where a member of the Garda Siochana has himself or herself been involved in the investigation of an offence for which a search warrant is required, he or she is not eligible to issue a warrant. Rather, if a warrant is required to be issued by a member of the Garda Siochana in the circumstances, an officer who is independent of the investigation must issue the warrant.

4.39 An example of this type of independence requirement can be found in the *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987*. Under the Regulations it is the duty of the member in charge of a Garda station to oversee the application of the Regulations in relation to persons in the custody in the station.[84] The Regulations specify that as far as practicable, the 'member in charge' shall not be a member "who was involved in the arrest of a person for the offence in respect of which he is in custody in the station or in the investigation of that offence".[85] The approach taken by the Regulations in respect of independence and detachment could be relied on as guidance with a view to introducing a similar provision regarding Garda members issuing search warrants. However, it is advisable that a neutral and detached protocol go beyond a requirement of "as far as practicable", rather it should be a matter of absolute ineligibility to issue a warrant if the Garda is involved in the matter.

4.40 The Commission invites submissions as to whether only a member if the Garda Siochana who is independent of an investigation may issue a search warrant relating to that investigation.

---

84 *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987*, section 5(1).

85 *Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987*, section 4(3).

E Location of the Issuing Authority

4.41 In *Creaven v Criminal Assets Bureau and Ors*[86] the Supreme Court considered the matter of the location of a District Court judge at the time when search warrants were issued by him. A number of warrants were applied for in this case; some under section 55 of the *Criminal Justice Act 1994*, others under section 14 of the *Criminal Assets Bureau Act 1996*. On the date when the applications were to be made, the President of the District Court was informed by the office of the Chief State Solicitor that the Criminal Assets Bureau was to apply for a number of warrants in respect of locations in a number of District Court districts. As a result, the President of the District Court contacted District Judge Anderson to deal with the applications in the President's chambers. At that time Judge Anderson was temporarily assigned to the Dublin Metropolitan District of the District Court and was not assigned permanently to any district. To allow Judge Anderson to issue warrants for the other districts concerned, the President of the District Court made orders under the relevant statutory powers to assign Judge Anderson as a temporary judge in respect of District No. 12 (which included Ennis and Shannon), District No. 14 (which included Limerick) and District No. 20 (which included Middleton, Co. Cork). A search warrant was also to be applied for in respect of a location within the Dublin Metropolitan District, to which Judge Anderson was already assigned.

4.42 The applicants contended that a judge of the District Court could not be assigned to more than one District at a given time. The Supreme Court rejected this because the Sixth Schedule of the *Courts (Supplemental Provisions) Act 1961*, as amended by section 37 of the*Courts and Courts Officers Act 1995*, states that:

> "A judge of the District Court who is not for the time being permanently assigned to a district may from time to time be assigned by the President of the District Court to any district."

The Court concluded that this permitted temporary assignments, of the same judge, to more than one district. Fennelly J. observed that the power to temporarily assign judges to districts gives greater flexibility and enables the President of the District Court to react to the changing demands on the District Court and to assign judges according to need.[87] Fennelly J. also stated that he could "see no objection to the possibility of a District [Court] judge being assigned to more than one district at the same time".

4.43 Although the Supreme Court held that a District Judge could be temporarily assigned to more than one district at one time, it did not accept that

---

86 [2004] 4 IR 434.

87 [2004] 4 IR 434, at 469.

the judge could exercise his or her jurisdiction in more than one district at the same time. Therefore the Court was not of the opinion that a judge of the District Court could exercise jurisdiction in one district while sitting in another.[88] In this respect, Fennelly J. stated that "the entire structure of the District Court is premised on the concept of the district". Fennelly J. observed that the *Courts (Supplemental Provisions) Act 1961* provides for the division of the State into districts,[89] the Act provides for the assignment of judges, either permanently or temporarily, to districts[90] and that the jurisdiction of the District Court in respect of certain civil, criminal and licensing matters is exercised by reference to districts.

4.44 In light of this the Court considered that where, as in this case, a judge had been sitting in one district and issuing warrants in respect of other districts, this was in conflict with the "basic principle that the District Court exercise jurisdiction by reference to districts".[91] The Court stated that if this practice were to be permitted, the result might be that much of the jurisdiction of the District Court could in fact be exercised from one district, and that this would not be in line with what was envisaged by and provided for by the *Courts (Supplemental Provisions) Act 1961.* The Supreme Court concluded that Judge Anderson would need to have been actually sitting in each of the districts if the search warrants relating to them were to be valid. The result of this was that only the warrant that related to the premises in the Dublin Metropolitan district where he had been sitting was valid.

4.45 In *The People (D.P.P.) v Joyce*[92] the location of the issuing authority was again considered. Here a search warrant was required by the Garda Siochana at a time when the District Court was not in session. Consequently Gardai made the warrant application to the relevant District Court judge at his home. The judge's home was outside the district to which he was permanently assigned. The defendant relied on the decision in *Creaven*[93] and contended that, as the issuing judge here had not been sitting in his assigned district at the

---

88 In the view of Fennelly J. the reason why there was no express provision stating that a District Judge can only exercise jurisdiction while sitting in his/her district "can only be that [it] is so obvious as not to need stating". [2004] 4 IR 434, at 475.

89 *Courts (Supplemental Provision) Act 1961*, s. 32(2).

90 *Courts (Supplemental Provision) Act 1961*, s. 32(3) and the sixth schedule, as amended.

91 [2004] 4 IR 434, at 479.

92 [2008] IECCA 53.

93 [2004] 4 IR 434.

time of issuing, the warrant was invalid. The prosecution argued that the judge was exercising jurisdiction only in respect of the district to which he was permanently appointed and the warrant which he issued related to a premises which was within his jurisdiction. Thus, the judge was "sitting" in the district for the purposes of the relevant legislation and the decision *Creavan v Criminal Assets Bureau and* Orsin[94] was not relevant.

4.46 The Court of Criminal Appeal accepted the defendant's argument. It concluded that unless a judge of the District Court "is 'sitting' in the sense of being physically present in the District Court Area to which he has been assigned" he or she does not have the power to issue search warrants. Therefore the warrant issued in this case was deemed invalid.

(1) Discussion

4.47 In the course of preparing this Consultation Paper the Commission has been informed that the requirement for a judge of the District Court to be physically sitting within his or her District while he or she is issuing a search warrant can be quite impractical on certain occasions. For example, cases have arisen whereby a search warrant is required at a time when the District Court is not sitting and so the application is made to a judge at his or her home; if the judge does not reside within the district he or she is assigned to, he or she must travel to a location within the relevant district and issue the warrant there.

4.48 In section B of this chapter it is noted that case law has identified that issuing a search warrant is a ministerial and not a judicial function. This was established by the High Court in *Ryan v O'Callaghan*[95] and has since been approved in a number of other cases.[96] Thus where a judge of the District Court issues a search warrant he or she is not actually administering justice on behalf of the District Court to which he or she is assigned. It may be argued, therefore, that a judge need not be within the particular district when issuing a warrant as he or she is not exercising a judicial function at that time. Furthermore, as a search warrant can be issued by certain persons other than judges, a search warrant need not necessarily be issued within a District Court.

4.49 The Commission has been advised that, in practice, search warrant applications have generally been made in private, often in a judge's chambers. Furthermore, in section F of chapter 3 it was observed that section 26 of the *Criminal Justice (Amendment) Act 2009* provides that an application made for a

---

94 [2004] 4 IR 434.

95 High Court. 22 July 1987.

96 Including *Berkeley v Edwards* [1988] IR 217; *Farrell v Farrelly* [1988] IR 201; *Simple Imports Ltd. v Revenue Commissioners* [2000] IESC 40.

search warrant under any enactment shall be heard otherwise than in public. Thus an application may no longer be made in an open courtroom. As the application will now be made in private and away from a courtroom, the requirement that a judge be physically present within the district when issuing a warrant which applies to that district may be somewhat excessive and inconsistent with this legislative provision and practice. The vital element for an issuing judge to comply with is that he or she fully assesses an application, so that he or she is completely satisfied that a search warrant should be issued. Where a judge is physically located would not have any impact on that process.

4.50 Therefore the Commission provisionally recommends that the law should be amended so that a search warrant may be issued by a judge who is not physically present in the district to which it applies. Thus a warrant issued in such circumstances would be recognised as valid.

4.51 The Commission provisionally recommends that the law be amended so that a search warrant may be issued by a judge who is not physically present within the district to which the warrant relates.

4.52 In provisionally recommending that the law be amended so that a search warrant issued by a judge who is physically outside of the district to which the warrant relates, the Commission has noted that it may be necessary to identify how this could be relied upon in practice. Thus the Commission has identified a number of methods which may be utilised where a warrant is applied for where a judge is not physically available within the relevant district. It is clear that this type of case will generally only arise out of court hours, where it is not possible to make the application to the judge in his or chambers.

(a) No limitation as to the judge who may issue a search warrant

4.53 This approach would remove all restrictions so that a search warrant could be issued by a judge located in any area, regardless of what district the search will be carried out in. Thus an application could essentially be made to any District Court judge for a search warrant. The Commission is of the view, however, that this approach is very broad and that there may be a danger of abuse. For example, a no restriction approach could enable forum shopping, that is an applicant choosing a particular judge because he or she might be more likely to issue a warrant. Another potential danger would be individual targeting, whereby an applicant could travel to a given district to obtain a search warrant in respect of property which has already been searched under a warrant issued in another district, and where a warrant is not likely to be issued in the original district because there are not sufficient new grounds to justify another warrant being issued.

(b) Only the President of the District Court may authorise a search warrant in respect of a district where he or she is not located

4.54 A more controlled system might be that only the President of the District Court could issue a search warrant in respect of any other district in which he or she is not sitting at the time of issue. This approach would be particularly useful in cases where a search warrant is required out of District Court office hours. In this respect, a system for electronic search warrant applications, as discussed in G of chapter 3 might be of assistance. It is acknowledged, however that this system might place too great a burden and workload upon the President of the District Court.

4.55 Alternatively, it might be recommended that an application could be made to a judge assigned to the district at a time when he or she is not physically located within the district, but that the President of the District Court would have to authorise the issue of the warrant. This system would retain the involvement of the judge who is assigned to the relevant district, but would be more efficient in cases where a warrant is immediately required as the judge would not have to travel to the district area for the purpose of issuing the warrant. Another advantage of this approach would be that the applicant would be physically present before the judge when giving the sworn information that grounds the warrant application. The requirement that the President of the District Court would need to authorise the issue of the warrant would be an additional safeguard.

(c) The introduction of an out of hours search warrant panel

4.56 The Commission has considered the implementation of a search warrant panel which would be in place to deal with all out of office search warrant applications and issuing. This would have the effect that where an application needs to be made out of District Court hours, the applicant would submit the information to an 'on call' member of the panel. With regard to convening such a panel, one approach might be to select suitable judges of the District Court, from various districts around the country, to be named as members. Thus where a warrant is required out of hours the applicant could contact the member of the panel who is nearest him or her for the purpose of meeting with the judge to make the application.

4.57 With regard to the duration of a panel; one option would be to establish a panel of judges for a fixed period, such as one year, while another option might be to have 'rota panels' such that a number of panels would be established to carry out the function on a short term basis, for example one month, and at the end of that period the next panel would take over. These panels would continue to work on a rota basis. The Commission recognises that it would be a matter primarily for the President of the District Court to determine the best approach to be taken on this matter.

(d) Retain the approach of applying to a judge who is assigned to the district to which the search warrant will relate

4.58 The fact that an application is made out of court hours does not currently prevent a District Court judge from issuing a search warrant. The current limitation is simply the fact that the judge must be physically in the district when he or she is issuing the warrant. Thus where an application is made out of hours a judge may be required to travel to a point within the district's boundaries so that he or she may issue a valid warrant.

4.59 In light of the Commission's provisional recommendation that the law be amended to recognise as valid a search warrant issued by a judge who is physically outside the district, it may be suitable to retain the current approach whereby the application is made to an issuing authority who is assigned to the district where the search will be executed.

4.60 In a case where search warrants are required for locations in more than one district, as occurred in the case of *Creaven v Criminal Assets Bureau and Ors*[97], it would simply be a matter of making each application to a judge assigned to the relevant districts. It would no longer matter whether each issuing judge was physically within the district at the time of issuance.

F Content of the Issued Search Warrant

4.61 Many of the legislative provisions that provide for issuing search warrants have corresponding search warrant forms.[98] These forms are completed by the issuing officer on his or her satisfaction that sufficient grounds exist to justify issuing the warrant. As these warrants are in a standard form they set out the necessary details to be provided within the content of the warrant. By fully completing the warrant form the issuing officer will generally satisfy all requirements in relation to the content of the search warrant.

(1) What the search warrant will state

4.62 A search warrant will state the Act under which it is being issued and the District Court area where it is being issued. It will then set out the following: i) the name of the individual who has provided the sworn information upon which the warrant application is based; ii) that the issuing authority is satisfied that there are reasonable grounds for suspecting or believing that a search should be carried out; iii) the location to be searched under the warrant; iv) the name of the individual who the warrant authorises to carry out the search, and it

---

97 [2004] 4 IR 434.

98 See for example forms contained in the *District Court Rules 1997 (S.I. 93/1997)* and the *District Court (Search Warrant) Rules 2008 (S.I. 322/2008)*.

may state that other individuals can accompany the executing officer so as to assist with the warrant's execution[99]; v) the period of time for which the warrant is valid; vi) the date of issuing; vii) the signature of the issuing authority; viii) the individual to whom the warrant is addressed[100]. A search warrant will usually state within its terms that, if necessary, force or reasonable force may be used when the warrant is executed and that material found under the warrant may be seized. Some legislation also provides that persons who are at the location when the search is being conducted may themselves be searched. If there is a power to search persons present under the legislation, provision for this will be made in the warrant issued.

4.63 The information contained in a search warrant is therefore quite detailed. This is essentially due to the law's requirement for specificity within warrants. The Commission has noted in chapter 1 that, until the 18th Century, search warrants were general in nature; they were unspecific as to persons and places to be searched and items to be seized, and also quite vague as to their duration. The decision in *Entick v Carrington*[101] clearly rejected the concept of general warrants and; as a result modern legislative provisions oblige a search warrant to be detailed in its contents so that there is certainty as to its scope. The requirement for specificity acts as a safeguard in that the search warrant clearly sets out the extent of the authority it affords. Executing officers will therefore not be justified in going beyond this as the warrant makes its limits known to them from the outset.

(2) To whom the search warrant is addressed and directed

4.64 Generally a search warrant is addressed to the Superintendent or Inspector of a named Garda station. The addressing element does not, however, qualify the superintendent or inspector, as the case may be, to execute the warrant. The individual intended to execute the search is specified within the terms of the warrant as the individual to whom the issued warrant is directed.

4.65 Certain provisions require that the search warrant be directed to, and therefore carried out by, a member of the Garda Siochana of a certain minimum rank. For example, the *Gaming and Lotteries Act 1956*[102], *Intoxicating Liquor Act 1962*[103] and *Official Secrets Act 1963*[104] all specify that an issued search

---

99 See paragraph 4.64.

100 See paragraph 4.64.

101 (1765) 2 Wils 275, 19 State Tr 1029; [1558-1774] All ER Rep 41.

102 Section 39.

103 Section 26.

warrant shall authorise a member of the Garda Siochana not below the rank of inspector to carry out the search. While the *Censorship of Publications Act 1946* states that a search warrant shall operate to authorise a member of the Garda Siochana not below the rank of superintendent to conduct the search.[105] These provisions do not, however, prevent the executing Garda from being accompanied during the search by members who hold a position below that rank. It is notable that a specification that a Garda must be of a certain minimum rank to make the search warrant application does not necessarily follow through as to who the issued warrant may be directed to. For example, the *Prohibition of Incitement to Hatred Act 1989*[106]*, Video Recordings Act 1989*[107] and *Criminal Justice Act 2006*[108], amending the *Criminal Justice (Miscellaneous Provisions) Act 1997* all require that an application by made by a Garda not below the rank of sergeant, but they permit the warrant to authorise *any* member of the Garda Siochana to execute the search.

4.66 It is also possible for search warrants to be directed to individuals who are not members of the Garda Siochana, but who hold other official roles. The *Customs and Excise (Miscellaneous Provisions) Act 1988* states that a warrant may authorise a named officer of Customs and Excise to execute the search.[109] The *Aviation Regulation Act 2001* permits a search warrant to be directed to an authorised officer who has been appointed under the Act.[110] The *Company Law Enforcement Act 2001* provides that a warrant may be directed to a named designated officer.[111] Under the *Safety, Health and Welfare at Work Act 2005* a search warrant will be directed to an inspector appointed under the Act.[112] The *Sea-Fisheries and Maritime Jurisdiction Act 2006* (as amended by

---

104 Section 16.

105 Section 17.

106 Section 9.

107 Section 25.

108 Section 6.

109 Section 5.

110 Section 43.

111 Section 30. A "designated officer" means the Director of Corporate Enforcement or an officer authorised by the Director to act in that capacity. *Company Law Enforcement Act 2001,* s.30(7).

112 Section 64.

the *Criminal Justice Act 2007*) provides that a named sea-fisheries protection officer may be authorised by the warrant to execute the search.[113]

4.67 Although a search warrant will be directed to a particular officer, it may also provide that he or she can be accompanied during the search by other persons. Specifications as to who may accompany the officer vary between Acts. Accompanying individuals may be a member of the Garda Siochana, another officer in the same role as the warrant-designated individual, or may be "any other person" whose presence is deemed necessary during the search. Search warrants directed to both members of the Garda Siochana and to individuals holding other official roles can allow for assistance by other persons at the time when the search is carried out.[114]

(3) Details of the issuing officer

4.68 The contents of the search warrant will also include the signature of the issuing officer and the description of his or her role, such as "judge of the District Court" or "peace commissioner." Generally where both a judge of the District Court and a peace commissioner are empowered to issue a warrant under an Act, both titles are printed on the standard warrant form and the issuing officer must delete whichever title does not apply to him or her.[115] In addition, the issuing officer shall also note the date upon which the warrant was issued within its contents.

(4) Errors within the content of the warrant

4.69 The Irish courts have, on occasion, dealt with challenges as to the validity of search warrants where an error has arisen within the warrant's contents. The leading case on this is *The People (Attorney General) v O'Brien.*[116] In this case a member of the Garda Siochana provided sworn information in applying for the warrant that stolen or unlawfully obtained items were believed to be located at the address "118 Captains Road, Crumlin". However, on the search warrant issued by the District Court, the address of the place to be searched was stated as "118 Cashel Road, Crumlin". This error went unnoticed and the Gardai carried out a search of the intended premises, 118 Captains Road, on the basis of the issued warrant. The applicant claimed that due to the error the warrant was invalid, and so articles found during the

---

113 Section 44.

114 For further discussion on other persons accompanying the executing officer see chapter 5, paragraph 5.04.

115 For an example where this did not appear to be the situation, see *The People (D.P.P.) v Edgeworth* [2001] IESC 31, [2001] 2 IR 131, discussed above.

116 [1965] IR 142.

search should not have been relied on as evidence during the proceedings which resulted in the conviction of the applicant on a charge under the *Larceny Act 1916*.

4.70 The Supreme Court held in *O'Brien* that a search of the defendant's dwelling that was made in "deliberate and conscious" disregard of his constitutional rights would be invalid, unless there were extraordinary and excusing circumstances justifying the breach; and that any evidence emerging from such as search would be inadmissible – this is the strict common law exclusionary rule.[117] It was noted by the Supreme Court that the mistake in this case was, in fact, "a pure oversight and it [had] not been shown that the oversight was noticed by anyone before the premises was searched".[118] The Court concluded that the error was neither deliberate nor conscious and so it held that the warrant was not invalid on this ground. As the error constituted a "mere illegality", the admissibility of the evidence that was obtained was determined on the basis of whether the illegality outweighed its probative value. Applying this less strict exclusionary rule, the Court held that the evidence obtained was admissible.

4.71 In *The People (D.P.P.) v Balfe*[119] a search warrant was issued under the *Larceny Act 1916*. Three errors existed within the completed warrant. The first error concerned the address to be searched. Prior to applying for the warrant, the Garda who had received information on which the application was based completed a search warrant information form, as well as a draft search warrant form. On both documents it was stated that the address to be searched was 5 Forest Hills. By the time the application for the warrant was made the applicant had discovered that the correct address was 34 Forest Hills. He informed the judge of the District Court of this and the judge accordingly amended the address on the documents. The second issue concerned the name of the individual to whom the warrant related. The name stated on the warrant, in respect of the individual believed to be in possession of the items being searched for, was Eddie Balfe; however it was Veronica Balfe who accepted responsibility for the items found during the search. Veronica Balfe was subsequently charged and convicted of an offence under the *Larceny Act 1916.* The third error was that the warrant stated the property being searched for was stolen on 5th January 1994, when in fact the offence had occurred on 5th January 1995.

---

117 This is discussed in more detail in chapter 6, part C.

118 [1965] IR 142, at 161.

119 [1998] 4 IR 50.

4.72 In respect of the error concerning the address, the Court of Criminal Appeal commented that "there is no prohibition on amendments being made and no stipulation that where made they must be verified by any particular means".[120] The Court stated that what is crucial is that the issuing authority is satisfied about the existence of facts and the details justifying the issuing of the warrant. The Court observed that "it is, of course, regrettable that any court document should have any hint of ambiguity" but noted that the combination of the name of the occupier along with the address of the premises "could hardly have left any doubt as to the premises intended".[121] As to the error in respect of the date of the offence, the Court accepted that "the incident clearly occurred one year later" than the date noted in the warrant, but did not consider this to be a serious defect. The Court concluded that the errors were similar to those in *The People (Attorney General) v O'Brien*[122] and so the evidence obtained in the search was admissible.

4.73 In *The People (D.P.P.) v McGartland*[123] the defendant challenged a search warrant which described the premises to be searched as 5 Weaver Square; the defendant claimed that the correct address was 5 *Weaver's* Square. The Court noted that there were two signs to be found in the surrounding area, one of which read "Weaver Square" while the other called it "Weaver's Square" and that "both descriptions appear to be in use".[124] The Court stated that it was by no means clear that the address named on the warrant was inaccurate and concluded that, in any event, if the address was erroneous, this was, as in the *O'Brien* case, "at best an accidental slip". The Court rejected the claim that the warrant was invalid due to the defect.

4.74 It can be seen from these cases that while specificity is required within the warrant, a certain margin of error may be allowed for. The courts will generally not declare a warrant invalid due to a defect where the error is relatively minor. Where a warrant does not appear to be misleading or contain a purposeful or intentional misdescription, it will be regarded as valid. Nonetheless, both applicants and issuing authorities should aim to ensure that all information contained within the search warrant application and the search warrant itself is accurate so as to avoid a challenge as to the validity of the warrant.

---

120 *Ibid*, at 61.

121 *Ibid*, at 60.

122 [1965] IR 142.

123 Court of Criminal Appeal, 20 January 2003.

124 *Ibid*, at 2.

G A Standard Search Warrant Form

4.75 The Commission noted in section E of chapter 3 that there is a scheme of information (application) forms, each one corresponding to the relevant provision, which are used when making an application for a search warrant. The applicant must therefore select and complete the appropriate information form when making an application. A comparable scheme of individual forms also exists in respect of search warrant forms. That is, each search warrant provision has its own corresponding form to be completed by the issuing authority.

4.76 With regard to the system of particularised information (application) forms, the Commission has expressed the view that this is not an efficient approach. Thus the Commission has provisionally recommended that a standard search warrant application form be developed, to replace the existing selection of forms.[125] The Commission is similarly of the view that having individual search warrant forms is inefficient and an uneconomical use of resources. Therefore, the Commission provisionally recommends the introduction of a generic search warrant form. This form would replace the selection of search warrants forms which currently exist under Irish law. Rather than completing the specific warrant form which corresponds with the Act under which a search is to be made, the standard form would be used in respect of any search warrant provision; the issuing authority would simply specify on the face of the warrant the Act under which it is issued. The issuing authority would also need to specify other matters which currently appear in print on each warrant form (and which vary from Act to Act). Such matters would include the period for which the warrant will remain valid, whether the executing officer may be accompanied by any other officers or individuals and whether force or reasonable force may be used

4.77 A number of benefits can be identified in respect of this approach. Having a single search warrant form in place would be more convenient and effective for the issuing authority. It would also be more economical than having a large number of distinct forms. Furthermore, this system would avoid the risk of an incorrect warrant form being used, that is a warrant intended to be issued under a particular Act but where the form used corresponds to another Act. This mistake could lead to a search under that warrant being held unlawful, and so evidence found during the search might be deemed inadmissible. Another advantage would be that upon the introduction of a new search warrant provision, the legislature would not need to draft a new search warrant form to correspond with that new provision, as a standard form would be used for all provisions.

---

125 This recommendation is set out in paragraph 3.32 of chapter 3.

4.78 Examples of this type of standard form can be found in other jurisdictions.

(1) Canada

4.79 In Canada section 487(3) of the *Criminal Code 1985* states that a search warrant issued under the section "may be in the form set out as Form 5 in Part XXVIII [of the Code], varied to suit the case". Form 5 requires the issuing officer to complete the following details on the face of the warrant: i) the territorial division where the warrant is issued; ii) a description of the items to be searched for; iii) the offence in respect of which the search is to be made; iv) the location to be searched; v) the hours during which the search may be carried out; vi) the date on which the warrant is issued; and vii) the signature of the issuing authority. The form states that the warrant authorises the entry of the named location to search for the named items, and that those items must be brought before the issuing justice or some other justice.

(2) Victoria

4.80 The standard search warrant form approach is also used in Victoria. A search warrant will be issued by a magistrate under the *Magistrates' Court Act 1989* . The warrant form to be used by a magistrate is prescribed by the *Magistrates' Court General Regulations 2000*.[126] This standard form firstly requires the issuing authority to provide certain fundamental information: i) the name and/or description of what is being searched for; ii) the location where the search is to be carried out; iii) the reason for the search; and iv) who the warrant authorises to carry out the search. The form then has three possible sections to be completed. The first section is completed if the warrant authorises the search for a person. In this case the warrant authorises entry and search of any place where the person is suspected to be and the arrest of that person if found. The second section is to be completed if the search is for "any article, thing or material of any kind". In this circumstance the warrant permits the entry and search of the named premises or vehicle, as well as the arrest of any person who appears to have possession, custody or control of the article, thing or material. This section provides that the item(s) must be brought before the court so that they are dealt with according to law. The third section is concerned with a case where a person is arrested. It provides for two approaches where a person is arrested under the warrant: i) the arrested individual should be brought before a bail justice or a court as soon as practicable to be dealt with according to law, or ii) the arrested individual is to be released on bail. The issuing authority can indicate on the warrant form which option is to be exercised by the executing officer if an arrest is necessary. Finally, the issuing

126 *Magistrates' Court General Regulations 2000*, Schedule 5, Form 15.

Magistrate must state on the warrant the Act and section under which it is authorised, the time and date of its issuance and provide his or her signature.

(3) Discussion

4.81 As is noted above[127] the Commission is of the view the current system of having individual search warrant forms is inefficient and an uneconomical use of resources and therefore provisionally recommends the introduction of a generic search warrant form. Standard search warrant forms which exist in other jurisdictions may offer guidance on the matter. For example, in Canada the standard Form 5 requires the issuing authority to state the offence in respect of which the search is to be made. Currently Irish search warrant forms have the Act and the section to which the warrant relates printed on the warrant. However, a generic form would simply require the issuing authority to set out these details on the form at the time of issuing. While in Victoria a tick the box system is set out on the standard form so that the issuing magistrate can indicate what the warrant relates to. This approach may be useful in Ireland whereby the issuing authority could indicate on a generic form whether the executing officer may be accompanied by other persons during the search, or whether a previous search warrant application has been made in respect of the premises, person or materials concerned.[128]

4.82 The Commission is also of the view that it would be beneficial for a schedule to be attached to a generic search warrant from which would list all of the provisions which the form may be used to issue a warrant in respect of. In addition, it would also be the case that when a new provision is enacted it would simply be a matter of adding this provision to the existing list, rather than the legislature having to provide a new warrant form. The Commission has recommended at chapter 2CHAPTER 2 that a principal search warrant framework should be implemented in Ireland. If such a framework were to be implemented it may be appropriate for i) a generic search warrant form to be contained within its terms, and ii) a schedule attached to such a form to refer to the framework as the guiding authority in respect of an issued search warrant, for example the protocol to be followed with regard to claims of legal

---

127 See generally 4.76.

128 The Commission provisionally recommends at 3.88 of chapter 3 that a search warrant applicant should be required to disclose that a previous search warrant application has been made in respect if the same premises, person or materials with which the present application is concerned.

professional privilege[129], giving a copy of the search warrant to the owner or occupier[130], or procedure in respect of seizing material.

4.83 The Commission provisionally recommends the introduction of a standard search warrant form to be used when any search warrant is issued. The Commission recommends that a schedule be attached to that standard form, setting out all of the search warrant provisions to which it applies. Where a new search warrant provision is introduced into Irish law the schedule should be updated to reflect this addition, rather than a new search warrant form being drafted as is the current approach.

H Electronically Issued Search Warrants

4.84 In chapter 3, 'Application for Search Warrants', the concept of electronic applications was discussed. If such a system were to be introduced in Ireland, a subsequent corollary may be the provision for electronic issuing of warrants where an electronic application was made. Other jurisdictions where applications by electronic means are permissible have made corresponding provisions for issuing search warrants electronically in response to these applications.

(1) Australia

(a) Commonwealth

4.85 The Commonwealth *Crimes Act 1914*, as amended by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*, sets out that where an electronic application is made and the issuing officer is satisfied that i) a warrant should be issued urgently, or ii) the delay that would occur if the application had to be made in person would frustrate the effective execution of the warrant, a warrant may be issued. In such circumstances the issuing officer is to inform the applicant "by telephone, telex, facsimile or other electronic means" of the terms of the warrant.[131] The applicant must then "complete a form of warrant in terms substantially corresponding to those given by the issuing office" and state the name of the issuing officer, and day and time when the

---

129 For a detailed discussion of legal professional privilege see part B of chapter 6CHAPTER 6.

130 The Commission provisionally recommends at paragraph 5.54 that a copy of the search warrant should be given to the owner or occupier of property at the time when the search warrant is executed, unless it would be detrimental to an investigation or would compromise the safety of executing officers or other individuals to do so.

131 *Crimes Act 1914* (Cth), section 3R(5).

warrant was issued.[132] The Act requires that "not later than the day after the day of expiry of the warrant, or the day after the day on which the warrant was executed, whichever is the earlier, give or transmit to the issuing officer the form of the warrant completed by the applicant".[133] Therefore the applicant completes the warrant form himself or herself, rather than the issuing authority doing so. However, the process does provide the issuing authority with a copy of the completed warrant.

(b) New South Wales

4.86 The *Law Enforcement (Powers and Responsibilities) Act 2002* provides that where the eligible issuing officer is satisfied to issue a search warrant on the basis of an electronic application, there are two possible means of providing the warrant. The first is that the justice may furnish the completed warrant to the applicant.[134] It will be furnished by "transmitting it by facsimile, if the facilities to do so are readily available" and the section explains that the copy produced by that transmission is taken to be the original search warrant document.[135] Thus the electronically transmitted warrant holds the same evidential status as if it had been issued personally to the applicant. The second method for issuing a warrant electronically applied for is that the issuing officer may inform the applicant of the terms of the warrant, as well as the date and time of its issue.[136] The applicant must then complete a form of warrant in the terms indicated by the issuing officer and write on it the name of that issuing officer and the date and time" of issuance.[137]

4.87 The Act does not specify why or when the method of the applicant completing the warrant form should be relied upon in place of the warrant being completed and transmitted by the issuing justice. However, in light of section 61(8) which provides that the warrant should be furnished by facsimile where the facilities to do so are readily available, it may be the case that this method would be used in circumstances where there is no means for the applicant to electronically receive a written copy of the warrant issued by the officer. Furthermore, on the basis of the provision contained in section 61(8), it may be the case that in practice there is a preference for warrants to be completed by the issuing authority and then transmitted to the applicant.

---

132 *Ibid,* section 3R(6).

133 *Ibid,* section 3R(7).

134 *Law Enforcement (Powers and Responsibilities) Act 2002*, section 61(5)(b).

135 Section 61(8).

136 Section 61(5)(b).

137 Section 61(6)(a).

(c) Queensland

4.88 The *Police Powers and Responsibilities Act 2000,* like the New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002*, provides that in response to an electronic application for a warrant, one of two approaches may be used. The Act sets out that the relevant issuing authority must immediately fax a copy to the police officer or law enforcement officer "if it is reasonably practicable to fax the copy".[138] However, if it is not practicable to fax the issued warrant, the Act provides that the issuer must inform the officer of the terms of the warrant and following this the officer must complete a warrant form with i) the details provided by the issuing authority, ii) the issuing authority's name, and iii) the day and time of the warrant's issuance.[139] It is notable that the Queensland Act shows preference for the authority to complete the warrant and then transmit it to the applicant. It is only where this approach is not practicable that the applicant will complete the warrant himself or herself on the basis of the terms detailed by the issuing authority. In both circumstances the police or law enforcement officer must send a sworn application to the issuer. And in a case where the officer completed the warrant himself or herself, he or she must also send the completed warrant form to the issuer.[140] These requirements act as safeguards, in that the applicant is still subject to the authority and checks of the issuer, and also the issuing officer retains proper documentation, in the form of a sworn application and the warrant as issued. Finally the Act states that where a warrant is properly completed by a police or law enforcement officer under the section, that warrant "is, and is taken always to have been, of the same effect as a prescribed authority signed by the issuer".[141]

(d) Tasmania

4.89 The *Search Warrants Act 1997* provides for electronic issuing of search warrants. Section 15 of the Act repeats the provisions found in the Commonwealth *Crimes Act 1914*, as amended.

(e) Victoria

4.90 The *Confiscation Act 1997* provides that a magistrate or judge may issue a search warrant, if he or she is satisfied to do so, on the basis of an affidavit submitted electronically by the applicant, as well as any further

---

138 *Police Powers and Responsibilities Act 2000*, section 801(1).

139 Ibid, section 801(2).

140 *Police Powers and Responsibilities Act 2000*, section 801(4). Section 801(5) specifies that these documents must be sent to the issuing authority "generally at the first reasonable opportunity".

141 Ibid, section 801(6).

information which he or she required the applicant to give so as to ground the application.[142] The Act requires the issuing authority to i) inform the applicant of the terms of the warrant and the date and time of its issuance, and ii) if transmission by facsimile machine is available, to transmit a copy of the warrant by this means.[143] However, if it is not possible to transmit the warrant to the applicant by fax, the applicant may complete a warrant form with the terms which have been expressed by the issuing authority. The applicant must then "write the name of the magistrate or judge and the date on which and the time at which the warrant was issued".[144] This warrant, as completed by the applicant, must then be sent to the issuing authority no later than the day after the day of the execution of the warrant, or after the day on which the warrant expired, whichever comes first.[145] This procedure therefore provides that the issuing authority will either retain a copy of the warrant where he or she has completed it and then transmitted it electronically, or alternatively he or she will be subsequently provided with the warrant as completed by the applicant.

(2) Canada

4.91 In Canada the *Criminal Code 1985* provides that a justice may issue a warrant by electronic means. Two situations are provided for, the first being where the electronic means does not produce a written document, the second is where the electronic means does produce a written document. In the first situation the Code state that the justice shall complete and sign a warrant and shall direct the applicant to "complete, in duplicate, a facsimile of the warrant". The justice shall then, as soon as is practicable, have the warrant filed with the court clerk.[146] Where, however, the justice issues the warrant by means of a telecommunication that produces a written document, the justice shall complete and sign a warrant and then transmit the warrant to the applicant by the electronic means. Again the justice must have the warrant filed with the court clerk.[147]

(3) United States

4.92 The United States *Federal Rules of Criminal Procedure* provide that where a magistrate agrees to issue a warrant is response to an electronic application, the applicant "must prepare a proposed duplicate original warrant

---

142 *Confiscation Act 1997* (Vic), section 81(4).

143 *Ibid*, section 81(5).

144 *Confiscation Act 1997* (Vic), section 81(6).

145 *Ibid*, section 81(6).

146 *Criminal Code* 1985, section 487.1(6).

147 *Criminal Code* 1985, section 487.1(6.1).

and must read or otherwise transmit the contents of that document verbatim to the magistrate".[148] Where the applicant reads the contents of the proposed duplicate warrant, the magistrate must enter those contents into an original warrant. On the other hand, if the applicant transmits the contents "by reliable electronic means", the transmission may serve as the original warrant.[149] The Rules also provide that the magistrate may modify the original warrant, and if this is done must transmit the modified version to the applicant by reliable electronic means.[150] Finally, it is provided that the magistrate must either sign the original warrant and transmit it by reliable means to the applicant, or else direct the applicant to sign the magistrate's name on the duplicate warrant.

(4) Discussion

4.93 Issuing search warrants by electronic means has been provided for in a number of other jurisdictions. Electronically issuing is employed for the purpose of responding to an electronic application. As noted in section G of chapter 3, electronic applications are provided for in other jurisdictions only for limited cases, generally where the matter is urgent or it is impracticable to make a search warrant application in person. Thus it is the case that the method of electronically issuing search warrants is also only used in these limited circumstances in these jurisdictions. Electronic issuing is not the standard method used.

4.94 Where it is necessary for the purposes of issuing a search warrant by electronic means, legislation in these jurisdictions generally provides that one of two approaches may be used. The first is that the issuing authority will complete the warrant and transmit it by electronic means to the applicant. The second is that the applicant will complete the warrant, setting out the terms and provisions specified by the issuing authority. Where the warrant is completed by the applicant it is often the case that the warrant must be returned to the issuing authority. The requirement acts as a safeguard in that the issuing authority has the opportunity to inspect the warrant and to ensure that the applicant did in fact complete the warrant with the precise terms that he or she specified.

4.95 In the previous chapter the Commission set out a number of possibilities in relation to introducing an electronic application system in Ireland. The following sections set out the corresponding arrangements with regard to issuing search warrants. The Commission identifies that the issue of the location of the issuing authority, as discussed above at section E, is of relevance to this issue. Case law has established that a search warrant must be

---

148 *Federal Rules of Criminal Procedure,* Rule 41(e)(3)(A).

149 *Federal Rules of Criminal Procedure,* Rule 41(e)(3)(B).

150 *Federal Rules of Criminal Procedure,* Rule 41(e)(3)(C).

issued by an authority who is physically within the district where the warrant relates to. In light of this it may be required that an electronically issued warrant would have to be issued within the relevant district also. However, the Commission has provisionally recommended that the law be amended so that a search warrant would be recognised as valid where it was issued by a District Court judge where he or she was not physically within the district to which the warrant applies at the time of issuing.[151] If this amendment were to be put in place the electronic issuing of a search warrant from outside the district boundaries would not be problematic.

(a) Possible reform options

(i) An entirely electronic system for issuing search warrants

4.96 The Commission has discussed the implementation of an entirely electronic search warrant application system at 3.58 to 3.60. The Commission has expressed the view that such applications should be made by a means that would produce a written format, for example by means of a dedicated database. Thus if all search warrant applications were to be submitted electronically, it may be the case that all search warrants should be subsequently issued electronically. As already noted, the Commission considers that a physical application in court for the warrant would still be required Where an issuing authority received an electronic application, he or she would be required to assess the application and if satisfied to issue the search warrant he or she could complete the warrant form on the electronic database and then transmit this to the applicant. Therefore the application would be transmitted to an authority who is assigned to the district concerned, and so the application would be assessed, and where suitable issued, by a local authority.

4.97 A primary advantage of this approach is that a central database of all issued search warrants could be created and maintained.

(ii) Provision for electronically issuing search warrants only in limited circumstances

4.98 It has been noted above that electronic issuing is generally relied upon in other jurisdictions in limited circumstances. Typically there is a requirement that the matter is urgent or that the delay that would arise if the search warrant was obtained in the usual, personal manner would be detrimental to the investigation. The Commission has considered whether it would be suitable to implement a similar approach in Ireland. Thus search warrants could be applied for, and subsequently issued, only in limited circumstances. For example, electronic issuing may be relied upon in urgent or emergency situations where it is not feasible for the application and issuing to

---

151 See generally 4.51 above.

be carried out personally between the applicant and issuing authority. It may also be effective in cases where a warrant is required urgently out of hours, for example at the weekend, as the issuing authority would be enabled to electronically transmit the warrant to the applicant easily and with speed at any time. This system could also be utilised so as to transmit a warrant to an officer who is carrying out surveillance on a location and where he or she requires the warrant but it is not practical or desirable for him or her to leave that surveillance location.

4.99 With regard to providing for electronic issuing in limited cases, the Commission invites submissions on whether a search warrant may only be electronically issued by the issuing authority completing the warrant and then transmitting this written form it to the applicant, for example by fax or email, or whether an applicant could be permitted to complete the warrant himself or herself in line with the terms stated by the issuing authority. The Commission notes that if the system was limited to the former approach, this may pose difficulties where an applicant does not have immediate access to a device which could electronically transmit a written document.

(iii) All issued search warrants to be filed electronically (e-filing)

4.100 This approach would involve a limited version of issuing search warrants by electronic means. Essentially this approach would involve the issuing authority completing the search warrant form on an electronic database. This form could then be filed and stored on this system. However, the warrant itself would not be transmitted to the applicant electronically, rather a hard copy would be it printed and given to the applicant. Search warrants would continue to be issued at a district level under this approach, it would simply be the case that the database would be accessible at district level and documents filed within every district would be stored centrally, such that all districts would be connected on the one database.

4.101 As noted in the previous chapter with regard to the possibility of e-filing all search warrant applications, the Courts Service has developed plans and strategies with a view to incorporating information and communication technology to a greater degree in the day to day running of the service. The Commission is of the view that implementing a search warrants database, where all applications and issued search warrants would be filed and stored, would be in line with Courts Service plans and intentions.[152]

4.102 The main advantage of e-filing all issued warrants is that there would be a central deposit of all warrants issued. This would provide a means for quickly and efficiently finding a copy of an issued warrant at a later date, for

---

152 See generally 3.66, chapter 3CHAPTER 3.

example if an issuing authority wanted to ascertain whether a warrant had previously been issued in respect of a person, premises or property, or if proceedings subsequently arose in respect of the warrant.

(b) Conclusion

4.103 *The Commission invites submissions as to whether a provision should be implemented in Ireland providing for electronic issuing of search warrants.*

CHAPTER 5 EXECUTION OF SEARCH WARRANTS

A Introduction

5.01 The function of a search warrant is to authorise particular personnel to enter and search a place without the consent of the owner or occupier. Thus the execution of the warrant is essentially a key element of the search warrant process.

5.02 In this chapter the Commission discusses the execution of search warrants. Part B discusses who may execute the search warrant, including provisions for the executing authority to be accompanied by other persons. Part C is concerned with the period of validity applicable to search warrants, that is, the timeframe within which they must be executed after they have been issued. Part D considers the time at which execution is carried out. The use of force when executing search warrants is discussed in part E. The presence of the occupier during the execution of a search is discussed in part F. In part G the Commission considers whether a copy of the search warrant should be given to the owner or occupier at the time of the warrant's execution. Part H is concerned with the concept of an occupier's notice. Part I details the procedure under certain legislation for dealing with persons present at the place being searched under a warrant. In part J the Commission discusses multiple executions of a single search warrant. Part K discusses the position with regard to finding material for which the search warrant has not been issued; for example evidence of a separate offence to which the search warrant investigation does not relate. Part L discusses the seizure of items found during the execution of a search warrant. Part M considers the concept of a search and seizure code of practice. In part N the Commission discusses electronic recording of the act of executing the search warrant.

B Who May Execute the Search Warrant

5.03 The execution of a search warrant involves a significant interference with an individual's, or corporate entity's, property and privacy. For this reason legislation and search warrant forms specify who may execute the warrant, whether force may be used by executing officers and other procedural requirements. As Keane J observed in *Simple Imports Ltd. v Revenue Commissioners*

> "[s]earch warrants...entitle police and other officers to enter the dwellinghouse or other 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".[1]

The Commission has noted in chapter 4 that a warrant will state the name of the individual who it authorises to carry out the search. Often the individual named will be a member of the Garda Siochana, generally an officer who is involved it the investigation for which the warrant is sought. A search warrant may also be directed to an individual who holds a particular office and is involved in the investigation for which the warrant is required. For example, the *Customs and Excise (Miscellaneous Provisions) Act 1988* states that a search warrant may authorise a named officer of Customs and Excise to enter and search the premises[2]. The *Company Law Enforcement Act 2001* provides that a warrant may authorise entry and search by a named designated officer.[3] The *Carer's Leave Act* 2001states that an inspector may execute the warrant.[4] The *Aviation Regulation Act 2001* permits the entry and search of a premises under a search under warrant by an "authorised officer".[5] Similarly, the *Railway Safety Act 2005* provides that a search warrant may be directed for execution an inspector.[6]

5.04 Although the person named and authorised in the warrant will be responsible for its execution, he or she may be accompanied by other individuals. In many cases where a warrant is to be executed by a named member of the Garda Siochana, the warrant will provide that he or she may be

---

1 [2000] 2 IR 243, at 250.

2 Section 3.

3 Section 30. An 'officer' is defined by section 30(7) of the *Company Law Enforcement Act 2001* as being either the Director of Corporate Enforcement or an officer authorised by the Director to act in that capacity.

4 Section 32. Section 32(2) states that an inspector is a person appointed for the purposes of the Act.

5 Section 43. An authorised officer is an individual who is appointed under section 42 of the *Aviation Regulation Act 2001*. The Acts contains a list of the possible individual officers who may be appointed as authorised officers.

6 Section 73. An inspector is an individual appointed by the Railway Safety Commission under section 73 of the Act.

assisted by other members of the Garda Siochana.[7] Some Acts make it possible 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 from outside the Garda Siochana. This may be particularly useful where a technical or other knowledge-specific matter is likely to arise during the course of the search.[8] Similarly, where the warrant is directed for execution to an officer who is not a member of the Garda Siochana, the warrant may also provide that the officer can be accompanied and assisted by other parties. Such provisions may enable a member of the Garda Siochana, another officer in the same role as the executing officer, or any other person to accompany the named individual during the execution of the warrant.[9]

C The Validity Period of a Search Warrant

5.05 In chapterCHAPTER 1 1 the Commissions observed that general search warrants, which existed until the 18th century, were extremely uncertain as to how long they would remain valid for.[10] Once issued a general warrant (or 'writ') continued to exist until six months after the death of the monarch under whose reign they were issued. Thus a warrant had the potential to last for years. By contrast, modern search warrants are far more certain and limited in respect of their validity period. This is the result of the rejection of the general warrant and the implementation of requirements that warrants be specific and precise in nature.

5.06 The Act under which a search warrant is issued will specify its duration. Once this date has passed the warrant is regarded as spent,

---

7 Examples of this are included in the *Misuse of Drugs Act 1977*, *Control of Dogs Act 1986*, *Criminal Law (Sexual Offences) Act 1993* and the *Criminal Justice (Miscellaneous Provisions) Act 1997.*

8 Examples of provisions allowing for the attendance of "other persons" are found in the *Child Trafficking and Pornography Act 1998*, *Copyright and Related Rights Act 2000, Illegal Immigrants (Trafficking) Act 2000, Criminal Justice (Theft and Fraud Offences) Act 2001*, *Prevention of Corruption (Amendment) Act 2001*, *Immigration Act 2003* and *Criminal Justice Act 2006.*

9 Such provisions can be found in the *Customs and Excise (Miscellaneous Provisions) Act 1988*, *Finance Act 1995*, *Company Law Enforcement Act 2001*, *Communications Regulation Act 2002*, *Safety, Health and Welfare at Work Act 2005*, *Disability Act 2005*, *Sea-Fisheries and Maritime Jurisdiction Act 2006* (as amended by the *Criminal Justice Act 2007*) and *Pharmacy Act 2007*.

10 See generally part C of chapter 1CHAPTER 1.

regardless of whether or not it has been executed.[11] The validity period of a search warrant depends on the Act under which it was issued. A validity period of one week applies where a warrant is issued, for example, under the *National Monuments (Amendment) Act 1987*[12], *Criminal Justice (Miscellaneous Provisions) Act 1997* (as amended by *Criminal Justice Act 2006*),[13] *Illegal Immigrants (Trafficking) Act 2000*[14], *Criminal Justice (Theft and Fraud Offences) Act 2001*[15] or the *Immigration Act 2004.*[16] The *Criminal Assets Bureau Act 1996* provides that a search warrant issued by a judge of the District Court is valid for one week.[17] As amended by the *Proceeds of Crime (Amendment) Act 2005*, a warrant issued under the 1996 Act shall be valid for one week "unless it appears to the judge that another period, not exceeding 14 days, would be appropriate in the particular circumstances of the case".[18] By contrast, a validity period of one month exists for warrants issued under other Acts, including the *Prohibition of Incitement to Hatred Act 1989*[19], *Firearms and Offensive Weapons Act 1990*[20], *Criminal Damage 1991*[21], *Merchant Shipping (Salvage and Wreck) Act 1993*[22], *Criminal Law (Sexual Offences) Act 1993*[23], *Control of*

---

11 For example, in *The People (D.P.P.) v Curtin*, Circuit Criminal Court, 23 April 2004, *The Irish Times*, 24 April 2004, Gardai were reported as having obtained a search warrant under the *Child Trafficking and Pornography Act 1998* on the 20 May 2002. The warrant was valid for seven days. On the 27 May 2002 Gardai searched the accused's home and seized certain materials. At trial, the Circuit Criminal Court was reported as holding that the seven day period included the day on which the warrant was issued. Thus the warrant was spent by midnight on 26 May 2002. As a result, the search warrant was invalid and the evidence obtained by virtue of the search was not admissible. As there was no other evidence against the accused he was acquitted.

12 Section 22.

13 Section 10 of the 1997 Act, as inserted amended by section 6 of the 2006 Act.

14 Section 7.

15 Section 48.

16 Section 15.

17 Section 14 of the 1996 Act.

18 Section 16 of the 2001 Act.

19 Section 9.

20 Section 20.

21 Section 13.

22 Section 57.

23 Section 10.

Horses Act 1996[24], *Company Law Enforcement Act 2001*[25], *Prevention of Corruption (Amendment) Act 2001*[26] and the *Communications Regulation Act 2002*[27]. Another variation can be found in both the *Copyright and Related Rights Act 2000*[28] and *National Oil Reserves Agency Act 2007*[29]; they provide that a search warrant issued under their terms is valid for 28 days.

5.07 Where a search warrant is issued by a member of the Garda Siochana, the period of validity is far more limited as these warrants only remain alive for a 24 hour period. Examples of this can be found in the *Criminal Assets Bureau Act 1996*[30], *Criminal Justice (Drug Trafficking) Act 1996*[31] and the *Prevention of Corruption (Amendment) Act 2001*[32].

5.08 A recent legislative development is notable. Section 20 of the *Companies Act 1990*, as amended by section 5(c) of the *Companies (Amendment) Act 2009*, provides that the validity period of a search warrant shall be one month from the date of its issue "but that period of validity may be extended". The 1990 Act, as amended, provides that the officer may, during the period of validity of the warrant, apply to a judge of the District Court for an order extending the validity period. This application must be grounded upon information on oath by the officer "stating, by reference to the purpose of purposes for which the warrant was issued, the reasons why he considers the extension to be necessary".[33] If the District Court judge is satisfied that there are reasonable grounds for believing, on the basis of the information 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 such period as, in the opinion of the judge, is appropriate and just".[34] The search warrant must be suitably endorsed by the judge to indicate this extended period of validity.

(1) Discussion

---

24 Section 35.

25 Section 30.

26 Section 5.

27 Section 40.

28 Sections 143 and 261.

29 Section 48.

30 Section 14.

31 Section 8.

32 Section 5.

33 *Companies (Amendment) Act 2009*, section 5(c).

34 *Ibid*, section 5(c).

5.09 The Commission is aware that search warrants are generally executed very soon after being issued and that it is not common for cases to arise where a search warrant is not executed before its validity period expires. Nonetheless, it appears that the variation between validity periods is somewhat challenging, as it requires executing officers to be aware of the validity period relating to each particular search warrant.

5.10 The Commission invites submissions as to whether greater consistency should be implemented in respect of search warrant validity periods. It has been suggested to the Commission that a single validity period might be recommended. In relation to this, different periods of validity have been suggested as appropriate. These periods vary from 7 days to 30 days. It is notable that in the U.K. the *Serious Organised Crime and Police Act 2005* amended the *Police and Criminal Evidence Act 1984* (PACE) to provide that entry and search under a search warrant "must be within three months from the date of its issue".[35] Originally PACE had stated that entry and search under a warrant had to be carried out within one month from the date of its issue.

5.11 The Commission acknowledges, however, that a standard validity period may be too broad in nature. An alternative to this approach might be the categorisation of validity periods. Categorisation would be a move towards greater consistency without being too prescriptive. This approach would entail categorising search warrants with regard to the offence, or suspected offence, to which they relate. Each search warrant category would then have a corresponding validity period. Thus where a search warrant was issued, the category within which that type of warrant falls would determine the validity period to apply. For example, a suspected theft offence would generally involve searching a premises to determine whether stolen material is located there. As executing officers will usually have a description of the stolen material, they know what they are looking for. By contrast, a suspected money laundering or fraud investigation may need to be far more in depth and therefore require greater background work so as to determine what exactly is being searched for under the warrant. Thus a shorter validity period, such as 7 days, may be reasonable in respect of a theft offence, whereas a more complex investigation may require a more extensive period, such as 30 days. The crux of this approach would be the establishment of fixed validity period categories which would relate to each particular search warrant. This in itself would lead to greater standardisation of validity periods.

5.12 The Commission invites submissions as to whether greater consistency should be implemented with regard to the validity period of search warrants. The Commission is of the view that a categorisation approach may be more appropriate than a single validity period, but welcomes submissions on this matter.

---

35 *Police and Criminal Evidence Act 1984*, section 16(3), as inserted by the *Serious Organised Crime and Police Act 2005*, section 114(8).

D The Time of the Execution

5.13 Irish legislation generally does not contain particular specifications as to the time of the execution of a search warrant issued under its terms. Thus no preference is shown by the provisions for execution of the warrant by day or by night. An exception to this was the *Merchandise Marks Act 1931* (repealed) which stated that entry under the warrant must be "at any reasonable time by day".[36] Some Acts simply state that a search warrant issued under their authority permits entry within the warrant's validity period. No further specification is made as to the time of execution.[37] However, other Acts state that the warrant may be executed at "any time or times".[38] Order 26, Rule 6 of the *District Court Rules 1997* states that a search warrant "may be issued or executed on any day and at any time". Similarly the Revenue Commissioners' Customs and Excise Enforcement Manual states that a search warrant to which the manual applies "may be executed at any time of the day or night, including Sunday".[39]

5.14 In contrast to Ireland, the law in some other jurisdictions specifies when a search warrant may be executed. Examples of such provisions are set out below.

(1) United Kingdom

5.15 The *Police and Criminal Evidence Act 1984* (PACE) states 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".[40] Similarly Code of Practice B; which supplements the provisions within PACE in respect of search and seizure; states that

---

36 Section 24. The 1931 Act was repealed by the *Consumer Protection Act 2007.* Section 32(6) and 32(10) of the 2007 Act authorise entry of premises at any reasonable time.

37 Examples of this type of provision can be found in the *Control of Dogs Act 1986*, *Broadcasting Act 1990*, *Trade Marks Acts 1996*, *Child Trafficking and Pornography Act 1998*, *Criminal Justice (Theft and Fraud Offences) Act 2001*, *Prevention of Corruption (Amendment) Act 2001* and *Immigration Act 2003*.

38 Examples of this wording can be found in the *Prohibition of Incitement to Hatred Act 1989*, *Video Recordings Act 1989*, *Criminal Damage Act 1991*, *Control of Horses Act 1996*, *Company Law Enforcement Act 2001*, *Communications Regulations Act 2002*, and *Criminal Justice Act 2006* (amending section 6 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*).

39 *Customs and Excise Enforcement Manual*, at 2.8. Available at www.revenue.ie.

40 *Police and Criminal Evidence Act 1984*, section 16(4).

"searches must be made at a reasonable hour unless this might frustrate the purpose of the search".[41] Neither the Act nor the Code explains what is considered to be a reasonable hour.

5.16 Stone has commented that 'reasonableness' will generally be determined on the basis of the nature of the premises to be entered; that is whether it is commercial or domestic; and the identity of the occupants, if any.[42] Thus, while it may not be reasonable to enter a family home at 10 p.m., it may not be unreasonable to enter a business premises, such as a public house, which is carrying on trade at that time. Generally, reasonableness is understood to involve a degree of limitation, it is not absolute. Therefore the facts of a particular case will have to be considered so as to determine whether something was reasonable in those circumstances.

(2) Canada

5.17 The Canadian *Criminal Code 1985* states that a search warrant issued under its terms "shall be executed by day", unless

5.18 a) the justice is satisfied that there are reasonable grounds for it to be executed by night;

5.19 b) the reasonable grounds are included in the information; and

5.20 c) the warrant authorises that it be executed by night.[43]

(3) Australia

(a) Commonwealth

5.21 The Commonwealth *Crimes Act 1914*, as amended by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*, specifies that where a search warrant is issued, the issuing officer must state on the face of the warrant "whether the warrant may be executed at any time or only during particular hours".[44]

(b) New South Wales

5.22 The *Law Enforcement (Powers and Responsibilities) Act 2002* states that a search warrant may be executed by day "but must not be executed by

---

41 *Code B: Code of Practice for Searches of Premises by Police Officers and the seizure of Property Found by Police Offices on Persons or Premises*, at 6.2.

42 Stone, *The Law of Entry, Search and Seizure* (4th ed Oxford University Press 2005) at 110.

43 *Criminal Code 1985*, section 488.

44 *Crimes Act 1914* (Cth), section 3E(5).

night unless the eligible issuing officer, by the warrant, authorises its execution by night".[45] The Act goes on to explain that the issuing officer is not to authorise the execution of a warrant by night unless satisfied that there are reasonable grounds for doing so. These grounds are stated by the 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.[46]

The Act defines day time hours as those between 6 am and 9 pm on any day, and night time as being period between 9 pm on any day and 6 am on the following day.[47]

(c) Queensland

5.23 The *Police Powers and Responsibilities Act 2000* provides that a search warrant must state within its terms if the warrant is to be executed at night, and if so the hours when the place may be entered.[48] The same wording can be found in the Queensland *Crime and Misconduct Act 2001* in respect of search warrants issued under its provisions.[49]

(d) Western Australia

5.24 The *Criminal Investigation Act 2006* states that a search warrant must be executed between 6 a.m. and 9 p.m. unless the executing officer reasonably suspects that if it were executed during those hours "the safety of any person, including the officer, may be endangered or the effectiveness of the proposed search may be jeopardised".[50]

---

45 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), section 72(1).

46 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), section 72(2).

47 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), section 72(3).

48 *Police Powers and Responsibilities Act 2000* (QLD), section 156.

49 *Crime and Misconduct Act 2001* (QLD), section 91.

50 *Criminal Investigation Act 2006* (WA), section 43(6).

(4) United States

5.25 Ployviou has commented that there is a "general agreement that night-time entries and searches involve a particularly severe impairment of the values underlying the Fourth Amendment".[51] Therefore, it appears that, as a matter of constitutional law, searches conducted in the middle of the night should require a considerably more persuasive justification than "ordinary daytime searches".[52]

5.26 In *Gooding v United States*[53] the U.S. Supreme Court held that a "special showing of need" for a night-time search was required under the principles of the Fourth Amendment of the U.S. Constitution. The Court took the view that a night-time search was particularly intrusive in nature. According to La Fave *et al* restrictions on the time of execution of warrants can be found throughout state law; generally officers are confined to executing searches during daytime hours and may only do so at night time where special authorisation has been afforded on special grounds.[54]

(5) New Zealand

5.27 The New Zealand Law Commission has considered the time of execution in its report on Search and Surveillance Powers.[55] The Report observed that variations are found between New Zealand provisions providing for search warrants. Several regimes authorise the execution of warrants at any time, while others expressly state that execution may occur at any time, day or night. By contrast, some New Zealand provisions state that execution of warrants should occur at a time that is "reasonable in the circumstances".

5.28 Having considered these variations, as well as examining the approach of other jurisdictions, the Law Commission recommended that a provision authorising the execution of warrants at a time which is reasonable in the circumstances was the most favourable. According to the Commission this standard should be applied to all search warrant regimes and would provide for flexibility to take account of differences where necessary. The Commission went on to recognise that it may not always be possible to execute a search warrant

---

51 Polyviou, *Search and Seizure: Constitutional and Common Law* (Duckworth Ltd. 1982) at 124.

52 *Ibid*, at 124.

53 (1974) 416 U.S. 430.

54 LaFave, Israel and King, *Criminal Procedure* (4th ed Thomson West 2004) at 166.

55 New Zealand Law Commission, *Search and Surveillance Powers.* (Report 97 2007).

during daytime hours and that the provision for reasonableness would allow for this reality.[56]

5.29 The New Zealand *Search and Surveillance Bill 2009* has included a reference to the time of execution. Section 101(3)(b) states that 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".[57] Thus rather than specifying particular hours during which a search warrant may be executed, the Bill has left the matter to the issuing authority to determine whether a specification as to time should be made in the circumstances.

(6) Discussion

5.30 Although there is no legislative specification as to the time when a search warrant is executed, the Commission has been informed that a majority of searches under warrant are carried out during day time hours. The Commission has also been advised that when there is nobody present at the premises to which a search warrant relates, executing officers will generally wait until the occupier or person in control of the premises returns, so that he or she is informed of the search warrant, before entering to execute the warrant. Therefore it may be the case that a search warrant is not executed until after daytime hours because that is when the occupier or person in control of the premises is present.

5.31 The Commission believes that the flexibility which exists under the current system should be retained. Such flexibility enables authorities to execute search warrants at a time which is most suitable in the circumstances of each case. This is particularly beneficial in circumstances when the occupier or person in control of the premises is not present at the location during certain hours. Although the Commission is in favour of retaining a general position in respect of execution times, the Commission invites submissions as to whether a requirement for reasonableness should be introduced. A requirement that search warrants be executed at a time which is reasonable in the circumstances would retain flexibility and subjectivity in respect of each search, but would also require executing authorities to consider whether the time of the search is reasonable, and if not to determine what time would in fact be reasonable in the circumstances. Therefore, where it is believed that evidence is likely to be destroyed or removed if the warrant is not executed immediately it may be reasonable to execute a warrant late at night, whereas in a case where there is no immediate danger to the investigation it may not be reasonable to execute the search late at night when it could be carried out at a reasonable hour the

---

[56] *Ibid*, at 163.

[57] Search and Surveillance Bill 2009, section 101(3)(b)(i).

next morning. A requirement of reasonableness would also prevent targeting or harassment of occupiers as the time of the search would have to be justified on the basis of the facts of the case.

5.32 *The Commission invites submissions as to whether a requirement of reasonableness should be implemented in respect of the time of a search, such that the time when a search warrant is executed would have to be reasonable in the circumstances.*

E The Use of Force in Executing Search Warrants

5.33 Walsh has stated that as a primary function of a search warrant is to provide legal authority to enter and search private property in the absence of the consent of the owner, "it follows that the right to use force, where necessary, in order to gain access to the property is an integral element of the authority conferred by the warrant".[58] At common law it was accepted that force may be used where necessary. In *Semayne's Case*[59] it was clearly recognised that, although the house of every person is his castle and may not be unduly interfered with, force may be used where necessary. The Court explained that "[i]n all cases where the King is party, the sheriff may break the party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter".[60] The Court limited this power by holding that before forcibly entering the house, the sheriff had to "signify the cause of his coming and make a request to open doors", and this request of admission must be denied if the entry was to be legally justified.[61] This position followed through to later centuries. With regard to the position in the eighteenth century Hale has explained that when a search was to be executed under warrant, "[i]f the door be shut, and upon demand it be refused to be opened by them within...the officer may break open the door, and neither the officer nor the party that comes in his assistance are punishable for it".[62] According to Hayes the procedure in the mid-nineteenth century was as follows: "should the officer find the outer door closed against him, he may, after an audible demand of admittance, and notification of his purpose, break into the premises, if not opened to him. So also, upon finding the inner doors, cupboards [or] boxes locked, he should demand the keys, and upon or refusal to produce them, the locks may be

---

58 Walsh, *Criminal Procedure* (Thomson Round Hall 2002) at 414.

59 [1604] 77 ER 194; 5 Co. Rep. 91a.

60 *Ibid*, at 195.

61 *Ibid*, at 195-196.

62 Hale, *Historia Placitorum Coronae, Volume II* (Originally published by S. Emlyn 1736, Reprinted by Professional Books Ltd. 1971) at 151.

forced". [63] More recently, Stone has commented that "it seems to be generally accepted that at common law the exercise of entry powers could only be effected by force where permission to enter had been sought and refused".[64] On this point Stone refers to the English case *Swales v Cox*[65], where Donaldson LJ. noted that at common law "it was an essential precondition that there should have been a demand and refusal by the occupier to allow entry before the doors could be broken".[66]

5.34 Irish legislation under which search warrants are provided for state that force may be used during the warrant's execution, where such is necessary. It can be seen that while some provisions simply state that force may be used, others specify that *reasonable* force may be used. It appears that the use of the word 'reasonable' in respect of force used during search warrant execution was first introduced in the *Criminal Justice (Miscellaneous Provisions) Act 1997* and that "reasonable force" has been referred to in the majority of search warrant provisions enacted since then.[67] Thus in more recent years search warrant provisions have been concerned that any force used is *reasonable*.

(1) Force v Reasonable force

5.35 As noted, there is a variation within Irish Acts as to whether 'force' or 'reasonable force' may be used when executing a search warrant. All Irish search warrant provisions require that the use of force must be necessary. This requirement acts as a safeguard against an arbitrary use of force. The use of the word 'reasonable' is another safeguard in respect of the use of force; essentially it requires any force used to be proportionate and not excessive.

---

63 Hayes, *Criminal Law. Volume II* (Hodges and Smith 1842) at 790. See also generally Montgomery, *The Justice of the Peace for Ireland* (3rd ed Hodges, Foster and Co. 1871) at 66.

64 Stone, *The Law of Entry, Search and Seizure* (4th ed Oxford University Press 2005) at 18. Ryan and Magee have also commented that if the use of force was to be justified at common law "a demand for admission ought first to be made and be refused". *The Irish Criminal Process* (Mercier Press Ltd. 1983) at 142.

65 [1981] 1 All E.R. 1115; [1981] 1 QB 849.

66 *Ibid*, at 1118.

67 An exception is section 20 of the *Companies Act 1990*, as substituted by section 30 of the *Company Law Enforcement Act 2001*, which states that a search warrant issued under its terms authorises entry of a premises "if necessary, by force". The amendments made to section 20 of the 1990 Act by section 5 of the *Companies (Amendment) Act 2009* did not affect this.

5.36 In a number of other jurisdictions, 'reasonableness' is the standard requirement to be adhered to where it is necessary to use force during a search. In the United Kingdom, the *Police and Criminal Evidence Act 1984* Code of Practice B states that "reasonable and proportionate force" may be used if necessary.[68] In Australia, the Commonwealth *Crimes Act 1914*, as amended, states that the level of force that may be used is that which is "necessary and reasonable in the circumstances".[69] While Acts in a number of jurisdictions afford the authority to executing officers to use such force as is "reasonably necessary". These include: *Crimes Act 1958* and the *Confiscation Act 1997* in Victoria[70], *Police Powers and Responsibilities Act 2000*[71] in Queensland and *Criminal Investigation Act 2006*[72] in Western Australia. The New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002* also refers to "force as is reasonably necessary", and it further explains that an executing officer may "disable any alarm, camera or surveillance device at the premises" where it is reasonably necessary to do so for the purpose of entering the premises.[73] The *Search and Surveillance Bill 2009* in New Zealand also refers to the use of any force that is reasonable for the purposes of entry, search and seizure as authorised by the warrant.[74]

5.37 In light of the fact that force used during a search may result in physical damage to or interference with a person's possessions, the Commission is of the view that the additional element of reasonableness is advisable. Therefore the Commission provisionally recommends that 'reasonable force' should be the standard phrase used with regard to the use of force when executing any search warrant. In addition, the Commission is of the view that it would be appropriate if this standard provision was set out in the principal search warrant framework with has been provisionally recommended by the Commission in the Consultation Paper.[75]

---

68 *Code of practice for searches of premises by police officers and the seizure of property found by police officers on persons or premises*, at 6.6.

69 Section 3G.

70 Section 342 of the 1958 Act and section 85 of the 1997 Act. .

71 Section 614.

72 Section 16.

73 Section 70.

74 Section 108(c).

75 See generally chapter 2CHAPTER 2.

5.38 *The Commission provisionally recommends that a single standard of "reasonable force" be implemented in respect of the use of force, where necessary, when executing a search warrant*.

(2) Requirements to be met if force is to be used

(a) Failure of request to enter

5.39 The issue of forcible entry under statute was considered by the Court of Criminal Appeal in *The People* (*D.P.P.) v Laide and Ryan*.[76] The Court was concerned with section 6(2) of the *Criminal Law Act 1997*, which states that for the purpose of arresting a person without a warrant for an arrestable offence, a member of the Garda Siochana may enter a premises, if need be by the use of reasonable force. In respect of this section, the Court held that:

> "before the somewhat draconian power of forced entry is invoked there would have to have been either no response from a knock on the door or ring of the doorbell, or in the case where such an inquiry is met by the door being opened by an occupant a request for entry would have to be first uttered and subsequently rejected, before the Gardai would be entitled to make a forcible entry".

The requirements set out by the Court of Criminal Appeal in this case are quite in line with common law principles. There is a requirement for a request to enter followed by no response, or a refusal to consent to entry, before forcible entry may be effected.

(b) Necessity

5.40 Necessity is a clear requirement in respect of the use of force. All Irish search warrant provisions state that force, or reasonable force, may be used where it is necessary to do. Force must therefore be necessary for the purpose of gaining access to a premises or material. Determining necessity will depend on the facts of individual case. In many circumstances the executing officer may decide that necessity exists where the course of action observed in *The People* (*D.P.P.) v Laide and Ryan* has occurred, that is where request for entry has not been answered or has been rejected. It may also be the case that an executing officer is of the view that immediate entry by force is necessary to prevent the destruction of evidence which might occur if the occupier becomes aware that a search is about to occur.

(c) Within the scope of authority

5.41 In *Dowman v Ireland*[77] the High Court considered to use of force in respect of the arrest of an individual. Barron J. held that an arresting officer is

---

[76] [2005] IECCA 24.

[77] [1986] ILRM 111.

entitled to use such force as is reasonably necessary to effect and maintain an arrest. However, on the facts of the case, Barron J. held that the Garda concerned "was not acting in the execution of his duty and consequently the use of force by him was an unlawful act".[78] Although this case was concerned with an arrest, the requirement of acting within the scope of one's authority, if force is to be used, would also apply to the execution of a search warrant. It has been noted that in Ireland search warrant provisions, and indeed search warrants themselves, generally provide that force may be used where necessary.

F Presence of the Occupier during a Search

5.42 Irish search warrant provisions do not specify whether it is necessary for the occupier of the premises to be present at the time of execution of the search warrant. The Commission is aware that although there is no requirement in law for the occupier to be present at the time of a warrant's execution, in practice it is often the case that the occupier will be there. The Commission notes that generally if the occupier is not present when officers arrive to execute a search warrant they will either wait for him or her to return, or they will leave the location and return to execute the warrant at a later time, when the occupier is present.[79] The Commission also notes that there is usually no objection to the occupier watching officers carry out the search. For example, the Commission is aware that the policy of the Sea Fisheries Protection Authority is to encourage owners or occupiers to remain on the premises during the search. The Commission is also aware that the Office of the Director of Corporate Enforcement, generally in cases where the persons concerned have cooperated with the investigation and where it is believed that this cooperation will continue, will inform the parties of the search and will make arrangements for its execution. Thus the occupier or owner is not only present, but has advance notice of the search.

5.43 Occasionally the occupier is confined to one room or area within the premises so that he or she may not be able to witness the entire search. Such confinement tends to be due to an apprehension that an individual might destroy or conceal evidence before it is found if he or she were given access to the entire premises.

---

78 *Ibid*, at 115.

79 This is not, of course, an absolute rule or requirement. In some cases a decision will be made to proceed with the search although the occupier is not present or has not been informed of the existence of the warrant.

5.44 The Revenue Commissioners' *Customs and Excise Enforcement Manual* lays out guidelines in respect of the presence of the occupier where a search warrant is being executed by a Revenue officer.[80] The Manual states that the owner or person in charge "should be invited to accompany the search team, should circumstances permit".[81] The provision for the owner or person in charge to witness the search is not absolute however; it will depend on the circumstances of the case. As noted above, this limitation may be due to apprehension that the owner or occupier might interfere with the result of the search is he or she were permitted to accompany the search team. Or it may be the case that an invitation to accompany is not offered to the owner of person in charge because the executing officers do not know how to contact him or her, or because necessity to execute the search immediately does not afford the time to do so.

G Giving a Copy of the Search Warrant to the Occupier or Person in Control of the Property

5.45 There is no provision in Ireland which requires a copy of the search warrant to be given to the occupier or person in control of the property to be searched. By contrast, the law in some other jurisdictions requires that a copy of the search warrant be left with, or for, the owner or occupier of the property. This part firstly sets out the requirements in a number of other jurisdictions and then considers the Irish position.

(1) United Kingdom

5.46 The *Police and Criminal Evidence Act 1984*(PACE) states that where the occupier is present, the executing officer shall a) identify himself, b) produce the warrant and c) give a copy of the warrant to the occupier.[82] Where the occupier is not present, but some other person who appears to be in charge of the premises at that time is, the executing officer may carry out the process noted above in respect of that individual.[83] If there no person who appears to be in charge of the premises present at the time, the officer shall leave a copy of the warrant in a prominent place on the premises.[84] In *Redknapp v Commissioner of the City of London Police*[85] the English High Court explained

---

80 *Customs and Excise Enforcement Manual*, available at www.revenue.ie.

81 *Ibid*, at 18.

82 *Police and Criminal Evidence Act 1984*, section 16(5).

83 *Police and Criminal Evidence Act 1984*, section 16(6).

84 *Police and Criminal Evidence Act 1984*, section 16(7).

85 [2008] EWHC 1117.

that section 16(5) of PACE 1984 went beyond requiring an executing officer to produce the warrant to the person in occupation, rather it demanded the officer "to supply him with a copy of it".

5.47 Code of Practice B, which supplements the 1984 Act, further specifies the procedure to be followed. The Code requires that, if the occupier is present, the copy of the search warrant must, if practicable, be given to him or her before the search begins. This obligation need not be satisfied if the officer in charge of the search reasonably believes that this would frustrate the object of the search or endanger officers or other people.[86] If the occupier is not present, the Code requires that the copy of the search warrant should be left in a prominent place on the premises or appropriate part if the premises, and endorsed with the name of the officer in charge of the search[87], the date and the time of the search.[88] Where a copy of the warrant has been either given to or left for the occupier, the warrant shall be endorsed to show that this has been done.[89]

(2) Australia

(a) Commonwealth

5.48 The *Crimes Act 1914*, as amended by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*, requires that when a search warrant is being executed, the executing officer must make a copy of the search warrant available to the occupier of the premises, or to another person who apparently represents the occupier, present at that time.[90] The section does not, however, establish the procedure to be followed where the occupier, or another person representing him or her, is not present at the premises.

---

86 *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*, provision 6.8.

87 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 reasonable believes that disclose of his or her name might put him or her in danger. In such circumstances police identification numbers should be used.

88 Code B, provision 6.8.

89 *Ibid*.

90 *Crimes Act 1914*, as amended, section 3H.

(b) Queensland

5.49 Both the *Police Powers and Responsibilities Act 2000* and the *Crime and Misconduct Act 2001* set out the same requirements in respect of copies of search warrants. If the occupier is present, the Acts state that the officer must give the occupier a copy of the warrant. If the occupier is not present the Acts require the copy to be left "in a conspicuous place". The Acts also provide that if the executing officer reasonably suspects that giving the occupier a copy of the warrant "may frustrate or otherwise hinder the investigation or another investigation" the officer may delay giving the copy, but until for so long as a) the officer continues to have the reasonable suspicion, and b) the officer or another officer involved in the investigation remains in the vicinity of the place to keep the premises under observation.[91]

(c) Western Australia

5.50 The Criminal Investigation Act 2006 provides that if the occupier of the premises is present, before entering the premises the executing officer must give the individual a copy of the search warrant. The Act further provides that if the document is not given to the occupier before the moment of entry, the executing officer must give the copy of the warrant "as soon as practicable after the place is entered". In the event of the occupier not being present, the Act provides that 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. [92]

(3) New Zealand

5.51 In its report Search and Surveillance Powers[93] the New Zealand Law Commission referred to the final report of the New Zealand Search and Search Warrants Committee.[94] The Committee advised that there be a duty on every person executing a search warrant to produce the warrant for inspection upon initial entry and, in response to a reasonable request thereafter. The Committee further advised that where a request was made to provide a copy of the warrant,

---

91 *Police Powers and Responsibilities Act 2000* (QLD) section 158 and *Crime and Misconduct Act 2001* (QLD) section 93.

92 *Criminal Investigation Act 2006* (WA) section 31.

93 New Zealand Law Commission. *Search and Surveillance Powers* (Report 97, 2007).

94 New Zealand Legislation Advisory Committee: Search and Search Warrants Committee. *Search and Search Warrants Final Report* (New Zealand 1988); as referred to by the New Zealand Law Commission, *Search and Surveillance Powers* (Report 97, 2007) at 185.

this should be done no later than 7 days after the request being made.[95] Having considered the Committee's report, the Law Commission recommended that the law should go beyond requiring the executing authority to produce the warrant for inspection; rather the officer should provide a copy of the warrant for the owner or occupier, regardless of whether or not the copy is requested. According to the Commission this additional step would "reduce the room for argument about an occupant's ability to inspect the warrant".[96]

5.52 The New Zealand *Search and Surveillance Bill 2009* has followed this line of thought and has provided that before or on the initial entry into or onto the place or vehicle or other thing to be searched, the executing authority must give the occupier or person in charge a copy of the search warrant.[97] However, the Bill provides that the executing officer is not required to comply with the requirement if he or she has reasonable grounds to believe that compliance would i) endanger the safety of any person, ii) prejudice the successful exercise of the entry and search, or iii) prejudice ongoing investigations.[98]

(4) Discussion

5.53 Many Irish Acts provide that where a search warrant is being executed the warrant will be produced on request. Thus the owner or occupier is entitled to request that he or she be shown the warrant upon entry to the premises by executing officers. Acts where such provision can be found include the *Firearms and Offensive Weapons Act 1990*[99], *Merchant Shipping (Salvage and Wreck) Act 1993*[100], *Control of Horses Act 1996*[101], *Road Transport Act 1999*[102], *Aviation Regulation Act 2001*[103],*Industrial Designs Act*

---

95 New Zealand Legislation Advisory Committee: Search and Search Warrants Committee. *Search and Search Warrants Final Report* (New Zealand 1988), Chapter 5 at (C)(9). Available at www.justice.govt.nz/lac/pubs/1988/search_warrants.

96 New Zealand Law Commission, *Search and Surveillance Powers* (Report 97, 2007) at 185.

97 *Search and Surveillance Bill 2009* (NZ), section 126(1)(b).

98 *Ibid*, section 126(2)(b).

99 Section 15.

100 Section 57.

101 Section 35.

102 Section 15.

2001[104],*Adventure Activities Standards Authority Act 2001*[105], *Communications Regulation Act 2002*[106],*Disability Act 2005*[107],*Safety, Health and Welfare at Work Act 2005* [108], *Employment Permits Act 2006*[109] and the *Criminal Justice Act 2006*[110] (amending section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*). Aside from legislation, the Commission is aware that in practice search warrants are commonly shown to the owner or occupier for inspection at the time of execution. Thus production tends to occur regardless of whether the Act under which the warrant has been issued provides that production of the warrant may be requested. For example, the Commission has been advised that the Garda Siochana, the Office of the Director of Corporate Enforcement and the Sea Fisheries Protection Authority will generally produce a search warrant to the individual concerned. The Revenue Commissioners' *Customs and Excise Enforcement Manual* also provides that the search warrant should be produced for inspection by the owner or occupier of the premises concerned at the time of execution.[111]

5.54 Although the owner or occupier is shown the warrant, he or she is generally not given a copy of it. Thus an individual's ability to read and examine the document is only temporary and he or she is generally unable to keep a copy of the warrant for his or her own records.

5.55 The Commission is of the view that a copy of the search warrant, regardless of the Act under which it has been issued, should generally be given to the owner or occupier of property which is the subject of the warrant. Giving a copy of the search warrant would enable the occupier to i) understand that the

---

103 Section 43. Connery and Hodnett have noted with regard to the *Aviation Regulation Act 2001*, which expressly permits the owner or occupier to be shown the search warrant, that it is the practice of the Commission for Aviation Regulation "to simply hand over a copy [of the warrant] on the day". Connery and Hodnett, *Regulatory Law in Ireland* (Tottel Publishing Ltd. 2009) at 81.

104 Section 70.

105 Section 37.

106 Section 40.

107 Section 23.

108 Section 64.

109 Section 22.

110 Section 6.

111 Revenue Commissioners of Ireland. *Customs and Excise Enforcement Manual*, at 17. Available at www.revenue.ie.

search is authorised and lawful, and ii) be aware of the law under which the search is being conducted. It would also be an act of courtesy towards the individual or corporate entity and indicative of respect towards his or her property. Furthermore, the occupier would be able to bring the copy of the search warrant to his or her legal advisor, if he or she desired. The requirement could also prevent cases of abuse of process or executing officers going beyond the permissible scope of the warrant. In this respect the particulars of the search warrant and what it permitted could be compared to an account of the execution of the warrant, so as to determine whether the execution adhered to the authority afforded by the warrant. Giving a copy of the warrant to the owner or occupier would essentially lead to greater transparency and accountability.

5.56 The Commission recognises that in certain circumstances it may be detrimental to an investigation to give a copy of the warrant to an owner or occupier, and thereby inform him or her of the materials being searched for. Thus the Commission is of the view that the requirement could be limited in one of two ways. The first exception to the requirement would be a temporary exception. Where the executing authority believes that giving the copy of the warrant at the commencement of the execution may impede on the search and the ability to find evidence, or endanger the safety of officers involved in the execution, it would be permissible to retain the copy of the warrant until the execution of the search was fully completed. Therefore the executing authority would give the copy of the warrant upon leaving the premises. The second exception to the requirement would arise where the executing officer believes that giving a copy of the warrant to the owner or occupier at any time would be detrimental to the investigation at hand, or to any other investigation, or would endanger the safety of any person. In such circumstances the executing authority would be permitted to forgo the requirement to give a copy of the warrant. However, the executing officer should be required to certify this belief so that a decision not to give a copy of the warrant would be justified and accounted for.

5.57 With regard to this second exception, the Commission considers that there should be a provision which would enable an owner or occupier to make a request for a copy of the warrant in cases where the copy has initially been withheld. The *Criminal Justice Act 2007* may provide guidance on this point. Section 56 of the 2007 Act 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 Siochana while he or she was detained in a Garda Siochana 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". A similar provision may be suitable in respect of

withheld copies of search warrants; it might be provided that when a copy is withheld on the basis of a belief that giving a copy of the warrant could be detrimental to an investigation or to the safety of any person, the individual 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 individual, or to his or her legal representative, or refuse the application. Directing that a copy be given could be subject to such conditions as the court sees fit.

5.58 The Commission provisionally recommends that a copy of the search warrant should be given to the owner or occupier of the property as a matter of procedure. The Commission is of the view that a copy of the warrant should be given at the commencement of the search, subject to one of two exceptions. If it is believed that giving the copy of the warrant at the commencement of the search may be detrimental to the warrant's execution or endanger the safety of an executing officer, the copy may be retained and given when the search is complete. Alternatively, if it is believed that giving a copy of the warrant may be detrimental to the investigation at hand, or any other investigation, or would endanger the safety of any person, the copy of the search warrant may be withheld. The Commission is of the view that where the latter case arises, a process should be in place permitting the individual to apply to the District Court for a copy of the warrant

5.59 The Commission is of the view that the process for giving a copy of the warrant to the owner or occupier, as well as the process for applying to the court for a copy of the warrant which has been withheld, should be placed on a statutory basis. In chapter 2 the Commission provisionally recommends the implementation of a principal search warrant framework in Ireland. This framework would act as the principal legislative authority in respect of all search warrant provisions. The Commission is of the view that this legislative authority would be the appropriate forum for a provision requiring that a copy of the search warrant be given to the individual concerned.

5.60 The Commission provisionally recommends that detailed procedures with regard to giving a copy of the search warrant to an owner or occupier should be placed on a statutory basis.

H Occupier's Notice

5.61 An occupier's notice is a document distinct of a search warrant which may be given to the occupier when a search warrant is executed in respect of his or her property. Various specifications may be made as to the information contained within the notice. Generally the issues addressed in an occupier's notice will include the nature of the authority afforded to executing officers by the search warrant, the procedure for seizing material under the warrant and the

rights of the occupier. There is no provision in Irish law for this type of notice. Examples of such notices can be found in other jurisdictions.

(1) United Kingdom

5.62 Code of Practice B, which supplements the *Police and Criminal Evidence Act 1984* (PACE), states that when a search is conducted the executing officer "shall, unless it is impracticable to do so, provide the occupier with a copy of a Notice [of powers and rights] in a standard format".[112] This notice must:

i) specify whether the search is made under warrant, with consent[113], or in the exercise of powers afforded by PACE, section 17[114]; PACE, section 18[115]; PACE, section 32[116];

ii) summarise the extent of powers of search and seizure conferred by PACE 1984;

iii) explain the rights of the occupier, and the owner of any property seized;

iv) explain that compensation may be payable in appropriate cases for damages caused by entry and search of the premises and give the address to which a compensation application should be sent; and

v) state that the Code (Code of Practice B) is available at any police station.

---

112 *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 6.7.

113 Provision 5.1 of the Code states that "if it is proposed to search premises with the consent of a person entitled to grant entry the consent must, if practicable, be given in writing on the Notice of Powers and Rights before the search. The officer must make any necessary enquiries to be satisfied the person is in a position to give such consent".

114 Section 17 provides for entry and search without warrant for the purpose of making an arrest.

115 Section 18 provides for entry and search without a warrant occupied or controlled by a person who is placed under arrest.

116 Section 32 provides that where a person has been arrested for an indictable offence, a search without warrant may be carried out on the premises where the person was arrested or where the person immediately was before being arrested.

In respect of the payment of compensation noted at point (iv), the Code offers guidance on this point. Note 6A explains that whether compensation is payable depends on the circumstances in each case. It states:

> "compensation for damage caused when effecting entry is unlikely to be appropriate if the search was lawful and the force used can be shown to be reasonable, proportionate and necessary to effect entry. If the wrong premises are searched by mistake everything possible should be done at the earliest opportunity to allay any sense of grievance and there should normally be a strong presumption in favour of paying compensation".

5.63 Code B requires that, if the occupier is present, copies of the search warrant and the notice of powers and rights must, if practicable, be given to him or her before the search begins. This obligation need not be satisfied, however, if the officer in charge of the search reasonably believes that this would frustrate the object of the search or endanger officers or other people.[117] If the occupier is not present, the Code requires that copies of the search warrant and the notice should be left in a prominent place on the premises or appropriate place if the premises, and endorsed with the name of the officer in charge of the search[118], the date and the time of the search.[119] Where a copy of the warrant and a notice has been either given to or left for the occupier, the warrant shall be endorsed to show that this has been done.[120]

(2) Australia

(a) New South Wales

5.64 The *Law Enforcement (Powers and Responsibilities) Act 2002* provides that when an issuing officer issues a search warrant, he or she must also prepare and give an occupier's notice to the applicant.[121] The occupier's notice will be in a prescribed form and must specify the following:

---

117 Code B, provision 6.8.

118 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 establishes 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 reasonable believes that disclose of his or her name might put him or her in danger. In such circumstances identification numbers should e used.

119 Code B, provision 6.8.

120 *Ibid*.

121 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), section 67(1).

i) the name of the person who applied for the warrant,

ii) the date and the time when the warrant was issued,

iii) the address or other description of the premises,

iv) the subject of the warrant, and

v) a summary of the nature of the warrant and the powers it confers.[122]

vi) The Act requires the executing officer to serve the notice, on entry into or onto the premises or as soon as practicable after entry, to a person who appears to be an occupier of the premises and to be of or above 18 years of age. If there is no such person present at the time of entry, the notice must be served on the occupier of the premises within 48 hours after the execution of the warrant.[123] The Act provides that if an occupier's notice cannot practicably be served on a person within the said 48 hours, the eligible issuing officer may, by order, direct that instead of service such steps be taken as are specified in the order for the purpose of bringing the occupier's notice to the attention of the occupier.[124]

(b) Victoria

5.65 The *Confiscation Act 1997,* like the New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002*, requires that the issuing authority prepare and give an occupier's notice to the applicant. The notice under the 1997 must also contain the same details as the New South Wales occupier's notice, with the exception that the notice under the *Confiscation Act 1997* will also specify the name of the magistrate or justice who issued the warrant.[125] The 1997 Act provides that the executing officer must serve the notice on a person who appears to be an occupier of, or to be in charge of, the

---

122 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), section 67(2). It is notable that the *Search Warrants Act 1985,* the provisions of which were repealed by the *Law Enforcement (Powers and Responsibilities) Act 2002*, provided that an occupier's notice should contain the name of the authorised justice who issued the warrant, in addition to the details which are specified above under the 2002 Act. However, the 2002 Act does not contain a mirror provision on this point.

123 *Ibid*, section 67(4).

124 *Ibid*, section 67(5). Section 67(6) provides that an order by the issuing officer under subsection (5) may direct that the occupier's notice be taken to have been served on the occupier on the happening of a specified event or on the expiry of a specified time.

125 *Confiscation Act 1997* (Vic), section 83(2).

premises and to be aged 18 or more. Such service must be done "on entry into the premises or as soon as practicable thereafter".[126] If no suitable person is present at the time of entry, the occupier's notice must be served either personally or in such other manner as the magistrate or judge who issued the warrant may direct, as soon as practicable after executing the warrant.[127] Service of the notice may, however, be postponed by the issuing authority if he or she is satisfied that there are reasonable grounds for the postponement; such postponement may occur on more than one occasion but service must not be postponed on any one occasion for a period exceeding 6 months.[128]

(c) Queensland

5.66 Both the *Police Powers and Responsibilities Act 2000* and the *Crime and Misconduct Act 2001* make the same provision in respect of an occupiers notice. The Acts state that, in addition to giving the occupier a copy of the search warrant, the executing officer must give him or her "a statement in the approved form summarising the person's rights and obligations under the warrant". If the occupier is not present, this notice may be left in a "conspicuous place".[129]

(3) Discussion

5.67 The Commission has not, at this stage, come to a specific view on this matter and is therefore inclined to invite submissions as to whether an occupier's notice should be introduced to the Irish search warrant scheme. One advantage of having occupier's notices might be that, if simple language were used, a notice may be easier to understand than the terms of the warrant itself. Another advantage may be that an occupier's notice could contain information on matters of law which are related to search warrants but not actually contained within the warrant form, such as the concept of legal professional privilege[130] or rules regarding seizure of materials. An occupier's notice might also explain more fully the extent of the authority afforded under the search warrant.

5.68 The introduction of an occupier's notice might be a suitable alternative to a requirement to give a copy of the search warrant to the owner or occupier. By setting out the scope of the power under the search warrant and

---

126 *Ibid*, section 83(3)(a).

127 *Ibid*, section 83(3)(b).

128 *Ibid*, sections 83(4) and 83(5).

129 *Police Powers and Responsibilities Act 2000* (QLD) section 158 and *Crime and Misconduct Act 2001*(QLD) section 93.

130 See chapter 5, part B below for a discussion of legal professional privilege.

explaining the rights and duties of occupiers, this type of notice would be likely to address many of the queries an occupier would have in respect of the execution of a search warrant.

5.69 The Commission invites submissions as to whether an occupier's notice should be required as part of the proposed general statutory framework on search warrants. The Commission also invites submissions as to what information should be included in this type of notice.

I Dealing with Persons Present at the Place Being Searched

5.70 Many Irish search warrant provisions afford executing authorities not only the power to search the named premises, but also persons present there at the time of execution. A number of Acts provide additional powers, such as the power to ask for personal details or the power to request assistance from a person present at the place being searched. Furthermore, certain Acts provide that the failure to comply with an executing authority's requests amounts to an offence. These provisions do not distinguish between occupier and non-occupiers, therefore a person may be subject to these powers simply by being present when a search warrant is being executed; it is not necessary that the person exercises any control over the property.

(1) Searching persons present

5.71 The power to search persons present is provided in addition to the power to search the premises by a variety of Acts. This power is of particular assistance where item(s) being searched for can be easily hidden on a person's body, although the power to search persons is not exclusive to situations where such is envisaged. Examples of this power can be found in the following Acts: *National Monuments (Amendment) Act 1987*[131], *Criminal Damage Act 1991*[132], *Criminal Assets Bureau Act 1996*[133], *Criminal Justice (Miscellaneous Provisions) Act 1997* (as amended by *Criminal Justice Act 2006*),[134] *Child Trafficking and Pornography Act 1998*[135], *Illegal Immigrants (Trafficking) Act 2000*[136], *Criminal Justice (Theft and Fraud Offences) Act 2001*[137] and the *Immigration Act 2004*[138].

---

131 Section 22.

132 Section 13.

133 Section 14.

134 Section 10 of the 1997 Act, as amended by section 6 of the 2006 Act.

135 Section 7.

136 Section 7.

(2) Requesting Personal Details

5.72 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 place being searched give his or her name and address to the officer. This power enables an officer to keep a record of all persons present at a place being searched, or may be of benefit to an investigation in the long term, where it is believed that the person present may have some connection to or knowledge of the matter being investigated. This power is not exclusive of the power to search individuals present, a number of Acts make provision for both powers. Acts which authorise a request for personal details of persons present include: *National Monuments (Amendment) Act 1987*[139], *Prohibition of Incitement to Hatred Act 1989*[140], *Video Recording Act 1989*[141], *Criminal Assets Bureau Act 1996*[142], *Child Trafficking and Pornography Act 1998*[143], *Copyright and Related Rights Act 2000*[144], *Illegal Immigrants (Trafficking) Act 2000*[145], *Prevention of Corruption (Amendment) Act 2001*[146] *and Immigration Act 2004*[147]. In addition to a person's name and address, the *Company Law Enforcement Act 2001*[148] also provides that an officer may enquire as to a person's occupation.

---

137 Section 48.

138 Section 15.

139 Section 22.

140 Section 9.

141 Section 25.

142 Section 14.

143 Section 7.

144 Section 114.

145 Section 7.

146 Section 5.

147 Section 15.

148 Section 30.

(3) Requesting Assistance

5.73 In certain circumstances executing officers may require assistance so as to gain access to material, for example where passwords are needed to access electronic data. With a view to this, some Acts make specific provisions which entitle executing officers to request assistance, and subsequently oblige persons capable of offering that assistance to comply. Thus the *Company Law Enforcement Act 2001* states that where an officer seeks to search a computer, he or she may require any person present who appears to be in a position to facilitate access to the computer to a) 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) produce the information in a form in which it can be removed and in which it is, or can, be made visible and legible.[149] Provisions with the same wording as the *Company Law Enforcement Act 2001* can be found in the *Criminal Justice (Theft and Fraud Offences) Act 2001*[150], *Proceeds of Crime Act 2005*[151] and the *Criminal Justice Act 2007*.[152]

(4) Persons present obstructing or failing to comply with executing officers

5.74 In respect of the provisions that a person give his or her personal details, or comply with requests for assistance from an executing officer, the relevant Acts generally contain a corollary provision that a failure to respond is an offence. Furthermore, some Acts provide that an individual who obstructs or impedes a search is also guilty of an offence. A variation of provisions can be seen throughout legislation. A number of Acts have the same provision as to what amounts to an offence. For example the *Criminal Justice (Miscellaneous Provisions) Act 1997* (as amended by *Criminal Justice Act 2006*),[153] *Child Trafficking and Pornography Act 1998*[154], *Illegal Immigrants (Trafficking) Act 2000*[155] and *Immigration Act 2004*[156] all state that it is an offence to a) obstruct

---

149 Section 30.

150 Section 48.

151 Section 16, amending section 14 of the *Criminal Assets Bureau Act 1996*.

152 Section 44, amending section 17 of the *Sea-Fisheries and Maritime Jurisdiction Act 2006*.

153 Section 10 of the 1997 Act, as amended by section 6 of the 2006 Act.

154 Section 7.

155 Section 7.

156 Section 15.

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. The *Company Law Enforcement Act 2001* is somewhat broader as it states that a person shall be guilty of an offence if he or she a) obstructs the exercise of a right of entry conferred by a search warrant, b) obstructs the exercise of a power under warrant to seize and retain material information, c) fails to give his or her name, address or occupation when requested, or gives false information where requested, or d) fails to comply with a request to facilitate an executing officer to gain access to information stored on a computer.[157] The relevant provision in the *Broadcasting Act 1990* is broad in that it does not necessarily require physical obstruction. It provides that any person who by act or omission impedes or obstructs a person exercising a search warrant power is guilty of an offence.[158] The *Criminal Assets Bureau Act 1996* states that where an individual 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, the individual may be arrested without warrant as a result.[159] The Act also provides that such conduct amounts to an offence. Other Acts where obstruction or failure to comply provisions can be found include the *Prohibition of Incitement to Hatred Act 1989*[160], *Criminal Damage Act 1991*[161], *Copyright and Related Rights Act 2000*[162], *Criminal Justice (Theft and Fraud Offences) Act 2001*[163], and the *Prevention of Corruption (Amendment) Act 2001*[164].

J Multiple Executions of a Search Warrant

5.75 Search warrants are required by law to be specific, rather than general in nature. Therefore, a warrant must state the place to be searched, the reason why the search is to be carried out, and a description of the material(s) being searched for. Due to this requirement of specificity a single execution of the search warrant will generally be sufficient to either find the material sought

157 Section 30.

158 Section 14.

159 Section 14.

160 Section 9.

161 Section 13.

162 Section 143.

163 Section 48.

164 Section 5.

as evidence, or to determine that the material is not located at the named premises. However, certain cases can occur which require more than one entry and/or search to satisfy the purpose of the search warrant. For example, if the amount of material being searched for is so vast that it is not possible to complete the search in one day, it may be necessary for the executing authority to return to the location on a subsequent date to continue with the search. Or it may be the case that material being searched for is not at the location at the time of the first entry and search, but is likely to be taken to the location soon afterwards, thereby requiring the executing authority to search the premises at a later point in time. In such circumstances it can be both necessary and justified for more than one entry and search to be carried out under the search warrant. This section will set out the position in respect of multiple executions of search warrants in both the United Kingdom and New Zealand. It will then move to consider the law in Ireland.

(1) United Kingdom

5.76 The *Serious Organised Crime and Police Act 2005* introduced a provision for multiple entry search warrants. This type of warrant permits the executing authority to enter the premises concerned on more than one occasion under its single authority. Section 114(2) of the *Serious Organised Crime and Police Act 2005* provides that a search warrant "may authorise entry to and search of premises on more than one occasion if, on the application, the justice of the peace is satisfied that it is necessary to authorise multiple entries in order to achieve the purpose for which he issues the warrant". The section further states that if a warrant authorises multiple entries, "the number of entries authorised may be unlimited, or limited to a maximum".

5.77 Section 15 of the *Police and Criminal Evidence Act 1984* (PACE) which relates to search warrant safeguards, was consequently amended by the 2005 Act. Section 15 now includes a provision stating that where a constable applies for a search warrant it is his or her duty to state if the application "is for a warrant authorising entry and search on more than one occasion, the ground on which he applies for such a warrant, and whether he seeks a warrant authorising an unlimited number of entries, or (if not) the maximum number of entries desired".[165] Furthermore, where section 15(5) of PACE had stated that "[a] warrant shall authorise an entry on one occasion only", this was amended to state "[a] warrant shall authorise an entry on one occasion only unless it specifies that it authorises multiple entries".[166] The 2005 Act inserted a

---

165 *Police and Criminal Evidence Act 1984*, section 15(2)(iii), as inserted by *Serious Organised Crime and Police Act 2005*, section 114(4)(c).

166 *Ibid*, section 15(5), as inserted by *Serious Organised Crime and Police Act 2005*, section 114(4)(5).

provision stating that if a warrant specifies that it authorises multiple entries, "it must also specify whether the number of entries authorised is unlimited, or limited to a specified maximum".[167]

5.78 With regard to executing a multiple entry search warrant, section 16 of PACE states that "[n]o 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".[168]

(2) New Zealand

5.79 The New Zealand Law Commission noted in its 2007 report *Search and Surveillance Powers* that search warrants issued under section 198 of the *Summary Proceedings Act 1957* may authorise more than one entry during the validity period of the warrant.[169] Section 198 of the 1957 Act states "[e]very search warrant...shall authorise any constable at any time or times within one month from the date thereof to enter and search" the named premises.[170]

5.80 The New Zealand Legislation Advisory Committee: Search and Search Warrants Committee's 1988 Report[171] formulated a number of principles in respect of searches. One such principle was that a search warrant should authorise only a single entry under its authority. Therefore the Committee recommended that the existing section 198 provision, as noted above, should be replaced with the following model provision: Every search warrant shall authorise the person executing the warrant "to enter and search the place or thing on *one* occasion within 14 days of the date of issue of the warrant at any time which is reasonable in the circumstances subject nevertheless to any conditions imposed by the issuer".[172] In respect of this recommendation, the Committee observed that the model provision would have the effect that once a search warrant had been used to gain entry it could not be used again for

---

167 *Ibid*, section 15(5A), as inserted by *Serious Organised Crime and Police Act 2005*, section 114(6).

168 *Police and Criminal Evidence Act* 1984, section 16(3B), as inserted by *Serious Organised Crime and Police Act 2005*, section 11498)(b).

169 New Zealand Law Commission, *Search and Surveillance Powers* (Report 97, 2007) at 123.

170 *Summary Proceedings Act 1957* (NZ), section 198(3).

171 *Search and Search Warrants Final Report* (New Zealand, 1988). Available at www.courts.govt.nz/lac/pubs/1988/search_warrants.

172 Emphasis added.

further entry and/or seizure. The applicant would have to obtain a new warrant to authorise a further entry.[173]

5.81 The Law Commission has observed that subsequent to the report of the Search and Search Warrants Committee, some legislation did in fact reflect and incorporate the recommendation that a search warrant only permit a single entry.[174] The Commission noted that given the intrusive and coercive nature of search warrants they should *usually* only be executed once. However, the Commission expressed the view that there will be occasions where multiple executions should be permitted[175] and that it would be "administratively burdensome, and could prejudice ongoing investigations, if the police were required to make multiple warrant applications" in such cases. Thus the New Zealand Law Commission recommended that where an applicant satisfies an issuing officer that more than one execution of the warrant may be necessary, the officer should be permitted to authorise multiple executions and endorse the warrant to that effect.[176] In respect of this recommendation, the Commission further stated that the multiple execution of a search warrant "will not authorise a fishing expedition". The Commission advised that, in respect of both the initial and each subsequent execution, an officer would have to have reasonable grounds to believe that items subject to the warrant remain in the specified location.[177]

5.82 The New Zealand *Search and Surveillance Bill 2009* includes provisions which mirror the recommendation of the Law Commission in respect of multiple entry search warrants. Section 96(1)(g) of the Bill states that where an applicant wants to be able to execute a search warrant on more than one occasion, the application must set out the grounds on which execution on more than one occasion is believed to be necessary. While section 96(5) states that

---

173 New Zealand Legislation Advisory Committee: Search and Search Warrants Committee. "Search and Search Warrants Final Report" (1988), see generally chapter 5.

174 New Zealand Law Commission. "Search and Surveillance Powers" (Report 97, 2007) at 123.

175 *Ibid*, at 123. The Commission explained that one such situation would be where police may need to enter a place believed to be a transit point for stolen goods more than once in order to gather evidence relating to goods as they arrive. Another example put forward by the Commission was that a search may need to extend over more than one day due to the amount of material to be searched for and seized there.

176 *Ibid*, at 123.

177 *Ibid*, at 124.

the issuing officer may authorise the search warrant to be executed on more than one occasion during the period in which the warrant is in force if he or she is 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 101(4)(e) requires that if a warrant may be executed more than once, it must state the number of executions authorised. The Bill does not, however, reflect the safeguard requirement recommended by the Law Commission that an executing officer must have reasonable grounds to believe that a search is necessary each and every time entry under and execution of the warrant occurs.

(3) Ireland

5.83 A number of Irish Acts provide that a search warrant issued under their authority may be executed "at any time or times" within the validity period of the warrant.[178] On this point Walsh explains that it follows that such search warrants "can be used to search the specified premises for the specified items on several occasions" within the validity period.[179] Where a search warrant is issued under an Irish Act that permits multiple executions, the search warrant form will simply state on its face that it may be executed at any time or times. The warrant does not make any further specification. Furthermore, the relevant Acts do not set out any requirements to be satisfied or guidelines to be followed if a search warrant is to be executed on more than one occasion.

(4) Discussion

5.84 In the United Kingdom the *Police and Criminal Evidence Act 1984*, as amended, sets out the procedure to be followed in respect of a multiple execution search warrant. Firstly, an officer must state on an application if he or she requires the search warrant to authorise multiple entry and searches, as well as the ground(s) for applying for this type of warrant. Secondly, if the issuing officer is satisfied to issue a multiple execution search warrant, he or

---

178 It may be noted that the wording "any time or times" used in some Irish provisions is the same as the wording used in New Zealand in respect of search warrants issued under section 198 of the *Summary Proceedings Act 1957*. Irish Acts where this wording may be found include the *Misuse of Drugs Act 1984*, *Video Recording Act 1989*, *Prohibition of Incitement to Hatred Act 1989*, *Firearms and Offensive Weapons Act 1990*, *Criminal Damage Act 1991*, *Criminal Damage Act 1991*, *Control of Horses Act 1996*, *Copyright and Related Rights Act 2000*, *Merchant Shipping (Investigation of Marine Casualties) Act 2000*, *Company Law Enforcement Act 2001* and *Criminal Justice Act 2006* (amending *Criminal Justice (Miscellaneous Provisions) Act 1997*.

179 Walsh, *Criminal Procedure* (Thomson Round Hall 2002) at 415.

she must specify on the warrant i) the fact that it authorises entry and search on more than one occasion, and ii) whether the number of entries authorised is unlimited, or limited to a specified maximum. Thirdly, where more than one entry and search under this type of warrant is to be carried out, a police officer of at least the rank of inspector must authorise in writing the subsequent entry to the premises. With regard to the position in New Zealand, the *Search and Surveillance Bill 2009* proposes to implement the recommendation of the New Zealand Law Commission that an applicant is required to satisfy an issuing officer that more than one execution of the warrant is believed to be necessary, and that the search warrant itself must state that more than one execution is permitted under its authority. The Bill also requires the search warrant to specify the number of executions it authorises. By contrast, the law in Ireland does not set out a procedure to be followed or safeguards to be satisfied in respect of multiple executions of a search warrant. The wording used in Irish provisions, that the warrant may be executed "at any time or times" is quite open. It does not require the applicant to state whether or not more than one entry and search under the warrant may be necessary, the issuing officer is not required to state on the face of the warrant whether or not it permits more than one execution, and it does not require the warrant to state whether or not there is a maximum number of executions permitted under its authority. Moreover, where the initial execution of a search warrant has occurred, the Irish position does not require executing authorities to provide any further justification, or to seek any further permission before carrying out a subsequent entry and search under the warrant.

5.85 Multiple execution search warrants are helpful in cases where more than one entry and search is necessary. They also relieve the burden of applying for and issuing more than one search warrant in respect of the same matter and in a short period of time. The Commission is of the view, however, that the current approach in Ireland does not sufficiently monitor multiple executions. A more restrictive approach would help to prevent 'fishing expedition' searches or abuses of the multiple execution system. Thus the Commission invites submissions as to whether a specific procedure and safeguards should be put in place in respect of these search warrants. The positions in the United Kingdom and New Zealand might offer guidance on this matter; for example the implementation of a requirement for an applicant to state in a warrant application that more than one entry and search may be necessary, or of a requirement for the issuing officer to state on the warrant that he or she is satisfied for the warrant to authorise more than one entry and search. It may also be advisable to require the executing officer who wants to carry out a second or subsequent execution to justify this to an officer of higher ranking, as is required under legislation in the United Kingdom.

5.86 Specific procedures and safeguards with regard to multiple executions of a search warrant could be placed within the scope of the principal search warrant framework which has been provisionally recommended by the Commission in this Consultation Paper.[180] The Commission acknowledges that it would not necessarily be appropriate to permit search warrants issued under any provision to be executed on more than one occasion. Thus any procedure implemented would not be universally applicable to search warrant provisions. Rather the multiple execution provisions contained within the framework would only apply to search warrant provisions where it has been specifically provided in law that a warrant may be executed on more than one occasion in fitting circumstances.

5.87 The Commission invites submissions as to whether specific procedures and safeguards should be put in place in respect of multiple execution search warrants.

K Seizure

5.88 Each Irish legislative provision which provides for the obtaining and execution of a search warrant also provides for seizure of material under the authority of the warrant. Finding material is essentially the core purpose of a search warrant and the provision for seizure enables executing authorities to take the material(s) out of the control of the occupier and/or to use them as evidence that an offence has been committed.

(1) Scope of power to seize

5.89 A search warrant will authorise the seizure of material which relates to the offence being investigated by means of the warrant. This follows from the requirement of specificity which has been established by law in respect of search warrants. Thus a search warrant will not authorise the executing authority to seize whatever material he or she wants to; the material seized must relate to the purpose of the search. Thus, for example, the Revenue Commissioners' "Customs and Excise Enforcement Manual" also sets out the condition that material may only be seized if it is relative to the purpose of the search warrant, although it does provide for exceptional cases. The Guide states "[i]f goods are found which are not specified on the warrant and reasonable suspicion exists that such goods are smuggled, an additional warrant should be procured. In exceptional circumstances, e.g. where there is serious risk that goods may be removed or destroyed, the goods may be

180 See generally chapter 2.

detained under the appropriate legislation and removed without procuring an additional warrant".[181]

5.90 It is notable, however, that a search warrant issued under the *Criminal Justice (Miscellaneous Provisions) Act 1997* (as amended by the *Criminal Justice Act 2006*) is quite broad, in that it provides a search warrant issued its terms authorises the seizure of "anything found at [the] place, or anything found in the possession of a person present at that place at the time of the search, that the member reasonably believes to be evidence of, or relating to, the commission of an arrestable offence".[182] Therefore while the majority of search warrant provisions provide for seizure of material in respect of a certain offence or a particular section under the relevant Act, a warrant under the 1997 Act, as amended, is afforded more scope as offences which fall within the definition of "arrestable" are quite numerous.

(a) Material subject to legal professional privilege

5.91 Where material is deemed to benefit from legal professional privilege, that is where it is the subject of communications between a lawyer and his or her client in respect of a legal matter, it generally may not be seized. A small number of Irish search warrant provisions specifically state that material which is legally privileged may not be seized under their terms. These Acts include the *Criminal Assets Bureau Act 1996* (as amended by *Proceeds of Crime (Amendment) Act 2005*),[183] *Criminal Justice (Theft and Fraud Offences) Act 2001*[184], *Sea-Fisheries and Maritime Jurisdiction Act 2006* (as amended by *Criminal Justice Act 2007*)[185] and *Criminal Justice (Mutual Assistance) Act 2008*[186]. However, the preclusion from seizing material which is deemed legally privileged is not limited to material sought by search warrants issued under the terms of an Act which specifically refers to the privilege. Legal professional privilege is a well established legal principle and material sought under any

---

181 *Customs and Excise Enforcement Manual*, at 2.8. Available at www.revenue.ie.

182 Section 6. An arrestable offence is defined as an offence for which a person of full capacity and not previously convicted may, under or by virtue of any enactment or the common law, be punished by imprisonment for a term of five years or by a more severe penalty and includes an attempt to commit any such offence. This definition is provided by section 2(1) of the *Criminal Law Act 1997*, as amended by section 8 of the *Criminal Justice Act 2006*.

183 Section 16.

184 Section 48.

185 Section 44.

186 Section 74.

search warrant may be refused on the ground of it being privileged. For a detailed discussion of legal professional privilege and the limits it places on searching and seizing material see section B of chapter 6.

(2) Procedure for seizing material

5.92 The procedure for seizing material found during the execution of a search warrant is not set out in legislation. Nonetheless, authorities who carry out the function of executing search warrants will generally have procedures and protocols in place with regard to seizing materials found in the course of executing a search warrant. The Commission has been advised of the particular practices of a number of authorities.

5.93 For members of the Garda Siochana, the procedure to be followed is set out in a Garda practice and procedure manual which deals with the process to be followed in respect of seizing material. The Commission has been informed that all items seized during a search are wrapped and labelled by executing officers. Certain items will be seized in a certain way, so as to protect forensic evidence or to prevent interference for example. All seized items are documented in a log so that a full record of the items is kept form the time of seizure. Once removed from the premises, the seized items are stored in a secure room, usually at a Garda station. Once examined and processed by the Garda Siochana, seized items are generally returned to their owner as soon as possible. Exceptions to this will of course arise, for example where the seized item is drugs or an illegal weapon. It may be the case that the Garda Siochana will have to carry out investigations to determine who the owner of the item actually is, for example where the item is stolen property.

5.94 With regard to the seizure process followed by the Sea Fisheries Protection Authority when executing a search warrant issued under the *Sea Fisheries and Maritime Jurisdiction Act 2006*[187] (as amended by section 44 of the *Criminal Justice Act 2007*), the Commission is aware that the lead officer in respect of the execution will generally take on the role of exhibits officer for the duration of the search. He or she will keep a record of all items seized and will ensure that they are properly labelled. The exhibits will be subsequently be secured in the SFPA office in charge of the search operation, or in the SFPA headquarters. When seized items are returned to an individual, he or she will be shown each item and it will be ensured that he or she is satisfied with what has been returned.

5.95 Where material is seized under a search warrant issued to the Office of the Director of Corporate Enforcement, it is the ODCE's practice to log all information or material(s) seized. Seized items are then securely stored in

[187] Section 17.

evidence rooms in the ODCE. The Commission has been advised that access to such rooms is limited to core personnel concerned with the relevant case and is under the general supervision of the Exhibits Officer assigned to the matter. This process goes to ensuring that seized materials are not contaminated or interfered with. When seized items are no longer required by the office they will be returned to the relevant individual. Section 30(3) of the *Company Law Enforcement Act 2001,* under which the ODCE operates, provides that any material information seized under a search warrant may be retained "for a period of 6 months, or such longer period as may be permitted by a judge of the District Court, or if within that period there are commenced any proceedings to which the material information is relevant, until the conclusion of those proceedings".

5.96 It can be seen from these examples that common steps are often followed by bodies seizing material under search warrant. These include logging all materials seized, storing seized materials in secure areas and returning materials to relevant individuals when it is not longer necessary to retain them.

(a) Seizure of computers and electronic storage devices

5.97 A minority of Acts specifically identify a power to seize and retain computers or other storage devices under a search warrant issued under their authority. The *Criminal Assets Bureau Act 1996*,[188] *Criminal Justice (Theft and Fraud Offences) Act 2001*[189] and *Sea Fisheries and Maritime Jurisdiction Act 2006*[190] all provide that a search warrant issued under their terms provides, where necessary, the power "to seize and, for as long as necessary, retain any computer or other storage medium in which any record is kept". These Acts also state that a search warrant authorises the executing officers to make and retain a copy of relevant documents or records found during the search. This provision would extend to material which is electronically stored. A similar provision is found in the *Company Law Enforcement Act 2001*, which states that an executing officer may access any computer at the place being searched and produce information contained on the computer "in a form in which it can be removed and in which it is, or can be made visible and legible".[191]

---

188 Section 14 of the 1996 Act, as amended by section 16 of the *Proceeds of Crime (Amendment) Act 2005*.

189 Section 48.

190 Section 17, as amended by section 44 of the *Criminal Justice Act 2007*.

191 The Company Law Enforcement Act 2001 defines a 'computer' to include a personal organiser or any other electronic means of information storage or retrieval, at section 30(7).

5.98 Although a limited number of Acts specifically refer to the seizure of computers and electronic storage devices, where a computer is found while executing a search warrant issued under another Act, and that computer is believed to contain evidence relevant to the search, it may be seized. Where a computer is seized by the Garda Siochana, it will be taken to a specialised sector of the Garda Siochana where it will be decoded and examined. This department will then write up a report of what has been found during the examination of the computer and this information may be used as evidence in proceedings.

(3) Discussion

5.99 The law and procedures set out in this part with regard to seizure under search warrant appear to conform to best practice systems. By specifying that items seized must relate to a particular suspected offence, and therefore to the purpose of the search, search warrants issued under Irish provisions prevent general and unrestricted search and seizures. By labelling all items seized and creating a log of these items, it is ensured that these items are accounted for and acknowledges the fact that they have been taken from their owner. Placing seized items in secure rooms prevents interference with a person's property and also reduces the possibility of items being misplaced. While sending computers to be searched by specialised officers, as opposed to officers with limited training in or understanding of computer systems, reduces the risk of electronic data being lost or damaged. Part 0 below considers the implementation of a code of practice encompassing best practice procedures in respect of all search and seizures.

L Finding Items During the Search for Which the Warrant was not Issued

5.100 This issue is something which may be referred to as 'incidental findings'. It has already been noted in chapter 4CHAPTER 4, that there must be specificity within the warrant terms. Therefore the applicant is required to set out before the issuing officer what items are expected to be found at the location, and in connection to what offence. It is, however, possible that during the course of a search items are found which a) were not expected to be found and so not listed on the warrant and/or b) do not relate to the suspected offence to which the warrant relates, but nonetheless are likely evidence of another offence.

(1) The common law position

5.101 In *Chic Fashions (West Wales) Ltd. v Jones*[192] the English Court of Appeal considered the law with regard to finding and seizing items in the course of executing a search warrant, where the warrant did not specifically refer to those items. In this case police were investigating the theft of clothes from a number of shops and factories. They obtained search warrants so as to enter and search shops owned by the plaintiffs, as well as the managing director's home and his parents' home, as they believed that some of the stolen goods would be found there. During the execution of a search warrant at one of the company's branches police did not find items which were specified in the search warrant. However, they did come across other clothing which they believed to have been stolen. On the basis of this belief they seized 65 items of clothing. It later transpired that none of the 65 items were stolen property. The question before the Court was whether it was lawful for the police to seize the items which had not been referred to in the search warrant. The Court observed that there was no direct legal authority to resolve that matter and that, as a result, case law "ranging over two centuries" would have to be examined so as to determine the legal position.[193] Thus the Court of Appeal set out and traced the development of the common law on the matter.

5.102 Lord Denning MR began by observing the position as it was in the 17th century. He explained that "at one time the courts held that the constable could seize only those goods which answered the description given in the warrant. He had to make sure, at his peril, that the goods were the very goods in the warrant". If other goods were seized which were not mentioned in the warrant, then the officer was a trespasser both in respect of the goods seized and the property or land itself.[194] Lord Denning MR referred to the 17th century *Six Carpenters' Case*[195] on this point. It was held in that case that where entry, authority or licence is given to anyone by the law and he abuses it, he is to be regarded as a trespasser ab initio.[196] Thus the officer would be held liable for an action going beyond the scope of the authority afforded to him.

---

192 [1986] 1 All E.R. 229.

193 *Ibid*, at 233 and 237.

194 Lord Denning MR commented that the 17th century position was "a boon to receivers of stolen property and an impediment to the forces of law and order" and that if such had remained as the law "no constable would be safe in executing a search warrant". [1968] 1 All E.R. 229, at 234.

195 (1610) 8 Co. Rep. 146a; 77 E.R. 695; [1558-1774] All E.R. Rep. (Reprinted) 292.

196 [1558-1774] All E.R. Rep. (Reprinted) 292, at 293.

5.103 Lord Denning MR noted that at the beginning of the 19th century the law was varied so that a constable could seize material which was reasonably believed to be within the scope of the search warrant. The constable would not be held liable where it was later discovered that this belief was mistaken. The authority for this position was the decision in *Price v Messenger*[197] where the court held that the defendant officers were not liable where they had seized a quantity of sugar, which they believed to be the stolen sugar for which the warrant was issued. The Court found that in seizing the sugar the officers had been acting in obedience to the warrant.[198] However, in the course of executing the search warrant the officers also seized two parcels of tea and a bag of nails, neither of which had been mentioned in the warrant. The Court held that as the warrant did not refer to the tea and nails the officers had acted in excess of the authority of the warrant by seizing them and so were liable in that respect.

5.104 In *Chic Fashions* Lord Denning MR went on to note that the decision in *Crozier v Cundey*[199] extended the protection afforded to police officers further. This decision established that an officer could seize items not specifically referred to in the search warrant if those items would be likely to furnish evidence of the stolen materials which were detailed in the warrant. In this case the warrant authorised the search for a quantity of one hundred pounds of cotton. The constable executing the warrant found the cotton contained in two packing cases; these cases were in fact the property of the owner and had been stolen with the cotton, however they had not been mentioned in the search warrant. The Court held that it had been reasonable for the constable to seize the packing cases containing the cotton as it was likely that there were evidence relating to the stolen property referred to in the warrant. By contrast the Court held that a tin pan and a sieve which had also been seized could not be said to furnish evidence in respect of the stolen cottons; thus their seizure was not permissible. Lord Denning MR in *Chic Fashions* further noted in respect of this case that the plaintiff, Crozier, failed in his claim for trespass to his house. He stated that "this illustrates the proposition that now if a constable lawfully enters a house by virtue of a search warrant and seizes the goods mentioned in the warrant, his entry does not become unlawful simply because he unjustifiably seizes other goods. He is liable for trespass in respect of those other goods, but not for trespass to the house". This position contrasts with the approach originally established by the decision in the *Six Carpenters' Case*.

---

197 (1800) 126 E.R. 1213; 2 Bos. & Pul. 159.

198 (1800) 126 E.R. 1213, at 1215.

199 (1827) 108 E.R. 439; 6 B. & C. 232.

5.105 Lord Denning MR observed that the next development emerged following the decision of *Pringle v Bremner and Stirling*.[200] Here Lord Chelmsford stated that if "there were matters discovered which shewed the complicity of the pursuer in a crime, then I think the officers, I can hardly say would have been justified, but would have been excused by the result of their search". Lord Denning MR in *Chic Fashions* noted, on the basis of this decision, that "it may be inferred that a constable may seize other goods not mentioned in the warrant if they afford useful evidence" to substantiate an investigation.

5.106 Having set out the historical development of the law on the point, Lord Denning MR moved to determine the present position of the law. In doing this he considered the power of police to arrest an individual on the basis of a belief that he or she has committed an offence. In this regard, Lord Denning MR stated that "[s]o far as a man's individual liberty is concerned, the law is settled concerning powers of arrest. A constable may arrest him and deprive him of his liberty, if he has reasonable grounds for believing that a felony (now an 'arrestable offence') has been committed".[201] He went on to say that he could see no reason why goods should be more sacred than persons and consequently expressed the view that where an officer enters a premises under a search warrant he may seize "not only the goods which he reasonably believes to be covered by the warrant" but also any other material which he reasonably believes to be material evidence of an offence.[202]

5.107 Similar views were expressed by the other judges of the Court of Appeal. Diplock L.J. stated that it would be irrational if an officer could, under common law, arrest an individual believed to be guilty of an offence but would not be "likewise justified in the less draconian act" of seizing material believed to be evidence of an offence.[203] While Salmon L.J. observed that as a person believed to be guilty of an offence "undoubtedly can lawfully be arrested, it is difficult to discover any sensible reason for conferring immunity from seizure on the goods found on his premises".[204] Thus the Court determined that it would be lawful for material not mentioned in the warrant but subsequently found during

200 (1867) 5 Macph. (H. of L.) 55.

201 [1968] 1 All E.R. 229, at 236.

202 *Ibid*, at 236.

203 *Ibid*, at 238.

204 *Ibid*, at 239.

the execution of the warrant to be seized by officers, provided that they have reasonable grounds to believe that such material is evidence of an offence.[205]

5.108 It is clear from this decision that the concept of reasonableness is fundamental to the common law power to seize material for which the search warrant has not been issued. The common law does not seek to promote general searches, which would authorise the seizure of any material the executing officer desired to take. Rather the officer must establish reasonable grounds for believing that items found during the course of the search are material evidence of the commission of an offence.

(2) The position in England and Wales

5.109 Zander observes that the Philips Royal Commission in its *Report on Criminal Procedure 1981*[206] stated that "it defies common sense to expect the police not to seize items incidentally found during the course of a search".[207] The Report explained that although it did not wish to legitimise general searches, it recommended that the police should be permitted to seize items incidentally found if it was evidence of a grave offence and the search itself was being carried out lawfully; that is in accordance with the terms of the warrant and in a manner appropriate to the items being searched for.[208]

5.110 The *Police and Criminal Evidence Act 1984* (PACE), which was "broadly based" on the Philips Royal Commission Report[209], placed the law with regard to incidental findings on a statutory footing. Section 19 of PACE sets out the powers of seizure exercisable by a constable who is lawfully on a premises. Section 19(2) provides that a constable may seize anything that is on a premises if he or she has reasonable grounds for believing that a) it has been obtained in consequence of the commission of an offence; and b) it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed. Section 19(3) provides that a constable may seize anything on a premises is he or she has reasonable grounds for believing that a) is evidence in relation to an offence which he is investigating or any other

---

205 The common law position where material is incidentally found during a search which is not under warrant; such as a search consequent to arrest; was set out by the Court of Appeal in *Ghani v Jones* [1969] 3 All E.R. 1700.

206 Cmnd. 8092-1 (1981).

207 Zander, *The Police and Criminal Evidence Act 1984* (5th ed Thomson Sweet & Maxwell 2005) at 82.

208 See generally *Ibid*, at 82.

209 Zander, *The Police and Criminal Evidence Act 1984* (5th ed Thomson Sweet & Maxwell 2005) at xi-xiii; 41.

offence; and b) it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed. According to Zander the 1984 Act defined the power of seizure much more broadly than envisaged by the Philips Royal Commission. He notes that section 19 "differs from the recommendation of the Commission in not being limited to grave offences".[210] Furthermore, the Act "did not give effect to the Commission's view that evidence seized in the course of an unlawfully conducted search should be inadmissible".[211] However, Zander observes that the act went beyond the recommendations of the Commission in providing that evidence may be seized only where it would otherwise be concealed, lost or destroyed.[212]

5.111 The *Police Reform Act 2002* extended the power of seizure under section 19 to non-police investigating officers. Thus an appropriate, designated official, when lawfully on a premises, is deemed to have the same powers as a constable under section 19 of PACE.[213]

5.112 By comparison with the common law position, Zander notes that section 19 has extended the common law in that in permits the seizure of fruits of a crime or evidence of a crime "regardless of the crime and of who is implicated".[214] Stone has also commented that "generally the PACE power is slightly wider than that under the common law".[215]

(3) The Irish position

5.113 The Irish High Court dealt with issue of finding evidence for which the search warrant was not issued in *McNulty v D.P.P.*[216] A warrant had been obtained by the Garda Siochana to search a premises for evidence in respect of an alleged rape. During the execution of that warrant, officers found a large

---

210 *Ibid*, at 83.

211 *Ibid*, at 83. It may be contended, however, that the common law rule of inadmissibility of evidence could be relied on in a case where material was obtained during an unlawful search. Thus it was not entirely necessary for the Police and Criminal Evidence Act 1984 to make such a provision with regard to material incidentally found during a search.

212 Zander, *The Police and Criminal Evidence Act 1984* (5th ed Thomson Sweet & Maxwell 2005) at 83.

213 *Police Reform Act 2002* (U.K.) Schedule 4, Part 2.

214 *Ibid*, at 83.

215 Stone, *The Law of Entry, Search and Seizure* (Oxford University Press 2009) at 121.

216 [2006] IEHC 74.

number of white tablets, which they believed to be MDMA ecstacy tablets. The applicant sought an order of prohibition in respect of a charge taken against him in respect of the possession of illegal drugs. The High Court refused the relief sought. The incidental seizure of the drugs under the search warrant was permissible.

5.114 In the earlier case of *The People (D.P.P.) v Balfe*[217] the Court of Criminal Appeal observed that the requirement for specificity regarding the items which were to be sought under a search warrant "has been eroded and rendered virtually irrelevant by the provisions of s.9 of the *Criminal Law Act 1976*".[218]

5.115 Section 9(1) of the *Criminal Law Act 1976* provides that:

> "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 Siochana, 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..."

It is notable that section 9(2) of the 1976 Act prevents the seizure of legally privileged material.[219] Section 9(2) states:

> "If it is represented or appears to a person proposing to seize or retain a document under this section that the document was, or may have been, made for the purpose of obtaining, giving or communicating legal advice from or by a barrister or solicitor, that person shall not seize or retain the document unless he suspects with reasonable cause that the document was not made, or is not intended, solely for any of the purposes aforesaid".

5.116 The power to seize material under section 9 of the 1976 Act is quite broad. Ryan and Magee have observed that the section seems to "render otiose the words in individual statutes which purport to limit the property which may be

---

217 [1998] 4 IR 50.

218 *Ibid*, at 61.

219 For a detailed discussion of the law of legal professional privilege see part B, chapter 5.

seized in the course of a search executed by a warrant issued thereunder".[220] Walsh has also commented on the broad scope of the section 9 power. He notes that material seized under the power can be totally unrelated to the suspected offence to which the search warrant relates and also that it does not matter that the warrant "specifically prescribes" the items which it authorises seizure of; section 9 seizures can go beyond those named materials.[221] It is also notable that the section simply requires the officer to "believe" that the material is evidence of an offence or suspected offence; there is no requirement of reasonableness. Walsh comments that this lower standard "emphasises [the] exceptional scope" of section 9.[222]

5.117 The scope of section 9 is somewhat limited, however, in that the officer must be exercising an authorised power to search if he or she is to rely on the section as the authority for seizure. Section 9 of the 1976 does not in itself authorise a search; that authority must stem from another legal power. Walsh has discussed the provision's limitation. He observes that an officer may not be able to rely on section 9 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".[223] Walsh uses the example of searching for a stolen piano; he 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. Thus it may be argued that the officer has gone beyond the scope of the permissible power. Walsh submits that a similar result would ensue if an officer's power had expired before he or she seized the material under section 9.[224] Ryan and Magee have also considered this latter possibility. They have commented that if material not referred to in the warrant is found in the course of a search for specific items listed in the search warrant, seizure of such material falls within the scope of section 9. However, if the items specified in the search warrant have been found and the officer continues to search and then finds the unrelated material, seizure of that material is not permitted under section 9 as the power to search expended when the item being searched for was found.[225] In such circumstances the officer's power to search would have expired before the material was seized under section 9.

---

220 Ryan and Magee, *The Irish Criminal Process* (Mercier Press Ltd. 1983) at 153.

221 Walsh, *Criminal Procedure* (Thomson Round Hall 2002) at 423-424.

222 *Ibid*, at 424.

223 Walsh, *Criminal Procedure* (Thomson Round Hall 2002) at 425.

224 *Ibid*, at 425.

225 Ryan and Magee, *The Irish Criminal Process* (Mercier Press Ltd. 1983) at 153.

(4) Discussion

5.118 The power to seize material incidentally found during the execution of a search warrant, which is believed to be evidence of an offence but which has not been referred to on the warrant, has been envisaged and provided for by the legislature in Ireland. 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 Commission is of the view that the power in section 9 of the *Criminal Law Act 1976* is not objectionable. However, the Commission believes 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 legislation. The Commission is of the view that it would be appropriate that the proposed general statutory framework for search warrants should include a provision in respect of this power to seize.

5.119 The Commission is of the view that such a provision should be more substantial than section 9 of the 1976 Act. Thus, 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. It is notable by comparison that in England and Wales the *Police and Criminal Evidence Act 1984* (PACE) provides that there must be reasonable grounds for believing that items incidentally found are material evidence of an offence so that seizure is permitted. Moreover, the principle which has been established at common law is also founded on reasonable grounds of belief. The Commission also believes that the power to seize evidential material which has not been provided for in the search warrant should be extended to other authorities who execute search warrants. Currently the provision contained in the *Criminal Law Act 1976* permits members of the Garda Siochana, Defence Forces or prison officers to seize incidentally found material. However, since this time a large number of legislative provisions have been enacted permitting other officials to execute search warrants. Thus legislation should be reformed to reflect these developments. The protection of legally privileged material form seizure which exists under section 9 of the 1976 Act should be replicated in any reformed provision in respect of seizure.

5.120 The Commission provisionally recommends that a provision in respect of finding and seizing material reasonably believed to be evidence of or relating to an offence, where the search warrant does not refer to that material, should be included in the Commission's proposed general statutory framework on search warrants.

M A Search and Seizure Code of Practice

5.121 As noted at paragraph 5.92 above, the Garda Siochana Practice and Procedure Manual sets out the process to be completed in respect of search and seizure under a warrant. Similarly, the Revenue Commissioners have set out general guidelines and best practice approaches in its Customs and Excise Enforcement Manual, which are to be followed by Revenue officials when carrying out their duties.[226] Included in this manual is a section regarding search warrants and execution of them. The Office of the Director of Corporate Enforcement also has operational protocols in place, while the Commission is aware that the Sea Fisheries Protection Authority is currently drafting search warrants standards of practice. There is not, however, a standard code in respect of the execution of all search warrants, whether executed by the Garda Siochana or another authority.

5.122 An example of this type of code exists in the United Kingdom. The *Police and Criminal Evidence Act 1984* (PACE) is supplemented by a number of codes of practice. Code B is the *Code of Practice for Searches of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises.* The Code contains guidance in respect of the conduct of searches and the seizure and retention of property, amongst other things. The Code is very much concerned with the permissible scope of police activity when searching and seizing, as well as rights of the occupiers. With regard to the conduct of searches, some of the requirements set out by the Code are as follows: i) the premises may only be searched to the extent necessary to achieve the purpose of the search; ii) a search may not continue under the authority of a warrant once all of the items specified in the warrant have been found; iii) no search may continue where the officer in charge is satisfied that the items being searched for are not on the premises; iv) searches must be conducted with due consideration for the property and privacy of the occupier and with no more disturbance than necessary; and v) reasonable force may be used only when necessary and proportionate because the cooperation of the occupier can not be obtained or is insufficient for the purpose.[227] With regard to seizure and retention of material, some of the guidance points include: i) an item may not be sized where an officer has reasonable grounds for believing it to be subject to legal privilege; ii) the officer in charge of the investigation is

---

226 Available at www.revenue.ie.

227 See generally *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 section 6(d).

responsible for making sure seized property is properly secured[228]; iii) any item seized may only be retained for as long as is necessary; iv) when property is retained, the person who had custody or control of it immediately before the seizure must be provided with a list or description of the property within a reasonable time; and v) the owner or controller of the property, or his or her representative, must be allowed supervised access to the property to examine it or to have it photographed or copied, or must be provided with a photograph or copy, within a reasonable time of any request and at their own expense, unless the officer in charge of the investigation has reasonable grounds for believing that this would prejudice the investigation of any criminal proceedings or lead to the commission of another offence. A record of the grounds of refusal shall be made where access is denied.[229]

5.123 The Commission provisionally recommends the implementation of a code of practice and procedure to apply to all search and seizures carried out under a warrant. This would be separate and distinct to a Search Warrant Act. Nonetheless, the Commission believes that a code would need to be of legal force so that it would be fully respected and a failure to comply with it could result in official proceedings. A code would be of benefit both to executing authorities and occupiers and/or owners of property made the subject of a search warrant. A search and seizure code could set out the best practice approaches to be followed by executing officers, rights and duties of persons involved in the process and relevant safeguards. Such a code might enable executing authorities to have greater knowledge of the scope of their powers, as well as the limits that exist, and it would also enable occupiers and owners to identify whether the conduct of officers during a search and seizure was permissible or not.

5.124 The Commission considers that a number of key guidelines and requirements should be included in such a code. Although some of these matters are already established procedures or as points of law, the Commission is of the view that they should, nonetheless, be identified within a code so that

---

228 The Code explains that securing involves "making sure the property is not examined, copied, imaged or put to any other use except at the request, or with the consent, of the applicant or in accordance with the directions of the appropriate judicial authority. Any request, consent or directions must be recorded in writing and signed by both the initiator and the officer in charge of the investigation". Code B, *Ibid*, at 7.11.

229 See generally 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 sections 7(a)-(d).

they may be acknowledged by any person who examines the code. The following points may be included in a code of practice:

i) Respect and care should be shown for premises and property during search and seizure.

ii) Respect should be shown to the occupier or owner of the property.

iii) Any items seized should be carefully packaged, clearly labelled and securely stored.

iv) An inventory should be made of all items seized.

v) A copy of the inventory should be given to the occupier or owner so that he or she can be fully certain of the item(s) which have been seized. Where it is reasonably believed that giving an inventory to an occupier or owner might threaten the investigation, it may be permissible not to so do.

vi) Premises should only be searched to the extent that is permitted by the search warrant; once the purpose of the warrant is complete the search may not continue.

vii) Legally privileged material may not be examined or seized.

viii) Seized items should be returned as soon as possible, unless there is a lawful reason for withholding them from the person from whom they were seized.

ix) A code of practice on search and seizure would not be limited to these points and the Commission welcomes submissions as to other matters which a code of practice should include.

5.125 The Commission provisionally recommends the implementation of a code of practice and procedure to apply to all search and seizures carried out under a warrant. The Commission welcomes submissions as to the specific matters which a search and seizure code of practice should include.

N Electronically Recording the Execution of Search Warrants

5.126 Electronic recording of the execution of search warrants is not, as a matter of law, required in Ireland. By contrast, in other jurisdictions searches under warrant may be so recorded.

(1) Australia

5.127 In Western Australia the *Criminal Investigations Act 2006* states that "if reasonably practicable, an audiovisual recording must be made of the

execution of a search warrant".[230] Under the Commonwealth *Crimes Act 1914*, as amended, it is provided that when executing a search warrant, an officer may take photographs, including video recordings, of the place being searched or of things at that place. Such recording is limited to cases a) for a purpose incidental to the execution of the warrant, or b) where the occupier of the premises consents in writing to the recording.[231] Tasmania's *Search Warrants Act 1997* repeats the same provision as contained in the Commonwealth *Crimes Act 1914*, with the exception that the occupier's consent need not be in writing.[232]

(2) New Zealand

5.128 In its report *Search and Surveillance Powers* the New Zealand Law Commission noted that although most search and seizure regimes do not specifically authorise executing officers to take video recordings or photographs, a practice of recording search scenes and the location and relationship of items seized; by means of photograph, video recording or other images; has developed there.[233] The Commission observed that recorded images and sounds may be used as evidence in proceedings arising from a search and seizure and may also serve to protect law enforcement officers from allegations of impropriety in accessing the place to be searched or in undertaking the search. The Commission expressed its opinion that video and image recording "seems to be a sound practice as it results in the compilation of an accurate, reliable, contemporary record of a scene or an article that can be reproduced or made available to the parties or to the court at a later date".[234] Therefore the New Zealand Commission recommended that in executing a search warrant, an officer should be entitled to take photographs or record images and sounds of the place being searched and items found there where such recordings would i) be relevant to the purposes of the search, or ii) verify that the search was properly exercised. The Commission did, however, note that to preserve legitimate privacy interests of occupiers any recording should, as far as possible, be confined to areas or things that are relevant to the purpose of the search.

---

230 *Criminal Investigations Act 2006* (WA) section 45(2).

231 *Crimes Act 1914*, as amended (Cth) section 3J(1).

232 *Search Warrants Act 1997* (Tas) section 9.

233 New Zealand Law Commission, *Search and Surveillance Powers* (Report 97, 2007) at 174.

234 *Ibid*, at 174-175.

5.129 A provision for recording a search and material found during a search has been included in the New Zealand *Search and Surveillance Bill 2009*. The Bill states that every search power, which includes a search under warrant, authorises the person exercising it to "take photographs, sound and video recordings, and drawings of the place, vehicle, or other thing searched, and of any thing found in that place, vehicle, or other thing, if the person exercising the power has reasonable grounds to believe that the photographs or sound or video recordings or drawings may be relevant to the purposes of the entry and search".[235] The Bill also states that a person assisting in the execution of a search power may take photographs, sound and video recordings, or drawings of the place, vehicle, or other thing searched and of things found "if the person exercising the power has determined that that [a recording] may be lawfully taken".[236]

(3) Discussion

5.130 The Commission has considered whether a provision for electronically recording the execution of search warrants should be introduced in Ireland. The Commission acknowledges that there are some advantages that would flow from the power to make a visual and audio recording of an execution. There would be an advantage of protection which would be twofold. Firstly recordings would protect executing authorities from unfounded claims of wrongdoing, and secondly, it would protect the occupier from untruths or uncertainties in respect of what was found during the search. In addition, recordings might also be useful as evidence where the search results in a prosecution. However, the Commission is concerned that a power to record a warrant execution might unduly impose on the right to privacy, particularly where the place being searched is a dwelling. The Commission also notes that recording an individual's home or property might be distressing to him or her.

5.131 The Commission has provisionally concluded that the proposed statutory framework on search warrants should not include provision for electronic recording of the execution of search warrants.

5.132 *The Commission provisionally recommends that the proposed statutory framework on search warrants should not include provision for electronic recording of the execution of search warrants.*

---

235 *Search and Surveillance Bill 2009* (NZ) section 108(k).

236 *Ibid*, section 110(2)(f).

CHAPTER 6 SAFEGUARDS: LEGAL PROFESSIONAL PRIVILEGE AND ILLEGALLY OBTAINED EVIDENCE

A Introduction

6.01 In this chapter the Commission deals with two important but separate safeguards, the protection of legal professional privilege and the exclusion of illegally obtained evidence.

6.02 In part B the Commission discusses the law on legal professional privilege and search warrants. In part C the Commission turns to discuss the exclusion of evidence obtained under an unlawful search warrant.

B Legal Professional Privilege

6.03 Legal professional privilege is a rule of law which provides that material which is the product of communication between an individual and his or her lawyer is confidential in nature. The effect of the law, as McGrath explains, "entitles a client to refuse to disclose any communications with his or her lawyer made for the purpose of giving or receiving legal advice."[1] Thus material which benefits from the privilege may not be accessed by a third party. The rationale behind the privilege is that it encourages full disclosure by the individual to his or her lawyer, as the individual should be confident that the communication will remain private and that he or she will not put him or herself at risk of a consequent legal action by revealing these details. As the English High Court in *Anderson v Bank of British Columbia*[2] explained

> "by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, that he should be able to make a clean breast of it to the gentleman with whom he consults...that he

1 McGrath, "Legal Professional Privilege" (2001) 36 Ir. Jur. 126, at 127.

2 (1876) 2 Ch D 644.

> should be able to place an unrestricted and unbounded confidence in the professional agent, and that the communications he so makes should be kept secret [so] that he should be enabled properly to conduct his litigation."[3]

The English Lord Chancellors Court in *Greenough v Gaskell*[4] observed that the rule was born "out of regard to the interests of justice...and to the administration of justice...If the privilege did not exist at all...a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case."[5] More recently the Supreme Court in *Smurfit Paribas Bank Ltd. v A.A.B. Export Finance Ltd.*[6] commented that "in the interests of the common good [the privilege] is desirable for the purpose of ascertaining the truth and rendering justice."[7]

(1) The Status of the Privilege

6.04 McGrath observes that the "traditional common law view of legal professional privilege was that it is merely a rule of evidence", however in more recent times the view has emerged that the privilege is of a greater substance.[8] That the privilege is a rule of law in itself has also been noted by the courts. In *Bula Ltd. v Crowley (No.2)*[9] Finlay C.J. referred to the confidence in relation to communications between lawyers and their clients as "a fundamental part of our system of justice [which] is considered in all the authorities to be a major contributor to the proper administration of justice".[10] In *Duncan v Governor of Portlaoise PrisonDuncan v Governor of Portlaoise Prison R. v Derby Magistrates' Court, ex parte B*[11] Kelly J. referred to the U.K. House of Lords decision in.[12], in which Lord Taylor stated that legal privilege "is much more than

---

3 *Ibid*, at 649.

4 (1833) 1 My & K 98; [1824-1834] All E.R. Rep 767.

5 (1833) 1 My & K 98, at 103.

6 [1990] 1 IR 469.

7 *Ibid*, at 477. Finlay C.J. also expressly referred to the statements of the Court in *Anderson v Bank of British Columbia* and *Greenough v Gaskell. Ibid*, at 476.

8 McGrath, "Legal Professional Privilege" (2001) 36 Ir. Jur. 126, at 150-151. See also Fennell, *The Law of Evidence in Ireland* (2nd ed Butterworths 2003) at 217-218.

9 [1994] 2 IR 54.

10 *Ibid*, at 59.

11 [1997] 1 IR 558.

12 [1995] 3 W.L.R. 681.

an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests." In *Miley v Flood*[13] Kelly J. reiterated the view he had taken in *Duncan v Governor of Portlaoise Prison*[14], showing that the view remains that the privilege is more than a rule of evidence.

6.05 In light of such case law, McGrath has commented that "legal professional privilege, or at least some aspects of it, might be found to have a constitutional foundation." In this regard he notes that the right to communicate in confidence with a legal advisor is "protected in the civil context by Article 40.3 as a facet of the right of access to the courts and in the criminal context by the right to legal representation."[15]

(2) The Scope of the Privilege

6.06 The privilege relates to confidential communications made between the client and his or her lawyer. The term 'communication' is given quite broad meaning in respect of the rule. It refers not only to written communication between client and lawyer, but also to notes of oral conversations, copies of documents containing legal advice and material built up for a lawyer's file for the purpose of assisting with the matter (such as witness statements and investigative reports).[16] Furthermore, the communication need not be directly between the lawyer and client; the privilege can attach to communications where an agent was involved who passed the communication either to or from the lawyer.[17] In respect of an agent involved on lawyer's side, McGrath explains that often legal firms could not function without the use of personnel such as secretaries or apprentices who deal with information on behalf of a lawyer. Meanwhile, in relation to an agent acting on behalf of the client, McGrath warns that only where the agent of a client is engaged for the purpose of obtaining legal advice on behalf of the client will the privilege attach to the communication.[18]

---

13 [2001] 2 IR 50.

14 [1997] 1 IR 558.

15 McGrath, "Legal Professional Privilege" (2001) 36 Ir.Jur. 126, at 151-152.

16 See generally McGrath, "Legal Professional Privilege" (2001) 36 Ir. Jur. 126, at 132; O'Brien, " Legal Professional Privilege – How Far Does it Extend?" (2003) 10(3) CLP 63, at 63 and 64.

17 See O'Brien, "Legal Professional Privilege – How Far Does it Extend?" (2003) 10(3) CLP 63, at 63.

18 McGrath, "Legal Professional Privilege" (2001) 36 Ir. Jur. 126, at 133. May and Powles have commented that the privilege would also arise where an interpreter

6.07 The privilege itself belongs to the client, and not to the lawyer. The lawyer may, however, invoke the privilege on behalf of the client and refuse access to the communications to a third party. Fennell notes that the relevant English authority which establishes this is *Minster v Priest.*[19] The U.K. House of Lords held that it is the decision of the client as to whether or not the privilege may be waived in respect of the material.[20] The Commission considers that this also reflects the position under Irish law. The fact that material is in the possession of the lawyer does not of itself render material privileged. As May and Powles explain:

> "if a document would be privileged in the hands of the client, it is privileged in the hands of the solicitor, on the other hand if the document is not privileged in the hands of the client, it is not privileged in the hands of the solicitor."[21]

Thus a lawyer cannot claim privilege on behalf of the client simply because material is in his or hers, rather than in the client's own, possession.

6.08 O'Brien points out that the privilege is not absolute in nature. She comments that "[a]ny application of legal professional privilege must be viewed in the context of the interests which it has sought to preserve."[22] She refers in this respect to *Murphy v Kirwan*[23] where Finlay C.J. commented that "professional privilege cannot and must not be applied so as to be injurious to the interests of justice". In the earlier case of *Smurfit Paribas Bank Ltd. v A.A.B. Export Finance Ltd.*[24] Finlay C.J. observed that while legal professional privilege was a clearly identified principle of law, "the question as to whether or not a party will be privileged to refuse to produce particular evidence is a matter within the sole competence of the courts".[25]

---

is present at an interview between a client a lawyer, as the interpreter is bound by a duty of confidence not to disclose what has taken place. May and Powles, *Criminal Evidence* (5th ed Thomson Sweet and Maxwell 2004) at 337.

19 [1930] A.C. 558.

20 Fennell, *The law of Evidence in Ireland* (2nd ed Butterworths 2003) at 203.

21 May and Powles, *Criminal Evidence* (5th ed Thomson Sweet and Maxwell 2004) at 341.

22 O'Brien, "Legal Professional Privilege – How Far Does it Extend?" (2003) 10(3) CLP 63, at 64.

23 [1993] 3 IR 501.

24 [1990] 1 IR 469.

25 *Ibid*, at 475.

(3) Conditions which must be met

6.09 Before a communication can fall within the scope of the privilege protection there are certain conditions which must be met. Many of these have, over time, been identified in case law.

(a) The communication must involve a qualified and practising lawyer and arise in the course of a professional legal relationship

6.10 The communication must be made to or made by a qualified and practicing lawyer in the course of a professional legal relationship. Therefore communications offered by an individual who is not qualified as a lawyer or who is not currently practicing will not benefit from the privilege.[26] Furthermore, the communication must arise in a professional context, thus a conversation which occurs at a social event or which relates to non-professional business will not attract the benefit of the privilege.[27] As the High Court in *Miley v Flood*[28] noted "[t]he communication must be made to the lawyer or his assistants in their professional capacity; the relationship must be a professional one at the exact moment of the communication."[29]

(b) The Communication must have been for the purpose for giving or obtaining legal advice

6.11 The communication must have been made for the purpose of giving or obtaining legal advice. This issue was considered in *Smurfit Paribas Bank Ltd. v A.A.B. Export Finance Ltd*.[30] In the High Court Costello J. held that documents in question were not privileged from disclosure and inspection. He concluded that the documents did not request and did not contain any legal advice, but simply statements of fact as to the transaction which the defendant indicated it wished to have completed by the drafting of necessary legal documents.[31] Costello J. referred to the English decision *Smith-Bird v Blower*[32]

---

26 See generally McGrath, "Legal Professional Privilege" (2001) 36 Ir. Jur. 126, at 135-136; O'Brien, "Legal Professional Privilege – How Far Does it Extend?" (2003) 10(3) CLP 63, at 63.

27 Fennell, *The Law of Evidence in Ireland* (2nd ed Butterworths 2003) at 203.

28 [2001] 2 IR 50.

29 *Ibid*, at 67. The requirement has also been observed by the Irish Courts in *Smurfit Paribas Bank Ltd. v A.A.B. Export Finance Ltd.* [1990] 1 IR 469; *Ochre Ridge v Cork Bonded Warehouses* [2004] IEHC 160; *Prendergast v McLoughlin* [2008] IEHC 296.

30 [1990] 1 IR 469.

31 *Ibid*, at 473.

where it was held that a letter written by a client to his solicitor was not for the purpose of obtaining legal advice but simply an answer to an inquiry as to whether or not he had agreed to sell a property, thus it was not privileged. The Supreme Court upheld the decision of Costello J. that legal professional privilege did not apply here. The Supreme Court distinguished between legal advice and legal assistance in this respect. According to Finlay C.J. where a communication, "whether at the initiation of the client or the lawyer", was concerned with affording legal advice, that communication should in general be privileged. He stated that, by contrast, the same privileged status would not apply to communications made "for the purpose of obtaining legal assistance other than advice."[33] Finlay C.J. added that there does not appear to be sufficient public interest or feature of the common good to be secured or protected which could justify the exemption of legal assistance communications from disclosure.[34] McCarthy J. also commented on the distinction; he noted that:

> "communication of fact leading to the drafting of legal documents and requests for the preparation of such, albeit made to a solicitor, unless and until the same results in the provision of legal advice, is not privileged from disclosure."[35]

6.12 The decision in *Smurfit Paribas Bank Ltd. v A.A.B. Export Finance Ltd.*[36] was followed in *Miley v Flood*[37] where privilege was claimed by a lawyer in respect of a client's identity. The High Court held that the communication of an individual's identity did not relate to the giving or receiving of legal advice, rather it was no more than a collateral fact. Thus client identity could not benefit from the privilege.

6.13 Similarly in *Buckley v Bough*[38] the defendant claimed legal privilege over documents in respect of a hearing of the Fitness to Practice Committee under the *Medical Practitioners Act 1978*. The Court held that that although the

---

32 [1939] 2 All E.R. 406.

1.02 33 *Smurifit Paribas Bank Ltd. v A.A.B. Export Finance Ltd.* [1990] 1 IR 469, at 478. Finlay C.J. commented that there are "many tasks carried out by a lawyer for his client and properly within the legal sphere, other than the giving of advice, which could not be said to contain any real relationship with the area of potential litigation". *Ibid*, at 478.

34 *Ibid*, at 478.

35 *Ibid*, at 480.

36 [1990] 1 IR 469.

37 [2001] 2 IR 50.

38 High Court, 2 July 2001.

documents consisted of correspondence from the defendant's solicitors, they did not communicate legal advice and so did not attract the privilege. This principle has also applied in England. In *R. v Crown Court, ex p Baines and Baines*[39] it was held that conveyancing documents were not privileged as they did not come within the scope of giving legal advice, rather they were records of the purchase of a house. By contrast communications between the client and lawyer whereby legal advice was given in respect of the transaction were privileged.

6.14 A further element of Finlay C.J.'s judgment in *Smurfit Paribas Bank Ltd. v A.A.B. Export Finance Ltd.*[40] was that he linked the concept of legal advice with the possibility of litigation. He commented that where a person seeks or obtains legal advice:

> "there are good reasons to believe that he necessarily enters the area of potential litigation. The necessity to obtain legal advice would in broad terms appear to envisage the possibility of a legal challenge or query...Whether such query or challenge develops or not, it is clear that a person is then entering the area of potential litigation."[41]

6.15 In *Prendergast v McLoughlin*[42] the High Court observed that proximity to the area of litigation was a "predominant element of the test formulated by Finlay C.J." as to whether a communication did, in fact, amount to legal advice which could benefit from legal professional privilege. In *Ochre Ridge v Cork Bonded Warehouses*[43] the High Court took a somewhat broader view however. Lavan J. noted that the provision of legal assistance "may entail the provision of legal advice because of the fact that a solicitor's duty of care extends beyond the scope of instructions and requires him to consider the legal implications of the facts told to him." In any event the principle that a communication must contain legal advice appears to be well established in law. Perhaps the correct conclusion to be drawn is that its application to particular communications is a matter to be determined on a case by case basis.

---

39 [1987] 3 All E.R. 1025.

40 [1990] 1 IR 469.

41 *Ibid*, at 478.

42 [2008] IEHC 296.

43 [2004] IEHC 160.

(c) The communication must have been confidential

6.16 The communication must have been confidential for the privilege is to apply.[44] The requirement that communications "are sworn to be confidential" was noted by Costello J. in *Smurfit Paribas Bank Ltd. v A.A.B. Export Finance Ltd.*[45] This requirement is in line with the rationale behind the privilege rule – that communications between an individual and his or her lawyer remain secret. In *Bord na gCon v Murphy*[46] the Supreme Court observed that privilege "attaches to confidential communications between solicitor and client."[47] However, having examined the facts of the case here, the Court concluded that "the client's statement was made to the solicitor not in confidence but specifically and expressly for disclosure" to Bord na gCon.[48] Thus the letter written by the defendant's solicitor in reply to the complainant's initial letter was not the subject of legal professional privilege.

(d) The communication must not be in relate to unlawful conduct

6.17 The communication must not be for the purpose of furthering or preparing for a criminal offence. Where the communication is for this purpose it will not benefit from the privilege.[49] The rationale behind this exception is clearly the prevention and prosecution of crime. As May and Powles note, if this exception did not exist "a criminal could obtain advice as to how most advantageously to commit a crime from a legal point of view and the solicitor would not be able to give evidence about it."[50]

6.18 In *Murphy v Kirwan*[51] the Supreme Court traced the exception through a number of cases. The first case referred to was *R. v Cox and Railton*[52] where Stephen J. observed that the rule of legal privilege –

---

44 See generally Fennell, *The Law of Evidence In Ireland* (2nd ed Butterworths 2003) at 204; McGrath, "Legal Professional Privilege" (2001) 36 Ir. Jur. 126, at 135.

45 [1990] 1 IR 469.

46 [1970] IR 301.

47 *Ibid*, at 312.

48 *Ibid*, at 312.

49 O'Brien has pointed out where such cases arise, "the lawyer must yield the privilege to [the] superior social interests" of preventing or terminating crime or fraud. O'Brien, "Legal Professional Privilege – How Far Does it Extend?" (2003) 10(3) CLP 63, at 64.

50 May and Powles, *Criminal Evidence* (5th ed Thomson Sweet and Maxwell 2004) at 338.

51 [1993] 3 IR 501.

> "cannot include the case of communications criminal in themselves or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice and to those of the administration of justice."[53]

In *Williams v Quebrada Railway, Land and Copper Company Ltd.*[54] the Court held that the exception extended beyond purely criminal purposes to cases of deceit or fraud. It stated that "where there is anything of an underhand nature or approaching to fraud, especially in commercial matters where there should be the veriest good faith, the whole transaction should be ripped up and disclosed in all its nakedness to the light of the court."[55] While in *Crescent Farm Sports v Sterling Offices*[56] the Court acknowledged that the exception of the rule in relation to fraud "is not limited to the tort of deceit [but] includes all forms of fraud and dishonesty, such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances."[57]

6.19 In *Murphy v Kirwan*[58] Finlay C.J. was satisfied that "the essence of the matter is that professional privilege cannot and must not be applied so as to be injurious to the interests of justice and to those in the administration of justice where persons have been guilty of conduct of moral turpitude or of dishonest conduct".[59]

6.20 In the subsequent case of *Bula Ltd. v Crowley (No. 2)*[60] the Supreme Court reiterated that the exemption to legal privilege arises in cases where there is "an allegation of fraud, criminal conduct or conduct constituting a direct interference with the administration of justice, such as malicious prosecution or an abuse of the processes of the court, all of which can be described as charges or offences obtaining a clear element of moral turpitude."[61]

---

52 (1884) 14 QBD 153.

53 *Supra*, n.51, at 617.

54 [1895] 2 Ch. 751.

55 *Ibid*, at 755.

56 [1972] Ch. 553.

57 *Ibid*, at 565.

58 [1993] 3 IR 501.

59 *Ibid*, at 511.

60 [1994] 2 IR 54.

61 *Ibid*, at 57-58.

(4) Legal Privilege and Search Warrants

6.21 A small number of search warrant provisions in Ireland specifically state 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 legal privilege. These Acts include the *Criminal Assets Bureau Act 1996,*[62] *Criminal Justice (Theft and Fraud) Act 2001*[63], *Sea-Fisheries and Maritime Jurisdiction Act 2006*[64], *International Criminal Court Act 2006*[65] and the *Criminal Justice (Mutual Assistance) Act 2008*[66]. Two points are notable here. The first is that a very limited number of Irish provisions specifically refer to legal privilege in respect of material found and seized under search warrant. Nonetheless, as it has been established that the privilege is a rule of law, seizure under any search warrant provision is subject to the privilege; it is not necessary that the provision expressly refers to it. The second point is that 'legal privilege' is not defined in any of the above noted provisions. However, case law has clearly set out what the privilege is and so these principles can be relied upon to determine whether material found during the execution of a search warrant is to be deemed legally privileged.

(5) Search warrants and legal professional privilege in other jurisdictions

(a) United Kingdom

6.22 In the United Kingdom the *Police and Criminal Evidence Act 1984* (PACE) provides express protection for legally privileged material in respect of searches and seizure carried out under warrant. Section 8 of PACE provides that if a justice of the peace is to issue a search warrant, he or she must be satisfied that there are reasonable grounds for believing that the material being sought "does not consist of or include items subject to legal privilege".[67] While in respect of seizing material, section 19 of PACE states that no power of seizure conferred on a constable under any enactment is to be taken to authorise the seizure of any item which the constable exercising the power has reasonable

---

62 Section 14 of the 1996 Act, as amended by section 16(b)(ii) of *Proceeds of Crime (Amendment) Act 2005*.

63 Section 48(6).

64 Section 17, as amended by section 44 of the *Criminal Justice Act 2007*.

65 Section 9.

66 Section 74(11).

67 *Police and Criminal Evidence Act 1984*, section 8(d).

grounds for believing to be subject to legal privilege.[68] With regard to the wording "reasonable grounds" for believing contained in section 19, Stone has commented that reasonable grounds presumably requires "more than a mere statement by the owner" that the material is subject to the privilege. It most cases it is probably likely that the officer will be able to determine himself or herself whether the material is likely to be privileged, for example if a document is headed with a solicitor's name or logo it may be reasonably contemplated that the it contains privileged information.

6.23 PACE also includes a definition in respect of legal privilege.[69] It sets out that the privilege covers communications[70] between a professional legal advisor and his or her client, or any person representing his or her client:

i) made in connection with the giving of legal advice;

ii) made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings;

iii) or items enclosed with or referred to in such communications and made

  i) in connection with the giving of legal advice;

  ii) in connection with or in contemplation of legal proceeding and for the purposes of such proceedings.

iv) The definition also explains that items held with the intention of furthering criminal purpose are not subject to legal privilege.

6.24 Code of Practice B, which supplements PACE, reiterates at 7.2 that items subject to legal privilege, as defined in section 10 of PACE, may not be seized. However there has been a legislative development which limits the scope of the protection in respect of seizure and the Code B provision has incorporated this change. Thus part 7.2 of Code B states that legally privileged material may not be seized except "under the Criminal Justice and Police Act 2001, Part 2". The *Criminal Justice and Police Act 2001*, part 2, gives officers limited powers to seize property from premises or persons so that they can sift

---

68 *Police and Criminal Evidence Act 1984*, section 19(6).

69 *Police and Criminal Evidence Act 1984*, section 10.

70 Stone notes that PACE does not define "communications". He states that there seems "no reason why the word should not include, in addition to letters, emails, faxes, telexes, or other typed, printed, or handwritten communications, recordings of conversation or telephone calls. Similarly, copies or transcripts of any of the above should be covered, if the scope of the privilege is not to be unduly narrow." *The Law of Entry, Search and Seizure* (4th ed Oxford University Press 2005) at 115.

through or examine the material elsewhere.[71] This provision is particularly useful 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 is relevant, or having to go through it all during the execution period of the search, officers may remove the material so that they can deal with it away from the search scene.[72]

6.25 Section 50(2) of the *Criminal Justice and Police Act 2001* provides:

> "Where–
>
> (a) a person who is lawfully on any premises finds anything on those premises ("the seizable property") which he would be entitled to seize but for its being comprised in something else that he has (apart from this subsection) no power to seize,
>
> (b) the power under which that person would have power to seize the seizable property is a power to which this section applies, and
>
> (c) in all the circumstances it is not reasonably practicable for the seizable property to be separated, on those premises, from that in which it is comprised,
>
> that person's powers of seizure shall include power under this section to seize both the seizable property and that from which it is not reasonably practicable to separate it".

Section 50(4) states that section 19(6) of PACE - that is the prohibition on seizing legally privileged material - "shall not apply to the power of seizure conferred by subsection (2)". Therefore, where it is not practical or possible to separate the material authorised to be seized from other material, the entirety of the material may at the time of the search be seized, even if this means taking some material which is legally privileged.

6.26 The 2001 Act has included safeguards to apply to seizures made under section 50. Section 53 requires the material seized to be examined as soon as is reasonably practicable after the seizure[73] and that the examination is the confined to whatever is necessary for determining how much of the property can be retained and whether it is required to be returned under section 54 of the

---

71 *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.

72 See generally Stone, *The Law of Entry, Search and Seizure* (4th ed Oxford University Press 2005) at 149-151.

73 *Criminal Justice and Police Act 2001*, section 53(2)(a).

Act.[74] Section 54 particularly deals with the obligation to return seized material which is legally privileged. The section states that if, at any time after the seizure of material under the Act, it appears that an item is subject to legal privilege or has legally privileged material comprised within it, that material is to be "returned as soon as reasonably practicable after the seizure".[75] However, the section 54 duty to return legally privileged material may not apply where it is not practicable to separate the privileged information from the entirety of the material seized.[76]

6.27 Although it may be noted that the powers afforded under the 2001 Act have limited the scope of the privilege protection somewhat, the practical benefits of the 'search and sift' provisions may also be identified. In this regard Stone has commented that these provisions prove to be 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. According to Stone as long as the powers are kept for use in 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". Stone also comments that the provisions are not, in principle, likely to lead to a breach of Art 8 of the European Convention on Human Rights so long as they are used legitimately and proportionately.[77]

(b) Australia

(i) Commonwealth

6.28 The *Crimes Act 1914*, as amended by the Crimes *(Search Warrants and Powers of Arrest) Amendment Act 1994*, states that it "does not affect the law relating to legal professional privilege."[78] Thus the provisions of the 1914 Act in respect of search warrants are subject to the privilege as it exists under the common law.

(I) Law Council of Australia Guidelines íí

---

74 *Ibid*, section 53(2)(b).

75 *Ibid*, section 54(1). See also 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 7.9B.

76 *Ibid*, section 54(2). See generally Stone, *The Law of Entry, Search and Seizure* (4th ed Oxford University Press 2005) at 152.

77 Stone, *The Law of Entry, Search and Seizure* (4th ed Oxford University Press 2005) at 155-156.

78 Section 3ZX.

6.29 With regard to legal professional privilege and search warrants, the Law Council of Australia has issued guidelines on the "Execution of Australian Federal Police Search Warrants on Lawyers' Premises".[79] These general guidelines were agreed upon by the Commissioner of the Australian Federal Police and the Law Council of Australia and they set out the procedure to be followed where a search warrant is issued under Commonwealth legislation in respect of a lawyer's premises or premises of a Law Society[80] where a claim of legal professional privilege is made. Guideline 7 states that although the guidelines focus on search warrants issued under the *Crimes Act 1914* (Cth), the guidelines "are to be interpreted as applying to search warrants under other Commonwealth legislation" where such warrants relate to a lawyer's or Law Society's premises. Guideline 12 sets out the purpose of the guidelines. It states:

> "The effect of these guidelines, in summary, is that, where the lawyer or Law Society is prepared to co-operate with the police search team, no member of that team will inspect any document identified as potentially within the warrant until the lawyer or Law Society has been given the opportunity to claim legal professional privilege in respect of any of the documents so identified."

Guideline 13 goes on to say that where such a claim is made, no member of the police search team will inspect any document the subject of the claim until either a) the claim is abandoned, or b) the claim is dismissed by a court. The aim of the guidelines is essentially to encourage cooperation and mutual assistance between the Federal Police and a lawyer or Law Society whose premises is to be searched under warrant.

6.30 The procedure to be followed in such circumstances is set out in detail by the guidelines. The guidelines state that when the executing officer attends at the premises of the lawyer or Law Society, he or she should explain the purposes of the search and invite the lawyer or representative of the Law Society to cooperate in the conduct of the search.[81] The executing officer and all other members of the search team should then be identified to the lawyer or

---

79 Law Council of Australia *Execution of Australian Federal Police Search Warrants on Lawyers' Premises* (June 1990, as updated in March 1997). Available at www.lawcouncil.asn.au/library/policies-&-guidelines /access-premises.cfm.

80 Guideline 1 sets out that for the purpose of the guidelines, "'Law Society' means a Law Society, a Bar Association, a Law Institute and any similar professional body of lawyers, and includes a body or tribunal established for the purpose of receiving or investigating complaints involving issues of professional standards or relating to the delivery of professional legal services against barristers and solicitors or for the purpose of disciplining barristers or solicitors.

81 Guideline 16, Law Council of Australia *Execution of Australian Federal Police Search Warrants on Lawyers' Premises*.

representative.[82] However, if no lawyer of representative is in attendance at the location the guidelines require, if it is practicable, that the premises or relevant part thereof "should be sealed and execution of the warrant deferred for a period which the executing officer in his or her discretion considers reasonable in all the circumstances to enable any lawyer or responsible person connected with the premises to attend or, if that is not practicable, to enable arrangements for another person to attend the premises".[83] The guidelines provide that a reasonable time should be allowed i) to enable a lawyer to consult with his or her client(s), or to the Law Society so that it may consult with the representatives of the person(s) to whose affairs the documents relate, and ii) so that the lawyer or Law Society may take legal advice. In line with this it is stated that it is desirable that warrants be executed only during normal working hours and that where they are executed outside of these hours allowances should be made for the delay which may arise in contacting relevant parties.[84]

6.31 Where the lawyer or Law Society agrees to assist the search team, the initial process to be complied with is as follows:

a) in respect of all documents identified by the lawyer or Law Society and/or further identified by the executing officer as potentially within the warrant, the executing officer should, before proceeding to further execute the warrant (by inspection or otherwise) and to seize the documents, give the lawyer or Law Society the opportunity to claim legal professional privilege in respect of any of those documents;
b) if the lawyer or Law Society asserts a claim of legal professional privilege in relation to any of those documents then the lawyer or Law Society should be prepared to indicate to the executing officer the grounds upon which the claim is made and in whose name the claim is made; and
c) in respect of the documents which the lawyer or Law Society claim are subject to legal professional privilege, the search team shall proceed in accordance with the guidelines. In respect of the remaining documents, the search team may then proceed to complete the execution of warrant.[85]

Where the lawyer or representative claims legal privilege in respect of documents, those documents will, under the supervision of the executing officer, be placed "by the lawyer and/or his or her staff, or the Law Society and/or its representatives, in a container which shall then be sealed".[86] In

---

82 *Ibid*, guideline 17. This guideline also states that the search team "should be kept to the lowest number of persons reasonably necessary in all the circumstances".

83 *Ibid* guideline 18.

84 *Ibid*, guidelines 20 and 21.

85 *Ibid*, guideline 24.

86 *Ibid*, guideline 25.

addition, a list of the documents placed in the container will be prepared by the search team and lawyer or Law Society.[87] The container and the list will then be signed and delivered to a third party by both the executing officer and the lawyer or representative of the Law Society.[88] The lawyer or Law Society then has 3 working days, or a longer period if such has been agreed by the parties, to institute proceedings in order to establish the privilege. Where such proceedings are instituted, the documents will be delivered to the relevant Court Registrar and the Registrar will hold the documents pending the order of the Court as to whether the documents should be deemed privileged and so exempt from the scope of the search warrant.[89] However, where proceedings are not instituted within the allocated time period, or the parties come to an agreement as to the disclosure of some or all of the documents, the parties may appear before the third party, advise him or her of the situation and give consent to have the material released into the possession of the executing officer, or only some of the material where such disclosure has been agreed by the lawyer or Law Society.[90]

6.32 Two final points should be noted. The first is that where the lawyer or Law Society refuses to cooperate, the search may nonetheless proceed. The guidelines provide that in such circumstances the executing officer should advise that, as the search team is not familiar with the office, it may be necessary to carry out a search of all files and documents in order to give full effect to the search warrant.[91] Therefore it would appear to be in the best interests of the lawyer and his or her clients, or the Law Society and interested parties, to cooperate with the executing officer under the guidelines procedure. Not only would cooperation have a practical advantage in that an office might not be as disrupted if its occupier rather than strangers opened files and storage, but also it would protect the legal privilege of documents which are not related to the search warrant but which may be searched where a stranger is not aware of their status. Furthermore, guideline 35 provides that the lawyer or Law Society should be advised that "a document will not be seized if, on inspection, the executing officer considers that the document is either not within the warrant or privileged from seizure". Thus it will not be necessary to carry out the removal of the material so that privilege can be determined in all cases. Rather the procedure set out in the guidelines will only need to be followed where legal privilege is claimed but where is does not immediately appear to the executing officer that the material concerned is in fact privileged.

---

87 *Ibid*, guideline 27.

88 *Ibid*, guidelines 29 and 30.

89 *Ibid*, guideline 32.

90 *Ibid*, guideline 33.

91 *Ibid*, guideline 34.

(II) Australian Law Reform Commission Report: "Privilege in Perspective Client Legal Privilege in Federal Investigations"

6.33 In 2007 the Australian Law Reform Commission issued its Report *Privilege in Perspective: Client Legal Privilege in Federal Investigations*.[92] The Report noted a number of points in respect of the guidelines and made some recommendations as to their reform. The Report noted that in the ALRC Discussion Paper *Client Legal Privilege and Federal Investigatory Bodies*[93] it proposed allowing a 14 day period for persons to commence proceedings so as to establish privilege in respect of identified material.[94] The Commission observed in its Report that this proposal was generally supported in the submissions it received and that the Australian Federal Police did not oppose the extension of the time period. According to the Commission this longer period "would be likely to lead top the formulation of well-considered claims and reduce the risk of blanket claims being made".[95] If this recommendation were to be implemented, the Commission recommended that the guidelines be amended to incorporate the change to the commencement of proceedings time period.

6.34 The ALRC Report observed that "only a very few federal bodies appear to have formal policies and practices concerning the resolution of privilege disputes".[96] The Commission noted a number of consequent issues due to this failing; these included significant delays, costs and the lack of clear, uniform and expeditious processes for resolving a legal privilege claim. In light of this, the Commission set out a uniform model process for reviewing privilege claims, which could be followed by all Federal bodies.[97] The model for this independent review procedure is set out in recommendation 14 of the Report. It states that where a Federal body disputes a privilege claim it should have a discretion to offer the claimant an opportunity to agree to an independent review process to resolve the dispute. Where the Federal body decides to offer the option of this review process, it should notify the claimant of the availability and features of the process, and of the statutory time period of 14 days (or such other time agreed to by the parties) for indicating agreement to submit to the

---

92 ALRC 107 (2007). The Report explains at 1.16 that the phrase "client legal privilege" rather than "professional legal privilege" is used for two reasons: firstly because the privilege is described in that way by the *Evidence Act 1995* and secondly because the former reflects the nature of the privilege as one belonging to the client and not to the lawyer.

93 ALRC DP 73 (2007).

94 ALRC 107 (2007) at 8.390.

95 *Ibid*, at 8.391.

96 ALRC 107 (2007) at 8.236.

97 See generally ALRC 107 (2007) at 8.232 - 8.331.

review process. The Commission further proposed that the process would involve the "engagement of a mutually acceptable independent reviewer or reviewers (with appropriate legal qualifications) to make a non-binding assessment of the claim, although the claimant and federal body may agree to accept the assessment as binding". Having signed a confidentiality undertaking, the reviewer should then be given access to the material and assess which category it should fall into: privileged, not privileged, partly privileged or unable to make an assessment. Where the parties had not agreed that the independent review would be binding upon then, the Commission proposed that either party could, within 7 days, commence proceedings in a superior court seeking a declaration as to whether the material is privileged.[98]

6.35 The ALRC Report recognised that implementation of the recommendation would necessitate a review of the Law Council of Australia guidelines. The Commission noted that the guidelines would need to include a reference to the procedure for the independent review of material. [99]

6.36 The ALRC further recommended that the guidelines should be amended to state that they apply "to any part of non-legal premises that contain the workspace of an in-house counsel."[100] According to the Commission this move would promote clarity and certainty of approach. It may be noted that documents subject to legal privilege can be located at any place, whether a legal office or elsewhere. Thus the Australian Commission is seeking to bring the guidelines in line with the principle by making this recommendation.

6.37 Separate to the guidelines, the Australian Commission recommended in its Report that an individual whose premises or person is the subject of a Commonwealth search warrant should be provided with guidelines as to "the procedures to be adopted in making and resolving a claim for privilege".[101] The Commission held the view that such guidelines should be attached to search warrants executed by all federal bodies. According to the Commission "the immediacy and circumstances of a search" increase the significance of ensuring that an individual is informed as to the protocols to be adopted in protecting his or her rights of legal privilege.

(ii) Queensland

6.38 Queensland's *Crime and Misconduct Act 2001*, section 94, sets out the procedure to be followed where an authorised officer exercising a search warrant power wishes to "inspect, photograph or seize a document or thing under the warrant" and a person who is entitled to claim privilege does so claim

---

98 ALRC 107 (2007) at 8.397.

99 ALRC 107 (2007) at 8.397.

100 ALRC 107 (2007) at 8.398.

101 ALRC 107 (2007) at 8.396.

that the material is privileged.[102] The authorised officer must consider the claim and either i) withdraw the requirement to access the material, or ii) follow the procedure under section 81 of the Act. Section 81 establishes that the executing officer shall require the individual to immediately seal the material claimed to be privileged under supervision. The sealed material will then be delivered to a registrar of the Supreme Court to be held in safe custody. An application must then be made to the Supreme Court, under section 96, within 3 days of the material being sealed and placed in custody. Section 96 states that the burden of proof lies upon the person who claims the privilege. The judge must consider submissions on the matter and then decide whether the claim of privilege is established.

(iii) Western Australia

6.39 The *Criminal Investigation Act 2006* sets out the procedure to be followed in respect of a claim of legally privileged material when a search warrant is being executed. Section 151 applies where a) a person entitled to possession of a record claims that all or some of the information is privileged, or b) the officer seizing the record or to whom it is produced reasonably suspects that all or some of the information is privileged. Under the provision the material concerned must be secured in a manner that i) prevents it from being concealed, disturbed or lost; ii) preserves its evidentiary value; and iii) prevents access to the information by any person who would not be entitled to access the information if it were privileged. The officer in charge must apply to the court to decide whether the information is privileged, and in doing so must deliver the secured material into the custody of the court. Section 151(6) provides that the application may, "if the court thinks fit", be heard in private. Section 151(7) states that the applicant, and any person entitled to possession of the record, is entitled to be heard on the application. If the Court decides that all of the information is privileged it must make the material available to be collected by the person from whom it was seized.[103] However, if the court decides that the information is not privileged it must make the material available to the applicant.[104] If the court determines that only some of the material is privileged it may make an order enabling the applicant to have access to the non-privileged information.[105]

---

102 Section 94.

103 Section 151(10).

104 Section 151(9).

105 Section 151(11).

(c) New Zealand

6.40 The *Search and Surveillance Bill 2009* has made provision in respect of legal professional privilege and search warrants. Section 130(2) of the Bill expressly provides that no privilege applies in respect of any communication or information, made, received, compiled, or prepared, a) for a dishonest purpose, or b) to enable or aid any person to commit or plan to commit what the person claiming the privilege knew, or ought reasonably to have known, to be an offence.

6.41 Section 135 of the Bill refers to the effect of privilege on search warrants and search powers. It states that where a recognised privilege exists, the privilege holder has the right to: i) prevent a search under the Act of any communication or information to which the privilege would apply if it were sought to be disclosed in a proceeding, or ii) require the return of any communication or information if it is seized or secured by a person exercising a search power, pending determination of the claim of privilege. Section 136 specifically deals with search warrants that extend to lawyers' premises or material held by lawyers. It states a search warrant may not be executed in such circumstances unless the lawyer, or a representative on behalf of the lawyer, is present.[106] Where the executing officer is unable to contact the lawyer or a representative on the lawyer's behalf, the officer may contact the New Zealand Law Society and request that a person be appointed by the Society to represent the interests of the lawyer's clients in relation to the search.[107] Before executing a search warrant, the executing officer must give the lawyer, representative or Law Society appointee the opportunity to a) claim privilege on behalf of the lawyer's clients, or b) make an interim claim of privilege if instructions have not yet been obtained from clients as to whether a privilege claim should in fact be made.[108]

6.42 Where an officer executing a search warrant has reasonable grounds to believe that any item discovered in the search may be the subject of privilege, he or she must provide any person believed to be able to claim the privilege a reasonable opportunity to claim it.[109] If the executing officer is unable to identify or contact a person who may be able to claim privilege in respect of the material, or that person's lawyer, the officer may apply to the District Court for a determination as to the status of the material and may do any thing

---

106 *Search and Surveillance Bill 2009*, section 136(2).

107 *Ibid*, section 136(3).

108 *Ibid*, section 136(4).

109 Section 138(2)(a).

necessary to enable the court to make that determination.[110] In the case of a claim of legal privilege having to be resolved, the officer executing the search warrant may secure the thing or make a forensic copy of it. He or she may then deliver the material to the District Court, where a determination will be made as to whether the material is privileged.[111] The officer "must supply the lawyer or other person who may or does claim privilege with a copy of, or access to" the secured material[112] and "must not search the thing secured, unless no claim of privilege is made, or a claim of privilege is withdrawn, or the search is in accordance with the directions of the court determining the claim of privilege".[113] The Bill provides that where a person wishes to make a claim in respect of any thing seized, or sought to be seized, under a search warrant, he or she must provide the executing officer with a particularised list of the items claimed to be privileged "as soon as practicable after being provided with the opportunity to claim privilege". If the material "cannot be adequately particularised" in accordance with the above provision, the individual may apply to the District Court for directions or relief.[114]

(d) Canada

6.43 In Canada the *Canada Criminal Code* 1985has set out a detailed procedure to be followed in respect of the examination or seizure of materials where privilege is claimed.[115] Under the Code if legal privilege is claimed in respect of a document about to be examined or seized by an officer, the officer shall, "without examining or making copies of" the document,

i) seize the document, place it in a package and suitably seal and identify the package; and

ii) place the package in the custody of the sheriff of the district or county in which the seizure was made or, if there is an agreement in writing that a specified person act as a custodian, in the custody of that person.

6.44 An application must then be made to a judge to set a date and place for the determination as to whether the material should be disclosed. The material must be presented to the judge at that time and place. This hearing shall be heard in private. If the judge considers it necessary, he or she may inspect the

---

110 Section 138(2)(b).

111 Section 139, *Ibid*.

112 Section 139(b).

113 *Ibid*, section 139(c).

114 *Ibid*, section 140.

115 *Criminal Code (1985) c-46*, section 488.1.

material so as to make the determination. Furthermore, if the judge considers that it would assist him or her in this determination, he or she may call upon the Attorney General (subject to any conditions or restrictions imposed by that judge) to inspect the document and/or make a representation as to whether or not it should be disclosed. If disclosure is refused, the material shall be repacked and sealed and returned to the lawyer. If the judge holds that disclosure is permissible, the documents shall be delivered to the officer who carried out the seizure, or to some person designated by the Attorney General.

(6) Discussion

6.45 The Commission provisionally recommends that legislation in Ireland should clearly set out that legal professional privilege relates to material found under *any* search warrant and not just warrants issued under Acts which specifically refer to legal privilege. This would ensure complete certainty that the privilege applies regardless of the provision under which the search warrant has been issued. The Commission is of the view that it would also be appropriate for legislation to encompass a definition of 'legal professional privilege'. In the U.K., for example, PACE 1984 offers a substantial definition of legal professional privilege in addition to its provision that a search warrant does not authorise the seizure of such material.

6.46 The Commission provisionally recommends that legislation should clearly set out that legal professional privilege relates to material found under any search warrant and that the term 'legal professional privilege' should be defined within such legislation.

6.47 The Commission has also concluded that a protocol should be implemented in Ireland with regard to dealing with material found under a search warrant which may be legally privileged. .

6.48 The Commission has referred to a number of jurisdictions in this section where legal procedures have been established in respect of the matter. A common approach in many jurisdictions is that material which may be, or is claimed to be, legally privileged must be secured or sealed and taken to an authority, such as a sheriff, registrar or judge. The relevant authority will then be charged with the function of determining whether the material is or is not legally privileged. Therefore, officers executing the search warrant will generally not see the content of the material unless and until it is deemed not to benefit from the privilege.

6.49 The Commission also notes a recent development in Irish law which is relevant to this discussion. The *Companies (Amendment) Act 2009* has included a specific provision with regard to dealing with and determining claims

of legal privilege.[116] The 2009 Act inserted a new section 23(1) into the *Companies Act 1990.* Section 23(1B) of the 1990 Act, as inserted by the 2009 Act, provides that:

> "The disclosure of information may be compelled, or possession of it taken, pursuant to the powers in this Part, not withstanding 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".[117]

The 1990 Act, as amended by the 2009 Act, also provides that, where information has been disclosed or taken possession of, an application may be made to the court 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.[118] Where proceedings have been taken for the purpose of such a determination, the 1990 Act, as amended, provides that the court may give such interim or interlocutory directions as it considers appropriate 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".[119] 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, with a view to assisting the court's determination as to privilege.

6.50 The Commission is of the view that the approach used in other jurisdictions with regards to claims of legal privilege during the execution of a search warrant, as well as the provisions of the *Companies Act 1990* (as amended by the *Companies (Amendment) Act 2009*) in respect of determining

---

116 Section 23(1) of the 1990 Act, as inserted by section 6 of the 2009 Act, provides that 'privileged legal material' means "information, which, in the opinion of the court, a person is entitled to refuse to produce on the grounds of legal professional privilege".

117 Section 23(1B) of the *Companies Act 1990*, as inserted by section 6 of the *Companies (Amendment) Act 2009*.

118 Sections 23(1C) and 23(1D) of the 1990 Act, as inserted by section 6 of the 2009 Act.

119 Section 23(1E) of the 1990 Act, as inserted by section 6 of the 2009 Act.

whether information is legally privileged, should be looked to as guidance in respect of implementing a method for assessing claims of legal privilege which arise during the search warrant process. The Commission considers that implementing a system whereby i) material would be securely sealed and removed from the scope of the search, and therefore not be examinable by executing officers, and ii) a higher authority, such as a District Court judge, would determine whether a claim of legal professional privilege is well founded, would be a suitable means of dealing with claims of privilege made during the execution of a search warrant.

6.51 The Commission is also of the view that the manner in which the Law Council of Australia guidelines on the "Execution of Australian Federal Police Search Warrants on Lawyers' Premises" could also be used as a model in this respect. As noted above at paragraph 6.29, the guidelines were agreed upon by both the Commissioner of the Australian Federal Police and the Law Council of Australia. The Commission is of the view that, if a protocol in respect of dealing with legally privileged material were to be developed in Ireland, it might be advisable to involve bodies such as the Law Society of Ireland, the Bar Council, An Garda Siochana and the Office of the Director of Public Prosecutions. In doing this it would be possible to identify and address practical aspects that would be involved in dealing with claims of privilege and implementing a workable system for dealing with such.

6.52 The Commission provisionally recommends that a system should be implemented in Ireland by which if legal 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; and that the secured material should then be assessed by a higher authority, such as a judge of the District Court, to determine whether it is in fact legally privileged, and therefore exempt from seizure under the search warrant. The Commission also provisionally recommends that the Law Society of Ireland, the Bar Council, An Garda Siochana and the Office of the Director of Public Prosecution should be consulted with regard to developing a guidance for dealing with claims of legal professional privilege.

6.53 Although a procedure for responding to and assessing claims of legally privileged material made during the execution of a search warrant could be set out in practice guidelines, the Commission believes it would be preferable for the process to be placed on a statutory footing. Firstly, it is notable that legislation carries greater force than practice guidelines would. Related to this point is that often guidelines can be open to greater interpretation, whereas interpretation of legislation is stricter. Secondly, the breach of a legislative provision would be a more serious matter than the breach of a guideline. The Commission is of the view that as legal professional privilege is such a fundamental safeguard and rule of law, any failure to respect

or to comply with it should be taken seriously. Therefore, it would be more appropriate to place a system for dealing with claims of legal privilege within legislation. A legislative provision with regard to dealing with claims of legally privileged material during the execution of a search warrant could be included in the principal search warrant framework which has been recommended by the Commission in this Consultation Paper.[120]

6.54 The Commission provisionally recommends that general provisions as to claims of legal privilege made during the execution of a search warrant should be placed on a statutory footing

C The Exclusion of Evidence Obtained under an Unlawful Search Warrant

6.55 This part is concerned with the exclusion of evidence, or the 'exclusionary rule' as it is often called. The examination is confined to the exclusion of evidence obtained under an unlawful search warrant, as a complete examination of the rule is beyond the scope of this Consultation Paper.

6.56 The rule of the exclusion of evidence is essentially concerned with due process and proper procedure. It provides that where evidence has been obtained in a manner which does not comply with the law or respect the rights of the individual, this improperly obtained evidence may not be relied upon. According to Collins, "[a]n exclusionary rule is undoubtedly an excellent means of protecting constitutional rights and putting an onus on law enforcement agencies, and the State generally, to take care not to intrude on such rights".[121] Furthermore, the exclusionary rule is in line with the adversarial legal system that exists in Ireland. As Fennell explains, the adversarial system of law[122] which exists in Ireland is concerned with balancing interests of all concerned.

> "The balancing of interests involved includes a recognition that the interest of the public in combating crime must be counterbalanced, by the need to secure the fair trial of an accused, the public interest in vindication of constitutional rights and the operation of the rule of law.

---

120 See generally chapter 2.

121 Collins, "The exclusionary Rule – Back on the Agenda?" (2009) 19(4) ICLJ 98, at 98.

122 An adversarial system allows for all parties to a dispute to make representations and submit evidence which supports their arguments. These submissions are then weighed up by the relevant authority so that a decision is made as to which party shall succeed in their case.

> Overall, the system is characterised as 'due process' rather than 'crime control'."[123]

To this extent, the exclusionary rule seeks to protect the individual, and respect due process, rather than giving an unfair advantage to the State.

(1) The O'Brien decision

6.57 The leading Irish authority on the exclusion of evidence obtained under an unlawful search warrant is *The People (Attorney General) v O'Brien.*[124] In this case a search warrant was obtained by An Garda Siochana under the *Larceny Act 1916* in respect of an address 118 Captains Road, Crumlin. On foot of this, Gardai entered and searched the intended premises. The defendants were charged and convicted on the basis of evidence found at the house. However, it later transpired that the address referred to on the face of the search warrant was incorrect – it stated the address to be searched was 118 Cashel Road, Crumlin. This error had gone unnoticed by the executing officers. In light of the error the defendants claimed that the material found should not have been admitted in evidence as it was obtained under an invalid search warrant.

6.58 In the Supreme Court Kingsmill Moore J. identified three possible approaches that could be taken in respect of the case before the Court.[125] The first possible approach was that if evidence is relevant it should not be excluded on the ground that it was obtained as a result of an illegal action. The second was if material was obtained as a result of an illegal action, it is never admissible as evidence. And the third was that where material was obtained by illegal action, it would be a matter for the trial judge, in his or her discretion, to determine whether or not that material should be admitted in evidence. In respect of the first option, Kingsmill Moore J. observed that such an open rule of admissibility, without exception, could operate unfairly against an accused. He further noted that courts, both in England and in Ireland, had "frequently refused to admit evidence which was undoubtedly relevant where the probative value of the evidence would be slight and its prejudicial effect would be great."[126]

---

123 Fennell, *The Law of Evidence in Ireland* (2nd ed Butterworths 2003) at 105-106. A crime control model or system is one which is focused primarily on preventing crime and prosecuting offenders. As this is the primary focus, it is often the case that individual rights hold a lesser status. A crime control model may therefore be satisfied to limit individual rights in favour of responding to crime and offenders.

124 [1965] IR 142.

125 *Ibid*, at 159.

126 *Ibid*, at 159.

Regarding the second option, the Judge observed that an absolute exclusionary rule would prevent the admission of relevant and vital facts even where the illegalities which arose in ascertaining them were unintentional or trivial in nature. He commented that "[f]airness does not require such a rule and common sense rejects it."[127] Kingsmill Moore J. concluded that the third approach was the most suitable one to follow, as it would involve a determination by the trial judge as to whether the public interest would be best served by the admission or the exclusion of the evidence, and it would also involve a consideration of all the relevant facts. The Judge therefore favoured a balancing exercise

6.59 Having set out the above issues, Kingsmill Moore J. turned to the facts of the case itself. He held that the mistake on the search warrant had been one of pure oversight and that it had not been shown that this error had been noticed by anybody prior to the execution of the warrant.[128] The Judge went on to say that he could find "no evidence of deliberate treachery, imposition, deceit or illegality; no policy to disregard the provisions of the Constitution or to conduct searches without a warrant".[129]

6.60 The final conclusion of Kingsmill Moore J. was that where evidence was obtained by a "deliberate and conscious violation of constitutional rights" it should generally be excluded. According to the Judge, the exclusion or non-exclusion of such evidence should be a matter within the discretion of the trial judge, and so determined on the facts of each particular case. In light of these observations he concluded that the evidence need not have been excluded as it had not been obtained in contravention of the constitutional rights of the defendants.[130]

6.61 Walsh J. took a somewhat different approach to the issue. He sought to distinguish between evidence which was illegally obtained and evidence obtained in violation of constitutional rights. In respect of illegally obtained evidence, Walsh J. expressed the view that it should not be automatically rendered inadmissible; rather its admissibility should be determined by the trial judge. Walsh J. then went on to say that when an illegality amounts to an infringement of a constitutional right "the matter assumes a far greater importance than is the case where the illegality does not amount to such an infringement."[131] In light of this, he opined that the State

---

127 *Ibid*, at 160.

128 *Ibid*, at 161.

129 *Ibid*, at 161.

130 Both Lavery and Budd JJ. agreed with the judgment of Kingsmill Moore J.

131 *Ibid*, at 170.

"must uphold the objection of an accused person to the admissibility to his trial of evidence obtained or procured ...as a result of a deliberate and conscious violation" of his constitutional rights.[132] Thus Walsh J. expressed the view that evidence obtained in conscious and deliberate violation of constitutional rights should be absolutely inadmissible, save in some limited excusable circumstances. Walsh J. held these 'excusable circumstances' to be i) the imminent destruction of vital evidence, ii) the need to rescue a victim in peril, and iii) evidence obtained by a search incidental to and contemporaneous with a lawful arrest. Walsh J. then went on to say that "follows therefore that evidence obtained without a deliberate and conscious violation of the accused's constitutional rights is not excludable by reason only of the violation of his constitutional right".[133]

6.62 Having set out these views Walsh J. held that it was "abundantly clear from the evidence" that the incorrect address on the search warrant was a matter of error and that the searching officers were unaware of this error. He concluded that there was no deliberate or conscious violation of constitutional rights in the present case and so the evidence obtained was not inadmissible.[134]

6.63 In respect of Walsh J.'s interpretation, Daly has commented that the Judge invoked sentiments "more closely associated with a rationale of protectionism, where the defence of rights is seen as more important than other concerns such as the repression of crime."[135]

(2) Case law after the O'Brien ruling

6.64 In the subsequent decision of *The People (D.P.P.) v Madden*[136] the Court of Criminal Appeal relied on the decision in *O'Brien.* In that case the accused gave a statement at a time when he had been detained for questioning beyond the legally permissible period. The Court held that this was in violation of his constitutional right to liberty, as guaranteed by Article 40. The Court observed that the statement was taken by a senior member of the Garda Siochana "who must have been aware of the lawful period of detention which applied in this defendant's case."[137] It concluded that, in the circumstances, deliberate and conscious disregard was shown for the constitutional rights of

---

132 *Ibid*, at 170.

133 *Ibid*, at 170.

134 O'Dalaigh C.J. agreed with the judgment delivered by Walsh J.

135 Daly, "Unconstitutionally Obtained Evidence in Ireland: Protectionism, Deterrence and the Winds of Change" (2009) 19(2) ICLJ 40, at 42.

136 [1977] IR 336.

137 *Ibid*, at 346.

the individual. The Court ordered that the statement taken from the accused was inadmissible.

6.65 The Court in *Madden* also explained that there was no requirement for intentional wrongdoing or bad faith (mala fides) on the part of the Gardai to establish that a conscious and deliberate violation of constitutional rights had occurred. It held that to adopt this approach would be to misinterpret the decision of the Supreme Court in *O'Brien*.[138]

6.66 In the Supreme Court decision *The People (D.P.P.) v Shaw*[139] two different interpretations emerged as to the scope of a "deliberate and conscious" violation. Griffin J., delivering the majority judgment in the case, concluded that the term related to the violation of the rights itself. Thus Griffin J. held that evidence would only be excluded where Gardai were aware that rights were being breached but they continued with the action. Walsh J., delivering the minority judgment, held that it was the *act* of the Gardai which had to be a deliberate and conscious, and so a violation could be held occur even though the person carrying out the act may have been unaware that it amounts to a violation of constitutional rights. The interpretation offered by Walsh J. was therefore narrower in scope.

(3) The Kenny case

6.67 In *The People (D.P.P.) v Kenny*[140] a search warrant had been obtained under the *Misuse of Drugs Act 1977*, as amended by the *Misuse of Drugs Act 1984*. The warrant was obtained by a member of An Garda Siochana from a peace commissioner. The search warrant was subsequently deemed invalid by the Court of Criminal Appeal. On the facts of the case it held that the correct procedure for issuing a search warrant had not been complied with, as there was no proof that the peace commissioner had satisfied himself that there were reasonable grounds of suspicion which justified the issuing of the search warrant. Rather it appeared that the peace commissioner relied solely on the information submitted by the applicant Garda.

6.68 In the Supreme Court Finlay C.J. delivered the majority decision.[141] He held that evidence obtained in violation of the constitutional rights of an individual "must be excluded" unless a court is satisfied that the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify

---

138 *Ibid*, at 347.

139 [1982] IR 1.

140 [1990] 2 IR 110.

141 Walsh and Hederman JJ agreed with this judgment.

the admission of the evidence in the court's discretion.[142] Finlay C.J. concluded that the forcible entry[143] into the dwelling place which occurred in this case "was neither unintentional nor accidental" and that there were no extraordinary circumstances in this case which could justify the act. Although he accepted that the Gardai concerned did not have any knowledge that they were invading the constitutional rights of the accused, Finlay C.J. held that the evidence here had been unconstitutionally obtained and so was not admissible. This aspect of Finlay C.J.'s decision mirrored Walsh J.'s interpretation of the term 'conscious and deliberate violation' in *The People (D.P.P.) v* Shaw[144] where Walsh J. contended that an act could amount to a constitutional violation even though the actor is unaware of the unlawfulness if the act.

6.69 Both Griffin and Lynch JJ delivered minority judgments in *The People (D.P.P.) v Kenny*. They held that the evidence was admissible as the entry under the search warrant did not amount to a conscious and deliberate violation of constitutional rights. Lynch J. expressed the view that the Gardai had shown respect for the constitutional inviolability of the appellant's dwelling by applying for a search warrant to the appropriate authority.[145] Lynch J. appeared to support the view that it is the *act* of the Gardai which must amount to a conscious and deliberate violation of rights (as the majority in *The People (D.P.P.) v Shaw*[146] had done). He opined that there was nothing in the conduct of the Gardai to support an inference of a conscious and deliberate violation of constitutional rights.

(a) Commentary

6.70 McGrath has commented that there are three main principles which may be invoked to justify the application of the exclusionary rule to unconstitutionally and illegally obtained evidence.[147] The first is "rooted in the principle of the rule of law" and is the idea that the unlawfully obtained evidence should be excluded, as to such evidence would undermine respect for the law

---

142 *Ibid* at 134.

143 The executing Garda had firstly demanded entry to the premises and when he was not admitted he forcibly entered the premises through a window.

144 [1982] IR 1.

145 [1990] 2 IR 110, at 141.

146 [1982] IR 1.

147 McGrath, "The Exclusionary Rule in Respect of Unconstitutionally Obtained Evidence" 2004 11(1) DULJ 108, at 108.

itself.[148] The second principle is that of deterrence. This is the idea that police and other authorities are deterred from obtaining evidence by unlawful means if such evidence is of no use to them because it is inadmissible. The third principle is vindication; McGrath notes that this is the principle which underpins the exclusionary rule in Ireland. He states that "according to the principle, the courts are required to uphold the provisions of the Constitution."[149] McGrath submits that the Supreme Court in *The People (D.P.P.) v Kenny*[150] was "correct to endorse the vindication principle" as it provides the most satisfactory doctrinal base for the rule in Ireland because "it is consistent with the general jurisprudence of the courts relating to the protection of constitutional rights." Daly and Fennell have also separately commented that the approach taken by the Supreme Court in *Kenny* showed preference for the ideals of protectionism.[151] Essentially the *Kenny* decision sought to prioritise the protection and vindication of individual constitutional rights over State interests. This is in line with the due process model of law which has been referred to earlier at 6.56.

(4) Application of the Kenny decision

6.71 The decision in *The People (D.P.P.) v Kenny* has generally continued to be accepted and applied by the Irish courts. In *The People (D.P.P.) v Laide and Ryan*[152] the trial judge held that the search warrant, on foot of which Gardai entered a dwelling, was invalid. The Court of Criminal Appeal held that the entry into the dwelling came

> "within the concept of an intentional and deliberate action by members of An Garda Siochana, in the sense that it was not an accidental or unconscious act on their part. The fact that they believed that they had lawful authority to so enter is beside the point."

---

148 McGrath refers to section 24(2) of the *Canadian Charter of Rights and Freedoms* as an example of this approach. He also refers to the judgement of the U.S. Supreme Court in *Olmstaed v U.S.* (1928) 277 US 438, where Brandeis J. commented that the State must lead by example in respect that law, if the Government were to break the law in its actions it would "breed contempt for law".

149 (2004) 11(1) DULJ 108, at 110.

150 [1990] 2 IR 110.

151 Daly, "Unconstitutionally Obtained Evidence in Ireland: Protectionism, Deterrence and the Winds of Change" (2009) 19(2) ICLJ 40, at 43. Fennell, *The Law of Evidence on Ireland* (2nd ed Butterworths 2003) at 120.

152 [2005] IECCA 24.

The Court went on to note that there were no extraordinary excusing circumstances which could justify admitting the evidence concerned.

6.72 In *Competition Authority v Irish Dental Association*[153] the High Court considered evidence obtained by a search warrant issued under the authority of the *Competition Act 2002.* The search warrant contained a fundamental flaw (in respect of its description of the business of the defendant) and so was held to be invalid. Mc Kechnie J. concluded that he was satisfied that the defendant, as an association, had "constitutional rights and that such rights, of freedom of expression, most certainly, and probably also that of privacy, are not too remote so as to exclude their application to the present circumstances."[154] Mc Kechnie J. considered that, in light of the decision in *The People (D.P.P.) v Kenny*[155]*,* the constitutional rights of the defendant were violated by the actions of the Authority.[156] He observed that the Authority knowingly, deliberately and intentionally i) applied to the District Court for a search warrant, ii) went to the premises of the defendant for the purpose of entering it and iii) searched for materials and removed certain materials found there. He concluded that he could not see "how such acts could be described as unintentional or accidental, given the description of what constitutes a conscious and deliberate violation" as outlined in the *Kenny* judgment. Therefore, in line with *The People (D.P.P.) v Kenny,* the Court held that the evidence obtained under the unlawful search warrant was not admissible.

6.73 In *Curtin v Dail Eireann*[157] the Supreme Court followed the Kenny decisions. In that case the time limit on the search warrant had expired by the time the search was carried out at the individual's home, thus the search had

---

153 [2005] 3 IR 208.

154 *Ibid*, at 222.

155 [1990] 2 IR 110.

156 McKechnie J. expressly noted that he would not follow the majority Supreme Court decision in *The People (D.P.P.) V Shaw* [1982] IR 1. He stated: "After very careful consideration I conclude that I must differ from the views of the majority of the Court expressed in the [Shaw] judgment. I am satisfied that the correct principle is that evidence obtained by invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in its (the court's) discretion". [2005] 3 I.R. 208, at 221.

157 [2006] IESC 14.

been carried out in violation of his constitutional rights. As a result, the evidence obtained was ruled inadmissible.

(5) Possible re-assessment of Kenny

6.74 More recently, in *The People (D.P.P.) v Cash*[158] Charleton J. in the High Court expressed his dissatisfaction with the *Kenny* rule. He observed that the rule "automatically requires the exclusion of any evidence obtained through a mistake which had the accidental, and therefore unintended, result of infringing any constitutional right of one individual, namely the accused." Therefore, he commented, the rule does not enable a proper balancing of the rights and interests of the individual and society. Charleton J. felt that the "original test, as propounded by the Supreme Court in *O'Brien* would have allowed for a balancing of the rights of parties." He noted that the gravity of the offence and the nature of the infringement by the State authorities would be taken into account under the *O'Brien* test.

6.75 Prior to the *Cash* case the *Final Report of the Balance in the Criminal Law Review Group* had also referred to the exclusion of evidence rule.[159] The Report observed that one of the central problems of a strict exclusionary rule is that is "does not allow the trial judge to weigh the public interest in ensuring that constitutional rights are protected by agents of the State against the public interest in ensuring that crime is detected and punished and that the constitutional rights of victims are vindicated by the courts."[160] A majority[161] of the group concluded that the current rule is too strict and that they would prefer an approach where the court would have discretion as to whether or not to admit evidence, "having regard to the totality of the circumstances".[162]

---

158 [2008] 1 ILRM 443.

159 *Balance in the Criminal Law Review Group. Final Report* (Department of Justice, Equality and Law Reform, 2007).

160 *Ibid*, at 155.

161 The Group's chair dissented from the majority view expressed in the Report on the need for reform of the exclusionary rule. He noted that our society has committed itself to respect and vindicate the personal rights that are enshrined in the Constitution. He argued that a strict exclusionary rule should be maintained for the purpose of ensuring that these constitutional rights are guaranteed. He noted that the occasional exclusion of evidence is a price society should be prepared to pay in the interests of upholding the values enshrined in the Constitution. *Ibid*, at 287-289.

162 *Ibid*, at 161.

6.76 At the time of writing (December 2009), the Supreme Court has heard an appeal from the High Court decision in *The People (D.P.P.) v Cash*[163] and has reserved its decision. Thus a re-assessment of the *Kenny* rule is currently pending.

(6) The exclusion of unconstitutionally obtained evidence as a safeguard.

6.77 The rule regarding the exclusion of evidence obtained under an unlawful search warrant is of course a fundamental safeguard in respect of the search warrant process. Were it not in place authorities could rely on invalid search warrants, or go beyond the permissible boundaries set by a warrant, as a means of gaining evidence to be admitted against an individual. The courts have shown immense respect for the constitutional rights of the individual, and it remains to be seen whether the Supreme Court will modify the rule as interpreted in the *Kenny* case.

6.78

163 [2008] 1 ILRM 443.

CHAPTER 7 BENCH WARRANTS

A Introduction

7.01 This chapter is concerned with the law on bench warrants in Ireland. The bench warrant procedure is quite commonly used in Ireland with a view to securing the appearance of individuals before the courts. In this respect, the Commission notes that 26,474 bench warrants were issued in Ireland in 2008. In part B, the Commission outlines the nature of a bench warrant and sets out the number issued in 2008. In part C the Commission considers the general power of the courts to issue bench warrants and the specific statutory provisions in respect of issuing bench warrants. In part D, the Commission deals with the summons procedure in Ireland, including the law which provides for summons, the form of summons, service of summons and responding to summons by post. In part E, the Commission discusses the requirement to appear before court as a condition of bail. Part F discusses the position in respect of unexecuted bench warrants and granting Garda station bail. Part G discusses the practice of courts considering the nature of the offence charged when determining whether to issue a bench warrant. In part H, the Commission discusses the execution of bench warrants, including delays in the execution of bench warrants and failure to execute bench warrants. In part I the Commission discusses the relevance of the Garda Siochana database PULSE in respect, of bench warrants. Part J discusses the extent of the information available to the courts concerning outstanding bench warrants against an individual.

B Overview

7.02 Essentially a bench warrant is a written command, handed down by a judge, ordering the arrest of an individual. It is therefore a "mechanism for bringing a person to Court who is in breach of his obligation to be in Court."[1]

---

[1] Callaghan v Governor of Mountjoy Prison. [2007] IEHC 294, at 6 (Peart J.). 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 in respect of arrest warrants is set out in the District Court Rules 1997, Order 16. With regard to arrest warrants, see generally Walsh, *Criminal Procedure* (Thomson Round Hall 2002) at 211-214; Woods, *District Court Practice and Procedure in Criminal*

The *Garda Siochana Guide* explains that a bench warrant may be issued by a court of competent jurisdiction for a number of reasons; where the court deems a person to be in contempt of court, to secure his or her arrest for an indictable offence in respect of which he or she is not in custody or is about to abscond, for failure to answer bail or summons, or any other reason which the court believes that it is suitable to issue a bench warrant.[2]

7.03 The bench warrant procedure has been used for some time for the purpose of seeking a person's appearance before the courts. Hayes described the bench warrant process as it existed in the mid 19th century. He explained that in cases of misdemeanour and felony where it was "not intended to proceed to outlawry, the ordinary mode of making a defendant amenable after indictment found against him, is by bench warrant."[3] A bench warrant would generally have been issued during the time of the assizes or sessions, having been sought by the prosecutor in response to the defendant's non-appearance. If the order for a bench warrant to be issued had not been made before the close of the assizes or sessions, the prosecutor could obtain a certificate of the finding of indictment against the defendant from the clerk and, upon production of this to a judge or justice of the peace, a warrant may have been issued.[4] O'Connor explained the procedure regarding bench warrants in the early 20th century.[5] He noted that where an individual failed to appear in Court in response to a charge against him or her, the court could either hear and adjudicate the matter in the absence of the defendant, or issue a warrant for his or her arrest where it was proved that a summons was served to the individual a reasonable time before the date of the hearing. O'Connor further notes that upon the individual being brought before the court, he or she may be either committed pending the hearing or discharged once a recognisance was taken from him or her.

7.04 The Courts Service provided figures to the Commission in respect of bench warrants issued in 2008. During that period the total number of bench warrants issued was 26,474. However, this does not mean that bench warrants were issued against 26,474 individuals. It is often the case that an individual will

---

Cases (James V. Woods 1994) at 100-102, 104-142; *Garda Siochana Guide*, 7th ed Volume II (Stationery Office 2008) at W-1-W-2.

2 *Garda Siochana Guide*, 7th ed Volume II (Stationery Office 2008) at W – 8.

3 Hayes, *Criminal Laws* (Volume II, Hodges and Smith, 1842) at 712.

4 See generally Hayes, *Ibid*, at 712-713. For further discussion on the bench warrant process in the nineteenth century see Humphreys, *The Justice of the Peace for Ireland* (Hodges, Figgis & Co.Ltd, 1897) at 784.

5 O'Connor, *The Irish Justice of the Peace* (E. Ponsonby Ltd. 1911) at 46-47.

have a number of bench warrants issued against him or her. The figures are as follows:

Bench warrant imposed between 01-JAN-2008 TO 31-DEC-2008	Bench Warrant issued during this period	Of those warrants Executed/Cancelled	Active bench warrant in this period
Offence Category	**No. Of warrants issued**	**EXECUTED/ CANCELLED**	**ACTIVE**
ALIENS	159	57	102
ARSON	22	20	2
ASSAULT	838	701	137
CIE	3	2	1
CONTROL OF ANIMALS	12	11	1
CRIMINAL DAMAGE	1,106	931	175
CRIME	782	529	253
CONTROL OF DOGS	9	9	
DANGEROUS DRIVING	334	256	78
DOMESTIC VIOLENCE	189	173	16
DRUGS	1,701	1,453	248
DRINK DRIVING	2,513	1,754	759
FORGERY	1	1	
FIREARMS/OFFENSIVE WEAPONS	605	509	96
HEALTH & SAFETY	1		1
HEALTH BOARD	4	4	
LOCAL AUTHORITY	45	38	7
LIQUOR	17	12	5
OTHER	256	176	80
PENALTY POINTS	2,020	1,604	416
PUBLIC ORDER	6,632	5,645	987
REVENUE	43	26	17
ROAD TRAFFIC (FOTS)	131	93	38
ROAD TRAFFIC (OTHER)	1,879	1,541	338
SEXUAL	105	86	19
SOCIAL WELFARE	88	39	49
TRADE & EMPLOYMENT	1	1	
THEFT	6,768	5,368	1,400
TOBACCO	3	2	
TELEVISION LICENCE	1	1	1
UNAUTHORISED TAKING MOTOR VEHICLE	206	178	28
TOTAL	**26,474**	**21,220**	**5,254**

C The Power to Issue Bench Warrants

(1) The court's inherent powers

7.05 Case law has established that the courts have an inherent power to issue a bench warrant so as to compel the attendance of an individual. In *The State (Attorney General) v Judge Roe*[6] Gavan Duffy P. stated "[i]f a defendant, duly summoned, does not appear, he can be arrested on a bench warrant."[7] The High Court in *The State (Attorney General) v Judge Fawsitt*[8] quoted the decision in *Roe* with approval. Davitt P. observed that the decision contained a "clear recognition and acceptance of the principle that where a statute confers upon a Court a substantive jurisdiction to try a person charged with a criminal offence it impliedly confers likewise the adjective or ancillary jurisdiction necessary to compel that person to attend the Court to take his trial".[9] The Judge explained that to decide whether there was a power to issue a bench warrant, it should first be determined whether the Court has the jurisdiction to try the accused. If this jurisdiction does exist, then the Court has the authority to issue a bench warrant so as to compel the attendance of the individual. In *Dunphy v Crowley*[10] the Supreme Court observed that the appellant was duly served with a number of summonses and so was under an obligation to attend at the time and place stated on the summonses. The Court held that the appellant's failure to attend "amounted to disobedience to the summonses and entitled [the] Judge, in the exercise of his discretion, to issue the warrant for his arrest".[11] More recently in *Stephens v Governor of Castlerea Prison*[12] the High Court reiterated the principle that issuing a bench warrant is an inherent power of the courts. Finlay Geoghegan J. noted that this power "flows from the jurisdiction to try the offences in question and also to release an accused on bail by recognisance to appear before a subsequent sitting of the Court".[13]

---

6 [1951] I.R. 172.

7 *Ibid*, at 193.

8 [1955] I.R. 39.

9 *Ibid*, at 52.

10 Supreme Court, 17 February 1997.

11 *Ibid*, at 14.

12 High Court, 20 September 2002.

1.03 [13] It appears that the recognition of this inherent jurisdiction existed long before these cases. According to Supple, in the 19th century, it could generally be stated that whenever a statute gave a justice of the peace jurisdiction over any offence, or a power to require any person to do a certain thing ordained by such statute "it impliedly gives them a power to grant a warrant to bring any person

7.06 Although a court's inherent power to issue bench warrants has been identified, that is not to say that a judge is obliged to issue a bench warrant in the event of a failure to appear before the Court. Order 23, Rule 2 of the *District Court Rules 1997* provides that where the accused is not present and is not represented to answer the complaint, and, in the case of a summons, it appears to the Court that the summons was duly served, the Court may proceed to deal with the complaint or may issue a warrant for the arrest of the accused.[14] The rule therefore affords the Court some discretion as to whether a bench warrant should be issued, or the hearing should proceed in the absence of the accused.

7.07 The authority of a Court to proceed to hearing has been clearly recognised in case law. In *Rock v Governor of St. Patrick's Institution*[15] the applicant was summonsed to appear at a sitting of the District Court in respect of a driving offence but failed to appear. Nonetheless he was convicted and sentenced to two consecutive six month periods of detention. It was submitted to the Supreme Court that if a person summonsed to court does not appear, the judge should adjourn the case and issue a bench warrant, rather than convicting and sentencing the accused in his or her absence. The Supreme Court rejected this on the ground that if this were the case then a sentence could never be imposed on anyone in the District Court in his absence, as the effect of this would be that "all a person intent on evading justice will have to do is to keep avoiding the service of a warrant, or subsequently, avoid arrest".[16] The Court observed that there was no excuse for the applicant's non-attendance. Thus it held that the District Court's action in sentencing the applicant was legitimate. Similarly, in *Callaghan v Governor of Mountjoy Prison*[17] the High Court held that where the accused had failed to appear in Court in response to a summons, the District Court Judge was not obliged to issue a bench warrant so as to ensure the applicant's attendance. The High Court was satisfied that the summons had been delivered to the accused and that he had been given ample opportunity to appear before the Court. Thus the conviction of the accused, though he was not present in court, was upheld.

---

within the precincts of their commission who is accused of such offence, or compellable to do the thing ordained by such statute." Supple, *Irish Justice of the Peace.* (William Magee Publishing, 1899).

14 Prior to the *District Court Rules 1997*, Rule 64 of the *District Court Rules 1948* set out that a judge of the District Court could proceed where an accused failed to appear and was not represented in Court.

15 Supreme Court, 22 March 1993.

16 *Ibid*, at 4.

17 [2007] IEHC 294.

7.08 Whether a judge is justified in continuing with a hearing where an accused has not turned up may, however, depend greatly on the facts. For example, in *Brennan v Windle*[18] the Supreme Court held that the conviction and sentencing of the accused in the District Court when he had failed to appear were bad in the circumstances. The Supreme Court accepted the applicant's argument that the summonses concerned were not served personally on him, were not served on any person who told him about them and that he was not, in fact, aware of the hearing at which he was convicted and sentenced to four months imprisonment. The Court held that the District Court Judge should not have proceeded to hear the matter and impose a conviction and sentence "without taking reasonable steps to ensure that the applicant was notified of the case given that there was no appearance".[19] The convictions were therefore quashed.[20]

7.09 It therefore appears to be a matter of considering the relevant facts of a case in determining whether a bench warrant should be issued when an individual fails to appear, or whether the Court may proceed in the absence of an accused.

7.10 The Commission now turns to examine the detailed statutory provisions on bench warrants.

(2) Statutory Provision for Bench Warrants

7.11 Orders 21 and 22 of the *District Court Rules* 1997 set out the grounds for issuing a bench warrant in a number of circumstances. Order 21 is concerned with issuing a bench warrant in respect of a witness in criminal proceedings. Order 22 is concerned with issuing a bench warrant for an accused in criminal proceedings.

(a) Bench warrant for the arrest of a witness in criminal proceedings

7.12 Order 21, Rule 1 of the *District Court Rules 1997* sets out the procedure for summonsing an individual to give evidence or produce any

---

18 [2003] 3 I.R. 494.

19 *Ibid*, at 509.

20 The Commission notes that Geoghegan J. stated that he agreed with the view that there "would not necessarily be any obligation on a District Court Judge to issue a bench warrant merely because there was no appearance". *Ibid*, at 501. However, the Supreme Court quashed the applicant's conviction on the ground that the District Court did not ensure that he had been properly notified of the hearing, and so it did not go so far as to consider the submission that a bench warrant should have been issued before proceeding to a conviction in absentia.

accounts, papers, documents or things at a criminal hearing. The summons form to be used to secure the attendance of a witness is Form 21.1, as contained in Schedule B of the *District Court Rules 1997*. The summons states that the individual is required to attend at a sitting of the District Court, at a specified time and date, to give evidence on behalf of a named party, in respect of the hearing of a complaint against the named accused. Rule 1(3) states that i) the summons shall be signed by the Judge, clerk or peace commissioner issuing it; ii) a copy of the summons shall be issued for each person to whom it is directed; and iii) service of the summons must occur at least three clear days before the date fixed for the hearing.[21] Rule 1(4) provides that a summons ordering the attendance of a witness may be served in any part of the State and upon being served the witness shall be as effectively bound by the summons "as if he or she resides within the area of jurisdiction for issuing summons of the Judge, Clerk or Peace Commissioner". Rule 1(5) sets out the procedure for issuing a bench warrant for the arrest of a witness where he or she

a) fails to appear in response to a summons requiring his or her attendance,

b) is believed to be evading service of the summons requiring him or her to appear as a witness,

i) or

c) is likely to refuse to attend as a witness unless compelled to do so.

ii) The procedure for dealing with a witness to civil proceedings is not, however, the same as the procedure in respect of criminal proceedings. A bench warrant is *not* used to bring a witness to civil proceedings before the court. Where a witness is summonsed to appear in court and fails to do so without lawful excuse and the court is satisfied the he or she was duly summonsed, the Circuit Court Rules provide that the witness may be held in contempt of court or be fined for this default.[22] The *Rules of the Superior Courts 1986* provide that a witness who wilfully disobeys an order to attend court will be held in contempt; there is no provision for a fine.[23]

---

21 'Clear days' are counted exclusively of the of both the first and last days of a specified period. *Duckworth v McClelland* 12 I.L.T.R. 136; *Davies v Davies* 4 L.R. Ir. 330.

22 *Circuit Court Rules 2001*, Order 24, Rule 6.

23 *Rules of the Superior Courts 1986*, Order 39, Rule 7.

(i) The witness had failed to appear in response to a summons

7.13 Order 21, Rule 1(5) of the *District Court Rules 1997* states that where a person to whom a witness summons is directed "fails to attend at the time and place appointed and no just excuse is offered for such failure", then on proof that the summons was duly served upon that person, the Judge before whom the complaint is to be heard may issue a warrant for the arrest of the witness. The warrant form to be used in these circumstances is Form 21.4, as contained in Schedule B of the *District Court Rules 1997*. The warrant must set out the date when the summons was issued, the time and date on which the witness was to appear before the court and the complaint which the accused is facing. The warrant must also state that it has been duly proved that the summons was served on the witness in accordance with the 1997 Rules. The warrant is addressed to the Superintendent of a named Garda station and is a command to arrest the individual and to bring him or her before the issuing Judge or another Judge to be dealt with according to law.

(ii) The witness is evading service of summons to appear

7.14 Order 21, Rule 1(5) of the *District Court Rules* 1997 provides that where a person with an interest in proceedings believes that an individual "is able to give evidence in the case", but is evading service of a summons to appear, that person may provide information on oath using Form 21.2 (Schedule B) to the Court as to this belief. Having set out this information, Form 21.2 acts as an application for the issue of a warrant to arrest the individual. A Form 21.3 (Schedule B) bench warrant will be completed where a District Court Judge is satisfied that the individual is i) evading service of a summons, and ii) is able to give evidence in the case. The warrant will be addressed to the Superintendent of a named Garda station and commands that the individual be arrested and brought before the issuing Judge, or another Judge, to be dealt with according to law.

(iii) The witness is unlikely to or is refusing to attend

7.15 Order 21, Rule 1(6) provides that where a Judge is satisfied by information on oath and in writing "that it is probable that a person who is able to give evidence in a case will not attend to give evidence without being compelled to do so", the Jude may issue a warrant for the arrest of that person, in place of a summons ordering attendance. Form 21.5 in Schedule B should be completed by the individual who seeks to inform the Court of his or her belief that the witness will not attend to give evidence unless compelled to do so. The individual must set out the basis for this belief. Where a Judge is satisfied by this information on oath, he or she will complete Form 21.6, contained in Schedule B, which is a warrant to arrest the witness and to bring him or her before the issuing Judge, or another Judge, to be dealt with according to law. The bench warrant will be addressed to a Superintendent of a Garda Station.

(b) Bench warrant for the arrest of an accused

7.16 The concept of a bench warrant is, perhaps, more traditionally associated with bringing accused persons before the courts. Order 22, Rules 1 and 2 identify four particular circumstances where a bench warrant might be issued for an accused:

a) the accused has failed to appear in response to a summons;

b) the accused is evading service of the summons demanding his appearance in Court;

c) the accused has absconded or is about to abscond;

d) the accused has failed to appear in Court having been released or remanded on bail.

i) Again the position in respect of civil proceedings may be contrasted here; a bench warrant is not issued for a defendant who fails to respond to a summons for a civil matter. Under the Circuit Court Rules 2001 the plaintiff may make an application for judgment in default of appearance against the defendant.[24] Under the Rules of the *Superior Courts 1986* a plaintiff may seek a judgment in default of appearance against the defendant. The plaintiff must first file an affidavit of service of summons, or in lieu of summons. A final judgment may then be entered against the defendant.[25]

(i) The individual has failed to appear in response to a summons

7.17 Order 22, Rule 1 of the *District Court Rules* 1997 states:-

> "Where a summons is issued requiring the appearance before the Court of a person against whom a complaint has been made or an offence has been alleged and such person fails to appear at the required time and place or at any adjourned hearing of the matter, and it is proved to the Judge there present that such person has been served with the summons" a warrant for that person's arrest may be issued.

7.18 The Judge will issue a Form 22.2 bench warrant, as provided in Schedule B of the Rules. This Form was originally provided in the *District Court Rules* 1997, but was then replaced by the Form provided in the *District Court (Bench Warrant) Rules 2007* . Form 22.2 states on its face that it is a command to the addressee of the warrant, the addressee being the Superintendent at a

---

24 *Circuit Court Rules 2001*, Order 27.

25 *Rules of the Superior Courts 1986*, Order 13. See generally Delany and McGrath, *Civil Procedure in the Superior Courts* (Round Hall Ltd, 2001) at 75-82.

named Garda station, to bring the individual before the issuing judge, or another judge, to be "dealt with according to law".

(ii) The individual is evading service of a summons

7.19 The District Court Rules 1997, Order 22, Rule 1 states that where "at any time either before or after the date on which such person is required by summons to appear" before a court, and information is provided, using Form 22.1 in Schedule B of the Rules, that he or she is evading service of the summons, a Judge may issue a bench warrant for the arrest of that person. Where it is believed that an accused is evading service of the summons, Form 22.1 enables an individual to apply to a District Court judge to issue a warrant for the arrest of the accused. This individual need not necessarily be a member of the Garda Siochana; however Form 22.1 does oblige the applicant to state his or her interest in the proceedings. The Form requires the applicant i) to state the date upon which the summons was issued and ii) the date, time and location of the District Court sitting to which the accused has been summonsed to appear. The applicant must provide this information on oath and must explain the basis of his or her belief that the accused is evading service of the summons. A Form 22.2 bench warrant will be issued by the Judge where he or she is satisfied to do so in the circumstances. The warrant is addressed to the superintendent of a named Garda station and it commands the arrest of the accused, to be brought before either the issuing judge or another judge to be dealt with according to the law.

(iii) The individual is about to abscond or has absconded

7.20 The District Court Rules 1997, Order 22, Rule 1 sets out the same procedure noted above regarding the evasion of service of a summons in respect of an individual about to abscond or who has absconded. Where a person with an interest in the proceedings believes that the accused is about to abscond or has absconded, he or she may apply to a District Court judge to issue a warrant for the arrest of the accused. The application must be made by means of a Form 22.1 and the applicant must provide information on oath as to the basis for his or her belief. Where the District Court Judge accepts the application, he or she will issue a Form 22.2 warrant, as provided by the *District Court (Bench Warrant) Rules 2008*, for the arrest of the accused.

(iv) The individual has failed to appear after release or remand on bail

7.21 The *District Court Rules 1997*, Order 22, Rule 2 provides for the issuing of a bench warrant where an accused who has been granted bail fails to appear in Court. Two situations are envisaged by the Rule. Rule 2(a) refers to the case of an individual who "has been arrested and charged with an offence [and] is released on bail by recognisance by a member of the Garda Siochana

for his or her appearance before a sitting of the Court at a time on a date and at a place specified in the recognisance". Rule 2(b) refers to the case where "an accused person is before the Court in connection with an offence and, on being remanded, is admitted to bail by recognisance for his or her appearance before a subsequent sitting of the Court (either in the same or another place)". Where bail has been granted in either of these circumstances and the individual, having entered the recognisance, fails to appear at the place, on the date and at the time, as he or she was bound to do by the recognisance, the Judge may issue a warrant for the individual's arrest. The Rule states that the recognisance must be produced to the Judge where a bench warrant is to be issued.

7.22 The warrant to arrest the accused under this Rule will be a Form 22.3 warrant, as provided in Schedule B of the *District Court Rules* 1997. This warrant must state the offence with which the accused has been charged, as well as the time and date of the offence. It must further state i) the date on which the accused was admitted to bail by recognisance and ii) the time, date and District Court at which he or she was bound by the recognisance to appear. The warrant will be addressed to the Superintendent of a Garda station and commands that the accused be arrested and then brought before the issuing Judge, or another Judge of the District Court, to be dealt with according to the law.

(c) 2008 statutory provision regarding bench warrant structure

7.23 The *District Court (Bench Warrant) Rules* 2008 amended Order 22 of the *District Court Rules 1997* by adding another rule. The added Rule 5 states:

> "A single warrant may be issued under this Order in respect of several failures to appear referred to in rules 1 and 2. Any [such] warrant issued under this order shall contain, either in the body thereof, or attached thereto, sufficient particulars to identify the failure or failures to appear referred to in rules 1 and 2."

The explanatory memorandum to the rule states that it provides for the particulars of all offences and/or complaints, together with particulars of recognisances which have been breached, to be contained within the body of the warrant or attached to it. Rule 5, therefore, requires the bench warrant to be more precise and informative in nature. Any person dealing with the bench warrant, such as a member of the Garda Siochana or a judge, will be enabled to gain a greater insight into the circumstances surrounding the issue of the warrant simply by reading its contents.

D Summons Procedure

7.24 A summons is a formal written document delivered to an individual informing him or her that it has been alleged that he or she has committed an offence, and that he or she is required to attend a sitting of the court where a particular matter will be heard. In *Dixon v Wells*[26] Mathew J. explained a summons as being "a citation proceeding upon information or complaint laid before the magistrate who issues the summons, and conveys to the person cited the fact that the magistrate is satisfied that there is a prima facie case against him".[27] In *D.P.P. v Clein* [28] Henchy J. described a summons as "a written command issued to a defendant for the purpose of getting him to attend court on a specified date to answer a specified complaint".[29] As noted above in section C(2), it is also possible to issue a bench warrant for the arrest of a witness in criminal proceedings, thus the procedure is not limited to the arrest of an accused individual.

7.25 Serving a summons affords the individual concerned the opportunity to appear before the court so that he or she may defend himself or herself against the allegation. Woods has stated that this opportunity is one of the "fundamental tenets of constitutional justice".[30] Thus the summons is an important part of the justice procedure.[31]

7.26 Originally summonses were issued judicially. The Act which provided for this was the *Petty Sessions (Ireland) Act 1851*. The legislature then enacted the *Courts Courts (No. 3) Act 1986* which introduced an administrative

---

26 (1890) 25 QBD. 249.

27 *Ibid*, at 257.

28 [1983] ILRM 76.

29 *Ibid*, at 77.

30 Woods, *District Court Practice and Procedure* (James V. Woods 1994) at 124.

31 It is notable that the summons does not confer jurisdiction; that is, the jurisdiction of the court to hear the matter does not derive from the existence of the summons. A summons is merely the step in proceedings which requires the attendance of the accused at court. The High Court in *The State (Clarke) v Roch*e explained that a "valid complaint is the foundation of the jurisdiction of the court....If the person receiving the complaint determines not to proceed on foot of it, the matter dies. If he decides to exercise his jurisdiction then he may sign a summons to compel the presence before the court of the person against whom the complaint is made." [1986] IR 619, at 630. See also Walsh, *Criminal Procedure* (Thomson Round Hall 2002) at 647-648; Woods, *District Court Practice and Procedure* (James V. Woods 1994) at 124.

procedure, not requiring the involvement of a judge, for the issuing of summons. The provisions of both Acts will be set out in this section.

(1) Petty Sessions (Ireland) Act 1851

7.27 The jurisdiction of the District Court to issue a summons requiring a person to appear before the Court in response to a complaint that he or she has committed an offence was initially set out in the *Petty Sessions (Ireland) Act 1851*. Section 10 of the 1851 Act states:

> "Whenever information shall be given to any Justice that any person has committed or is suspected to have committed any Treason, Felony, Misdemeanour, or other Offence, within the limits of the jurisdiction of such Justice, for which such person shall be punishable either by indictment or upon summary conviction...it shall be lawful for such Justice to receive such information or complaint, and to proceed in respect to the same".

The section further provides that the information or complaint may be made either with or without oath, and in writing or not, "according as the Justice shall see fit". In respect of cases of summary jurisdiction, the section states that the complaint must be made within six months of the time when the alleged offence occurred. Section 11 of the *Petty Sessions (Ireland) Act 1851* goes on to establish that where such information or complaint is received in respect of a summary jurisdiction matter, the Justice may issue a summons which requires the accused person "to appear and answer to the complaint". The summons "shall state shortly the cause of complaint" and be signed by the Justice.[32] Section 11 further specifies that "the cause of the complaint shall have arisen within the Petty Sessions District for which the Justice issuing any such summons shall act".

7.28 The jurisdiction to issue summons under the *Petty Sessions (Ireland) Act 1851* was extended to peace commissioners by the *Courts of Justice Act 1924*. Section 88(3) of the 1924 Act stated that a peace commissioner shall have all the powers and authorities that were vested in a Justice of the Peace immediately prior to 6th December 1922; the section specified signing summonses as one of these powers.[33]

---

32 Section 11 of the 1851 Act states that "no summons shall be signed in blank".

33 See generally Walsh, *Criminal Procedure* (Thomson Round Hall 2002) at 654; Delany, *The Courts Acts 1924-1997* (2nd ed Round Hall Ltd. 2000) at 51-54; *The State (Clarke) v Roche* [1986] IR 619, at 638.

7.29 The office of the district court clerk was then established by the *Court Officers Act 1926*.[34] Section 48 of the 1926 Act stated that every district court clerk "shall have and exercise all such powers and authorities and perform and fulfil all such duties and functions in relation to the District Court ...as shall from time to time be conferred or imposed on him by statute or rule of court". Subsequently, Rule 29 of the District Court Rules 1948 set out that where a summons was sought to require the attendance at Court of a person, against whom a complaint was made, that complaint grounding the summons could be made to a district court clerk (as well as to a Justice or peace commissioner). On the basis of this Rule 30 stated that, in cases of summary jurisdiction, a clerk could issue a summons i) in cases where a defendant is charged with an offence, if the offence is stated to have been committed, or the defendant resides, within the limits of the court area or areas for which he acts as a clerk, or ii) in summary proceedings of a civil nature, if the defendant or one of the defendants resides or carries on any profession, business or occupation within the said limits. Rule 30 further stated that "such summons shall direct the appearance of the defendant before a Justice who has jurisdiction to hear and determine the complaint and at a court where such Justice can exercise his jurisdiction."

7.30 In *The State (Clarke) v Roche*[35] the Supreme Court questioned the power of peace commissioners and district court clerks to issue summons under the *Petty Sessions (Ireland) Act 1851* . Finlay C.J. stated that "on the terms of s. 10 of the Act of 1851, it is an inescapable conclusion that the issue of a summons upon the making of a complaint is a judicial as distinct from an administrative act".[36] The Court went on to say that consideration should be given to replacing s. 10 and s. 11 of the 1851 Act with provisions providing that issuing summonses in criminal cases could be an administrative procedure, thus summonses could be properly issued by clerks where a complaint was made to them. Walsh has commented that the "clear implication [of this decision] is that peace commissioners and district court clerks have no power to issue process under the 1851 Act".[37]

(2) Courts (No. 3) Act 1986

7.31 The decision of the Supreme Court had a significant practical effect on the workings of the District Court. Due to the large volume of summons required to be issued by the Court, it would have been extremely time

---

34 Section 46(5).

35 [1986] IR 619.

36 *Ibid*, at 641.

37 Walsh, *Criminal Procedure* (Thomson Round Hall 2002) at 655.

consuming if every summons had to be issued by a judge. This point was, in fact, recognised by Finlay C.J. in his judgment.[38] Thus, action was quickly taken in response to the matter and the *Courts (No. 3) Act 1986* was enacted.[39] Section 1(1) of the 1986 Act provided:

> "Proceedings in the District Court in respect of an offence may be commenced by the issuing, as a matter of administrative procedure, of...a summons by the appropriate office of the District Court"

Section 1(2) of the Act stated:

> "Summonses shall be issued under the general superintendence of an appropriate District Court clerk and the name of an appropriate District Court clerk shall appear on each summons".

Therefore the 1986 Act established an administrative procedure whereby an application[40] for a summons could be made to the office of the District Court and

---

38 [1986] IR 619, at 639.

39 See generally Delany, *The Courts Acts 1924-1997* (2nd ed Round Hall Ltd. 2000) at 401-402 and Walsh, *Criminal Procedure* (Thomson Round Hall 2002) at 655. On this point McGuinnes J. commented in the High Court in *National Authority for Occupational Safety and Health v O'Brien Crane Hire Ltd.* [1997] 1 IR 543 that the 1986 Act was "enacted to cure the mischief of the practical difficulties in properly bringing a complaint under the Act of 1851", at 555.

40 Walsh points out that under the 1986 Act an 'application' is made to the District Court office for a summons, whereas under the 1851 Act it is stated that a 'complaint' must be made to a judge. Walsh, *Criminal Procedure* (Thomson Round Hall 2002) at 656. There does not, however, appear to be any real difference between the two procedures, as the 1986 Act does not set out any particular requirements for the application to meet which would distinguish it from the 1851 procedure. It is essentially just the giving of information which will ground or justify a summons being issued. In *D.P.P. v Dwyer* (High Court. 23 November 1995) the applicant submitted that the use of the old 'complaint' form when an application for summons was made under the 1986 Act rendered the summons invalid. Morris J. held that the fact the Garda applicant was described as a 'complainant' in the form used did not affect the summons; the form remained "an application for a summons within the terms of subsection 1(4) of the Act". Therefore there does not appear to be a fundamental difference between the two.

the office could issue it; the involvement of a judge was not required under this legislative scheme.[41]

7.32 In *D.P.P. v Nolan*[42] the Supreme Court considered the effect of the 1986 Act. Finlay C.J. commented that it was intended by the legislature to vest jurisdiction in the District Court to try an offence where the proceedings were commenced in accordance with the statutory provisions contained in the Act.[43] The Judge went on to say that "a summons duly issued under the Act of 1986 shall have the same force and effect as a summons issued pursuant to s.10 of the Act of 1851".[44] In *National Authority for Occupational Safety and Health v O'Brien Crane Hire Ltd.*[45] McGuinness J. referred to the decision in *Nolan*. She observed that the decision of the Supreme Court in that case clearly set out that the summons procedure under s. 1 of the *Courts (No. 3) Act* 1986 Act "is valid and effective" to vest jurisdiction in the District Court to hear and determine the charge contained in a summons issued under its provisions, and that the 1986 procedure "is separate from and parallel to" the summons process provided for under the *Petty Sessions (Ireland) Act 1851*.[46] The 1986 Act itself makes it clear that it is distinct from the 1851 Act and was not intended to repeal the earlier Act. Section 1(8) of the *Courts (No. 3) Act 1986* states that the procedures provided for in its provisions are "without prejudice to any other procedures in force immediately before the passing of this Act...accordingly, any of those other procedures may be adopted, where appropriate, as if this Act had not been passed".

7.33 There is however a variation in the scope of applicants between the two Acts. This was referred to by McGuinness J. in *National Authority for Occupational Safety and Health v O'Brien Crane Hire Ltd*.[47] Section 1(4) of the *Courts (No. 3) Act 1986* provides that the administrative summons procedure under the Act may be used only "by or on behalf of the Attorney General, The Director of Public Prosecutions, a member of the Garda Siochana or any person authorised by or under statute to prosecute the offence". By contrast neither

---

41 In *Kelly v Hamill* [1997] IEHC 7 McCracken J. noted that although a summons issued under the 1986 Act is issued by the District Court, it is not issued as a judicial function.

42 [1990] 2 I.R. 526.

43 *Ibid*, at 545.

44 *Ibid*, at 545.

45 [1997] 1 I.R. 543.

46 *Ibid*, at 551.

47 [1997] 1 I.R. 543.

section 10 or section 11 of the *Petty Sessions (Ireland) Act 1851* make any specification as to who may seek the issue of a summons. Thus McGuinness J. stated "it seems to me that by limiting the Act of 1986 procedure to those specifically charged by the State with the duty to prosecute offences, the Oireachtas intended to exercise a degree of control through the District Judge, to whom a complaint must be made over frivolous, vexatious or other unnecessary prosecutions".[48] Walsh has also referred to this issue. He notes that "[i]t follows that a complaint laid by a citizen as a common informer will have to be processed through the 1851 Act procedure...such complaints would have to be laid before a judge of the District Court who would have to consider them personally."[49] In respect of section 1(4) of the 1986 Act, McCracken J. explained in *Kelly v Hamill*[50] that the provision that an application for summons may only be made by or on behalf of certain authorities "does not mean that they must personally attend at the District Court Office, or personally fill in a form of application which is not a statutory form". He reiterated that applying for a summons under the 1986 is an administrative act and so the applicant "is perfectly entitled administratively to request some other person physically to attend at the District Court Office, and indeed physically to fill in whatever form is necessary".

(3) Electronic application and issuing of summons

7.34 Section 49 of the *Civil Liability and Courts Act 2004* amended section 1 of the *Courts (No. 3) Act 1986* by inserting a new section 1. Under the new section 1(2) it was stated:

> "The issue of a summons may, in addition to being effected by any method by which the issue of a summons could be effected immediately before the enactment of section 49 of the Act of 2004, be effected by transmitting it by electronic means to the person who applied for it or a person acting on his or her behalf."

The new section 1(4) stated:

> "The making of an application...may, in addition to being effected by any method by which the making of an application for a summons could be effected immediately before the enactment of section 49 of the Act of 2004, be effected by transmitting it to the appropriate office by electronic means."

---

48 *Ibid*, at 552.

49 Walsh, *Criminal Procedure* (Thomson Round Hall 2002) at 659.

50 [1997] IEHC 7.

Thus the the 1986 Act, as amended by the 2004 act provided for the establishment of an electronic application and issuing process in respect of summons.

(4) Form of the Summons

7.35 The *District Court Rules 1997* set out the requirements in respect of the form of a summons. Order 15, Rule 1(3) provides that where a complaint is made to a Judge, he or she may issue a summons in any case where he or she "has jurisdiction in the district to which he or she is assigned". A Form 15.1 summons, as contained in Schedule B of the *District Court Rules 1997*, will be used in such a case. A Form 15.1 summons states on its face that a complaint has been made to the issuing judge and that the summons is "to command" the individual "to appear on the hearing of the said complaint" at a sitting of the District Court to answer that compliant. Order 15, Rule 2(2) provides that where an application for a summons is made to an office of the District Court under the *Courts (No. 3) Act 1986*, a clerk shall issue such summons or cause it to be issued "if such clerk is assigned to any court area in which a judge has jurisdiction in relation to the offence to which the summons relates". A summons issued by an office of the District Court will be in the Form 15.2, as provided in Schedule 1 of the *District Court (Summonses) Rules 2005*, amending Form 15.2 contained in Schedule B of the *District Court Rules 1997*. A Form 15.2 summons states that the individual has been accused of the offence(s) listed and that the summons is "to notify" the individual that he or she will be accused of the offence(s) at a sitting of the District Court and is required to appear at the sitting "to answer the said accusations(s)".

7.36 A summons must state briefly and in ordinary language "particulars of the cause of complaint or the offence alleged" as well as the name and address (if known) of the person "against whom the complaint has been made or who is alleged to have committed the offence".[51] A single summons may contain more than one complaint.[52] Where a summons is judge-issued, it must be signed by the judge himself or herself and it may never be signed in blank.[53] A summons may not be avoided or cancelled by reason of the death of the issuing judge or district court clerk, or by reason of the issuing judge or district court clerk ceasing to hold office.[54]

---

51 *District Court Rules 1997*, Order 15, Rule 3(1), as amended by Rule 3 of the *District Court (Summonses) Rules 2005*.

52 *District Court Rules 1997*, Order 15, Rule 4.

53 *District Court Rules 1997*, Order 15, Rule 5(1).

54 *District Court Rules 1997*, Order 15, Rule 5(3).

7.37 Copies of a summons will also be issued where the summons is directed to more than one person. Copies will therefore be served on each individual concerned.[55] The *District Court (Summonses) Rules 2005;* in amending Order 15 of the *District Court Rules 1997*; provide that where a summons is issued by electronic means to the applicant or a person acting on the applicant's behalf (as provided for under the *Civil Liability and Courts Act 2004*, section 49), a "true copy" of the summons shall be served upon each person to whom the summons is directed.

(5) Service of Summons

(a) Petty Sessions (Ireland) Act 1851

7.38 Section 12 of the *Petty Sessions (Ireland) Act 1851* provides that a summons shall be served upon the person to whom it is directed 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, warehouse, counting-house shop, factory or place of business, with some inmate of the house not being under sixteen years of age". The section further states that a summons must be delivered within a reasonable time before the hearing of the complaint. An element of personal service therefore appears to be required under the 1851 Act.

(b) Courts Act 1991

7.39 Section 22 of the *Courts Act 1991* specifically deals with service of summons. Section 22(1) states:

> "Notwithstanding section 12 of the Act of 1851 and without prejudice to the provisions of any Act authorising the service of summonses in any particular manner in particular cases, 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
>
> > (*a*) 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 or at his place of business in the State,
> >
> > (*b*) by sending, by any other system of recorded delivery prepaid post specified in rules of court, a copy thereof in such an envelope as aforesaid, or
> >
> > (*c*) by delivery by hand, by a person other than the person on whose behalf it purports to be issued authorised in that behalf by

---

[55] *District Court Rules 1997*, Order 15, Rule 6.

rules of court, of a copy thereof in such an envelope as aforesaid."[56]

The 1991 Act therefore provided that a summons in respect of a summary jurisdiction matter could be served by registered post. Prior to this the *Petty Sessions (Ireland) Act 1851* required summons to be delivered personally.

7.40 In addition to providing for service by post, the Act set out the requirements to be met so that service of summons can be deemed sufficient. Section 22(2) states:

> "Service of a summons upon a person pursuant to *subsection* (*1*) of this section shall, 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 the provisions of the said *subsection* (*1*), be deemed to be good service of the summons upon the person unless it is proved...that the person did not receive notice of the summons or of the hearing to which the summons relates."

(c) District Court Rules 1997

7.41 The *District Court Rules 1997*, Order 10, Rule 5 states:

> "Save where otherwise provided by statute or by Rules of Court, service of a document[57] shall be effected upon a person in the State by delivering to that person a copy thereof or by leaving the copy for that person at his or her last or most usual place of abode, or at his or her office, shop, factory, home or place of business with that person's husband or wife, as the case may be or with a child or other relative (apparently residing with that person) of that person or of his wife or her husband as the case may be, or with any agent, clerk, servant or employee of that person, or with the person in charge of the house or premises wherein that person usually resides, provided that the person (other than the person upon whom service is to be

---

[56] Section 22(1)(c) of the *Courts Act 1991* has been supplemented by the *District Court (Service of Summons) Rules 1995*. Rule 4 states that any member of the Garda Siochana, "other than the person on whose behalf the summons purports to be issued", is authorised under the Rules to serve a summons in accordance with section 22(1)(c) of the 1991 Act.

[57] Rule 1 of Order 10 provides that "document" means a summons, a civil summons, a witness summons, a notice, an order of the Court and such other documents as may be specified by the County Registrar pursuant to the powers vested in him or her.

effected) with whom the copy is left is not under the age of sixteen years and is not the person instituting the proceedings".

The Rules do not specify the method(s) of service that may be used so as to deliver the document to the individual. They simply require that the documents be delivered to the person, or that it be left for him or her at one of a number of places.

7.42 The Commission has been advised that a great number of summonses are delivered by ordinary post, or more colloquially referred to as "letterbox delivery". The effect of such delivery is that the summons is simply placed through the letterbox and, unlike registered post, it is not necessary that somebody sign for receipt of the document. Order 10, Rule 18 of the District Court Rules 1997 provides that where service of a document is "effected by registered prepaid post or by ordinary prepaid post the document shall be deemed to be served upon the person to whom it was directed at the time at which the envelope containing the copy for service would be delivered in the ordinary course of post". Thus it can be seen that the 1997 Rules do in fact envisage delivery of summons by means of ordinary post.

(d) Discussion of summons service

7.43 The Commission notes that there may be an issue in respect of the postal procedure for serving summonses. The practice of letterbox delivery of summonses means that it is not necessary for a summons to be delivered personally, or for any person to accept or acknowledge the delivery. What can be problematic with this approach is that a summons may not in fact reach the individual, for example where it is sent to an incorrect address. Due to the lack of a personal element, however, the Courts Service and prosecutors may not be aware of the failed service. Thus the accused is expected to appear in court when in fact he or she is not aware of the request to be present.

7.44 It has already been noted in paragraph 7.06 that a court may proceed with a hearing in the absence of an accused. However, where the individual has been summonsed to court, it must be shown that the summons was duly served before the court can continue with the hearing *in absentia*. In *Brennan v Windle*[58] the Supreme Court held that where the District Court did not have sufficient evidence to be satisfied that the summons had in fact been delivered to the individual, it should not have proceeded with the hearing in the absence of the accused, rather it should have either adjourned proceedings or issued a bench warrant. It therefore follows from this decision that where a Court is not entirely satisfied that a summons has been delivered to the individual, it must either adjourn or issue a bench warrant. The Commission has been informed

[58] [2003] 3 IR 494.

that a number of bench warrants are issued in such circumstances, that is where the Court is not certain that there was sufficient service and delivery of a summons to the individual.

7.45 The Commission invites submissions as to whether summons in respect of criminal proceedings should only be served by registered post and not by ordinary postal delivery. This provision would not affect the law on delivery by hand, thus summonses could continue to be delivered in person to the individual concerned. The procedure for registered postal delivery established under section 22 of the *Courts Act 1991* would therefore apply to all summons not delivered by hand. One advantage of this approach is that there would be greater certainty as to whether a summons was duly served. Thus courts could proceed more often with a hearing rather than issuing a bench warrant. A second advantage of registered post service of summons would be that the onus of proof would shift onto the accused to establish that the summons was not duly served. Registered post would essentially create a presumption of sufficient service.

7.46 There are two other relevant points worth noting on this matter. Firstly, service by registered post would not be a costly measure, particularly in comparison to the cost of adjourning a hearing to another date or issuing a bench warrant where a court is not entirely satisfied that a summons was duly served. Secondly, there may be cases where an accused has failed to appear because a summons has not been adequately served due to incorrect details; such as one's name or address. Where a bench warrant is issued in such circumstances the lack of correct information may make it very difficult for that bench warrant to be executed. Thus the bench warrant may not be any more successful in securing the attendance of the individual. Under a system of registered post service it is likely that the fact of incorrect details would become known at a much earlier point in the proceedings. Therefore the matter could be addressed prior to the hearing date and the individual could be obtained by placing the correct details on a new summons, rather than by attempting to do so by means of a bench warrant. It is noted that the Commission has been advised that a disadvantage of service of summons by registered post is that there can be a period of delay from when the document is posted to when the postal service informs the relevant party that service of the summons by registered post has been unsuccessful. The Commission duly recognises this point. Nonetheless the advantages of registered postal service could outweigh this disadvantage.

7.47 The Commission invites submissions as to whether summons in respect of criminal proceedings should only be served by registered post and not by standard letterbox delivery.

(6) Responding to Summons by Post

7.48 In the United Kingdom the *Magistrates' Courts Act 1980* enables an accused to respond to a summons with a guilty plea by post. The procedure only applies where an individual is summonsed to appear before a Magistrates' Court on a summary matter.[59] Section 12 of the 1980 Act sets out the postal procedure. When a summons is sent it will be accompanied by

i) a notice explaining the effect of section 12,

ii) a statement of the facts which will be put before the Court at the hearing in respect of the offence[60],

iii) 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.[61]

iv) Having received 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. The Court will bring this notification to the attention of the prosecutor.[62] 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.[63] Before the Court actually accepts the guilty plea and convicts the accused in his or her absence, the statement of facts (which has been sent to the accused with the summons) will be read out by the clerk, as well as the notification of the guilty plea sent by the accused. The accused may also make a submission to the Court on a matter which may be considered as a mitigating factor; this submission will also be read out by the clerk prior to conviction.[64]

---

59 The *Magistrates' Courts Act 1980* , section 12, does not apply where the offence charged is one where the accused is liable to be sentenced to more than 3 months imprisonment.

60 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* (12th ed Oxford University Press 2008) at 169.

61 *Magistrates' Courts Act 1980*, Section 12(3).

62 *Magistrates' Courts Act 1980*, Section 12(4).

63 *Magistrates' Courts Act 1980*, Section 12(5).

64 *Magistrates' Courts Act 1980*, Section 12(7)(d). Sprack explains that where this submission of mitigating circumstances alleges facts which, if accepted, would

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 offence charged or ii) give any other information relating to the accused.[65] Thus there can be no variation of the information which the accused has been notified of and has decided to plead guilty on the basis of. The Court has a discretion to decide whether or not to proceed with the hearing and conviction of the accused in his or her absence. Where the Court decides not to proceed the matter will be adjourned and the adjourned hearing will proceed as though the accused had not pleaded guilty by postal notification.[66] The accused, or somebody 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. The Court will inform the prosecutor of this withdrawal and proceed as though the guilty plea was never received.[67]

(a) Discussion of responding to summons by post

7.49 The Commission invites submissions as to whether a system of postal response to summons should be introduced in Ireland in respect of minor offences. The system would enable district courts to deal with minor offences in a quick and efficient manner. It could also reduce the number of people attending the district court on any given day, thereby making the organisation of courtrooms more manageable. With regard to bench warrants, this system could help to reduce the need to issue a bench warrant where an individual has failed to appear for a hearing of a minor offence. In some cases failure to appear may simply arise because the individual is unable to appear due to existing commitments or perhaps because they do not have a suitable mode of transport available to them. A postal system would enable an individual 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 make the hearing but is satisfied for the court to proceed in his or her absence. In turn the District Court would not have to determine whether a summons was duly delivered and whether a bench warrant needs to be issued to bring the individual before the court. Overall a postal procedure could speed up proceedings in respect of minor

---

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* (12th ed Oxford University Press 2008) at 169. Thus the accused's submission must be within the scope of the statement of the offence to which the accused has pleaded guilty.

65 *Magistrates' Courts Act 1980*, Section 12(8).

66 *Magistrates Courts Act 1980*, Section 12(9).

67 *Magistrates' Courts Act 1980*, Section 12(6).

offences, reduce the number of bench warrants issued in respect of minor offences and relieve some of the burden on resources which results from issuing bench warrants.

7.50 *The Commission invites submissions as to whether a system of postal response to summons should be introduced in Ireland in respect of minor offences*.

E Explaining the Requirement to Appear as a Condition of Bail

7.51 As already discussed, where an individual fails to appear in court as required by his or her bail agreement, a bench warrant may be issued.[68] While it may be the case that an accused has wilfully chosen not to appear in court, it may also be the case that the individual is not aware of or does not understand the obligation upon him or her to appear. For example, an individual being granted Garda station bail may be under the influence of an intoxicating substance or be a foreign national with a limited understanding of English. In such circumstances it is possible that the person believes that the matter has been completely dealt with at the Garda station and that they do not have any other obligation to fulfil. A similar issue may also arise in respect of bail being afforded by the District Court. District courtrooms are generally busy and often noisy places, thus it may be the case that an individual cannot properly hear or comprehend what is being said by a judge and so does not appreciate that he or she is bound to appear before the court again at a later date.

(1) Victorian Law Reform Commission Report: Failure to Appear in Response to Bail

7.52 In 2002 the Victorian Law Reform Commission published its Report *Failure to Appear in Court in Response to Bail*. The report identified that certain members of society may be more likely to fail to appear due to inherent conditions or personal issues, rather than as a result of an intention not to attend court. Groups identified in the 2002 report included people with psychiatric illness, people with cognitive disabilities, homeless people, people from cultural minorities and members of the Aboriginal community. The report observed that factors which may be more common amongst such groups and which may lead to a greater likelihood of a person failing to appear included low literacy levels, a difficulty with understanding numbers and dates, an inability to remember dates, or a general misunderstanding of the criminal process and/or the need to appear in court at a later date.[69]

---

68 *District Court Rules 1997*, Order 22, Rule 2.

69 See generally Victorian Law Reform Commission, *Failure to Appear on Response to Bail: Report* (2002) at 22-23.

(2) Discussion

7.53 It is likely that many of the issues and factors identified in the Victorian Law Reform Commission Report are also relevant to the Irish situation. Therefore there are a number of possibilities, beyond mere refusal to comply, as to why a person fails to appear in court in response to bail. Greater effort or assistance in explaining the need to appear in court may, however, prevent at least some cases of non-appearance.[70]

7.54 The following approaches may be advisable with regard to station bail:

i) where there is a language barrier it may simply be a case of calling on an interpreter to explain the bail condition to appear in court;

ii) where a person appears to be under the influence of an intoxicating substance the matter should be followed up by meeting with the individual at another time when he or she may be better able to understand his or her obligations;

iii) where an individual 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;

iv) where a person appears to suffer from a psychiatric illness or cognitive disability, a suitable or relevant social worker or solicitor should be contacted so that the matter is followed up.

7.55 In respect of court bail, the judge or solicitor involved should be certain that the individual comprehends the requirement to attend at the court on a future date; this may, for example, involve taking the individual to a quiet area of the court or relying on an interpreter to explain the matter completely.

7.56 An additional, overall approach would be to give the individual a simple document, in letter form, setting out the time and date on which he or she is bound to appear before the court, the name and location of the court where he or she is to appear, and the matter to which this appearance relates. This would be particularly advisable where an authority involved in the case believes that the individual is having difficulty with understanding the process. In cases where the individual does not in fact fully comprehend his or her obligation, he or she would be able to show this letter to another person who

---

70 The Queensland Law Reform Commission similarly identified in its working paper *The Bail Act* that one method for improving the rate at which defendants appeared in response to bail agreements would be to provide better explanations about bail undertakings to the individuals concerned. Queensland Law Reform Commission, *The Bail Act* (WP No. 41 1993) at 49.

could then assist the individual with fulfilling the obligation to attend court. The Commission provisionally recommends that a code of practice setting out these points should be implemented, which would offer guidance to authorities concerned with informing individuals that they are required to appear before court as a condition of their bail. Ultimately, by ensuring that the individual appreciates the bail condition that he or she must return to court on a specified date, the number of non-appearances may be reduced and in turn fewer bench warrants may need to be issued on this basis.

7.57 The Commission provisionally recommends that a code of practice be drawn up, in respect of both Garda station bail and court granted bail, setting out that an individual fully understands the obligation to appear in court as a fundamental requirement of granting bail. The Commission also provisionally recommends that an individual being granted bail should be given a basic document, in letter format, setting out the time and date on which he or she is bound to appear before the court, the name and location of the court where he or she is to appear, and the matter to which the appearance relates.

F Unexecuted Bench Warrants and Garda Station Bail

7.58 The *Criminal Procedure Act 1967* provides that in certain cases a person may be released on bail by a member of the Garda Siochana. Section 31 of the Act, as amended by section 3 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, empowers a sergeant or other member in charge of the station to release an individual on bail to appear before the District Court if he or she "considers it prudent to do so". However, this power does not extend to a case where a bench warrant exists against the person. Section 31 of the 1967 Act, as amended, states that station bail can be afforded only where there is "no warrant directing the detention of that person". In addition, Order 17, Rule 2 of the *District Court Rules 1997* states that a person arrested pursuant to a warrant "shall on arrest be brought before a Judge having jurisdiction to deal with the offence concerned as soon as practicable".[71] Thus, where an individual is arrested in response to an issued bench warrant or where an individual is arrested on another separate matter and Gardai realise that there is an outstanding bench warrant against him or her, it will not be possible for that

[71] Rule 3 of the *District Court (Criminal Justice) Rules 1998*, amending Order 17, Rule 3 of the *District Court Rules 1997*, provides that where a person is arrested pursuant to a warrant later than 5 p.m. on any evening and a Judge is due to sit in the district in which the person was arrested not later than noon on the following day, it shall be sufficient compliance with the requirement to bring the person before the court "as soon as practicable" if that person is brought before a Judge at the commencement of that sitting.

person to be granted station bail. Instead the individual must be taken before the District Court as soon as possible so that the bench warrant may be executed.

7.59 Where there is no sitting of the District Court to which the individual can be taken within a short time, for example on a weekend day, an emergency sitting of the court may have to be convened. The Commission has been advised that this tends to be a costly process.[72] The Commission has also been advised that often the bench warrants concerned may have been issued in respect of quite minor offences, or even be years old. In such circumstances it may not be entirely justified to expend finances and resources by convening an emergency court to execute the warrant.

7.60 A solution in respect of this issue may be to amend the law so that where a member of the Garda Siochana is dealing with an individual in whose name there is an unexecuted bench warrant, station bail could be granted where deemed appropriate. Such an amendment could provide that i) where a bench warrant has existed for a long time and/or relates to a minor matter and ii) where it is not believed that the individual is likely to abscond or evade justice, there would be a Garda discretion to grant station bail, on the condition that he or she appears at a specified sitting of the District Court. This approach might be more suitable than convening an emergency sitting of the court in certain cases.[73]

7.61 The rank of Garda who could grant station bail in such circumstances would also need to be addressed. As is noted above, under the *Criminal Procedure Act 1967*, as amended, a sergeant or member in charge may grant station bail where appropriate. Granting station bail in the case of an individual with an open bench warrant may involve a greater, and perhaps more onerous, assessment of a case. Therefore it may be suitable to recommend that only a member of higher rank could grant bail, for example a superintendent or chief superintendent.

7.62 *The Commission invites submissions as to whether there should be discretion for a member of the Garda Siochana, of a certain minimum rank, to*

---

72 Costs of convening an emergency court would include the cost of having relevant parties present in court, for example the prosecuting Garda, the court registrar and judge, and solicitors and interpreters where necessary.

73 As a practical matter, it would be vital for the member of the Garda Siochana involved to obtain any updated personal information in respect of the individual so that if the individual did in fact fail to appear in Court this failure could be addressed speedily.

grant station bail where a person has an unexecuted bench warrant against them.

G The Nature of the Offence and Bench Warrants

7.63 The District Court is a court of summary jurisdiction.[74] It therefore deals with minor offences. There are, however, also provisions which enable certain indictable offences to be tried summarily and therefore disposed of by the District Court.

i) A number of statutes provide that an offence may be dealt with either summarily or on indictment. Where such offences are prosecuted, it is the decision of the prosecutor as to whether or not the matter should proceed summarily or on indictment; the accused does not have an input into the decision.[75]

ii) Under section 2 of the *Criminal Justice Act 1951*, as amended by section 8 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*, the District Court may summarily try certain offences where a) the Court is satisfied the matter constitutes a minor offence fit to be tried summarily, b) the accused is informed of his or her right to a jury trial and does not object to being tried summarily and c) the D.P.P. consents to the accused being tried summarily. The offences which fall within the scope of this provision are listed in the First Schedule to the 1951 Act.

iii) In addition the legislature may provide for indictable offences to be tried summarily under the same criteria as the 1951 Act. For example, section 53 of *the Criminal Justice (Theft and Fraud) Act 2001* states that any indictable offence under the Act can be tried summarily where the above noted criteria are satisfied.[76]

iv) Section 13 of the *Criminal Procedure Act 1967* provides that where a person pleads guilty to an indictable offence, subject to exceptions, in

---

74 *Courts (Supplemental Provisions) Act 1961*, section 33.

75 See generally O'Donnell, "Summary v. Indictable: Choices in the Disposal of Criminal Cases" [2006] JSIJ 15, at 18; Hamilton, "The Summary Trial of Indictable Offences" [2004] JSIJ 154, at 158; Walsh, *Criminal Procedure* (Thomson Round Hall 2002) at 11.

76 See generally O'Donnell, "Summary v. Indictable: Choices in the Disposal of Criminal Cases" [2006] JSIJ 15, at 17-18; Hamilton, "The Summary Trial of Indictable Offences" [2004] JSIJ 154, at 158-159; Walsh, *Criminal Procedure* (Thomson Round Hall 2002) at 665-666.

the District Court, the Court may proceed to deal with the matter summarily if a) the Court is satisfied that the accused understands the nature of the offence and the facts alleged and b) the D.P.P. consents to the matter being tried summarily. Offences which are excluded from the scope of this provision include an offence under the *Treason Act 1939*, murder, attempt to murder, conspiracy to murder, piracy, rape under section 4 of the *Criminal Law (Rape)(Amendment) Act 1990* and aggravated sexual assault under section 2 of the *Criminal Law (Rape Amendment) Act 1990* Hamilton observes that the wording used in section 13 of the 1967 Act states that the District Court "may" deal with the offence concerned. He comments that "it is suggested that the judge is entitled, and may be obliged, to decline jurisdiction where the judge considers that the sentencing powers of the District Court are inadequate to deal with the case properly".[77]

v) Where the offence charged is indictable in nature and is one which the District Court does not have, or refuses, jurisdiction in respect of, the accused will be sent forward for trial to the relevant superior court. [78]

(1) Discussion

7.64 When an individual fails to appear in Court as required, the Court will consider the nature of the offence concerned before deciding how to proceed. In respect of a summary offence a court may be inclined to either adjourn the hearing[79] or proceed in the absence of the accused.[80] Where the prosecutor has decided that an indictable matter should be dealt with summarily, the District Court judge may also decide to adjourn the hearing or proceed in the absence

---

[77] Hamilton, "The Summary Trial of Indictable Offences" [2004] JSIJ 154, at 160-161.

[78] Section 8, *Criminal Procedure Act 1967*.

[79] Where the accused has failed to appear in response to a summons, section 22(4) of the Courts Act 1991 provides that where the District Court considers it "undesirable in the interests of justice...to continue with the hearing in the absence of the person" the court may adjourn the hearing to another time. The individual will be notified of the adjournment. If the individual again fails to appear at the adjourned hearing, section 22(5) of the 1991 Act provides that "if the complaint or accusation has been substantiated on oath and if the Court is satisfied that reasonable notice of the adjourned hearing was given" the court may proceed to hear the matter in the absence of the accused.

[80] As discussed in part 0 above.

of the accused, rather than issue a bench warrant. Either of these approaches avoids the cost, and often fruitlessness, of issuing a bench warrant.

7.65 Where the matter is one indictable in nature which may be tried summarily on the consent of the accused and the prosecutor, issuing a bench warrant is the more suitable option open to the District Court. It will be necessary for the individual to appear before the Court so that he or she may consent to a summary trial or elect for a trial on indictment. The procedure under section 13 of the Criminal Procedure Act 1967 will also require the presence of the accused so that a guilty plea to an indictable offence can be entered.

7.66 Therefore, while it may be possible for a court to adjourn the hearing or to proceed in the absence of the accused where he or she has failed to appear on a summary charge, the same procedure does not apply to indictable offences. Although there are occasions where the District Court can deal with an indictable matter summarily, it will generally be necessary for the accused to appear so that the District Court can make a final decision on how to deal with the matter.

7.67 The Commission invites submissions as to whether the law relating to some indictable offences should be amended to include the possibility of dealing with these matters, where appropriate, in a summary manner. This could, perhaps, be done by a grading system whereby an offence may be either summary or indictable depending on the particular facts of the case and conduct of the accused. Grading could be based, for example, on the value of property concerned or the degree or nature of the harm caused. By creating a higher threshold for matters to be dealt with on indictment, more offences could be dealt with in a summary manner and consequently fewer bench warrants may need to be issued where an individual fails to appear.

7.68 The Commission invites submissions as to whether the law relating to some indictable offences should be amended to include the possibility of dealing with these matters, where appropriate, in a summary manner. Increasing the offences which could be dealt with in a summary manner may reduce the number of bench warrants required to be issued for non-appearance.

H Execution of Bench Warrants

7.69 Although a bench warrant will be addressed to a Superintendent of a Garda station, its execution may be delegated to another member of the Garda Siochana.[81] In *Dunne v D.P.P.*[82] the High Court explained that a warrant issued

[81] See *Dunne v The D.P.P.* High Court, 6 June 1996.

to arrest an individual is a command issued to the Garda Siochana to bring the named person before the Court.[83] The Court held that a bench warrant does not merely vest a discretion or permission to arrest the individual, rather it places a "mandatory duty" upon Gardai to carry out the order of apprehending him or her.[84] The Court in *Bakoza v Judges of the Metropolitan District Court*[85] observed that a reasonable effort must be made to execute a bench warrant. Peart J. explained the level of effort required as being "a middle ground short of a national manhunt, but in excess of a few unsuccessful knocks on the door." The Judge went on to say that each case would have to be considered on its own facts. Thus what might be a sufficient effort to execute a warrant in some cases may not be adequate in others. In *Cormack v D.P.P. and Ors. and Farrell v D.P.P. and Ors*[86] the Supreme Court held that the law "unambiguously requires Gardai to execute bench warrants without delay and within reasonable timeframe...the execution of a bench warrant is not something to be left to the relevant State authority as a matter of discretion." The Court went on to say that it is not open to Gardai to take no active steps or simply wait for the wanted person to gratuitously fall into their laps by being arrested in relation to some other offence.

7.70 Despite the consensus that bench warrants should be executed efficiently and with reasonable speed, it appears that there are delays, as well as complete failures to execute these warrants. The issues of delay in execution and failure to execute are discussed below.

(1) Execution by Arrangement

7.71 Although a bench warrant affords the power to the Garda Siochana to arrest the named individual at any time when he or she comes to the attention of a Garda member, not all arrests on foot of a bench warrant are sporadic in nature. It is possible for a bench warrant to be executed by arrangement. The Commission has been informed that this is, in fact, a popular method of dealing with a bench warrant. Execution by arrangement involves the individual named on the bench warrant and the prosecuting Garda meeting at a planned time and location; whether at a Garda station or elsewhere; so that the

---

82 High Court, 6 June 1996.

83 A bench warrant states on its face that it is "a command" to the addressee to arrest the individual and to bring him or her before the Court to be dealt with according to the law.

84 *Supra*, n. 81, at 4-5.

85 [2004] IEHC 126.

86 [2008] IESC 63.

individual may be arrested on foot of the warrant and taken to the District Court for the warrant's execution.

(2) Delay in the Execution of Bench Warrants

7.72 A number of cases have come before the courts in respect of the period of delay between the time the bench warrant was issued and when it was actually executed. Generally these proceedings have involved individuals claiming for orders of prohibition of proceedings due to the detrimental effect which the delay in execution has had on their cases.

7.73 In *Bakoza v Judges of the Dublin Metropolitan District Court*[87] the applicant claimed that there had been an inordinate and inexcusable delay in respect of the execution of a bench warrant issued against him. The applicant also claimed that he had suffered prejudice in relation to his defence regarding the matter, as he could not properly recall all the facts due to the passage of time. The bench warrant was issued in May 2001 when the applicant failed to appear in the District Court, as he was required to do under the recognisance of his bail. The warrant was not executed until June 2003. Thus more than two years had passed from the time of issue to the execution of the warrant.

7.74 Peart J. was not satisfied that the applicant had established that he was prejudiced in his defence as a result of the delay. He did, however, agree that the delay was inordinate. Peart J. held that the delay here had been caused both by the applicant and by the Garda Siochana. In respect of the applicant's contribution to the delay, the Judge noted that he had left the address which he had given to Gardai at the time of his arrest, he did not make any attempt to inform Gardai that he was moving to a new address and he when being dealt with by Gardai (at another Garda station) in February 2002, he did not bring the outstanding matter to their attention. Regarding the efforts of the Garda Siochana to execute the warrant, Peart J. held that these were "minimal and perhaps short of what the court should regard as reasonable". The Court concluded that the question to be determined here was whether the delay was of sufficient length to give rise to a presumption of prejudice, such that a fair trial may not be guaranteed. In considering the relevant facts, the Court held that an order of prohibition should be granted prohibiting the respondents from proceeding with the charges against the applicant.[88]

---

87 [2004] IEHC 126.

88 The facts which the Court considered and balanced here were as follows: i) that the applicant was a non-national, ii) it could be presumed that memories of the event which led to the charge (which involved the applicant being intoxicated at the time of the alleged offence) would have faded over the time period, iii) that, due to the delay in executing the bench warrant, the alleged offence had now

7.75 In *Conway v D.P.P.*[89] the applicant sought an order of prohibition due to the delay in the execution of a bench warrant for his arrest. The warrant was issued in June 1992 when the applicant failed to appear before the Circuit Criminal Court on a number of charges.[90] The bench warrant was not executed until June 2006. The High Court heard that in June 1992 the applicant travelled to England, where he resided for an unspecified period of time (during which he served a prison sentence of a number of years), that he used both his mother's and father's surnames at varying times and that he resided at various addresses. In light of this, Mac Menamin J. held that the applicant's conduct formed "part of a pattern of behaviour designed to avoid detection" and that this conduct had "substantially contributed to the delay". Mac Menamin J. further noted that there was no evidence of misconduct on the part of the Garda Siochana, or an absence of *bona fides* in respect of the circumstances of the delay.

7.76 In considering the issue of prejudice caused by delay in executing the bench warrant, Mac Menamin J. noted that he did not agree with the concept of presumptive prejudice on the grounds of delay alone, as identified by Peart J. in *Bakoza v Judges of the Dublin Metropolitan District Court*.[91] Mac Menamin J. opined that the correct approach was that specific prejudice must be demonstrated in order to substantiate an allegation of delay. This was the approach taken by the Supreme Court in *P.M. v D.P.P.*[92] Kearns J. held in that case that, even where blameworthy delay is found to exist on the part of the Garda Siochana or the D.P.P., the applicant must "satisfy the court that he has suffered or is in a real danger of suffering some form of prejudice as a consequence of this delay". Kearns J. added that the balancing exercise referred to by the Supreme Court in *P.M. v Malone*[93] was the appropriate mechanism to be adopted by a court when determining whether a prosecutorial delay should result in an order of prohibition. In *P.M. v Malone*[94] the Supreme Court explained that this balancing process should involve a consideration of

---

occurred some three years ago, and iv) the offences charged were not extremely serious so as to justify proceeding with the charge in light of the other facts.

89 [2007] IEHC 434.

90 These charges included manslaughter, assault causing grievous bodily harm, malicious wounding, assault causing actual bodily harm and common law assault.

91 [2004] IEHC 126.

92 [2006] IESC 22.

93 [2002] 2 I.R. 560.

94 *Ibid*.

the right of the accused to be protected from stress and anxiety caused by an unnecessary and inordinate delay, the public interest in the prosecution and conviction of persons guilty of criminal offences, as well as the nature of the offence and the extent of the delay.[95]

7.77 In conclusion Mac Menamin J. held that the applicant had not demonstrated any particular prejudice as a result of the delay and further, that due to the seriousness of the charges involved, the public interest in prosecuting the accused outweighed his claim.

7.78 In *McFarlane v D.P.P.*[96] the Supreme Court again considered the issue of prosecutorial delay. It referred to the decision of the U.S. Supreme Court in *Barker v Wingo*[97], where the Court set out four factors to be considered in determining whether an individual had been denied his constitutional right to a speedy trial. In this case Kearns J. stated that the framework identified by the United States Supreme Court was, in his opinion, one with which judges can comfortably operate. Kearns J. commented that the framework "focuses at the outset on the question as to whether a particular period of delay is such as to give rise to an inference that it is excessive having regard to the nature and gravity of the proceedings in question." The four factors set out by the Court are as follows:-

1) The length of the delay. The U.S. Supreme Court commented that the peculiar circumstances of the case must be considered with regard to the delay. It noted that the delay which can be tolerated for a more minor offence is far less than that which may be acceptable where the crime is serious in nature.

2) Reasons for the delay. According to the U.S. Supreme Court, different weights should be assigned to different reasons. Thus where a valid reason might serve to justify a delay, a deliberate attempt to delay proceedings would weigh more heavily against the individual who caused it.

3) The role of the applicant. The U.S. Supreme Court explained that an individual's assertion of his right to a speedy trial would provide strong evidentiary weight in determining whether he is being deprived of his constitutional right, whereas a failure to assert the right may make it more difficult for an applicant to prove that he wanted or was denied a speedy trial.

---

95 *Ibid*, at 581.

96 [2008] IESC 7.

97 407 U.S. 514 (1972).

4) Prejudice. The U.S. Supreme Court explained that prejudice should be assessed with regard to the interests of defendants which the right to a speedy trial is designed to protect. Three such interests were identified: (i) the prevention of oppressive pre-trial incarceration, (ii) the reduction of anxiety and concern of the accused and (iii) the limitation of the possibility that the defence will be impaired.

7.79 The decision of in *McFarlane v D.P.P.*[98] was applied in *McDonagh v D.P.P.*[99] A bench warrant was issued in May 2000 when the applicant failed to appear in respect of a burglary charge. A second bench warrant was issued in November 2001 when the applicant failed to appear in respect of a charge of dangerous driving. The applicant was subsequently arrested in January 2007. He claimed that the delay on execution was inordinate and excessive and that there was a real and substantial risk to his right to a fair trial as a result.

7.80 Having referred to the four factors approved by the Supreme Court in *Mc Farlane v D.P.P*.[100] Hedigan J. considered the facts of the case at hand. He noted that there was a period of several years between the issuing of the bench warrants and their execution. He then referred to the reasons behind the delay, noting that the applicant had given a number of false names, addresses and dates of birth to Gardai, as well as living outside the jurisdiction for a period without bringing this to the attention of the Garda Siochana. He held that the applicant's role in the delay was a central feature; he was "an evader of justice" throughout the period concerned. Hedigan J. held that he could not accept that any prejudice had arisen against the applicant which could be attributed to a culpable prosecutorial delay. In respect of the balancing test to be applied, Hedigan J. commented that the crime of burglary is considered to be one of the most serious crimes known to the law. He therefore concluded that society had a strong interest in prosecuting the offence and that this heavily outweighed "what little there is on the scales on the side of the applicant" in this case. The applicant's claim therefore failed.

7.81 In *Cormack v D.P.P. and Judges of the Dublin Metropolitan District Court And Farrell v D.P.P. and Judges of the Dublin Metropolitan District Court*[101] the Supreme Court provided a single judgment in respect of two separate cases which had been heard successively by the Court. Both applicants sought orders of prohibition due to delay in the execution of bench warrants issued against them.

---

98 [2008] IESC 7.

99 [2009] IEHC 73.

100 [2008] IESC 7.

101 [2008] IESC 63.

7.82 In the *Cormack* case the applicant had failed to appear before the District Court on 10 February 2003 and so a bench warrant was issued. The applicant then failed to appear before the District Court on a separate matter on 17 February 2003 and another bench warrant was issued. The prosecuting Gardai involved informed the Court that they had both, on separate occasions, called to the address given to them by the applicant so as to execute the respective warrants but they had been informed that he did not reside there. Ultimately another member of the Garda Siochana executed the first bench warrant on 26 April 2005.

7.83 The applicant in *Cormack* claimed that there had been a significant and inordinate delay in the execution of the warrants and that this gave rise to an unavoidable presumption of prejudice against him. The Supreme Court accepted that the delay in executing the warrants was prima facie excessive in the circumstances, particularly as the applicant had been charged with summary offences. It also observed that although some attempts were made by the Gardai to execute the warrants, there was some culpability on their part for not making greater efforts to arrest the applicant. Nonetheless, the Court held that there was greater culpability on the part of the applicant. This was due to the fact that he failed to appear before the Court in respect of two separate matters and he did nothing to remedy his non-attendance. The Court concluded with three observations. The first was that the period of delay here did not constitute such delay as would warrant an order for prohibition. The second was that there was a "definite public interest" in seeing the charges concerned being prosecuted. The third was that the applicant had failed to point to any circumstance of prejudice arising as a result of the delay. The Court therefore held that "the outcome of any balancing test must be in favour of allowing the prosecution to proceed."

7.84 In the *Farrell* case the applicant had failed to appear before the District Court in response to five summonses in March 2005. He later claimed that he had not received the summonses. The following month he was informed by a member of the Garda Siochana that a bench warrant may have been issued as a result of his non-appearance and that he should contact the prosecuting Garda involved so as to clarify the matter. The applicant informed his solicitor of this matter and his solicitor contacted the relevant Garda, requesting that he produce a copy of the bench warrant. This was not done. The applicant subsequently appeared before the District Court on three separate occasions; June 2005, July 2005 and February 2006. No attempt was made to either produce the warrant or to execute it on any of these occasions. In October 2006 the applicant was arrested on another matter and upon being taken to the Garda station it was noted that there was an unexecuted bench warrant against him. This warrant was then executed by arrangement four days later.

7.85 The Supreme Court was satisfied that there was an element of unjustifiable delay in the *Farrell* case. It held that the Gardai had not done enough to attempt to execute the warrant, a single call out to the address on the warrant was not sufficient, and furthermore that there should have been a response to the solicitor's letter. However, the Court also observed that the applicant was himself partly responsible as he had provided an out of date address to Gardai, to which the summonses were sent (and so he did not receive them) and when informed that he might be the subject of an outstanding bench warrant he did not contact the relevant Garda as he had been advised to do. The Court further noted that the applicant had not established any actual prejudice to his defence as a result of the delay. Although the Supreme Court accepted that there had been a degree of delay, it held that there had not been gross delay. The appeal was dismissed.

(a) Discussion on delay

7.86 Case law has therefore established that in cases of a delay in the execution of a bench warrant, the courts will consider and balance all of the relevant facts. It appears that where an individual himself or herself contributed to the delay this factor will weight greatly against them. Furthermore, where an individual claims that there has been a delay in execution, he or she will be required to show how that has had a detrimental or prejudicial effect to his or her case. The fact of delay alone will not be sufficient to ground a claim. The courts have acknowledged the part played by the Garda Siochana in a number of delay cases. It appears that a certain level of effort is expected by the courts in respect of the execution of bench warrants and they tend to be critical where this is not met.

(3) Failure to Execute Bench Warrants

7.87 In *Murphy v Shields*[102] the applicant's hearing in respect of a driving offence had been adjourned three times for various reasons. On the fourth appearance date neither the accused nor his solicitor could appear at the court due to hazardous weather conditions. An application was again made for an adjournment, but the District Court Judge refused to grant it, and instead convicted the accused and issued a bench warrant for his arrest.[103] On judicial review Carney J. observed that from the date of the issue of the warrant to the judicial review, a period of almost one year had passed but the warrant had remained unexecuted. The effect of this was that the warrant lay "capable of being given effect to at any time subject to renewal." Carney J. also noted that

---

102 [1998] IEHC 167.

103 See paragraph 6.05 as to the power of the courts, in certain cases, to proceed with a hearing where the accused has failed to appear.

there was no justification, "such as the applicant having lain low or left the jurisdiction", for the non execution of the warrant. He observed that he had no reason to believe that the applicant has not been amenable to legal process from the date when the warrant was issued. The Court quashed the warrant, not by reason of its issue but by reason of its continued existence without execution.

(4) Numbers of non-executed bench warrants

7.88 The Commission's attention has been drawn to has been drawn to the number of outstanding bench warrants and that, at any given time, the figure is somewhere between 20,000 and 30,000. The Commission understands that often a number of bench warrants exist in respect of one person. Thus the number given regarding unexecuted warrants does not mean that there are that many individuals to be arrested under bench warrant.

7.89 In December 2007 the Dail was informed that 36,000 bench warrants were outstanding.[104] In December 2008 a more precise figure was noted, with the Dail being told that the number stood at 36,972.[105] In April 2009 it was noted during Dail debates that the number of outstanding bench warrants was 30,000.[106] Whether there was in fact a reduction of between 6,000 and 7,000 outstanding warrants during this period was not addressed by the Dail; it may simply have been the case that a round figure of 30,000 had been relied upon in respect of unexecuted bench warrants.

7.90 The Commission has been advised that certain sittings of the District Court are now entirely dedicated to assessing unexecuted bench warrants with a view to cancelling warrants that are no longer relevant. Thus where a bench warrant exists, for example, in respect of a person who is now deceased, or who is in prison, or where a warrant is many years old and was issued in respect of a minor offence, the District Court may cancel the warrant so that it longer exists. The benefit of this review process is that a number of unexecuted warrants which are impossible, unlikely or unnecessary to ever be executed are eliminated. As a result the list in respect of unexecuted warrants is reduced.

(a) Unexecuted bench warrants for the year 2008

7.91 Figures have been supplied to the Commission by the Courts Service in respect of bench warrants issued, executed or cancelled, and outstanding in 2008 (this period is calculated from 1st January until 31st December 2008). These figures have been set out in part B.

---

104 Dail debates. 5th December 2008. Vol. 643, No. 1.

105 Dail debates. 18th December 2008. Vol. 671, No. 2.

106 Dail debates. 29th April 2009. Vol. 681, No. 2.

7.92 Overall 5,254 of the 26,474 bench warrants issued in 2008 remained unexecuted at the end of the year. The category of offence with the highest number of outstanding bench warrants was theft; 1,400 warrants issued in 2008 were not executed by the end of that year. Second to this was warrants issued for public order offences; 987 bench warrants issued in respect of this category of offence had not been executed by the end of the year. Bench warrants issued for drink driving offences were the third highest in this category, with 759 of bench warrants issued in 2008 remaining unexecuted at year end. 416 bench warrants issued in 2008 for driving penalty point offences were not executed, while 376 warrants issued in 2008 in respect of other road traffic offences were not executed within the year.

7.93 However, while the above categories had the highest numbers of unexecuted bench warrants, they did not necessarily represent the highest rate of failure to execute warrants issued in 2008. The highest rate of non-execution was in respect of bench warrants issued for offences involving non-Irish nationals ("alien" offences); 65.15% of bench warrants issued in 2008 were not executed by the end of that year.[107] The next highest rate of non-execution with regard to warrants issued in 2008 were those relating to social welfare offences, 55.68% of which remained unexecuted by the end of the year.[108] Warrants issued for drink driving offences had the third highest rate of non-execution within the year, 30.2% of warrants issued in 2008 were not executed.[109] The fourth highest rate of non-execution of bench warrants in 2008 was in respect of theft offences; 20.68% of warrants issued remained unexecuted.[110] The fifth highest rate related to bench warrants issued for driving penalty points; 20.59% of these warrants were not executed by the end of 2008.[111]

7.94 It is acknowledged that it may not have been realistic or possible to execute a certain number of bench warrants issued in 2008 before the end of that year, for example, if a bench warrant had been issued at the very end of 2008. In such a case a bench warrant would have been counted in the overall

---

107 Of the 159 bench warrants issued for 'alien' offences, 102 remained unexecuted by the end of 2008.

108 88 bench warrants were issued in respect of social welfare offences and 49 remained unexecuted by the end of 2008.

109 759 of the 2,513 bench warrants issued in 2008 with regard to drink driving offences were not executed by the end of the year.

110 6,768 bench warrants were issued in respect of theft offences in 2008, 1,400 of these remained unexecuted.

111 2,020 bench warrants were issued in respect of driving penalty points in 2008 and 416 of these had not been executed by the end of the year.

yearly figures even though there may only have been a matter of days to have executed the warrant so that it fell within execution during 2008.

(5) Other issues affecting non-execution of execute bench warrants

7.95 The issue of false information being given by individuals to the Garda Siochana is also very problematic. It is understandably difficult for the Garda Siochana to find an individual so as to arrest him or her where they do not have the correct name, address or date of birth of that person. Gardai must be careful not to arrest the wrong person as this would amount to an unlawful and unconstitutional deprivation of their liberty. In *Walsh v Ireland and the Attorney General*[112] Gardai executed a bench warrant but arrested the wrong person. Although the individual claimed that the Gardai had mistaken him for somebody else, he was taken to the Garda station and detained there until he was brought before the District Court, where he was admitted to bail. The Supreme Court held that the arrest was not in accordance with the terms of the warrant as the applicant was not the individual named therein and did not reside at the address named on the warrant. Damages were awarded to the applicant. Therefore, where Gardai are unsure of a person's exact identity they may have to avoid executing a bench warrant due to the danger that they may arrest the wrong person.

7.96 In some circumstances a bench warrant remains on the unexecuted list when it should in fact be cancelled.[113] This might occur, for example, where the individual is now deceased, or is already in custody. As noted at 7.90, there is a practice for periodic sittings of the District Courts to be dedicated to assessing unexecuted bench warrants for the purpose of cancelling those which are no longer relevant or useful. However, the Court is not limited to cancelling bench warrants only during such sittings. Thus, on any occasion where it becomes apparent that the bench warrant is no longer of any benefit, this matter should be made known to the court so that the warrant may be cancelled. Unless such warrants are brought to the attention of the courts so as to be cancelled they will continue to be included within the active bench warrants statistics.

---

112 Supreme Court, 10 November 1994.

113 In 1998, when the list of unexecuted bench warrants was being placed on to the Garda PULSE system, the District Court cancelled approximately 15, 000 bench warrants which were decided to be no longer relevant, for example due to their age or the fact that the individual was no longer at large.

I PULSE

7.97 PULSE is the name of the Garda Siochana database. The word is an acronym for "Police Using Leading Systems Effectively". In 2004 it was noted that PULSE has "effectively given [An Garda Siochana] the capacity to store and share organisational wide knowledge as well as providing us with a corporate memory.[114] PULSE records all notable incidents which are of concern to An Garda Siochana. Details recorded on PULSE include the name of the individual concerned, the individual's address and date of birth, and a description of the person; including details of any distinguishing features, such as tattoos, piercings and birthmarks. Any individual who has a record on PULSE has his or her own identification number and file.

7.98 When a bench warrant is issued by a court, the Garda Siochana is informed of this matter. A record of the issued bench warrant is then placed on PULSE and is therefore accessible to all members. PULSE will record the personal details of the person in respect of whom the bench warrant has been issued, the court where it was issued and the date on which it issued. If a person has a PULSE record, the fact of a bench warrant being issued again him or her will be attached to the existing file, which is headed by the individual's personal details and identification number. This means that when a member of the Garda Siochana carries out a search on PULSE in respect of an individual, that person's entire file is displayed, including the fact that a bench warrant has issued against him or her, and whether or not that warrant has been executed.

(1) Discussion of PULSE

7.99 It has been suggested to the Commission that PULSE is not always used in the most efficient way in respect of bench warrants. One particular matter which has been brought to the attention of the Commission is that there is a failure in some cases to inspect PULSE records fully. This can result in persons being afforded station bail even though there is an open bench warrant against them which should be executed, a failure to execute a bench warrant against a person even though there is an available opportunity whilst Gardai are dealing with him or her on another matter, or courts not being informed that a person before them has an open bench warrant. In order that bench warrants are executed at the first available opportunity, rather than being left unexecuted or even forgotten about, it is essential that all members of the Garda Siochana are vigilant in checking the PULSE database so as to determine whether an individual is the subject of an open bench warrant. It is also, of course, vital that PULSE is kept up to date and that all bench warrants issued are recorded fully

---

114 An Garda Siochana. *Communique December 2004*, at 15. Available at http://www.garda.ie/Documents/User/communiquedec2004.pdf.

and correctly on the system. Any search carried out on PULSE should result in completely accurate and up to date information in respect if an individual.

7.100 The Commission is of the view that a protocol should be put in place obliging members of An Garda Siochana to always check PULSE in respect of an individual's record. A possible approach to this may be the introduction of a certification procedure, whereby a Garda would have to sign a declaration that he or she has checked the individual's PULSE record to ascertain whether a warrant exists against him or her. This declaration requirement would have to be satisfied before a member grants station bail, before bringing the individual before a court to be dealt with by a judge, or in respect of any other matter to be dealt with by the Garda Siochana.

7.101 The Commission suggests that this system would be easily implemented: a standard declaration form to be completed and signed could be introduced and this would simply need to be 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 has been checked to determine whether there is an unexecuted bench warrant against the individual, and then sign the declaration section. This approach would be particularly useful with regard to station bail forms. A certification requirement would place a greater responsibility on members of the Garda Siochana to check PULSE and would make members answerable for a failure to do so. The process would also act as a reminder to all members of the Garda Siochana to check PULSE when dealing with an individual.

7.102 *The Commission provisionally recommends that a protocol should be put in place requiring members of the Garda Siochana to inspect PULSE records so as to determine whether an unexecuted bench warrant exists in respect of an individual being dealt with. The Commission also provisionally recommends the introduction of a certification process whereby a declaration would have to be signed by a member of the Garda Siochana dealing with an individual stating that he or she has examined PULSE records.*

(2) Crime Solved Statistics

7.103 It has been brought to the attention of the Commission that when an individual is charged with an offence that particular matter is recorded in Garda Siochana statistics as a 'crime solved'. Thus, the fact that the investigation has culminated in an individual being charged is the crux of the matter being deemed a 'crime solved'. In the event of a bench warrant being issued, due to the individual charged failing to appear in Court in response to a summons or bail, the matter remains within the crime solved statistics. Therefore where there is a failure or delay in executing a bench warrant, which essentially means that

the individual is avoiding the consequences of being charged with an offence, that matter is not recorded as pending or unsolved.

J Informing the Courts of Existing Bench Warrants

7.104 The Commission is aware that on occasion cases appear before the courts where an individual has an outstanding bench warrant in respect of another matter, but this point is not brought to the attention of the court. The effect of this is that the warrant is not executed even though, as the individual is before the court, there is an opportunity to do so. It may also be the case that the court deals with the individual in a manner in which it would not have done had it been aware of the outstanding warrant; for example, a court might agree to grant bail, whereas if the matter of the bench warrant was known it may be more inclined to refuse bail, or perhaps only grant it on stricter conditions.

7.105 The Commission is also aware that some judges will enquire specifically as to whether there is an outstanding bench warrant against an individual before the court. This appears to be a best practice approach to the issue of identifying and actively responding to existing bench warrants. Another best practice approach would be for the prosecution, that is, Gardai concerned with the case or State lawyers, to thoroughly research the background of the accused individual to determine whether there are any outstanding warrants which should be brought to the attention of the court. The Garda Siochana would be able to use their own database, PULSE, to carry out such checks.[115]

7.106 The Commission invites submissions as to whether a District Court rule or a code of practice should be implemented to require either, or both, judges of the District Court and member of the Garda Siochana to ascertain whether there are any unexecuted warrants against the individual before the court. This would create a sense of responsibility and place a legal requirement upon judges and/or Gardai to determine whether a bench warrant exists in respect of the individual being dealt with. By establishing these best practice approaches as standard procedure, more warrants would be effectively dealt with rather than going un-noted and unexecuted, despite there being a suitable situation for their execution. Therefore the number of unexecuted bench warrants may be reduced.

7.107 The Commission invites submissions as to whether a District Court rule or a code of practice should be implemented to require either, or both,

---

115 This point is related to the recommendation made above at 7.100 that a protocol should be out in place obliging members of the Garda Siochana to always check PULSE so as to determine whether there are any outstanding matters in respect of an individual.

judges of the District Court and Gardai to ascertain if there are any unexecuted warrants against an individual appearing before the court.

(1) Court Records

7.108 With regard to the issue of courts being informed of existing bench warrants, the Commission is aware that problems may arise in respect of identifying an individual and his or her records on the Courts Service records. When a bench warrant is issued by a court, it will be recorded on the Courts Service Criminal Case Tracking System (CCTS).[116] Generally a person's name and address will be recorded on the CCTS. A date of birth will usually be recorded also. However, there may be a lack of precision in respect of these recorded details. For example, the manner of recording a person's date of birth can vary; in some circumstances it will be recorded numerically, in some cases words (for example the month) may be used, while in other cases a person's age may be used. Other issues include persons giving a false address, inaccurate recording of addresses or individuals having a very common name. In general, both lack of precision and not having a specific format in recording information on the CCTS can lead to difficulties in ascertaining any and all records relating to an individual. Therefore, where a search of the system is carried out to establish whether there are outstanding warrants in respect of a particular individual, it may be the case that not all of the records relating to that person are retrieved or that there is difficulty in determining whether the results of a search are in fact related to the individual concerned.

7.109 The Commission invites submissions as to how the issue of precisely and definitively identifying an individual's court records might be achieved. An improvement of the system would assist the courts in being fully informed of all relevant background facts when dealing with an individual. One such possibility would be including a person's Personal Public Service (PPS) number on records.[117] There would however be some limits to using PPS numbers, for example the facts that not all immigrants would have one.[118] If PPS numbers

---

116 The Criminal Case Tracking System was rolled out to all District Court Offices nationwide. On this point, and the system itself, see the Courts Service Report "ICT Strategy 2006-2010 for the Courts Service" (2006) at 18-19. Available at www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/75704E3E1D4B1E048025716800557865/$FILE/ICT%20Strategy%202006-2010.pdf.

117 A PPS number is not a national identity number, rather it is a public service identity number which is only used in respect of public services and benefits, such as revenue, social welfare and public healthcare.

118 Non-Irish citizens are required to apply for a PPS number. PPS numbers have been issued automatically to Irish citizens born after 1971. Generally all Irish

were to be used in this way, corollary guidelines and safeguards would need to be set out, for example in respect of data protection requirements. The development of corollary regulations in respect of a refusal to give one's PPS number, or giving a false PPS number may also be advisable.

7.110 *The Commission invites submissions as to how all records relating to an individual would be easily accessible to the Court so that the Court may be fully informed when dealing with that person.*

---

persons will have a PPS number however, as they are required for persons in employment or receiving social welfare payments.

CHAPTER 8 SUMMARY OF PROVISIONAL RECOMMENDATIONS

The provisional recommendations made by the Commission in this Consultation Paper may be summarised as follows.

8.01 The Commission provisionally recommends the implementation of a generally applicable statutory framework for search warrants. The Commission also provisionally recommends that this statutory framework should make provision in respect of each step of the search warrant process, including applications for, issuing of, execution of and safeguards in respect of search warrants. The Commission also provisionally recommends that this framework should have general application, subject to variations where this is required as a matter of practicability [paragraph 2.23]

8.02 The Commission invites submissions as to whether a single standard of opinion should be established in respect of all search warrant applications. The Commission also invites submissions as to whether that standard should be 'reasonable suspicion', 'reasonable belief', or another standard. [paragraph 3.19]

8.03 The Commission provisionally recommends that, for purposes of consistency, a standard procedure of either swearing information or taking an oath be implemented in respect of all search warrant provisions. [paragraph 3.24]

8.04 The Commission invites submissions as to whether members of the Garda Siochana should be obliged to affirm their opinion on oath when issuing a search warrant. [paragraph 3.26]

8.05 The Commission invites submissions as to whether the power for an issuing authority to request further information from an applicant so as to ground a search warrant application should be set out in legislation in Ireland. [paragraph 3.30]

8.06 The Commission provisionally recommends that a standard search warrant application form be put in place. Under this an applicant could refer to the particular Act under which he or she is applying, the grounds for making the

application and the materials to be searched for in the standard form. [paragraph 3.35]

8.07 The Commission invites submissions as to the form and nature of an electronic process for applying for search warrants. [paragraph 3.67]

8.08 The Commission invites submissions as to whether a provision enabling anticipatory applications for search warrants should be introduced in Ireland. [paragraph 3.78]

8.09 The Commission provisionally recommends the introduction of a requirement that a search warrant application should disclose details of previous search warrant applications made in respect of the premises, material or person to which the present application relates. [paragraph 3.90]

8.10 The Commission invites submission as whether notice of any and all previous applications should be required, or whether notice need only relate to applications made within a certain past period. [paragraph 3.91]

8.11 The Commission invites submissions as to whether only a member if the Garda Siochana who is independent of an investigation may issue a search warrant relating to that investigation. [paragraph 4.40]

8.12 The Commission provisionally recommends that the law be amended so that a search warrant may be issued by a judge who is not physically present within the district to which the warrant relates. [paragraph 4.51]

8.13 The Commission provisionally recommends the introduction of a standard search warrant form to be used when any search warrant is issued. The Commission recommends that a schedule be attached to that standard form, setting out all of the search warrant provisions to which it applies. Where a new search warrant provision is introduced into Irish law the schedule should be updated to reflect this addition, rather than a new search warrant form being drafted as is the current approach. [paragraph 4.83]

8.14 The Commission invites submissions as to whether a provision should be implemented in Ireland providing for electronic issuing of search warrants. [paragraph 4.103]

8.15 The Commission invites submissions as to whether greater consistency should be implemented with regard to the validity period of search warrants. The Commission is of the view that a categorisation approach may be more appropriate than a single validity period, but welcomes submissions on this matter. [paragraph 5.12]

8.16 The Commission invites submissions as to whether a requirement of reasonableness should be implemented in respect of the time of a search, such that the time when a search warrant is executed would have to be reasonable in the circumstances. [paragraph 5.32]

8.17 The Commission provisionally recommends that a single standard of "reasonable force" be implemented in respect of the use of force, where necessary, when executing a search warrant. [paragraph 5.38]

8.18 The Commission provisionally recommends that detailed procedures with regard to giving a copy of the search warrant to an owner or occupier should be placed on a statutory basis. [paragraph 5.60]

8.19 The Commission invites submissions as to whether an occupier's notice should be required as part of the proposed general statutory framework on search warrants. The Commission also invites submissions as to what information should be included in this type of notice. [paragraph 5.69]

8.20 The Commission invites submissions as to whether specific procedures and safeguards should be put in place in respect of multiple execution search warrants. [paragraph 5.87]

8.21 The Commission provisionally recommends that a provision in respect of finding and seizing material reasonably believed to be evidence of or relating to an offence, where the search warrant does not refer to that material, should be included in the Commission's proposed general statutory framework on search warrants. [paragraph 5.120]

8.22 The Commission provisionally recommends the implementation of a code of practice and procedure to apply to all search and seizures carried out under a warrant. The Commission welcomes submissions as to the specific matters which a search and seizure code of practice should include. [paragraph 5.125]

8.23 The Commission provisionally recommends that the proposed statutory framework on search warrants should not include provision for electronic recording of the execution of search warrants. [paragraph 5.132]

8.24 The Commission provisionally recommends that legislation should clearly set out that legal professional privilege relates to material found under any search warrant and that the term 'legal professional privilege' should be defined within such legislation. [paragraph 6.46

8.25 The Commission has also concluded that a protocol should be implemented in Ireland with regard to dealing with material found under a search warrant which may be legally privileged. [paragraph 6.47]

8.26 The Commission provisionally recommends that a system should be implemented in Ireland by which if legal 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; and that the secured material should then be assessed by a higher authority, such as a judge of the District Court, to determine whether it is in fact legally privileged, and therefore

exempt from seizure under the search warrant. The Commission also provisionally recommends that the Law Society of Ireland, the Bar Council, An Garda Siochana and the Office of the Director of Public Prosecution should be consulted with regard to developing guidance for dealing with claims of legal professional privilege. [paragraph 6.52]

8.27 The Commission provisionally recommends that general provisions as to claims of legal privilege made during the execution of a search warrant should be placed on a statutory footing. [paragraph 6.54]

8.28 The Commission invites submissions as to whether summons in respect of criminal proceedings should only be served by registered post and not by standard letterbox delivery. [paragraph 7.47]

8.29 The Commission invites submissions as to whether a system of postal response to summons should be introduced in Ireland in respect of minor offences. [paragraph 7.50]

8.30 The Commission provisionally recommends that a code of practice be drawn up, in respect of both Garda station bail and court granted bail, setting out that an individual fully understands the obligation to appear in court as a fundamental requirement of granting bail. The Commission also provisionally recommends that an individual being granted bail should be given a basic document, in letter format, setting out the time and date on which he or she is bound to appear before the court, the name and location of the court where he or she is to appear, and the matter to which the appearance relates. [paragraph 7.57]

8.31 The Commission invites submissions as to whether there should be discretion for a member of the Garda Siochana, of a certain minimum rank, to grant station bail where a person has an unexecuted bench warrant against them. [paragraph 7.62]

8.32 The Commission invites submissions as to whether the law relating to some indictable offences should be amended to include the possibility of dealing with these matters, where appropriate, in a summary manner. Increasing the offences which could be dealt with in a summary manner may reduce the number of bench warrants required to be issued for non-appearance. [paragraph 7.68]

8.33 The Commission provisionally recommends that a protocol should be put in place requiring members of the Garda Siochana to inspect PULSE records so as to determine whether an unexecuted bench warrant exists in respect of an individual being dealt with. The Commission also provisionally recommends the introduction of a certification process whereby a declaration would have to be signed by a member of the Garda Siochana dealing with an individual stating that he or she has examined PULSE records. [paragraph

7.102]

8.34 The Commission invites submissions as to whether a District Court rule or a code of practice should be implemented to require either, or both, judges of the District Court and Gardai to ascertain if there are any unexecuted warrants against an individual appearing before the court. [paragraph 7.107]

8.35 The Commission invites submissions as to how all records relating to an individual would be easily accessible to the Court so that the Court may be fully informed when dealing with that person. [paragraph 7.110]

APPENDIX ACTS AND STATUTORY INSTRUMENTS UP TO 2008 CONTAINING SEARCH WARRANT PROVISIONS

Instances of Search Warrants in Acts to end 2008
PRIMARY LEGISLATION

No	YEAR	LEGISLATION	SECTION
1	1831 1960	Illicit Distillation (Ireland) Act 1831 ** As amended by s22 of the Intoxicating Liquor Act 1960	Section 17
2	1851	Petty Sessions (Ireland) 1851	Section 6
3	1854	Spirits (Ireland) Act 1854	Sections 2 & 4
4	1874	Intoxicating Liquor (Ireland) Act 1874	Section 24
5	1875	Explosive Substances Act 1875	Section 73
6	1878	Public Health (Ireland) Act 1878	Section 121
7	1885	Criminal Law Amendment Act 1885	Section 10
8	1875 2006	Explosive Substances Act 1875 ** Amended by the Criminal Justice Act 2006	Section 80(7), as substituted by Section 68 of the 2006 Act
9	1925	Treasonable Offences Act 1925 (18/1925)	Section 10
10	1926 1988	Wireless Telegraphy Act 1926 (45/1926) ** Amended by Broadcasting & Wireless Telegraphy Act 1988, s. 17	Section 8
11	1926 1960	Wireless Telegraphy Act 1926 (45/1926) **Amended by Broadcasting Authority Act 1960, Third Schedule Part II 12 A	Section 12A
12	1927	Industrial & Commercial Property (Protection) Act 1927 (16/1927)	Section 185
13	1929	Censorship of Publications Act 1929 (21/1929)	Section 12 & 19
14	1931	Merchandise Marks Act 1931 (48/1931)	Section 24
15	1935	Criminal Law (Amendment) Act 1935 (6/1935)	Section 19
16	1935 2003	Aliens Act 1935 (14/1935) ** Amended by the Immigration Act 2003	Section 7
17	1939	Air Raid Precautions Act 1939 (21/1939)	Section 33
18	1946	Censorship of Publications Act 1946 (1/1946)	Section 17
19	1952 2007	Foyle Fisheries Act 1952 (5/1952) ** Amended by Foyle and Carlingford Fisheries Act 2007	Section 60, as substituted by section 24 of the 2007 Act
20	1956	Gaming and Lotteries Act 1956 (2/1956)	Section 39
21	1959 1980	Fisheries (Consolidation) Act 1959 (14/1959) ** Amended by S71 of the Fisheries Act 1980	Section 297
22	1961	Road Traffic Act 1961 (24/1961)	Section 106
23	1962	Intoxicating Liquor Act 1962 (21/1962)	Section 26

No	YEAR	LEGISLATION	SECTION
24	1963	Official Secrets Act 1963 (1/1963)	Section 16
25	1966 2001	Disease Of Animals Act 1966 (6/1966) ** Amended by Disease of Animals (Amendments) Act 2001, inserting s.17A	Section 17A (18)
26	1970	Health Act 1970 (1/1970)	Section 78 – unnecessary because Dangerous Drugs Act 1934 is repealed by Misuse of Drugs Act 1977
27	1972	Dangerous Substances Act 1972 (10/1972)	Section 40
28	1976 2000	Wildlife Act 1976 (39/1976) ** Amended by the Wildlife (Amendment) Act 2000	Section 73 (1)
29	1977 1984 1996	Misuse of Drugs Act 1977 (12/1977) ** Amended by Misuse of Drugs Act 1984 & Criminal Justice (Drug Trafficking) Act 1996	Section 26
30	1983	Postal and Telecommunications Act 1983 (24/1983)	Section 69-Section 18 (2)
31	1986 1999	Road Transport Act 1986 (16/1986) ** Amended by S.15 of the Road Transport Act 1999	Section 16A
32	1986	Control of Dogs Act 1986 (32/1986)	Section 26 (1)
33	1987 1994	National Monuments (Amendment) Act 1987 (17/1987) ** Amended by National Monuments (Amendment) Act 1994, s. 22	Section 22
34	1987 2006	Control of Clinical Trials Act 1987 (28/1987) ** Amended by the Irish Medicines Board (Miscellaneous Provisions) Act 2006	Section 15A, as inserted by Section 24 of the 2006 Act
35	1988	Customs & Excise (Miscellaneous Provisions) Act 1988 (10/1988)	Section 3(2)
36	1988	Customs & Excise (Miscellaneous Provisions) Act 1988 (10/1088)	Section 5
37	1988	Bankruptcy Act 1988 (27/1988)	Section 28
38	1989 2000	Insurance Act 1989 (3/1989) ** Amended by the Insurance Act 2000	Section 60(9)
39	1989	Safety, Health and Welfare at Work Act 1989 (7/1989)	Section 34 (d) – repealed by 2005

No	YEAR	LEGISLATION	SECTION
			Act
40	1989	Video Recording Act 1989 (22/1989)	Section 25 (1)
41	1990	Firearms and Offensive Weapons Act 1990 (12/1990)	Section 15
42	1991	Child Care Act 1991 (17/1991)	Section 35
43	1991	Child Care Act 1991 (17/1991)	Section 46
44	1991	Criminal Damage Act 1991 (31/1991)	Section 13 (i)
45	1993	Animal Remedies Act 1993 (23/1993)	Section 12
46	1993 2006	Irish Aviation Authority Act 1993 (29/1993) ** Amended by the Aviation Act 2006	Section 57B, as substituted by Section 3(1)(c) of the 2006 Act
47	1993	Merchant Shipping (Salvage and Wreck) Act 1993 (34/1993)	Section 57
48	1994	Criminal Justice Act 1994 (15/1994) ** Amended by the Criminal Justice (Terrorist Offences) Act 2005	Section 55
49	1994 2005	Criminal Justice Act 1994 (15/1994) ** Amended by the Criminal Justice (Terrorist Offences) Act 2005	Section 64
50	1995	Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995 (5/1995)	Section 9
51	1995	Finance Act 1995 (8/1995)	Section 87 (3)
52	1995	Stock Exchange Act 1995 (9/1995)	Section 66
53	1995	Investment Intermediaries Act 1995 (11/1995)	Section 75
54	1995	Package Holidays and Travel Trade Act 1995 (17/1995)	Section 21
55	1995	Consumer Credit Act 1995 (24/1995)	Section 106
56	1995 2003	Consumer Credit Act 1995 (24/1995) ** Amended by the Central Bank and Financial Services Authority of Ireland Act 2003	Section 8C
57	1995 2006	Irish Medicines Board Act 1995 (29/1995) ** Amended by the Irish Medicines Board (Miscellaneous Provisions) Act 2006	Section 32B, as inserted by Section 17 of the 2006 Act
58	1995	Energy (Miscellaneous Provisions) Act 1995 (35/1995)	Section 16 (5)
59	1996 2006	Trade Marks Act 1996 (6/1996) ** Amended by the Patents (Amendment) Act 2006	Section 25, as amended by section 40 of the 2006 Act

No	YEAR	LEGISLATION	SECTION
60	1996	Waste Management Act 1996 (10/1996)	Section 14 (7) (a)+(b)
61	1996 2005	Criminal Assets Bureau Act 1996 (31/1996) ** Amended by the Proceeds of Crime (Amendment) Act 2005	Section 14(1)
62	1996	Control of Horses Act 1996 (37/1996)	Section 35
63	1996	Sexual Offences (Jurisdiction) Act 1996	Section 10
64	1997 2006	Criminal Justice (Miscellaneous Provisions) Act 1997 (38/1996) ** Amended by Criminal Justice Act 2006	Section 10, as substituted by Section 6(1)(a) of the 2006 Act
65	1997	Central Bank Act 1997 (8/1997)	Section 76
66	1997 1999 2002 2005	Taxes Consolidation Act 1997 (39/1997) ** Amended by the Finance Act 1999 AND the Finance Act 2002 AND the Finance Act 2005	Section 905 2A
67	1997 2007	Taxes Consolidation Act 1997 (39/1997) ** Amended by the Finance Act 2007	Section 908C, as inserted by the 2007 Act
68	1998	Employment Equality Act 1998 (21/1998)	Section 94 (5)
69	1998	International War Crimes Tribunal Act 1998 (40/1998)	Section 30
70	1998	Carriage of Dangerous Goods by Road Act 1998 (43/1998)	Section 7
71	1999	Criminal Justice (Location of Victim's Remains) Act 1999 (9/1999)	Section 8
72	1999	Architectural Heritage (National Inventory) and Historic Monuments (Miscellaneous Provisions) Act 1999 (19/1999)	Section 3(6)
73	1999	Electricity Regulation Act 1999 (23/1999)	Section 12
74	1999	Stamp Duties Consolidation Act 1999 (31/1999)	Section 140
75	2000	National Beef Assurance Scheme Act 2000 (2/2000)	Section 23 (4)
76	2000	National Minimum Wage Act 2000 (5/2000)	Section 33
77	2000	Equal Status Act 2000 (8/2000)	Section 33 (4)
78	2000	Merchant Shipping (Investigation of Marine Casualties) Act 2000 (14/2000)	Section 28 (i)
79	2000	Electronic Commerce Act 2000 (27/2000)	Section 27 (i)
80	2000	Illegal Immigrants (Trafficking) Act 2000 (29/2000)	Section 7 (i)
81	2000	Planning and Development Act 2000 (30/2000)	Section 253

No	YEAR	LEGISLATION	SECTION
82	2001	Aviation Regulation Act 2001 (1/2001)	Section 43
83	2001	Finance Act 2001 (7/2001)	Section 136 (6)
84	2001	Carer's Leave Act 2001 (19/2001)	Section 32(7)
85	2001	Prevention of Corruption (Amendment) Act 2001 (27/2001)	Section 5 (1)
86	2001	Dormant Accounts Act 2001 (32/2001)	Section 23 (7)
87	2001	Adventure Activities Standard Authority Act 2001 (34/2001)	Section 37
88	2001	Local Government Act 2001 (37/2001)	Section 213 (7)
89	2001 2006	Criminal Justice (Theft and Fraud Offences) Act 2001 (50/2001) ** Amended by the Criminal Justice Act 2006	Section 48, as amended by section 192 of the 2006 Act
90	2001	Transport (Railway Information) Act 2001 (55/2001)	Section 36
91	2002 2004	Public Health Tobacco Act 2002 (6/2002) ** Amended by the Public Health(Tobacco) (Amendment) Act 2004	Section 48
92	2002	Competition Act 2002 (14/2002)	Section 45
93	2002	Communications Regulation Act 2002 (20/2002)	Section 40
94	2003	Unclaimed Life Assurance Policies Act 2003 (2/2002)	Section 20(7)
95	2003	Licensing of Indoor Events Act 2003 (15/2003)	Section 21(4)(e)
96	2003	Containment of Nuclear Weapons Act 2003 (35/2003)	Section 7(5)
97	2004	Immigration Act 2004 (1/2004)	Section 15
98	2004	Private Security Services Act 2004 (12/2004)	Section 15(3)
99	2004	Commissions of Investigation Act 2004 (23/2004)	Section 29(1)
100	2005	Safety Health and Welfare at Work Act 2005 (10/2005)	Section 64(7)
101	2005	Disability Act 2005 (14/2005)	Section 23(1)
102	2005	Veterinary Practice Act 2005 (22/2005)	Section 126(1)
103	2005	Railway Safety Act 2005 (31/2005)	Section 73(14)
104	2006 2007	Sea Fisheries and Maritime Jurisdiction Act 2006 (8/2006) **Amended by Criminal Justice Act 2007	Section 17A as inserted by the 2007 Act
105	2006	Employees (Provision of Information and Consultation) Act 2006 (9/2006)	Section 18(7)
106	2006	Employment Permits Act 2006 (16/2006)	Section 22(8)

No	YEAR	LEGISLATION	SECTION
107	2006	International Criminal Court Act 2006 (30/2006)	Section 51(5)
108	2007	National Oil Reserves Agency Act 2007 (7/2007)	Section 48(1)
109	2007	Consumer Protection Act 2007 (19/2007)	Section 29(10)
110	2007	Pharmacy Act 2007 (20/2007)	Section 67(6)
111	2007	Health Act 2007 (23/2007)	Section 75(2)
112	2007	Water Services Act 2007 (30/2007)	S. 22(8)
113	2008	Control of Exports Act 2008 (1/2008)	S. 7(11)
114	2008	Criminal Justice (Mutual Assistance) Act 2008 (7/2008)	S. 74(8)
115	2008	Criminal Justice (Mutual Assistance) Act 2008	S. 75(8) and (9)
116	2008	Chemicals Act 2008 (13/2008)	S. 12(8)
117	2008	Nuclear Test Ban Act 2008 (16/2008)	S. 9(5)

Instances of Search Warrants in Statutory Instruments to end 2008 Secondary Legislation			
No	**YEAR**	**LEGISLATION**	**SECTION**
1	1979	SI 170/79 EC (Radio Interference from Electrical Household Appliances, Portable Tools and Similar Equipment) Regulations 1979	Regulation 10
2	1979	SI 171/79 EC (Radio Interference from Fluorescent Lighting Luminaries) Regulations 1979	Regulation 10
3	1979	SI 383/79 EC (Dangerous Substances)(Classification, Packaging and Labelling) Regulations 1979	Regulation 9
4	1982	SI 258/82 EC (Dangerous Substances) (Classification, Packaging, Labelling and Notification) Regulations 1982	Regulation 16 (g)
5	1988 1991	SI 218/88 EC (Control of Estrongenic, Androgenic, Gastrogenic and Thyrostatic Substances) Regulations 1988 ** As amended by SI 198/91	Regulation 16(1)
6	1990	SI 32/90 EC (Safety of Toys) Regulations 1990	Regulation 18
7	1991	SI 265/91 EC (Food Imitations (Safety)) Regulations 1991	Regulation 8
8	1992	SI 45/92 EC (Telecommunications Services) Regulations 1992	Regulation 9
9	1992	SI 198/92 EC (Construction Products) Regulations 1992	Regulation 11
10	1992	SI 379/92 EC (Application of the Rules of the Competition to their Transport) Regulations 1992	Regulation 6
11	1993	SI 124/93 EC (Rules on Competition) Regulations 1993	Regulation 6
12	1993	SI 386/93 EC (Application of the Rules on Competition to Maritime Transport) Regulations 1993	Regulation 6
13	1993	SI 416/93 EC (Application of Rules on Competition to Rail and Road Transport) Regulations 1993	Regulation 6
14	1994	SI 252/94 EC (Medical Devices) Regulations 1994	Regulation 24 (1)
15	1994	SI 253/94 EC (Act of Implantable Medical Devices) Regulations 1994	Regulation 18 (1)
16	1994	SI 289/94 EC (Trade in Animals and Animal Products) Regulations 1994	Regulation 7
17	1996	SI 12/96 EC (Trade in Animals and Animal Semen,	Regulation 19

No	YEAR	LEGISLATION	SECTION
		Ova and Embryos) Regulations 1996	
18	1996	SI 102/96 EC (Trade in certain Animal Products) Regulations 1996	Regulation 27
19	1996	SI 112/96 EC (Trade in Bovine Breeding Animals, their Semen, Ova and Embryos) Regulations 1996	Regulation 24 (5)
20	1996 2002	SI 256/96 Medicinal Products (Prescription and Control of Supply) Regulations 1996 ** Amended by SI 627/02 Medicinal Products (Prescription and Control of Supply) Regulations 2002	Regulation 15(8)
21	1996	SI 278/96 EC Disease of Animals	Regulation 8
22	1997	SI 73/97 EC (Telecommunications Terminal Equipment) Regulations 1997	Regulation 15
23	1997	SI 191/97 EC (Trade in Fish) Regulations 1997	Regulation 8
24	1997	SI 204/97 EC (Contracts for Timesharing of Immovable Property – Protection of Purchasers) Regulations 1997	Regulation 15 (7)
25	1998	SI 22/98 EC (Electromagnetic Compatibility) Regulations 1998	Regulation 15
26	1998	SI 26/98 EC (Zootechnical and Genealogical Conditions applicable to Imports from Third Countries) Regulations 1998	Regulation 7
27	1998	SI 179/98 (Satellite Earth Station Equipment) Regulations 1998	Regulation 10
28	1998	SI 541/98 EC (Purity Criteria on Food Additives other than Colours and Sweeteners) Regulations 1998	Regulation 7 (8)
29	1999	SI 88/99 EC (Approval and Registration of Establishments and Intermediaries operating in the Animal Food Sector) Regulations 1999	Regulations 16 (6) and (7)
30	1999	SI 276/99 EC (Identification and Registration of Bovine Animals)	Regulation 27 (3) and (4)
31	1999	SI 398/99 EC (Additives in Foodstuffs) Regulations 1999	Regulations 25 (5) and (6)
32	1999	SI 400/99 EC (Pressure Equipment) Regulations 1999	Regulation 19 (3) (d)
33	2000	SI 4/00 EC (Animal Nutrition Inspections) Regulations 2000	Regulation 14
34	2000	SI 141/00 EC (Extraction Solvents in Food Stuffs and Food Ingredients) Regulations 2000	Regulation 16 (5)

No	YEAR	LEGISLATION	SECTION
35	2000	SI 142/00 EC (Processed Cereal Based Foods and Baby Foods for Infants and Young Children) Regulations 2000	Regulation 16 (5)
36	2000	SI 165/00 EC (Hygiene of Food Stuffs) Regulations 2000	Regulation 18 (6)
37	2000	SI 292/00 EC (Veterinary Checks on Products Imported from Third Countries) Regulations 2000	Regulation 19 (5)
38	2000	SI 437/00 EC (Additives, Colours and Sweeteners in Food Stuffs) Regulations 2000	Regulation 27 (5)
39	2001	SI 55/01 EC (Import Restrictions) Foot and Mouth Disease Regulations 2001	Regulation 12B (3) and (4)
40	2001	SI 64/01 EC (Dietary Foods for Special Medical Purposes) Regulations 2001	Regulation 18 (6)
41	2001	SI 207/01 EC (Protection of Consumers in Respect of Contracts made by means of Distance Communications) Regulations 2001	Regulation 15
42	2001	SI 240/01 EC (Radio Equipment and Telecommunications Terminal Equipment) Regulations 2001	Regulation 16
43	2001	SI 304/01 EC (In Vitro Diagnostic Medical Devices) Regulations 2001	Regulation 18
44	2001	SI 400/01 EC (Certain Contaminants in Food Stuffs) Regulations 2001	Regulation 23
45	2001 2008	S.I. No. 624/2001— European Communities (Classification, Packaging and Labelling of Plant Protection Products and Biocide Products) Regulations 2008 ** as amended by S.I. No. 351/2008 — European Communities (Classification, Packaging and Labelling of Plant Protection Products and Biocide Products) (Amendment) Regulations 2008	Regulation 21 as substituted by Regulation (2)(e)
46	2001	SI 632/01 EC (Noise Emissions by Equipment for use outdoors) Regulations 2001	Regulation 14
47	2002	SI 79/02 EC (Imposing Special Conditions on the Import of Figs, Hazelnuts and Pistachios and Certain Products Derived Thereof Originating in or Consigned from Turkey) Regulations 2002	Regulation 14(6)
48	2002	SI 80/02 EC (Import from Third Countries of Star Anise) Regulations 2002	Regulation 14(6)
49	2002	SI 81/02 EC (Import from Peanuts and Certain Products Derived from Peanuts Originating in or	Regulation 14(6)

No	YEAR	LEGISLATION	SECTION
		Consigned from China) Regulations 2002	
50	2002	SI 141/02 EC (Control on imports of Animal Products from China) Regulations 2002	Regulation 5(1)
51	2002	SI 379/02 EC (Foodstuffs Intended for Particular Nutritional Uses) Regulations 2002	Regulation 20(6)
52	2002	SI 395/02 EC (Export and Import of Certain Dangerous Chemicals)(Industrial Chemicals)(Enforcement) Regulations 2002	Regulation 6(1)(h)
53	2002	SI 420/02 EC (Avian Influenza)(Control on Imports of Avian Products from Chile) Regulations 2003	Regulation 5(1)
54	2002	SI 442/02 EC (Suspending the Placing on the Market, the Importation and the use in Manufacture of Jelly Confectionary Containing the Food Additive E425 Konjac) Regulations 2002	Regulation 11(6)
55	2002	SI 613/2002 EC (Food Additives other than Colours and Sweeteners) Regulations 2002	Regulation 12(6)
56	2002	SI 618/02 EC (Marketing of Forest Reproductive Material) Regulations 2002	Regulation 14(7)
57	2002	SI 639/2002 EC (Requirements to Indicate Prices) Regulations 2002	Regulation 10
58	2003	SI 48/03 EC (Welfare of Calves and Pigs) Regulations 2003	This SI provides for a search warrant underS174 of the Disease of Animals Act 1966 as inserted
59	2003	SI 50/03 EC (Foot and Mouth Disease)(Control on Imports of Meat from Botswana) Regulations 2003	Regulation 5(2)
60	2003	SI 68/03 EC (Directive 2000/31/EC) Regulations 2003	Regulation 22
61	2003 2006	SI 83/03 EC (Authorisation, Placing on the Market, Use and Control of Plan Protection Products) Regulations 2003 – ****As amended by SI 381/06 EC** (Authorisation, Placing on the Market, Use and Control of Plan Protection Products)(Amendment)(No. 4) Regulations 2006	Regulation 31(5)
62	2003	SI 94/03 EC (Foot and Mouth Disease)(Control on Imports of Meat from Paraguay) Regulations 2003	Regulation 5(2)
63	2003	SI 95/03 EC (Newcastle Disease)(Control on	Regulation 5(2)

No	YEAR	LEGISLATION	SECTION
		Imports of Avian Products from the United States of America) Regulations 2003	
64	2003	SI 220/2003 EC (Dangerous Substances and Preparations) (Marketing and Use) Regulations 2003	Regulation 7(6)
65	2003	SI 248/03 EC (Animal By-products)	Regulation 5(13)
66	2003	SI 284/03 EC (Avian Influenza)(Control on Imports of Avian Products from Italy) Regulations 2003	Regulation 5(2)
67	2003	SI 289/03 EC (Marketing of Sugar Products) Regulations 2003	Regulation 6(3)
68	2003	SI 294/03 EC (Marketing of Fruit Jams, Jellies, Marmalades and Sweetened Chestnut Purée) Regulations 2003	Regulation 6(3)
69	2003	SI 300/03 EC (Newcastle Disease)(Control on Imports of Avian Products from Australia 2003	Regulation 5(1)
70	2003	SI 317/2003 EC (Undesirable substances in Feedingstuffs) Regulations 2003	Regulation 8
71	2003	SI 367/03 EC (Marketing of Honey) Regulations 2003	Regulation 6(3)
72	2003	SI 540/03 Medicinal Products (Prescription and Control of Supply) Regulations 2003	Regulation 21(8)
73	2003	SI 548/03 EC (Veterinary Checks on Fish and Fish Products Imported from Third Countries) Regulations 2003	Regulation 20(5)
74	2003	SI 551/03 EC (Mechanically Propelled Vehicle Entry into service) Regulations 2003	Regulation 10(6)
75	2003	SI 552/03 EC (Passenger Car Entry into service) Regulations 2003	Regulation 10(6)
76	2004	SI 30/04 EC (Ethyl Alcohol) Regulations 2004	Regulation 6(3)
77	2004 2007	SI 112/04 EC (Organic Farming) Regulations 2004 *As amended by SI 698 of 2007	Regulation 9(8)
78	2004	SI 266/04 EC (Newcastle Disease)(Control on Imports of Avian Products from the United States of America) Regulations 2004	Regulation 5(1)
79	2004	SI 267/04 EC (Control on Imports of Animal Products for Personal Consumption) Regulations 2004	Regulation 4(1)
80	2004	SI 269/04 EC (Registration of Importers of Animal Products) Regulations	Regulation 4(7)
81	2004 2007	SI 399/04 EC (Equine Stud-Book and Competition) Regulations 2004 **As amended by	Regulation 12A(8)

No	YEAR	LEGISLATION	SECTION
		SI 530/07 EC Equine Stud-Book) and Competition)(Amendment) Regulations 2007	
82	2004	SI 509/04 EC (Avian Influenza)(Control on Imports of Avian Products from South Africa)	Regulation 5(1)
83	2004	SI 578/04 EC (Phytosanitary Measures) Regulations 2004	Regulation 9(1)
84	2004	SI 711/04 EC (Protein Feedingstuffs) Regulations 2004	Regulation 7(1)
85	2004	SI 893/04 EC (Introduction of Products of Animal Origin from Third Countries for Human Consumption) Regulations 2004	Regulation 9(7)
86	2004	SI 894/04 EC (Control of Organisms Harmful to Plants and Plant Products) Regulations 2004	Regulation 12(1)
87	2005	SI 111/05 EC (Newcastle Disease)(Control on Imports of Avian Products from Certain Districts of Bulgaria) Regulations 2003	Regulation 5(1)
88	2005	SI 180/05 EC (Avian Influenza)(Control on Imports of Avian Products and Live Birds from Certain Asian Countries) Regulations 2003	Regulation 10(1)
89	2005	SI 242/05 EC (Feed Additives) Regulations 2005	Regulation 13
90	2005	SI 13/05 EC (Insurance Mediation) Regulations 2005	Regulation 30
91	2005	SI 17/05 EC (Newcastle Disease) (Control on Imports of Avian Products from Bulgaria) Regulations 2005	Regulation 5
92	2005	SI 172/05 EC (Marketing Standards for Eggs) Regulations 2005	Regulation 7
93	2005	SI 360/05 EC (Quality and Safety of Human Blood and Blood Components) Regulations 2005	Regulation 19(6)
94	2005	SI 384/05 EC (Fertiliser) Regulations 2005	Regulation 10(5)
95	2005	SI 412/05 EC (Two and Three Wheel Motor Vehicle Entry into Service) Regulations 2005	Regulation 10(6)
96	2005	SI 565/05 EC (Avian Influenza) (Control on Imports of Avian Products and Live Birds from Several Third Countries) Regulations 2005	Regulation 10
97	2005	SI 632/05 EC (Newcastle Disease) (Control on Imports of Avian Products from certain districts of Bulgaria) Regulations (No. 2) 2005	Regulation 5
98	2005	SI 670/05 EC (Avian Influenza) (Control on Imports from Romania)	Regulation 5

No	YEAR	LEGISLATION	SECTION
		Regulations 2005	
99	2005	SI 678/05 EC (Avian Influenza) (Precautionary Measures) Regulations 2005	Regulation 8
100	2005	SI 679/05 EC (Avian Influenza) (Control on Imports from Turkey) Regulations 2005	Regulation 5
101	2005	SI 691/05 EC (Avian Influenza) (Control on Imports from Croatia) Regulations 2005	Regulation 5
102	2005	SI 708/05 EC (Avian Influenza) (Control on Movement of Pet Birds) Regulations 2005	Regulation 6
103	2005	SI 709/05 EC (Avian Influenza) (Control on Imports of Birds) Regulations 2005	Regulation 6
104	2005	SI 788/05 EC (Good Agricultural Practice for Protection of Waters) Regulations 2005	Regulation 25(7)
105	2005	SI 792/05 EC (Goat Identification) Regulations 2005	Regulation 14(5)
106	2005	SI 908/05 EC (Avian Influenza) (Control on imports of Avian Products from Ukraine) Regulations 2005	Regulation 6
107	2005	SI 910/05 EC (Food and Feed Hygiene) Regulations 2005	Regulation 10
108	2006	SI 11/06 EC (Avian Influenza) (Control on Imports of Feathers from Certain Third Countries) Regulations 2006	Regulation 6
109	2006	SI 71/06 EC (Avian Influenza) (Control on Imports from Romania) Regulations 2006	Regulation 6
110	2006	SI 80/06 EC (Avian Influenza) (Control on Imports of Avian Products from Italy) Regulations 2006	Regulation 6
111	~~2006~~	~~SI 139/06 EC (Plastics and other materials) (Contact with food) Regulations 2006~~ Note – Revoked by SI 587/07	~~Regulation 9~~
112	2006	SI 158/06 EC (Quality and Safety of Human Tissues and Cells) Regulations 2006	Regulation 22(6)
113	2006	SI 190/06 EC (Control on Imports of Products of Animal Origin from Madagascar) Regulations 2006	Regulation 5
114	2006	SI 216/06 EC (Avian Influenza) (Control on Imports from Israel) Regulations 2006	Regulation 6
115	2006	SI 217/06 EC (Avian Influenza) (Control on	Regulation 6

No	YEAR	LEGISLATION	SECTION
		Imports from Bulgaria) Regulations 2006	
116	2006	SI 225/06 EC (Newcastle Disease) (Control on Imports from Romania) Regulations 2006	Regulation 6
117	2006	SI 228/06 EC (Avian Influenza) (Control on Imports from Switzerland) Regulations 2006	Regulation 6
118	2006	SI 380/06 EC (Reinsurance) Regulations 2006	Regulation 74(2)
119	2006	SI 498/06 EC (Avian Influenza) (Control on Imports of Avian Products from South Africa) Regulations 2006	Regulation 5
120	2006	SI 592/2006 EC (Aerial Fertilisation)(Forestry) Regulations 2006	Regulation 11
121	2006	SI 654/2006 EC (Pesticide Residues) Regulations 2206	Regulation 7
122	2006	SI 702/2006 EC (Bluetongue)(Restriction on Import from Bulgaria) Regulations 2006	Regulation 5
123	2006	SI 703/2006 EC (Bluetongue)(Restriction on Import) Regulations 2006	Regulation 5
124	2006	SI 705/2006 EC (Protection of Animals kept for Farming Purposes) Regulations 2006	Regulation 7
125	2006	SI 706/2006 EC (Control of Salmonella in Breeding Flocks of Domestic Fowl) Regulations 2006	Regulation 11
126	2007	SI 60/2007 EC (Markets in Financial Instruments) Regulations 2007	Regulation 174(1)
127	2007	SI 71/2007 EC (Swine Vesicular Disease)(Restriction on Imports from Italy) Regulations 2007	Regulation 6
128	2007	SI 78/2007 EC (Avian Influenza)(Control on Imports from Croatia) Regulations 2007	Regulation 6
129	2007	SI 96/2007 EC (Avian Influenza) (Control on Movement of Pet Birds) Regulations 2007	Regulation 6
130	2007	SI 109/2007 EC (Electromagnetic Compatibility) Regulations 2007	Regulation 19
131	2007	SI 130/2007 EC (Classical Swine Fever)(Restriction on Imports) Regulations 2007	Regulation 6
132	2007	SI 131/2007 EC (African Swine Fever)(Restriction on Imports from Sardinia) Regulations 2007	Regulation 8
133	2007	SI 143/2007 EC (Control of Animal Remedies and their Residues) Regulations 2007	Regulation 30
134	2007	SI 144/2007 EC (Animal Remedies) Regulations 2007	Regulation 54

No	YEAR	LEGISLATION	SECTION
135	2007	SI 198/2007 EC (Potato Brown Rot) Regulations 2007	Regulation 7
136	2007	SI 202/207 EC (Phytosanitary Measures) Regulations 2007	Regulation 7
137	2007	SI 257/2007 EC (Circuses) Regulations 2007	Regulation 7
138	2007	SI 261/2007 EC (Photosanitary Measures)(Brown Rot in Egypt) Regulations 2007	Regulation 8
139	2007	SI 277/2007 Transparency (Directive 2004/109/EC) Regulations 2007	Regulation 55
140	2007	SI 289/2007 EC (Carriage of Dangerous Goods by Road)(ARD Miscellaneous Provisions) Regulations 2007	Regulation 20
141	2007	SI 448/2007 EC (Mechanically Propelled Vehicle Entry Into Service) Regulations 2007	Regulation 13(6)
142	2007	SI 545/2007 EC (Road Transport Activities Checks) Regulations 2007	Regulation 5(6)
143	2007	SI 557/2007 EC (Ecodesign requirements for certain energy-using products) Regulations 2007	Regulation 13(9)
144	2007	S.I. No. 578/2007 — European Communities (Foot and Mouth Disease) (Restriction on Imports from the United Kingdom) Regulations 2007	Regulation 16
145	2007	SI 587/2007 EC (Plastics and Other Materials)(Contact with Food) Regulations 2007	Regulation 10(1)
146	2007	SI 648/2007 EC (foot and Mouth Disease)	Regulation 15(1)
147	2007	SI 704/2007 EC (Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs) Regulations	Regulation 9(1)
	ADDED	Nov 09:	
148	2007	S.I. No. 734/2007 — European Communities (Bluetongue) Regulations 2007	Regulation 17
149	2007	S.I. No. 756/2007 — European Communities (Foot and Mouth Disease) (Restriction on Imports from Cyprus) Regulations 2007	Regulation 15
151	2007	S.I. No. 786/2007 — European Communities (Animal Remedies) (No. 2) Regulations 2007	Regulation 53
152	2007	S.I. No. 810/2007 — European Communities (Marketing Standards for Eggs) Regulations 2007	Regulation 7
153	2008	S.I. No. 007/2008 — European Communities (Avian Influenza) (Precautionary Measures) Regulations 2008	Regulation 8

No	YEAR	LEGISLATION	SECTION
154	2008	S.I. No. 14/2008 — European Communities (Welfare of Farmed Animals) Regulations 2008	Regulation 28
155	2008	S.I. No. 17/2008 — European Communities (Avian Influenza) (Control on Imports) Regulations 2008	Regulation 6
156	2008	S.I. No. 62/2008 — European Communities (Road Transport) (Working Conditions and Road Safety) Regulations 2008	Regulation 33
157	2008	S.I. No. 100/2008 — European Communities (Approval and Registration of Dealers of Ovine Animals) Regulations 2008	Regulation 12
158	2008	S.I. No. 133/2008 — European Communities (Bluetongue) Regulations 2008 Arrangement of Regulations	Regulation 18
159	2008	S.I. No. 147/2008 — European Communities (Classical Swine Fever) (Restriction on Imports from Slovakia) Regulations 2008 **(revoked by 163/2008)**	Regulation 6
160	2008	S.I. No. 163/2008 — European Communities (Classical Swine Fever) (Restriction on Imports from Slovakia) (No. 2) Regulations 2008	Regulation 6
161	2008	S.I. No. 227/2008 — European Communities (Milk Quota) Regulations 2008	Regulation 35
162	2008	S.I. No. 245/2008 — European Communities (Marketing of Meat of Bovine Animals Aged 12 Months Or Less) Regulations 2008	Regulation 7
163	2008	S.I. No. 247/2008 — European Communities (Control of Salmonella in Laying Flocks of Domestic Fowl) Regulations 2008	Regulation 13
164	2008	S.I. No. 252/2008 — European Communities (Transmissible Spongiform Encephalopathies and Animal By-Products) Regulations 2008	Regulation 22
165	2008	S.I. No. 261/2008 — European Communities (Health of Aquaculture Animals and Products) Regulations 2008	Regulation 28
166	2008	S.I. No. 327/2008 — European Communities (Avian Influenza) (Control on Imports from Croatia and Switzerland) Regulations 2008	Regulation 6
167	2008	S.I. No. 347/2008 — European Communities (Control on Mussel Fishing) Regulations 2008	Regulation 6
168	2008	S.I. No. 389/2008 — European Communities	Regulation 7

No	YEAR	LEGISLATION	SECTION
		(Feedingstuffs Intended for Particular Nutritional Purposes) Regulations, 2008	
169	2008	S.I. No. 407/2008 — European Communities (Machinery) Regulations 2008	Regulation 36(7)
170	2008	S.I. No. 466/2008 — European Communities (Control of Dangerous Substances in Aquaculture) Regulations 2008	Regulation 12
171	2008	S.I. No. 513/2008 — European Communities (Cat and Dog Fur) (Restriction on Trade) Regulations 2008	Regulation 7
172	2008	S.I. No. 547/2008 — European Communities (Environmental Liability) Regulations 2008	Regulation 23(7)
173	2008	S.I. No. 565/2008 — European Communities (Pesticide Residues) Regulations 2008	Regulation 6

www.lawreform.ie

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.

This role is carried out primarily under a Programme of Law Reform. The Commission's *Third Programme of Law Reform 2008-2014* was prepared and approved under the 1975 Act following broad consultation and discussion. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role also includes two other areas of activity, Statute Law Restatement and the Legislation Directory. Statute Law Restatement involves incorporating all amendments to an Act into a single text, making legislation more accessible. The Legislation Directory (previously called the Chronological Tables of the Statutes) is a searchable guide to legislative changes.

€15

ADDRESS
35-39 Shelbourne Road Dublin 4 Ireland

TELEPHONE
+353 1 6377600

FAX
+353 1 6377601

EMAIL
info@lawreform.ie

WEBSITE
www.lawreform.ie

The Law Reform Commission is a statutory body established by the Law Reform Commission Act 1975