

**Tab C – Summary of recommendations made by the IHRC which are incorporated in text of Bill**

1. Bill should provide that mutual assistance requests should only be received from or issued to designated countries (Point 3 page 7).
2. Legislation should outline how the provisions of the Data Protection Acts will apply where personal data is being handed over to authorities outside the State and what modifications will be required to these Acts (text in bold at end of page 11).
3. Bill provisions need to be strengthened to provide that requests for technical assistance for the interception of communications where the data subject is in Ireland must meet the criteria for authorisation laid down in the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 (Paragraph 2.3.2(ii) page 13 refers).
4. Bill provisions need to be strengthened to provide that requests to intercept data or provide technical assistance to intercept data outside the country must meet the criteria for authorisation laid down in the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 (Paragraph 2.3.2(iii) page 14 refers).
5. Variation in language viz “judicial authority” and “authority” in the context of the interception of communications needs to be addressed (paragraph 2.4.1 page 14).
6. The term “may” should not be used in the context of describing the conditions under which the Minister may consent to an interception being carried out (p2.4.2(i) page 15).
7. Wording in relation to two particular aspects of interception provisions where Ireland issues a request for mutual assistance in needs to be clearer (p2.5.2(i) page 6).
8. The provision that the Minister “may” provide that any information that may be furnished in response to a request for an account monitoring order will not, without his consent, be used for any purpose other than that specified in the request needs to be altered. Minister should exercise his discretion in a manner compatible with the State’s obligations under Article 8 of the ECHR (P4.2.(i) page 18).
9. The authority authorised to receive a request for a bank information or bank transaction order is too broadly and loosely defined (para 4.2(ii) page 18/19).
10. The manner in which the Data Protection Acts should be applied in the context of the Mutual Legal Assistance Agreement between Ireland and the USA should be made clearer (para 6.2(i) page 23).

1. Mr Michael Walsh *Michael Walsh*  
Head of Division
2. Ms Deirdre Fanning *DF*  
Criminal Law Reform Division

**Re: Criminal Justice (Mutual Assistance) Bill**  
**Observations of Irish Human Rights Commission**

I refer to Ms Fanning's note of 16 June, 2005, in relation to the above-mentioned matter, in which the views of the Division are sought on the observations of the Irish Human Rights Commissions (IHRC) on the Bill.

Within the remit of the Division (i.e., interception matters), the following issues have been raised by the IHRC, to which response material is provided.

1. **The Heads of the Bill do not clearly state that it is proposed that Ireland will only be entitled to receive requests for mutual assistance, or send such requests, to designated countries. The IHRC is of the view that this should be clearly stated in the proposed legislation (p7).**

This appears to be a reasonable observation and, if required on the basis of legal advice, clarity should be brought to the Bill.

2. **The IHRC notes that there is no exact definition of the term 'technical assistance' in the legislative proposal and is of the view that the Bill should clearly define this term, particularly in relation to the type of technical assistance that it is proposed Ireland will provide when the subject of the intercept is outside its jurisdiction (p12).**

Although this observation is understandable, given the lack of technical clarity, in any event, on the circumstances which would warrant the provision of this kind of technical assistance, attempting to further define this term would be unwise and inherently problematic. Moreover, in a field where technological advances occur at a steady pace, making this term more exact would probably fail to be technologically neutral and, hence, could lead to unnecessary legal difficulty.

3. **Although the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 provides for judicial supervision of the operation of the Act and a complaints mechanism, the IHRC is of the view that it would be preferable to have some judicial supervision of the initial decision to authorise an interception in an individual case (p13).**

This is not a view on the Bill but an observation of the adequacy of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993. The provisions of the 1993 Act relating to judicial oversight generally and to a separate judicial complaints procedure following authorisation of an interception were considered to be adequate safeguards in

1993 and have stood the test of time. In particular, they are considered adequate to demonstrate that the exclusion of judicial control prior to the granting of an authorisation does not exceed the limits of what is deemed necessary in a democratic society and that adequate and effective safeguards exist to protect the individual against arbitrary abuse of the power to intercept communications. Moreover, it is not considered appropriate to revisit the generality of safeguards relating to interception in a Bill dealing exclusively with mutual assistance matters.

4. **The IHRC is concerned that in considering requests for technical assistance, the Minister will find it difficult to comply effectively with the conditions set down in Section 4 of the 1993 Act, given the limited information the requesting State is required to supply (p13).**

This is a valid point, but the current draft Bill states that the requesting Member State must give sufficient information, inter alia, to justify the giving of an authorisation under the 1993 Act. This would appear to adequately address the IHRC's concerns in this regard.

5. **The IHRC recommends that the Minister should be required to have regard to the provisions of the 1993 Act when considering whether or not to provide technical assistance to intercept communications outside its territory (p14).**

Again, the current draft Bill would appear to adequately address the IHRC's concerns in this regard by requiring the Minister to have regard to the provisions of the 1993 Act.

6. **Clarification is needed as to the nature of the authority from which Ireland can receive requests to authorise interception in cases where the target is in Ireland but his/her communications are capable of being intercepted without the technical assistance of the Irish authorities (p14).**

This would appear to be a reasonable point, given the potential for confusion between the uses of the terms 'judicial authority' and 'authority'.

7. **In light of Ireland's positive obligations under Article 8 of the ECHR to respect the private life and correspondence of the intercept subject, the Minister should ensure that the interference is in accordance with law, that it pursues a legitimate aim and that the interference is necessary in a democratic society (p15).**

It can be confirmed that the Minister will have regard to his obligations under Article 8 when exercising such discretion.

8. **Where the Minister does not give his or her consent to the interception of communications, the Minister can require that any material already intercepted while the subject was on Irish territory may not be used or may only be used under conditions specified in Ireland. The Minister**

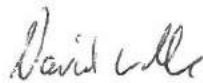
**should have regard to his obligations under Article 8 when exercising such discretion (p15-16).**

It is noted that the IHRC does not state that the Minister should not enjoy such discretion. It can be confirmed that the Minister will have regard to his obligations under Article 8 when exercising this discretion.

9. **The IHRC is of the view that the proposed legislation should require the Minister to have regard to the provisions of the 1993 Act when making a request for the interception of communications outside Ireland (p16).**

The current draft of the relevant Head would appear to require this, so the matter would appear to be resolved satisfactorily.

For approval and onward transmission to Criminal Law Reform Division.



David Walker  
Security & Northern Ireland Division

19 July, 2005



Marion G. Walsh/JUSTICE  
27/07/2005 11:24

To Deirdre M. Fanning/JUSTICE@JUSTICE  
cc  
bcc  
Subject Fw: Human Rights Commission submission re Mutual Assistance Bill

You might follow up with David on your return if we have no reply by then. Thanks.

Marion

— Forwarded by Marion G. Walsh/JUSTICE on 27/07/2005 11:23 —

Marion G. Walsh/JUSTICE

27/07/2005 11:23

To David G. Walker/JUSTICE  
cc  
Subject Human Rights Commission submission re Mutual Assistance Bill

David,

I know Deirdre has been in touch with you in relation to your Division's observations on the IHRC submission on the Mutual Assistance Bill. Deirdre has been out sick since last Monday week, hence me communicating with you on this.

We are nearing the end in terms of the final draft prior to circulation of the draft Bill and Memo for Government. We either

- (a) do not see merit, subject to any views you may have, on the recommendations made in relation to interception with one exception or
- (b) the recommendations have already been incorporated, in our view, during the course of drafting.

To take account of Paragraph 2.4.2(ii) of the HRC's recommendations (page 15 of their submission) we are suggesting Part 3, Section 25(2)(c) should be amended to state:

"where *paragraph (b)* applies, require that any material already intercepted while the telecommunications address was being used in the State-

- (i) may not be used, or
- (ii) may be used only under specified conditions that would satisfy the State's laws regarding the use of the information.

The justification for this decision shall be communicated to the competent authority in writing."

You might let me have your views on this proposal and any other views on the IHRC submission as soon as possible. Thanks.

Marion

CJM  
DI  
for MA file  
M

Minister

**Re: Irish Human Rights Commission (IHRC) recommendations on Criminal Justice (Mutual Assistance) Bill**

In December of 2004 you agreed we should refer the Scheme of the Criminal Justice (International Co-operation) Bill (as it then was – it is now entitled the Criminal Justice (Mutual Assistance) Bill) as approved by Government for drafting to the IHRC for their observations and recommendations. In May 2005 a response to the draft Scheme (at Tab A) was received from the IHRC. That response, which contained a total of 18 recommendations, is at Tab B.

After careful consideration, we are of the view that 10 of the recommendations required no amendments to the Bill, as such changes had been incorporated during the drafting process. A summary of the recommendations made which have been incorporated in the draft Bill are at Tab C. A further 3 recommendations were found to merit consideration. Suggested amendments have been forwarded to Parliamentary and Advisory Counsel for consideration. The relevant details are attached at Tab D.

**5 of 18 Recommendations which it is not proposed to accept****1. Death Penalty**

The IHRC have requested (at page 23 of their submission – paragraph 6.2(ii)) an explicit provision be included in the Bill stating whether or not Ireland would provide mutual assistance to the United States in cases where the death penalty may apply. This was a subject of intense debate during the negotiation of the original agreement between the E.U. and U.S., debate which concluded with the decision not to include such a provision.

While the treaty regarding extradition does contain provisions allowing Ireland to refuse extradition if an assurance is not given that the death penalty will not be applied, the mutual assistance provisions do not. The difficulties in applying such a provision would be immense, as mutual assistance may discover evidence which only at a future date leads to a possible death penalty case. In extreme cases, we are of the view that Section 3(1)(b)(ii)(II) of the draft Bill (at Tab E) will provide a method for Ireland to refuse assistance where the death penalty is a factor. That provision is to the effect that nothing in the Act requires assistance to be provided if there are reasonable grounds for believing that providing assistance may result in the person being subjected to torture. In the context of this approach, the IHRC's recommendation on this matter is not being taken on board.

**2. There should be judicial supervision of the initial decision to authorise an interception of communications** (para 2.3.2.(i) page 13). This matter falls outside the scope of this Bill. Furthermore, placing this additional burden on the courts system could result in delays in processing mutual assistance requests, requests that can often be time sensitive.

**3 to 5. The following terms need to be defined:-**



**3. technical assistance** – in the context of interception – (Para 2.3.1 page 12). It is not proposed to accept this recommendation as with the rapid pace of technological advancement, any attempt to define the type of assistance that governs this legislation would likely result in the law becoming outdated very quickly.

**4 and 5. In the context of the banking provisions in the Irl-US bilateral instrument it was recommended that the phrases “otherwise involved in a criminal offence” and “financial transactions unrelated to accounts” needed to be clarified.**

Article 16 bis 2 of the Instrument provides that the actions described in paragraph (a) – which are related to ascertaining if an identified person suspected or charged with a criminal offence is the holder of accounts – may be taken for the purpose of “identifying (i) information regarding natural or legal persons convicted of or otherwise involved in a criminal offence, (ii) information in the possession of non-bank financial institutions, (iii) financial transactions unrelated to accounts”.

Insofar as the first phrase is concerned Article 16 bis 2(b) of the Instrument provides “a request for information described in paragraph 1 shall include sufficient information to enable the competent authority of the requested State to reasonably suspect that the natural or legal person concerned has engaged in a criminal offence and the banks or non-bank financial institutions in the territory of the requested State may have the information requested”. This language explains the cited phrase, allowing for persons suspected of a crime to be included.

The phrase “financial transactions unrelated to accounts” was uncontroversial during the negotiating process. Attempting to define the phrase would be likely to place unnecessary and undesirable restrictions in the implementing legislation.

A draft reply to the IHRC is in the file pocket opposite for approval to issue.

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Marion Walsh  
Criminal Law Reform Division

July 2005

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10. The manner in which the Data Protection Acts should be applied in the context of the Mutual Legal Assistance Agreement between Ireland and the USA should be made clearer (para 6.2(i) page 23).



**Tab D : Proposed Amendments suggested to Parliamentary and Advisory Counsel**

**Amendment 1: (see paragraph 2.4.2(ii) of submission on page 15)**

IHRC recommended that the Bill include provisions preventing the use of information obtained in the context of the interception of communications in foreign countries in a manner which would violate Irish law. We have suggested to the AG's Office that Part 3, Section 25(2)(c) of the Bill be amended. This amendment would state that information will only be given to other countries where sufficient laws are in place or assurance given that the information will only be used in accordance with Irish laws regarding data protection.

**Amendment 2: (see paragraph 5.2(i) of submission on page 22)**

IHRC recommended that the Bill include additional provisions regarding the conditions under which testimony taken outside of Ireland would be admissible in Irish courts. Reference was made to the fact that the Criminal Justice Act 1994 does not require an Irish court to be satisfied that the conditions under which a witness statement was taken outside of Ireland provide sufficient indication of trustworthiness. The IHRC were also of the view that a statement taken outside the jurisdiction should not be admissible unless the court can secure the attendance of that witness. We have proposed that Section 47(9) of the Bill be amended. This amendment would require judges, when deciding the question of whether or not such testimony is admissible, to consider how the conditions under which the testimony was taken compared to the taking of similar evidence in a domestic context.

**Amendment 3: (see paragraph 6.2(iii) of submission on page 23/4)**

IHRC recommended that the term 'non-bank financial institution' should be formally defined. The relevant amendment is being made.



DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM  
AN ROINN DLÍ AGUS CIRT, COMHIONANNAIS AGUS ATHCHÓIRITHE DLÍ

Dr. Maurice Manning  
President  
Irish Human Rights Commission  
Fourth Floor, Jervis House  
Jervis Street  
Dublin 1

July 2005

Dear Dr Manning

Thank you for your submission of 11 May 2005 regarding the observations of the Human Rights Commission on the Scheme of the Criminal Justice (International Cooperation) Bill, which has now been re-titled the Criminal Justice (Mutual Assistance) Bill.

The issues you have raised have been considered by my Department in the context of the drafting of the Bill, which is ongoing. I am advised that a significant number of the recommendations you have made have already been included in the text of the Bill and a number of other recommendations are being considered further with a view to their incorporation, if possible. It is expected the Bill will be published in late August or early September 2005.

Yours sincerely,

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Michael McDowell, T.D.  
Minister for Justice, Equality and Law Reform

Observations on issues raised by the Revenue Commissioners**1. General -issue**Revenue obs

Our initial overall observation is that there is no mention throughout the Bill of the Revenue Commissioners ~~nor, for that matter, of an officer of the Revenue Commissioners. This would seem to suggest that insofar as DJELR is concerned, Revenue Officers do not~~ have any role in implementing its provisions. This is somewhat surprising, ~~since, Revenue has been dealing with fiscal MLA requests since 2001 and in fact dealt with 29 such requests last year. It is also noted that~~ the Bill includes a "revenue offence" in its definitions, an area where Revenue would clearly have a legitimate claim to have shared responsibility (at the least) and, in many cases, sole competency.

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Response

- The purpose of the Bill is to deal with mutual assistance in relation to criminal matters, which admittedly includes revenue offences. It will amend the Criminal Justice Act 1994 - which gave effect to the European Convention on Mutual Assistance in Criminal Matters and its additional Protocol and give effect to 6 mutual legal assistance in criminal matters instruments.
- The intention of the negotiations in relation to these instruments was that the police would play the primary role.
- Revenue offence is included within the definition of the term offence (in page 13 of the Bill) primarily because of the reference to fiscal offences in Article 8 of the 2001 Protocol. That instrument was drafted against the background of taking account of the results of mutual evaluations relating to the implementation of international obligations in the field of mutual assistance in criminal matters. The initiative was originally framed as a Convention designed to supplement the 1959 Convention on Mutual Assistance in Criminal Matters but was changed to a Protocol during negotiations.
- No compelling reasons have been put forward by the Revenue Commissioners for their inclusion within the terms of this Bill or as to what particular difficulties may result from their exclusion. At present MLA requests of a fiscal nature received by the Central Authority are transmitted to the Revenue Commissioners for attention. I understand that no difficulties arise in regard to those arrangements.

- Insofar as Customs issues are concerned there are arrangements agreed at EU level for customs co-operation in relation to mutual assistance.

## 2. Specific.

### 2.1. Revenue Obs

Definitions (page 14- 16 new draft): While the term “~~revenue offence~~” was included in an amendment of s.56 of the Criminal Justice Act (CJA), 1994 by s.15 of the Criminal Justice (Misc. Provisions) Act, 1997, the Protocol of 16 Oct. 2001 to the Convention, which is being transposed here, refers to “Fiscal Offences” in Article 8. Therefore, “Fiscal Offence” might be a more appropriate term, especially if breaches of Exchange Control regulations, which are clearly not revenue offences, are to be included.

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### Response

- There are 2 points in relation to this.
- First, the definition of revenue offence was formulated bearing in mind the provisions in A 8.2 of the Protocol which provides that “the request may not be refused on the ground that the law of the requested State does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the requesting Member State”. We will raise with PC whether fiscal offence” may be a more appropriate term.
- Second, the definition of revenue offence appears to relate only to offences that constitute offences under the law of the requesting state. It is not clear how Revenue could be seen as having a legitimate claim to shared responsibility, if not sole competence.

Note – Examine s86(f) in conjunction with this issue

### 2..2 Sects 7(2) (page 27): Transmission of evidence to designate states

What is being sought is to provide for an officer of the Revenue Commissioners, in addition to a member of the GS to transmit certificates or affidavits or other verifying documents to accompany evidence to the designated state.

### Revenue obs

**“Since Revenue deals with a significant number of fiscal Mutual Legal Assistance (MLA) requests every year, the term “or authorized officer of the Revenue Commissioners” should be inserted after “Garda Siochana”.**

**Response**

- **It is assumed it is not necessary that reference be made to the Revenue Commissioners. After all the judge who received the evidence – which could be evidence provided by the Revenue Commissioners will be in a position to provide the appropriate certificate.**

**2.3. Sects 11 & 12 (pages 34/37): Account information order and account monitoring orders.**

What is being sought here is to allow Revenue Officers, in addition to members of the GS, to apply to the Courts for account information and account monitoring orders.

**Revenue obs**

“Revenue officers already have power to access the records of financial institutions under s.906, 908 and 908A of the Tax Consolidation Act, 1997. These provisions relate only to historic transactions up to the date of the order and do not include (ongoing) account monitoring. While a monitoring facility is unlikely to assist typical tax investigations that invariably deal with historic transactions, it would assist in investigations involving trafficking in contraband since it would enable the authorities to monitor the illicit activities of a suspect where it was known that funds from the illegal activities in question were being lodged in a specific account. Accordingly, we would propose the inclusion of an “Authorised Officer of the Revenue Commissioners” in sections 11 & 12”.

**2.4. Sect 14 & 15 (pages 40/42):**

What is being sought is to provide for Revenue personnel to be added to those who can apply to the court for an account monitoring or information order.

**Revenue obs**

These provide for the Garda to obtain an account monitoring order in the State for the purposes of supporting a criminal investigation abroad. What if it is a Revenue investigation in relation to, for example, excise evasion

or “carousel” fraud (VAT), where we could already be jointly working on a case with the competent authority in another state? This section fails to provide for Revenue officers to assist the investigation in the manner required, and effectively excludes them from that part of the investigation. Therefore, there is a strong need for Revenue officers to be empowered under this section.

**2.5 Sect 17 (page 44):** It would follow on from the above that Revenue be included in this section also.

### **Response 2.3 to 2.5**

#### **Response**

- It seems that that it may be more appropriate to deal with the matter through an amendment of tax legislation

**2.6. Sect 21 & 22 (pages 48/51):** Revenue officers should also be listed as persons to whom the content of intercepted messages can be passed. This, of course, again raises a related and long-standing issue, the question of direct Revenue access to telephone subscriber and billing information under the Postal and Telecommunications Services Act, 1983, which we would wish to revive, particularly in light of legal advice from the Attorney General which supports our position.

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#### **Response**

- This request is related to 2 separate and distinct issues –
  - (a) access to the content of intercepted messages and
  - (b) direct access to telephone subscriber and billing information under the Postal and Telecommunications Services Act 1893
- (a) Access to the content of intercepted messages
- The Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 clearly limits access to the content of intercepted messages to the GS and the Defence Forces, on the basis that such a significant and intrusive form of covert surveillance/intelligence gathering should be confined only to the principle organizations responsible for law enforcement and/or national security. This is the case notwithstanding that many organizations has responsibility for the investigation and prosecution of serious offences (e.g.



Revenue and the D/SFA) which carry terms of imprisonment on conviction on indictment of 5 years or more yet the Oireachtas, has under the 1993 Act confined access to the products of interception to the 2 organisations.

- Nothing in the Bill or the 2000 MLA Convention would point towards the need to widen the scope of interception to revenue offences.
  - In summary we do not see that this matter is appropriate to the Mutual Assistance Bill.
  - There is a broader review of the States interception regime underway at present and the issues raised could be considered in that context
- 
- (b) Direct access to telephone subscriber and billing information under the Postal and Telecommunications Services Act 1893
  - The Bill does not make any provision in relation to this matter as it does not come within the scope of the provisions in the 2000 EU MLA Convention to be implemented. Accordingly, it does not arise at this time

*2.7 Part 4 & Part 5 Sect 28 – 45 (pages 61/97):* Just a general question here - what if the funds sought to be frozen are owed to the State as tax or duty? Are we still obliged to freeze them or do our own debts come first?

- Response

*2.8 Sect 47 (page 99):* Letter of request for evidence to be taken outside State

This section mirrors the existing provisions of section 52 CJA, 1994. We would like to have clarification from DJELR as to whether or not they interpret this section to mean that all outward MLA requests must be authorised by a Judge. The replacement section seems to permit the DPP to transmit the requests directly.

- Response
- The provision is intended to permit the DPP as well as the judiciary to issue and transmit a letter of request. The

provision to permit the DPP to issue and transmit a letter of request is new. It was inserted in the light of a recommendation in the Evaluation Report on Ireland on Mutual Legal Assistance and Urgent Requests for the Tracing and Restraint of Property pursuant to the evaluation carried out in pursuant of the Joint Action establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime.

- We have amended the Bill further to also allow the DPP to send the letter of request via the Central authority – as happens at present.

2.9 Sect 48 (page 102): Hearing of evidence for use outside the State  
“We would like to have clarification from DJELR on this section also. A problem arose recently over evidence of a Revenue officer being taken by deposition in relation to a UK prosecution, even though there was no question of him not attending the subsequent trial in the UK. In effect, this meant he was required to give evidence twice - once here, and again at the trial. This gave the defence two opportunities at cross-examination. It needs to be clarified if this section is intended, only to apply to cases where the evidence would **not otherwise** be available to the foreign court, e.g. in the case of a reluctant witness. In Revenue’s view, it should not be available, much less used, in the circumstances outlined above”.

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- Response
- This Section is intended to enable evidence to be taken here for use abroad. The question of attendance of a witness in the foreign proceedings is a matter for the witness himself/herself and is a different matter. Persons here cannot be compelled to attend and give evidence in proceedings in another country. Hence the need for the provision. If a person agrees to travel to give evidence abroad he or she may subsequently change his or her mind. This would result in setting back the proceedings and the reactivation of the mutual assistance request.

2.10 Sect 59 (pages 125/129): Search for evidence for use outside the State

Revenue are seeking equal powers with the Garda Síochána in relation to searches.

#### Revenue obs

“Once again Revenue appears to have been excluded from the provisions of this section even though cases are most likely to arise where Revenue has sole/primary competence. Therefore, we contend that Revenue officers should be included under this section”.

- Response
- These provisions give effect to and where it arises amend the procedures in the Criminal Justice Act 1994 arising from the obligations in relation to the implementation of the 1959 Convention in relation to mutual assistance in criminal matters. The need for the inclusion of the Revenue Commissioners and the difficulties arising from their exclusion has not been clearly demonstrated.

Furthermore, Chapter 7 – Recommendation No 64 of the Revenue Powers Group Report to the Minister for Finance specifically states

“The Group does not recommend granting to Revenue authorities the powers of search and production available under recent criminal justice legislation but would encourage further studies to be undertaken thereto by the LRC or otherwise – independently from the urgency attaching to the annual Finance Act....”.

*2.11.Sects 72-74 (pages 158/161):* Controlled Deliveries (CDs) are covered in these sections of the Bill even though the covering note from DJELR says legislation is not required. This also requires some clarification.

- Response
- The statement in the Departments letter of 19 May is incorrect. Unfortunately the letters were prepared before the revised text of the Bill was received and not amended prior to issue on receipt of the revised text.
- Ireland was evaluated in April 2001 in accordance with the Joint Action of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of

international undertakings in the fight against organised crime. The Multidisciplinary Group on Organised Crime approved the report on Ireland in March 2002. The final report on all MS evaluations was approved by JHA in October 2003.

- In the area of controlled deliveries , the criticism levelled at Ireland in the national report was as follows:
- The experts noted that in Ireland no law exists with regard to controlled deliveries and believe that consideration ought to be given to this matter."

2.11.1. That said, in relation to drugs enforcement, the decision on whether or not to conduct a CD is currently a matter for joint decision by Customs and Gardai at senior officer level, as per the agreed Memorandum of Understanding and Protocol. The Bill does not reflect this reality. (Illegal arms or weapons of mass destruction are other areas where there is shared competence.)

#### **Response**

- **We have amended the provisions in the Bill in this regard. We have copies here this afternoon which we would ask that you consider and revert as soon as possible. There is grave urgency attached to the publication of this Bill added to by the tragic events in London last week.**

2.11. 2. In the fiscal area, e.g. smuggling of cigarettes, alcohol and oils, CD's are a regular part of Revenue law enforcement activity, yet the Bill proposes to make the Garda Commissioner the sole decision-maker. Revenue cannot see how this will work effectively in practice, especially since these operations are conducted directly between Customs Services and in many cases are a product of investigation and profiling conducted by Customs in Ireland

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2.11.3. The Bill also specifies that any such CD will take place under the sole direction and control of An Garda Siochana, a situation that is not acceptable to Revenue and would not be acceptable to other Customs/Revenue service.

### **Conclusion of Revenue Letter**

The role, responsibilities and competencies of the Revenue Commissioners as an important agency in combating criminal activity at both national and international levels needs to be given due recognition in the Bill's provisions. The issues raised are not hypothetical. This Bill, as it stands, will cut across our day-to-day work and seriously curtail our effectiveness and efficiency, particularly in how we cooperate with foreign agencies. We are extremely concerned for the implications of this for our ability to fully discharge our international responsibilities to Revenue/Customs authorities in other member states in the investigation of Revenue offences.

The above summarises the views and deep concerns of Revenue on the current draft of the Bill. Clearly the issues raised in this note would benefit from a meeting where they could be discussed with you and/or with DJELR in greater depth.

Deirdre M.  
Fanning/JUSTICE  
12/07/2005 15:58

To Marion G. Walsh/JUSTICE@JUSTICE  
cc  
bcc  
Subject Bill - Page 61

Marion

With regard to your queries regarding p61 of the latest draft i.e. giving provision to 19.3 and 19.4 of the 2000 Convention and to para 10 Head 4G:

19.3

I understand 19.3 of the Convention to be saying that where a request is made in relation to the use of means of telecommunications where the subject is present in a MS and his or her communications can be intercepted by another MS, then the authorities of a MS can intercept using a service provider on its territory without involving the MS where the gateway is located.

We have made no mention of gateways. Section 22(1)(d) of the Bill provides that interception may take place where the person is present in the State and we have the ability to intercept. Section 24 provides for us to notify a State where the telecommunications address of the person concerned is being used in the territory of that state - this seems quite different from gateway. Section 26(3) of the Bill provides that where the person is present here, an authorised undertaking may use the facilities of a provider in a member state to intercept without involving the competent authority of that state. It thus appears to me that the Bill as it stands has sufficient legal provision to cover the situation envisaged under 19.3.

For the sake of clarification, we may want to consider inserting specific reference to a non-obligation to inform a MS where the gateway is located, but in my view it is not necessary.

19.4

With regard to Article 19.4 of the Convention, which provides that nothing in the Article shall prevent a MS from making a request for assistance to the MS where the gateway is located, I similarly think we do not need any additional provision. Section 21(1)(c) in the Bill states that we may make a request for assistance where "technical assistance from a member state is needed to intercept the telecommunications concerned." "Technical assistance" seems to me to be wide enough to cover a request to a MS where a gateway is located. However, a situation where we could intercept ourselves but still wish to make a request to the gateway MS would seem to me under current provisions not to be covered as we don't "need" assistance. To cover this we could insert a saver along the lines of 19.4, but I don't see that it is necessary realistically - why would we want to make the request if we can already obtain the material?

Para 10 Head 4G

Para 10 of Head 4G provides for the Minister to require a service provider, if not already in possession of the data, to obtain the data and to disclose all data in its possession or subsequently obtained by it. We already have provision at 26(2) for an authorised undertaking to make messages available, but this Head appears much wider. We would need to clarify what we intend by data. Possibly D/CMNR would have a view on this: I think the second part - disclosing material subsequently obtained - would be considered very broad indeed and too extensive.

Deirdre



Marion G. Walsh/JUSTICE  
06/07/2005 14:51

To Caoimhin.Smith@dcmnr.gov.ie  
cc Patricia.Cronin@dcmnr.gov.ie,  
Eamonn.Molloy@dcmnr.gov.ie, David G.  
Walker/JUSTICE@JUSTICE, Michael D.  
bcc  
Subject Fw: 27-6-05 to JELR comments on draft Criminal Justice  
(Mutual Assistance) Bill

Caoimhin,

Our recent telephone conversation refers.

Our response to the points raised by you is in bold and underlined beneath each of the relevant points. If you have any observations to offer in response I would appreciate if you could revert as soon as possible in view of the increasing pressure to have this Bill published this month.

Marion

— Forwarded by Marion G. Walsh/JUSTICE on 29/06/2005 16:24 —



"Caoimhin Smith"  
<Caoimhin.Smith@dcmnr.gov.ie>

27/06/2005 17:18

To <Marion\_G.\_Walsh@justice.ie>  
cc "Patricia Cronin" <Patricia.Cronin@dcmnr.gov.ie>, "Eamonn Molloy" <Eamonn.Molloy@dcmnr.gov.ie>  
Subject 27-6-05 to JELR comments on draft Criminal Justice (Mutual Assistance) Bill

Marion,

Below are comments, approved by our Minister. These comments refer to part 3 of the draft Bill forwarded to DCMNR on 19/5/2005 by your Department.

Please ring me at 01 678 2948 if you have any queries.

Regards,

Caoimhin

## Comments from D/Communications

### General

We welcome your email of 14/6/2005, in response to our previous comments on the Bill.

We will co-operate with you fully in your Department's review on interception and look forward to hearing your proposals.

We also welcome your consideration of the issue of placing additional obligations on authorised undertakings that have not been placed on them under the transposed EU Regulatory Framework for electronic communications networks and services. We would be grateful if you would keep us consulted on this issue as you develop

your thinking on it.

We have sought the views of the AG on this issue. That advice is awaited. We will be in touch with you when that advice is received.

The comments below are relatively minor in nature and are confined to Part 3; the sections of the Bill dealing with interception.

### **Section 20**

Should this definition mention that the Postal and Telecommunications Act 1983 has been amended since 1983.

We have asked Parliamentary Counsel to make the necessary adjustment.

### **Section 21(3)e**

The term "network connection number" is used but is undefined. We would advise that where possible the legislation should be as technologically neutral as possible. A similar reference also appears in Section 22(2)f.

The term was taken from Article 18.3.(f) of the 2000 EU Mutual Assistance Convention. The negotiators of the Convention did not see a need to define the term in the Explanatory Report to the Convention. We had decided to retain the term used in the Convention for the purpose of, in due course, being seen to have transposed the Convention accurately in our domestic law. It would appear to us in these circumstances that the term should suffice in the context of the rest of Section 21(3)(e). However, notwithstanding the points made if you feel further clarification is necessary if the term were amended to read "the relevant telecommunications or network connection number" would this meet your requirements? We will not proceed with any amendment or adjustment of the term unless we hear from you.

### **Section 23**

Section 23 (2) (a) and (b) refers for to Minister arranging for actions to be taken in relation to intercepting messages. Does this wording put responsibility on the Minister that he may intend to put on operators?

If the text of Section 23(2) were amended along the following lines would this meet the point you have raised

"Following the Ministers authorisation the Garda Commissioner will be requested to arrange for the authorised undertakings

(a) to effect and provide the intercepted communications to him or

(b) to record the messages and transmit the recordings to him

for transmission to the competent authority concerned or a person nominated by it"

(a) arrange for the authorised undertaking to transmit the intercepted communications....

(b) as appropriate, arrange for the authorised undertaking to record the messages and to transmit the recording...."

### **Section 24**

24(1)b is unclear; "telecommunications address" not defined. We would advise technologically neutral terms be used where possible.

**The term was used for the purpose of alignment with the general terminology in the Interception of Telecommunications provisions in the 2000 EU Mutual Assistance Convention (see Article 20.2). The term is also used in the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993. If you have any suggestions to offer on alternative wording bearing in mind the need not to depart significantly from the spirit and intent of the Convention and bearing in mind that the term is used in Irish legislation already we would be prepared to consider them.**

24(1)c is unclear and may need to be clarified. Is it not the case that assistance will be needed from someone to carry out an interception?

**This provision is intended to give effect to Article 20.2 of the 2000 Convention. Perhaps the text should be amended to read "no technical assistance is required from the member state to carry out the interception"? You might let me know if this would be in order from your perspective.**

## **Section 25**

25(1) is unclear. What is being intercepted the address or the message?

**We will ask Parliamentary Counsel to amend the provision to reflect the fact that it is the message which is being intercepted.**

## **Section 26**

26(2)c; It is unclear how this will work. What will be the legal/practical mechanism to get an operator/service provider here to use the facilities of another provider in a member State.

**As you will be aware this Section is intended to give effect to Article 19 of the 2000 EU Convention. It seems to me that, in view of the timescale for publication it would be best if we were now to publish the provision as drafted and immediately consult the authorised undertakings. We will be in touch with you further in relation to this matter.**

26(4) It is unclear what "a reasonable excuse" is.

**This is a term frequently used in the field of penalties in the criminal law area. It is a matter for the Court to determine what constitutes a reasonable excuse.**

Communications (Regulation and Postal) Division

Phone: +353 (0)1 678 2948

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906--12A  
**An Garda Síochána**

Oifig an Choimisinéara,  
An Garda Síochána,  
Páirc an Fhionnuisce,  
Baile Átha Cliath 8,  
Éire.

Tel/Teileafón: (01) 666 0000 / 2026

Fax/Facs: (01) 666 2013

Please quote the following ref. number:



Office of the Commissioner,  
Garda Headquarters,  
Phoenix Park,  
Dublin 8,  
Ireland.

Web site: [www.garda.ie](http://www.garda.ie)

E-mail: [comstaff@iol.ie](mailto:comstaff@iol.ie)

Date:

P.A. 6.1.6.10

**URGENT**

**CONFIDENTIAL**

Secretary General,  
Department of Justice,  
Equality and Law Reform,  
94, St. Stephen's Green,  
Dublin 2.

F.A.O. Ms. Marion Walsh

**Re: Criminal Justice (Mutual Assistance) Bill, 2005**

I am directed by the Commissioner to refer to your correspondence dated 19<sup>th</sup> May, 2005 in the above, and to make the following observations:-

**Section 3.1.c** The phrase "prejudice any criminal investigation in the State which is ongoing or in contemplation" should be included.

**Section 5.3.b** The phrase "to commit the offence or offences concerned or being reckless as to the purpose" should be included. This would be similar to the standards in Section 18 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

**Section 5.4** The list of offences is restricted and excludes elected members of government or EU institutions. Section 13, Criminal Justice (Terrorist Offences) Act, 2005 includes a wide definition, which would copperfasten what are not to be counted as political offences.

**Section 6.7** The phrase "prejudice any criminal investigation in the State which is ongoing or in contemplation" should be included.

**Section 7.2** While the majority of Mutual Assistance requests are dealt with by An Garda Síochána, some are dealt with by the Revenue / Customs authorities and a number of other agencies such as the Departments of Agriculture, Fisheries, etc., consideration should be given to amending the subsection by removing the reference to a member of An Garda Síochána and substituting reference to “appropriate State official” or other such term.

**Section 9** It should be clarified that the repeals and revocations would not upset any existing orders or processes.

**Section 10.1** The phrase “account means an account of whatever nature or legal composition.....includes” should be included. This would allow for a wider range of accounts to be accessed, which are held at arms length through companies, trusts or similar instruments.

**Section 10.1.d** Omit the phrase “held by another person” and replace with “held by any other person or entity”. This would allow for company accounts or business accounts, which are held in names other than those of persons.

**Section 10.a** Rewrite to include “a specified person or entity.....controls or is otherwise interested in.....institution”. This would capture non-person accounts as well as those entities that make a contribution to the account.

**Section 11** This provides the jurisdiction of a judge of the District Court to grant the account information order and account monitoring order. This raises jurisdictional questions in light of the Supreme Court decision in the Dylan Creaven case. This is not an application for search warrant where one can link jurisdiction to place of search, nor is it an application for a production order where one may focus on the place where the material is held. The provision should be clearer as to whether it is focusing on the place where the accounts are held or the place where the financial institutions have their centre.

**Section 11.4.a** The phrase “specified person or entity” should be included.

**Section 13.2.a** The phrase “the person or entity mentioned” should be included.

**Section 15** Provides for a new account information order and account monitoring order, on receipt of authorisation under Section 14. The consequences of non-compliance are at section 19. There does not appear to be any specific tipping-off offence in relation to this type of order. It may be that it is considered that the offence of obstruction at Section 80 is sufficient.

**Section 19** The provision of penalties against financial institutions for non-compliance with an account information order does not specify whether non-compliance within the timeframe stipulated is in itself an offence. A designated individual and the financial institution itself should be liable under the Section.

**Part 3 Section 20 etc.** This part deals with the interception of telecommunications messages. Reference is made to the interception of telecommunications messages between specified persons, whereas, the current domestic legislation refers to communications between particular postal addresses or telecommunications addresses.

The issue of the compellability of service providers in relation to upgrading their technical capabilities is one which requires resolution in advance of the enactment of this legislation.



**Section 21** This only allows for interception from a person, yet it may be an entity that facilitates the call. The term "entity" should be included with "person". The 1993 Act does not apply to data transmissions such as emails. It is recommended that internet service providers should be included under this heading.

**Section 22** This Section should also be extended to include internet service providers and data communications.

**Section 28** Contains a definition of a "Freezing Order" which includes orders under sections 2 or 3 of the Proceeds of Crime Act, 1996. The purpose of its inclusion is unclear as it is not understood how freezing orders as described further in those provisions could include orders under the Proceeds of Crime Act, which is a civil process.

**Section 32.9** Publication in Iris Oifigiuil may compromise an ongoing investigation.

**Section 37.1** There may be a contradiction here as if the notice is not published then a person may be disadvantaged by the time limit of a month when the notice may not be made known to him or her. Section 32.9 is the section which outlines the requirements for publication.

**Section 47** Clarification is required in relation to this section. Sub-section 4 indicates that the Director of Public Prosecutions may issue and transmit a letter of request. The necessity for the inclusion of that office at sub-section 2 as an authority which may apply to a judge for issue of a letter is unclear, if it can issue one independently.

Sub-sections 8 and 9 appear to contradict each other. It is unclear if the evidence should be taken in the form of deposition in order for it to be admissible in evidence.

**Section 48** This section mirrors and will replace Section 51 of the Criminal Justice Act, 1994 which is the current mechanism for transmitting evidence outside the jurisdiction by way of court order. Currently, there is no right of audience by defence solicitors or the party to be affected by the order at such hearings but it seems that the nominated District Court Judge has discretion in such matters.

**Part 6 Chapter 2 - Section 61etc.** This Chapter relates to the proposed mechanism by which the identification evidence is to be obtained at the request of another State. The matter was previously dealt with in the context of the Criminal Justice (International Cooperation) Bill. The provisions do not appear to provide for a power of arrest or detention for the purpose of obtaining a sample from a person who is not already in custody. If consent is not forthcoming the individual has committed no offence, and further action cannot be taken.

**Section 71.1** The property should be delivered to a named member(s) at a specified location rather than just a general deposit at a Garda Station.

**Section 71.2** The property should be delivered to a named member(s) not just the member in charge.



With regard to the submission made on behalf of the Revenue Commissioners, views are being formulated on this aspect and will be furnished as soon as possible. In addition, the name of the Garda member nominated to attend the meeting with the Revenue Commissioners will be communicated to you shortly.



**B. CORCORAN**  
**CHIEF SUPERINTENDENT**  
**PERSONAL ASSISTANT**  
**TO COMMISSIONER**

**1<sup>st</sup> July, 2005.**

Marion G. Walsh/JUSTICE  
30/08/2005 09:58

To Deirdre M. Fanning/JUSTICE@JUSTICE  
cc  
bcc  
Subject Fw: Criminal Justice (Mutual Assistance)Bill

----- Forwarded by Marion G. Walsh/JUSTICE on 30/08/2005 09:58 -----



"Patricia Cronin"  
<Patricia.Cronin@dcmnr.gov.ie>  
23/08/2005 10:47

To <Marion\_G\_Walsh@justice.ie>  
cc  
Subject FW: Criminal Justice (Mutual Assistance)Bill

-----Original Message-----

**From:** Patricia Cronin  
**Sent:** 23 August 2005 10:45  
**To:** 'Marion\_G\_Walsh@justice.ie'  
**Subject:** Criminal Justice (Mutual Assistance)Bill

Marion

Pl see our observations on the Criminal Justice (Mutual Assistance) Bill requested in your e-mail of 2 August last.

Regards

Patricia

#### **Section 26 Authorised undertakings**

ComReg is responsible under the transposed EU regulatory framework for imposing obligations on authorised undertakings. The proposed legislation places additional obligations on authorised undertakings, above those that have been imposed on authorised undertakings by ComReg. We trust that you have satisfied yourselves that this is legally in order.

The current draft places an onus on authorised undertaking to be "satisfied" before passing interception data to an intermediary in another State. Should such an obligation to satisfy one self as to the appropriateness of the intermediary not rest with the Minister of Justice rather than with authorised undertakings.

We support the dropping of paragraph 10 of Head G (as set out in your email of 2/8/2005)

#### **Section 27**

##### **Section 110 of the 1983 Postal and Telecommunications Services Act of 1983**

We support the proposed amendment of Section 110, to strengthen the enforcement powers available to our Minister.

Following receipt of the final legal advice from the AG's of 29/12/2004, it is our understanding that your Minister is currently considering a number of internal D/Justice proposals on the issue of interception.

We are unclear if this proposed amendment to section 110 is as a result of the proposals with your Minister, following receipt of the legal advice, and if so, if it forms part or all of a proposed resolution of the issue raised by the legal advice in relation to interception.

While we welcome the proposed amendment of Section 110, we would need to have a full understanding of the overall approach going forward on interception issues. We look forward to working with your Department to address the other substantive issues covered in the legal advice of 29/12/2005.

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David G. Walker/JUSTICE  
12/08/2005 10:34

To Deirdre M. Fanning/JUSTICE@JUSTICE  
cc  
bcc  
Subject Re: IHRC - Mutual Assistance Bill

Deirdre,

The Division has no observations on the proposals contained in your e-mail below. In particular, the change proposed in the latter substantive point would appear to meet the IHRC's concerns in this regard.

David Walker  
Security & Northern Ireland Division

12 August, 2005

Deirdre M. Fanning/JUSTICE

Deirdre M.  
Fanning/JUSTICE  
09/08/2005 16:38

To David G. Walker/JUSTICE@JUSTICE  
cc  
Subject IHRC - Mutual Assistance Bill

David

Thank you for your minute of 19 July 2005 regarding your Division's views on the observations of the Irish Human Rights Commission on the Criminal Justice (Mutual Assistance) Bill.

With regard to the point you make regarding the lack of clarification surrounding the use of the term "country" in the making and sending of requests for mutual assistance, the draft Bill as it now stands contains a definition of "member State" and also defines the process by which other states may be designated as falling under the provisions of the Bill. See sections 2 and 4 in the latest draft text, attached..

The point made regarding clarification as to the nature of the authority from which Ireland can receive requests to authorise interception has also been dealt with. The new text defines "competent authority" in section 20 and this term is used in the relevant sections of the Bill.

As noted in Marion's e-mail to you of 27 July, to take account of Paragraph 2.4.2(ii) of the HRC's recommendations (page 15 of their submission) we are suggesting Part 3, Section 25(2)(c) should be amended to state:

"where *paragraph (b)* applies, require that any material already intercepted while the telecommunications address was being used in the State-

- (i) may not be used, or
- (ii) may be used only under specified conditions that would satisfy the State's laws regarding the use of the information.

The justification for this decision shall be communicated to the competent authority in writing."

You might let me have your views on this proposal and on whether, in light of the above comments, you are satisfied with the approach being taken.

Kind regards

Deirdre Fanning



- 46B02-4A.doc

1. Mr Michael Walsh  
Head of Division
2. Ms Deirdre Fanning  
Criminal Law Reform Division

**Re: Criminal Justice (Mutual Assistance) Bill**  
**Observations of Irish Human Rights Commission**

I refer to Ms Fanning's note of 16 June, 2005, in relation to the above-mentioned matter, in which the views of the Division are sought on the observations of the Irish Human Rights Commissions (IHRC) on the Bill.

Within the remit of the Division (i.e., interception matters), the following issues have been raised by the IHRC, to which response material is provided.

1. **The Heads of the Bill do not clearly state that it is proposed that Ireland will only be entitled to receive requests for mutual assistance, or send such requests, to designated countries. The IHRC is of the view that this should be clearly stated in the proposed legislation (p7).**

This appears to be a reasonable observation and, if required on the basis of legal advice, clarity should be brought to the Bill.

2. **The IHRC notes that there is no exact definition of the term 'technical assistance' in the legislative proposal and is of the view that the Bill should clearly define this term, particularly in relation to the type of technical assistance that it is proposed Ireland will provide when the subject of the intercept is outside its jurisdiction (p12).**

Although this observation is understandable, given the lack of technical clarity, in any event, on the circumstances which would warrant the provision of this kind of technical assistance, attempting to further define this term would be unwise and inherently problematic. Moreover, in a field where technological advances occur at a steady pace, making this term more exact would probably fail to be technologically neutral and, hence, could lead to unnecessary legal difficulty.

3. **Although the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 provides for judicial supervision of the operation of the Act and a complaints mechanism, the IHRC is of the view that it would be preferable to have some judicial supervision of the initial decision to authorise an interception in an individual case (p13).**

This is not a view on the Bill but an observation of the adequacy of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993. The provisions of the 1993 Act relating to judicial oversight generally and to a separate judicial complaints procedure following authorisation of an interception were considered to be adequate safeguards in

① + Response  
wpe mail 27/7

Tell STAG  
Div had dealt with  
Bill & all  
if necessary  
schrofer  
was  
app

Tell STAG  
how dealt with  
in Bill

No action  
necessary

No  
Action  
necessary



1993 and have stood the test of time. In particular, they are considered adequate to demonstrate that the exclusion of judicial control prior to the granting of an authorisation does not exceed the limits of what is deemed necessary in a democratic society and that adequate and effective safeguards exist to protect the individual against arbitrary abuse of the power to intercept communications. Moreover, it is not considered appropriate to revisit the generality of safeguards relating to interception in a Bill dealing exclusively with mutual assistance matters.

4. **The IHRC is concerned that in considering requests for technical assistance, the Minister will find it difficult to comply effectively with the conditions set down in Section 4 of the 1993 Act, given the limited information the requesting State is required to supply (p13).**

*No action necessary ✓*

This is a valid point, but the current draft Bill states that the requesting Member State must give sufficient information, inter alia, to justify the giving of an authorisation under the 1993 Act. This would appear to adequately address the IHRC's concerns in this regard.

5. **The IHRC recommends that the Minister should be required to have regard to the provisions of the 1993 Act when considering whether or not to provide technical assistance to intercept communications outside its territory (p14).**

*No action necessary ✓*

Again, the current draft Bill would appear to adequately address the IHRC's concerns in this regard by requiring the Minister to have regard to the provisions of the 1993 Act.

6. **Clarification is needed as to the nature of the authority from which Ireland can receive requests to authorise interception in cases where the target is in Ireland but his/her communications are capable of being intercepted without the technical assistance of the Irish authorities (p14).**

*All S + N / 9 DW have dealt with in Bill*

This would appear to be a reasonable point, given the potential for confusion between the uses of the terms 'judicial authority' and 'authority'.

7. **In light of Ireland's positive obligations under Article 8 of the ECHR to respect the private life and correspondence of the intercept subject, the Minister should ensure that the interference is in accordance with law, that it pursues a legitimate aim and that the interference is necessary in a democratic society (p15).**

*No action necessary ✓*

It can be confirmed that the Minister will have regard to his obligations under Article 8 when exercising such discretion.

8. **Where the Minister does not give his or her consent to the interception of communications, the Minister can require that any material already intercepted while the subject was on Irish territory may not be used or may only be used under conditions specified in Ireland. The Minister**

**should have regard to his obligations under Article 8 when exercising such discretion (p15-16).**

*No Act  
necessary*

It is noted that the IHRC does not state that the Minister should not enjoy such discretion. It can be confirmed that the Minister will have regard to his obligations under Article 8 when exercising this discretion.

9. **The IHRC is of the view that the proposed legislation should require the Minister to have regard to the provisions of the 1993 Act when making a request for the interception of communications outside Ireland (p16).**

*No act  
necessary*

The current draft of the relevant Head would appear to require this, so the matter would appear to be resolved satisfactorily.

For approval and onward transmission to Criminal Law Reform Division.

*David Walker*

David Walker  
Security & Northern Ireland Division

19 July, 2005

Marion G. Walsh/JUSTICE  
14/09/2005 17:31

To Michael D. Walsh/JUSTICE@JUSTICE, David G. Walker/JUSTICE@JUSTICE  
cc Deirdre M. Fanning/JUSTICE@JUSTICE, paddy\_terry@ag.irlgov.ie  
bcc

Subject Interception provisions in Mutual Assistance Bill

Michael/David

Michael - I have left a message on your land line to the effect that I would appreciate if David or you could revert to me on this e-mail which is self-explanatory - if at all possible - before lunch tomorrow.

All written communications with D/CMNR to date have failed to get responses to a number of outstanding issues on the interception provisions in the Mutual Assistance Bill. These are primarily the questions set out on pages 71 and 72 of the latest text - which is in the attachment beneath. I would like to meet some people from the D/CMNR face to face for the purpose of

(i) getting a response to the outstanding issues and  
(ii) getting a better understanding of some of the interception provisions in order to be able to explain them in the Dáil - such as those related to gateways etc. as referred to in Article 19 of the 2000 EU MLA Convention. I propose to issue the e-mail beneath which addresses this issue and which responds (based on the information you provided) to the issues raised by Patricia Cronin in her e-mail of 23 August.

1. Any objection to the terms of the e-mail to D/CMNR and
2. Would someone from your Division be prepared to attend a meeting between Parliamentary Counsel, this Division and D/CMNR to address the issues identified and if so you might indicate your availability in terms of the dates proposed.

I would be very grateful if you could let me have your views if possible prior to lunch-time tomorrow as I will not be here tomorrow afternoon and Friday and I am anxious to issue the letter to D/CMNR before then. Thanks.

Marion

#####

#### Draft e-mail to D/CMNR

Patricia,

Thank you for your e-mail of 23 August and previous communications in relation to the Interception provisions in the Mutual Assistance Bill. The latest text of this Bill is in the attachment beneath.

You will note from pages 71 and 72 of the Bill that there are a number of outstanding issues on which we would appreciate some guidance from your Department to enable the text to be finalised. Would it be possible for the relevant personnel in your Department to meet with myself, a representative from Security and Northern Ireland Division of our Department and Paddy Terry of the Office of the Parliamentary Counsel to finalise these issues?. If so could I suggest any time which might suit you on either of the following mornings:-

Tuesday 20 September  
Wednesday 20 September or  
any morning from Tuesday 27 to Thursday 29 September.

The following are our views in relation to the issues raised in your e-mail of 23 August:-

#### Authorised undertakings (S25 of the current text)

You have referred to the proposed legislation placing additional obligations on authorised

undertakings, above those that have been authorised by ComReg. This Department's view is that a warrant for the purpose of interception already exists and at issue is how that product is accessed by the relevant authorities for the purpose of the criminal investigation. There are no additional obligations being placed as the authorised undertaking already has facilities enabling the interception to take place.

As to the question of the authorised undertaking satisfying itself before passing information to an intermediary in another State, this again revolves around the existence of the warrant. The existence of the warrant for interception is a fact that is easily verified. We do not see how it is necessary to put in place a layer of bureaucracy on top. The request comes from a designated provider of telecommunications services who will have the appropriate warrant.

#### Section 26 - Amendment of Section 110 of the Act of 1983

It is the case that the Department is formulating an approach to interception, that could, given the advices referred to you result in a new approach to the statutory underpinning of interception. The penalty provisions in s 27 do not arise as a direct result of the advices sought, however, it can be taken that in any new legislative framework for interception there will be penalty provisions. This is an obvious weakness in the existing provisions.

I am advised that the Security and Northern Ireland Division of the Department will consult you on the specific issues raised in the legal advices as soon as possible.

Note: Please note references on page 71 of the text of the Bill should be to Sections 20, 21 and 22 (rather than 21, 222 and 23).

Marion



- 46B02-4A.doc

Marion G. Walsh/JUSTICE  
06/09/2005 14:45

To Deirdre M. Fanning/JUSTICE@JUSTICE  
cc  
bcc  
Subject Fw: Criminal Justice (Mutual Assistance) Bill - Interception

— Forwarded by Marion G. Walsh/JUSTICE on 06/09/2005 14:45 —



Michael D. Walsh/JUSTICE  
06/09/2005 14:21

To Marion G. Walsh/JUSTICE@JUSTICE  
cc  
Subject Re: Fw: Criminal Justice (Mutual Assistance) Bill - Interception

Marion,

Apologies for the delay in responding . Catching up on emails is a real chore.

#### Section 26

The point I would have thought is that a warrant for the purpose of interception already exists and at issue is how that product is accessed by the relevant authorities for the purpose of the criminal investigation. There are no additional obligations being placed as the authorised undertaking already has facilities enabling the interception to take place. This is of course subject to any advices you might receive.

As to the question of the authorised undertaking satisfying itself, this again revolves around the existence of the warrant. The existence of the warrant for interception is a fact that is easily verified. We do not see how it is necessary to put in place a lair of bureaucracy on top. The request comes from a designated provider of telecomms services who will have the appropriate warrant.

#### Section 27

It is the case that the Department is formulating an approach to interception, that could, given the advices referred to by D/CMNR result in a new approach to the statutory underpinning of interception. This however is not yet at a stage where it can be shared. The penalty provisions in s 27 do not arise as a direct result of the advices sought, however, it can be taken that in any new legislative framework for interception there will be penalty provisions. This is an obvious weakness in the existing provisions.

We will consult with D/CMNR on the specific issues raised in the legal advices as soon as possible.

Michael Walsh

Marion G. Walsh/JUSTICE

Marion G. Walsh/JUSTICE  
02/09/2005 09:10

To David G. Walker/JUSTICE@JUSTICE, Michael D.

02/09/2005 09:10


Walsh/JUSTICE@JUSTICE  
cc paddy\_terry@ag.irlgov.ie, Clíodhna\_O'Hara@ag.irlgov.ie,  
Deirdre M. Fanning/JUSTICE@JUSTICE, Martin M.  
Power/JUSTICE@JUSTICE  
Subject Fw: Criminal Justice (Mutual Assistance) Bill - Interception

David/Michael,

We are trying to finalise the text of the Mutual Assistance Bill today and circulate it with a Memorandum for Government to Departments for observations early next week. I am just now finalising catching up with my post and e-mails since my return from holidays Tuesday. Beneath are observations from the D/CMNR on the interception provisions in the Bill.

I would be grateful for any observations you can offer in relation to the following

(a) Section 26 -(i) the point made that the legislation places additional obligations on authorised undertakings - we can then discuss whether it is legally in order with the AG's Office and (ii) the question of satisfaction in relation to the appropriateness of the intermediary resting with the Minister for JELR.

 (b) Section 27 - material for response to D/CMNR in relation to the points raised of relevance to your Division. You may wish to note that the penalty provisions were suggested for inclusion by this Division as we were of the view that in the absence of such a provision authorised undertakings might fail to comply with the requirements set out in the 2000 EU MLA Convention.

I would be grateful if you could - if at all possible - respond on the points raised today or Monday at the latest as we are under pressure to circulate the text and Memo for Government to Departments.

The latest text is in the attachment beneath for ease of reference.

Marion



- 46B02-4A.doc

----- Forwarded by Marion G. Walsh/JUSTICE on 02/09/2005 08:55 -----



"Patricia Cronin"  
<Patricia.Cronin@dcnmr.gov.ie>  
23/08/2005 10:47

To <Marion\_G.\_Walsh@justice.ie>  
cc  
Subject FW: Criminal Justice (Mutual Assistance) Bill

-----Original Message-----

**From:** Patricia Cronin  
**Sent:** 23 August 2005 10:45  
**To:** 'Marion\_G\_Walsh@justice.ie'  
**Subject:** Criminal Justice (Mutual Assistance) Bill

Marion

Pl see our observations on the Criminal Justice (Mutual Assistance) Bill requested in



your e-mail of 2 August last.

Regards

Patricia

**Section 26 Authorised undertakings**

ComReg is responsible under the transposed EU regulatory framework for imposing obligations on authorised undertakings. The proposed legislation places additional obligations on authorised undertakings, above those that have been imposed on authorised undertakings by ComReg. We trust that you have satisfied yourselves that this is legally in order.

The current draft places an onus on authorised undertaking to be "satisfied" before passing interception data to an intermediary in another State. Should such an obligation to satisfy one self as to the appropriateness of the intermediary not rest with the Minister of Justice rather than with authorised undertakings.

We support the dropping of paragraph 10 of Head G (as set out in your email of 2/8/2005)

**Section 27**

**Section 110 of the 1983 Postal and Telecommunications Services Act of 1983**

We support the proposed amendment of Section 110, to strengthen the enforcement powers available to our Minister.

Following receipt of the final legal advises from the AG's of 29/12/2004, it is our understanding that your Minister is currently considering a number of internal D/Justice proposals on the issue of interception.

We are unclear if this proposed amendment to section 110 is as a result of the proposals with your Minister, following receipt of the legal advice, and if so, if it forms part or all of a proposed resolution of the issue raised by the legal advice in relation to interception.

While we welcome the proposed amendment of Section 110, we would need to have a full understanding of the overall approach going forward on interception issues. We look forward to working with your Department to address the other substantive issues covered in the legal advice of 29/12/2005.

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This is also to certify that this mail has been scanned for viruses.

Marion G. Walsh/JUSTICE  
27/09/2005 17:51

To Patricia.Dowling@comreg.ie  
cc paddy\_terry@ag.irlgov.ie, Michael D.  
Walsh/JUSTICE@JUSTICE, David G.  
Walker/JUSTICE@JUSTICE, Deirdre M.  
bcc  
Subject Interception in the context of the Mutual Assistance Bill

Patricia

Further to our telephone conversation earlier this afternoon I enclose the documents I promised to forward to you.

The first attachment is the current text of the Mutual Assistance Bill which the Government have agreed should be published shortly, subject to any further views Departments may have on the text. Sections 19 to 26 of that Bill are intended to give effect to Articles 18 to 22 of the year 2000 EU Mutual Assistance Convention, which is contained in the second attachment. The third attachment is the Explanatory Report of that Convention.

I would be very grateful if you could arrange for someone in ComReg to look at Sections 19 to 26 (and in particular Sections 25, 26 and the notes in relation to Part 3) for your views as to whether the provisions in the Convention are accurately transposed in the draft legislation. As Caoimhin Smith and I have both indicated we would welcome if someone from ComReg could attend a meeting with the Office of the Attorney General (Paddy Terry) at which this Department and the Department of Communications, Marine and Natural Resources would also be represented to discuss the issues. We would welcome being able to discuss in practical terms with any such person what a gateway means in practical terms and in particular how Article 19 of the Convention might work in practice.

As indicated earlier we would welcome a discussion sooner rather than later in view of the urgency of publishing this legislation - the deadline for transposition having passed. Furthermore Paddy Terry who is drafting the Bill will be away for 2 weeks from the middle of next week so we need to finalise matters well in advance of that to meet the deadlines set by Government.

Would it be possible for someone from ComReg to attend a meeting later this week (maybe Friday) or very early next week?

I am copying this e-mail to the interested parties in our Department, the Attorney General's Office and the D/CMNR.

Please give me a ring if you have any queries.

Marion

Tel - 01/6028506



- 46B02-4A.doc - Current text of Bill



c\_19720000712en00010023.pdf - 2000 MLA Convention



c\_37920001229en00070029.pdf - Explanatory Report to MLA Convention