File No. 937

File Title: Covert Surveillance – Proposals for Legislation

FILE NO. 937 - PROPOSALS FOR LEGISLATION

4

Jump to navigation

- Home
- Covert surveillance

Covert surveillance

Types of covert surveillance

1 2

There are two types of covert surveillance - directed surveillance and intrusive surveillance.

The police, intelligence services and other public authorities can lawfully use covert surveillance if they have an authorisation or warrant signed by an authorised official.

Material obtained through covert surveillance can be used as evidence in court.

1 Directed surveillance

Directed surveillance is a type of covert surveillance where police, intelligence agencies and other public authorities follow an individual in public and record their movements.

Directed surveillance can be lawfully undertaken to obtain private information about a person if public authorities reasonably suspect that a person has committed, or intends to commit, a crime.

An authorisation for directed surveillance may be granted:

- when needed for a particular case
- in the interests of national security
- to prevent and detect crime or prevent disorder
- in the interests of the economic well-being of the UK
- in the interests of public safety
- to protect public health
- to assess or collect any tax, duty, levy or other charge payable to a government department

Directed surveillance is permitted without an authorisation in circumstances where authorities need to act immediately and there isn't time to make an application.

2 Intrusive surveillance

Intrusive surveillance involves the presence of an individual on private residential premises or in a private vehicle. It also includes any surveillance carried out by means of a device.

* Due to its invasiveness, this type of surveillance is only used to catch offenders suspected of serious crimes. Only the most senior authorising officer in relevant public authorities can approve intrusive surveillance.

* A separate authorisation from the Secretary of State is required if the police or other law enforcement agencies plan to interfere with property or with wireless telegraphy when concealing a surveillance device.

Go to navigation

5

NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

CASES INVOLVING THE UNITED KINGDOM DECIDED BY THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights, in Strasbourg, decides several hundred cases each year. Although all of the decisions are immediately posted on the Court's website (www.echr.coe.int/eng/Judgments.htm), the sheer numbers involved mean that it is difficult for busy practitioners and others to keep abreast of developments.

To assist in the process of promoting awareness of the decisions taken in cases involving the United Kingdom, the Northern Ireland Human Rights Commission has decided to provide brief summaries of those cases on its own website. We are doing so on a year-by-year basis and will update the current year at the end of each quarter.

Readers need to realise, of course, that a short paragraph cannot fully reflect the significance of a judgment. Before relying on any such summary they are therefore strongly recommended to consult the full judgment in the case on the European Court's website.

The summaries include only those cases where a decision on the merits was reached by the European Court. They are set out in reverse chronological order, starting with the most recent decision. The main European Convention Articles considered in each case are listed in italics at the start of each summary. Decisions declaring applications to be inadmissible are *not* included. Decisions involving applications originating in Northern Ireland are marked with an asterisk.

Brice Dickson
Chief Commissioner

(6)

[redacted]/JUSTICE
05/11/2007 17:23

To [redacted]JELR/JSECTOR@JUSTICE
cc
bcc
Subject [redacted] FW: WRITTEN PQ FOR DAIL DATE ANSWER 07/11/2007 REF 27786/07

[redacted],
Please see request for obs below which you may be positioned to help with.

Regards,

[redacted]

[redacted]
Criminal Law Reform Division
Department of Justice, Equality and Law Reform
Tel: 01-[redacted]
Fax: 01-[redacted]

----- Forwarded by [redacted]/JUSTICE on 05/11/2007 17:22 -----

[redacted]/JUSTICE
05/11/2007 17:08

To [redacted]JUSTICE@JUSTICE
cc
Subject Fw: Written PQ for Dail Date Answer 07/11/2007 (Ref 27786/07)

Grateful to receive the obs of Criminal Law Refrom on the attached PQ.

Thank you

[redacted]

[redacted]
Security & Northern Ireland Division
Phone [redacted]
---- Forwarded by [redacted]/JUSTICE on 05/11/2007 17:07 -----

[redacted]/JUSTICE
02/11/2007 16:33

To [redacted]/JUSTICE@JUSTICE
cc
Subject Fw: Written PQ for Dail Date Answer 07/11/2007 (Ref 27786/07)

[redacted]

Please seek the observations of the Gardaí and Criminal Law Reform Division on this PQ.

Thanks

[redacted]
---- Forwarded by [redacted]/JUSTICE on 02/11/2007 16:32 -----

[redacted]/JELR/JSECTOR
02/11/2007 16:29

To [redacted]/JUSTICE@JUSTICE, [redacted]/JUSTICE@JUSTICE, CRIM[redacted]

[redacted]/JUSTICE@JUSTICE, [redacted]/JUSTICE@JUSTICE, [redacted]/JUSTICE@JUSTICE, [redacted]@JUSTICE, [redacted]/JUSTICE@JUSTICE

cc

Subject Fw: Written PQ for Dail Date Answer 07/11/2007 (Ref 27786/07)

----- Forwarded by [redacted]/JELR/JSECTOR on 02/11/2007 16:29 -----

Section: CRIME 3

Written PQ for Dail Date Answer 07/11/2007 (Ref 27786/07):-

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* To ask the Minister for Justice, Equality and Law Reform when he expects electronic eavesdropping technology to be used against organised criminal gangs; and if he will make a statement on the matter.

- Bernard J. Durkan.

NOTE: If this PQ does not fall within your area of responsibility, please inform the Ministers Office IMMEDIATELY so that it can be forwarded to the section and officer responsible.

To PRINT for PQ folder, please PRINT pages 2 and 3 below for front of file and inside file.

[redacted]

This question is concerned with use of Garda operational matters and this Division ~~would have no ie~~ has no responsibility in that area.

As an aside [illegible] the [illegible] correct my State it is clear from the Ministers recent comments

[redacted]

* for WRITTEN ANSWER on Wednesday, 7th November, 2007.

Ref No: 27786/07 Initial Order (White No.): 658 Proof Order: 254

* * To ask the Minister for Justice, Equality and Law Reform when he expects electronic eavesdropping technology to be used against organised criminal gangs; and if he will make a statement on the matter.

- Bernard J. Durkan.

[redacted]:CN=[redacted]/O=JUSTICE[redacted])

Ref No: 27786/07 Initial Order (White No.): 658 Proof Order: 254

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* * To ask the Minister for Justice, Equality and Law Reform when he expects electronic eavesdropping technology to be used against organised criminal gangs; and if he will make a statement on the matter.

- Bernard J. Durkan.

* for WRITTEN ANSWER on Wednesday, 7th November, 2007.
s

(9)

[redacted]/JELR/JSECTOR
30/11/2007 11:52

To [redacted]/JELR/JSECTOR@JUSTICE
cc
bcc
Subject Fw: Rabbitte moves two major anti-crime Bills

----- Forwarded by [redacted]/JELR/JSECTOR on 30/11/2007 11:52 -----

[redacted]/JUSTICE
29/11/2007 16:01

To
cc
Subject Rabbitte moves two major anti-crime Bills

Rabbitte moves two major anti-crime Bills

Issued : Thursday 29 November, 2007

The Labour Party Spokesperson on Justice, Deputy Pat Rabbitte, today moved two new Private Members Bills in the Dail which he said formed central planks of Labour proposal to combat serious crime.

The Witness Protection Programme Bill, 2007, is designed to place the programme on a full statutory basis, under proper and independent oversight..
The Garda Siochana (Powers of Surveillance) Bill, 2007 would provide the Gardai with appropriate powers to undertake electronic surveillance of criminal suspects.

Deputy Rabbitte said:

"The nature of crime has changed dramatically in this country over recent decades. We have seen a huge growth in the illegal drugs trade, the emergence of ruthless criminal gangs who are prepared to kill at will, and murder levels not seen since the Civil War.

"Modern crime needs modern responses and the Gardai must be given the appropriate powers to enable them not just to detect crime and put those responsible behind bars, but also - to the greatest extent possible - prevent crime from taking place.

"Most people will have been shocked to learn that the Gardai currently have no legal powers to undertake electronic surveillance of criminal suspects, although these powers form a central part of the anti-crime armoury of most other countries.

"Earlier this month, in the aftermath of yet another round of gangland killings, the Minister for Justice, Brian Lenihan, said that his Department would look into the question of giving the Gardai additional powers, comments that reflected a total lack of urgency in regard to the changes needed in this area. In fact there is little need for the Department to look into the question at all as, as far back as 1996, the Law Reform Commission published a consultation paper on the issue and made its definitive and specific recommendations - published as the Heads of a Bill - back in 1998.

"Our Bill is based on those Heads of Bill prepared by the Law Reform Commission. It would give the Gardai additional powers of surveillance including, aural and visual surveillance, the interception of communications, the recording of conversations without the knowledge of all the parties and the surveillance of data equipment. It also includes appropriate safeguards, including a requirement that the surveillance would only be authorised in respect of serious crime and that the authorisation of a District Court (for long term surveillance) or a Garda not below the rank of Chief Superintendent (for shorter term operations).

"The Witness Protection Programme is ten years old this year, but the government has ignored a strong recommendation from the Court of Criminal Appeal that it should be place on a statutory basis.

"A working Witness Protection Programme is now an essential part of the Garda response to the changing nature of crime. But, if the programme is to operate successfully, it must be reliable and effective. It must withstand charges that evidence has been bought, that prosecution witnesses are tainted or that prosecution informants have operated with impunity and committed far more crimes than their evidence may have prevented.

"In August 2003, the Programme was strongly criticised by the Court of Criminal Appeal in the John Gilligan case. The court held that the procedures followed by the Garda Síochána compromised the evidence the two chief prosecution witnesses.

"The most effective way to deal with the issues about witness protection raised by the courts, and to ensure that all possible powers are available to put major criminals behind bars for a long time, is to put the scheme on a proper statutory basis, under proper and independent oversight so as to safeguard against any claims of abuse or miscarriage of justice. This would ensure that there was clarity as to what could be offered to witnesses by way of inducement to give evidence and make the whole scheme more secure and less vulnerable to challenge in the courts.

"I moved the first stage of both Bills this morning. This means that they will now be formally printed and will appear on the Dail Order Paper. I hope to secure the agreement of the Labour Parliamentary Party to have one or both taken in Labour's limited private members time in the near future. "

in the mining industry) wholly unrelated to any issue arising in the present proceedings.

(3) The form in which submissions are made to the Government as distinct from the contents of such submissions. In my view it would be appropriate to provide the title of the submission and the date thereof and to obliterate the remainder of the formal submission and the queries raised thereon."

Ambiorix Ltd & Others v Minister for Environment & Others,[56] is a Supreme Court decision in a similar vein. The grounds of appeal against the order of the trial judge granting discovery of documents including memoranda from government and cabinet documents, included here the contention that the Supreme Court should reconsider the decision and the principles laid down in *Murphy v Dublin Corporation*.[57]

Specifically it was submitted that a class or category of documents consisting of documents emanating at a level not below that of assistant secretary and for the ultimate consideration of Government Ministers should be absolutely exempt from production and should not be examined by a judge before privilege was granted to them, unless the judge was dissatisfied with the accuracy of the description of the document.

There was no contention as the Chief Justice noted in this case, that the documents were not relevant to the issues arising on the plaintiffs action. The Chief Justice stated that the flaw in the appellant's submission here was that it ignored the constitutional origin of the *Murphy* decision.

The principles set out in that case by Walsh J were as follows:—

"(1) Under the Constitution the administration of justice is committed solely to the judiciary in the exercise of their powers in the courts set up under the Constitution.

(2) Power to compel the production of evidence (which, of course, includes a power to compel the production of documents) is an inherent part of that judicial power and is part of the ultimate safeguard of justice in the State.

(3) Where a conflict arises during the exercise of the judicial power between the aspect of public interest involved in the production of evidence and the aspect of public interest involved in the confidentiality or exemption from production of documents pertaining to the exercise of the executive powers of the State, it is the judicial power which will decide which public interest shall prevail.

(4) The duty of the judicial power to make that decision does not mean that there is any priority or preference for the production of evidence over other public interests, such as the security of the State or the efficient discharge of the functions of the executive organ of the Government.

(5) It is for the judicial power to choose the evidence upon which it might act in any individual case in order to reach that decision."

The Chief Justice then went on to say that these principles led to certain

[56] Unreported Supreme Court, 23 July 1991.

practical conclusions applicable to a claim of privilege by the Executive of the nature here arising viz.:—

"(a) The Executive cannot prevent the judicial power from examining documents which are relevant to an issue in a civil trial for the purpose of deciding whether they must be produced.

(b) There is no obligation on the judicial power to examine any particular document before deciding that it is exempt from production, and it can and will in many instances uphold a claim of privilege in respect of a document merely on the basis of a description of its nature and contents which it (the judicial power) accepts.

(c) There cannot, accordingly, be a generally applicable class or category of documents exempted from production by reason of the rank in the Public Service of the person creating them, or of the position of the individual or body intended to use them."

The Chief Justice added, however, that he preferred to leave over further consideration of the issue of the safety of the State until it arose for decision in a case.

With regard to the issue of a privilege attaching to communications between third parties and government departments, taking the form of submissions to such departments by citizens, originating in the belief they would be treated in confidence, the Court noted there was no public interest in keeping such communications immune from production. The Chief Justice did point out however that a party obtaining documents by discovery, was prohibited from making use of such, other than for the purpose of the action, otherwise a contempt of court would be perpetrated.

McCarthy J's view is perhaps the most significant in locating the *Murphy* decision firmly in judicial sovereignty in the administration of justice: discovery of documents being part of the constitutional guarantee of fair procedures.

Whether or not this area of the law develops to subsume that relating to heads of privilege, its future is secure, having been intimately identified with judicial sovereignty and the separation of powers. Undoubtedly, in this jurisdiction at least, it will lead to an enhancement of the role of judicial discretion and scrutiny in an area, the territory of which is gradually being carved out.

[redacted] Set up a meeting (13)

Preparation of heads of Bill to amend the 1993 Interception Act to provide for statutory rules governing the gathering of information by the security forces by means of covert surveillance methods.

with people mentioned pl.

Secretary General,

Further to our discussion on 11 February, 2008, I attach a note for your information on the main issues which are relevant to this subject matter.

Initially, the matter arose of work connected with the "incorporation" of the European Convention on Human Rights into domestic law on 31 December, 2003 by means of the ECHR Act 2003. In order to be Convention compliant in this area, it is clear that we need to put in place a statutory regulatory regime. This matter was examined earlier by the Law Reform Commission in its 1998 Report on Privacy entitled "Surveillance and the Interception of Communications". It had come to the same conclusion even before further effect had been given to the Convention in our law. The substance of the Labour Party Private Members' Bill published last November largely follows the LRC's Draft Heads of a Bill. It has the advantage of being simpler and clearer in some respects, but a serious flaw is that it gives the oversight role to the Garda Ombudsman Commission.

The 2003 Act allows breaches of Convention rights to be pleaded directly before our courts. That has made the problem more acute. Secret surveillance operations are not illegal or prohibited under the Convention, but as the whole area is not regulated by law as the Convention requires, it would be open to a person to seek an award of damages for a breach of a Convention right by an organ of the State. It was the intention that an appropriate Bill, dealing solely with this issue and largely following the Law Reform Commission's model, would be enacted along with the proposed Privacy Bill. However, the previous Minister later indicated that this latter measure would not be a priority.

[redacted]

A possible factor in this decision was the increasing possibility that any such Bill would also have to take into account a number of other complex matters, some of which arose out of a review of security arrangements connected with Operation Amber and conducted by the former Garda Commissioner as far back as November 2001 following the 9/11 attacks in the USA. In addition, other related aspects were being put forward for consideration. These included (a) the complex question of the use in evidence not only of material on call content obtained through the use of the existing interception mechanism, but any information obtained through secret surveillance and targeting of suspects by other methods, and (b) the extension of intercept powers to the Revenue Commissioners (Customs and Excise) and now more recently the Garda Síochána Ombudsman Commission. With this growing agenda it appears that instead of amending the 1993 Act, a totally new and comprehensive measure might have to be prepared similar to the UK Regulatory and Investigatory Powers Act 2000.

The arguments in favour of such an approach are strong, though it would have to be acknowledged that such Bill would be controversial and the debate highly polarised as between civil liberties on the one hand and the requirements of state/public security

considerations on the other. However, a policy decision could still be taken to deal with the most pressing issue i.e., covert surveillance, in a relatively short Bill, and leave the other matters over for a more comprehensive Bill. Given the need for detailed consultations with the relevant Service Providers, ComReg, and the Department of Communications on many of the issues involved outside of the core objective, that approach would have certain advantages.

The attached note sets out the main issues in summary which could be considered for inclusion in new legislation and it takes account of points made by the garda Síochána at a meeting with [redacted] (NI and Security Division) and myself last November.

Summary:
A decision will have to be taken on the scope of a new Bill. The choice is between a comprehensive measure embracing most, if not all, of the issues mentioned above. That will be a complex task, necessitating discussions with outside bodies and Departments; It will take time. On the other hand a tightly focused Bill, amending the 1993 Act dealing with the secret surveillance aspects as well as other closely related matters, all of which I have indicated with an ⊛ on the attached note, could be produced relatively quickly. Ideally, we should decide on the best way forward in discussions between yourself, [redacted] of this Division, and Mr. [redacted]

[redacted]

Criminal Law Reform Division

13 February, 2008

[redacted]

13A

Outline of possible measures to be contained in a Covert Surveillance Bill, either by appropriate amendments mainly to the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993, or in a comprehensive new stand alone Bill.

Main provisions

These will provide principally as recommended by the Law Reform Commission -

- (*) The issuing of Surveillance Warrants by a Garda Officer not below the rank of Chief Superintendent for an initial period of, say, up to 28 days (not 14 days as the LRC suggest).

  Note: *This is similar to section 4 of the Labour Party Bill, which provides for an Authorisation for up to 7 days. That Bill also provides that if the circumstances do not reasonably allow, the need for a written application and Authorisation may be deferred. This could usefully be followed.*

- (*) After the expiry of this period, the Warrant may be extended by a Judge of the District Court for a further period of up to 3 months.

  Note: *This is similar to provisions in the Labour Party Bill.*

- (*) It will also be possible to apply for a Warrant from a Judge of the District Court from the beginning for up to 3 months, and this may be renewed from time to time by any such Judge for further periods of up to 3 months.

  Note: *This is similar to the Labour Party Bill.*

- (*) All such Judicial applications will be *ex parte*.

- ***Note:*** *No mention in Labour Party Bill*

- (*) A written Authorisation for a period of up to 3 months (renewable) from a Garda Officer not below the rank of Chief Superintendent will be required for the use of any overt or covert camera or audio recording of a person in a public place.

- ***Note:*** *No mention in Labour Party Bill.*

  Notes: (*) *The Labour Party Bill also has a useful provision dispensing with the need for an Authorisation, subject to a later report being made, dealing specifically with a case of exceptional urgency where a person may abscond, obstruct the course of justice, or commit a serious offence. This should be included in an official Bill. In general,*

the simpler and clearer provisions on the new Warrant procedure in the Labour Party Bill could be adopted also.

- (*) Supervision of the Warrant/Authorisation arrangements by the designated Judge of the High Court who makes an annual report to the Taoiseach on the operation of the interception provisions in the 1993 Act.

  Note: *The Labour Party Bill is completely unacceptable on this point. It provides for the Oversight/Supervisory role to be performed by the Garda Síochána Ombudsman Commission. Apart from the fact that this would entail an amendment of the Garda Síochána Act 2005, the primary role and functions of the Commission is to investigate general complaints against the Gardaí involving possible criminal offences, or for misbehaviour connected with breaches of the new Garda Disciplinary Code, or connected with deaths of or serious injury to persons as a result of Garda operations or while in Garda custody.*

Technical amendments to the 1983 and 1993 Acts recommended by the LRC

- (*) Amend section 98 of the 1993 Postal and Telecommunications Services Act to cover transmission by means of any public telecommunications system. At present that section refers only to Bord Telecom Éireann.

- (*) Replace the term " postal packet" with "postal communication" which term might be defined as "any communication in the course of transmission by post".

Additional Provisions (designed, inter alia, to address the operation amber issue, the absence of any provision in new operating licences for service providers to have an adequate capability to intercept and penalties)

  - (*) Provide for an amendment to section 10 of the 1983 Act for the purposes of the making of a direction to service providers for the cessation of mobile telephone services to an individual or any number of individuals, or a specified area where such is required in the national interest or in the interests of national security for such period as is specified in the direction.

  - (*) Provide for judicial oversight of such directions.

  - (*) Provide that no liability shall attach to the State, the Security Services(Gardaí or Defence Forces) or the Service Provider in question for any loss that may be caused by such cessation.

- (*) Provide for a statutory obligation to be placed on service providers to establish and maintain the capability to intercept messages, communications etc., delivered by the service provider, including the technical requirements necessary to ensure that that such capability is adequate.

- (*) Provide that failure by a service provider to comply with a direction shall be an offence punishable by conviction on indictment by a fine not exceeding €5 million.

- Provide that the costs of interception etc., associated with interception should be borne by service providers. This is controversial and may have constitutional implications.

- (*) Provide for new statutory based Protocols as between the Garda Síochána in relation to response times for production of intercept material.

- Provide for transfer of copies of relevant computer files on billing information to the Garda Síochána for easier and speedier access to call-related information.

- Provide for registration criteria to enable tracking of "pay as you go" phones, as referred to by the Designated Judge in his recent Report to the Taoiseach.

- (*) Provide that surveillance Warrants (and Authorisations) would allow persons other than members of the Gardaí access to property, the subject of the Warrant, for the purposes of initiating, maintaining or removing technical apparatus

Other possible amendments

- Provide for interception Warrants under the 1993 Act to be applied for by the Revenue Commissioners (Customs and Excise). This is the case in the UK insofar as HM Revenue and Customs is concerned. I recollect that a commitment may have already been given to Revenue in this regard.

- Provide similarly for the Garda Síochána Ombudsman Commission.

- Provide for intercept evidence and possibly, evidence obtained through covert surveillance methods to be used in evidence. At present there is general restriction on disclosure in the case of the former in section 12 of the 1993 Act. This coincides with the practice of the Gardaí not to use intercept product as evidence in prosecutions. They have not sought any change in this regard. However, the recently published Privy Counsel Chilcot Review of Intercept as Evidence (30 January,

2008), focuses attention on this complex policy issue in the neighbouring jurisdictions, which together with Malta and Ireland are the only common law countries subject to the ECHR. The main conclusion in that Review is that the UK Government should now take the next steps recommended to provide in statute for the use of intercept material as evidence subject to strict legal and operational requirements. No change is recommended for Scotland or Northern Ireland.

- The possible use in evidence of material legally obtained under foreign intercept or surveillance warrants in prosecutions before Irish Courts. This would not raise the same policy issues as domestically produced material. Such use would be permissible under EU Mutual Legal Assistance Instruments now being taken on board in the MLA Bill currently before the Dáil which will be enacted later this year. NO further legislative provision may be necessary in this regard, but the advice of the Attorney General in the matter will be required.

(14)

Secretary General,

For your information in connection with tomorrow's meeting with the Commissioner on the covert surveillance issue, I enclose -

- a copy of the latest draft of the proposed Heads of the Bill dated 1 August, 2008 which takes account of our previous discussion on the issue;

- a copy of a new Head 14 as requested by Mr. [redacted] on the outstanding issues on the technical and regulatory aspects of interception. In this connection it is worth noting that there is an overlap here with Heads 12 and 13 of the draft heads as they contain material on the same matter which was prepared in September, 2006 by Mr. [redacted]. There is a substantive matter to be considered here concerning the inevitable delays which will occur if the interception provisions are to be included in the Bill. There will have to be discussions with the Department of Communications and this will, of necessity, involve the Service Providers. As to the matter of costs, this is certainly going to be contentious and difficult. In the UK, the costs issue was dealt with in separate legislation – see my note to Head 14 for further information.

The important thing as I see it is for agreement to be reached tomorrow on the draft Heads on the covert surveillance proposals, with the inclusion possibly of one interception related matter – that providing for the operation amber aspect related to the power for the Gardaí to order the closedown of particular cellular networks.

The matter could then be discussed with the Minister and his approval obtained for the preparation of a Memo for Government for drafting and its submission to Government as soon as possible.

[redacted]
Criminal Law Reform Division

23 September, 2008

150

[redacted]/JELR/JSECTOR
23/09/2008 12:38

To [redacted]/JUSTICE, [redacted]/JUSTICE, [redacted]/JUSTICE
cc [redacted]@garda.ie
bcc
Subject new head re obligations etc on surveillance capability

[redacted],

Revised draft Head on this matter as promised.

I presume it will come up for discussion at tomorrow's meting.

As I have said in the note, there is a danger that getting involved with the Dept. of Communications in this area will delay progress on the operational issues.

[redacted]

Head 14 (new) on covert surveillance 23.09.08.doc

15 C

[redacted]/JELR/JSECTOR

23/09/2008 14:57

To [redacted]/JUSTICE@JUSTICE, [redacted]/JUSTICE@JUSTICE, [redacted]/JELR/JSECTOR@JUSTICE, [redacted]

cc

bcc

Subject Fw: Meeting on covert surveillance

Folks

Just wondering is it possible to get a briefing note for [redacted] for this meeting tomorrow.

Thanks

[redacted]

----- Forwarded by [redacted]/JELR/JSECTOR on 23/09/2008 14:56 -----

[redacted]/JELR/JSECTOR

11/09/2008 11:52

To [redacted]/JUSTICE, [redacted]/JUSTICE, [redacted]/JELR/JSECTOR, [redacted]/JUSTICE

cc [redacted]/JUSTICE@JUSTICE, [redacted]/JUSTICE@JUSTICE

Subject Meeting on covert surveillance

Folks

A meeting has been organised for the 24 September, at 12 noon in the Press Room on the 3rd Floor in 94 Stephens Green.

Please be advised that [redacted]; [redacted] and [redacted] will also be in attendance.

Kind Regards

[redacted]

[redacted]/JELR/JSECTOR
22/09/2008 10:17

To [redacted]@garda.ie
cc
bcc
Subject Draft material for discussion

[redacted]

Copy of material sent out by me on 1/8/08 attached as discussed.

[redacted]

Criminal Law Reform Division

Proposed Heads of Draft Surveillance Bill 31 July 08.doc

5F

[redacted]
[redacted]/JELR/JSECTOR
11/09/2008 10:25

To [redacted]/JUSTICE, [redacted]
[redacted]/JELR/JSECTOR, [redacted]/JUSTICE
cc
bcc
Subject Matter for information of the Sec. Gen.

[redacted]

The latest version of draft revised proposals for new legislation on covert surveillance operations by the Gardaí were circulated by me at the beginning of last month to all interested parties including the senior Gardaí involved. The intention was to have another round table meeting about this time with the Secretary General, the Deputy Commissioner (Ops) and his senior officers, and [redacted] and myself so that we could finalise the matter, present the proposals to the Minister, brief him on the details and, with his approval, proceed to get Government authority for drafting as soon as possible.

Could you draw the matter to the attention of the Secretary General please. I don't want to arrange a meeting until he has been informed of the position and his diary engagements

[redacted]

Criminal Law Reform Division.

[redacted]/JELR/JSECTOR
01/08/2008 14:31

To [redacted]/JUSTICE, [redacted]/JUSTICE, [redacted]/JUSTICE, [redacted]/JUSTICE, [redacted]/JUSTICE, [redacted]/JELR/JSECTOR
cc
bcc
Subject Latest Draft of Draft Surveillance Bill

Secretary General, ([redacted])
Assistant Secretaries([redacted])

Mr.[redacted]
Mr.[redacted]- (o forward to Chief Superintendent [redacted] and Superintendent [redacted] as discussed)

Ms. [redacted]

I attach the latest draft of the Covert Surveillance proposals for consideration.

I think they are pretty close to what we need in terms of a Government decision in principle to proceed with the drafting of a Bill. Could I suggest that we could have a meeting towards the end of the month to discuss views.

[redacted]

Criminal Law Reform Division

1 August 2008

Proposed Heads of Draft Surveillance Bill 31 July 08.doc

151

[redacted]

I have read the papers you received from [redacted] It strikes me that a major revision of the interception legislation would be required in order to give full effect to the preferred option of the NI/Security Division. In particular the provision of a new statutory framework involving the transfer of their existing legislative and other responsibilities in this area from the Department of Communications to Justice and extending interception requirements and capability to include voice,data, e-mail, internet etc.would require substantial changes to the 1993 Interception Act. In addition, such major changes could hardly be carried out without also addressing the issue of introducing statutory safeguards to deal with covert surveillance. In any event I do not think that the current Criminal Justice (Miscellaneous Provisions) Bill would be a suitable vehicle for such changes. You might want to consider therefore how best to approach this task. It would as I say be a major piece of legislation and would require line responsibility to be assigned and the establishment of a consultation process with the Department of Communications. Having said that, and pending your consideration of the matter, I have looked at the specific urgent problems that have been identified in the current regime, as mentioned in the papers, and have made a number of proposals for amendments that might be acceptable in a Miscellaneous Provisions Bill. These proposals presuppose that the existing regime limited to current interception arrangements remains in force until the bigger Bill is enacted.

Short-term proposals to deal with immediate problems

Provide for the following amendments to the Postal and Telecommunication Act 1983 -

the insertion of the following sections after section 110

"section 110A

Provide that, for the purposes of section 98 of this Act and the Interception of Postal Packets and Telecommunications Messages (Regulations) Act 1993, a direction under section 110 may include a direction to a service provider to establish and maintain the capability to

(1) (a) intercept [messages] [communications] delivered by the service provider. Such direction may lay down the technical requirements necessary to ensure that such capability is adequate, [and

(2) (b) cease service to any person or number of persons [or an area where the service provider provides a service]] .

section 110B

Provide that

(a) notwithstanding section 7(2) of the Postal and Telecommunications Services (Amendment) Act 1999, a direction under section 110 may include a direction to a service provider to cease service in the national interest [in the interests of national security] to a person or a number of persons [or to a specified area] for such period as may be specified in the direction and

(b) where service to a person or persons [or to an area] has been ceased pursuant to a direction under section 110 no liability shall attach to the [Minister], or the service provider [check the proper wording with Communications] which provides the service in question, for any loss that may be occasioned by such cessation.

section 110C

Provide that failure by a service provider to comply with a direction under section 110 shall be an offence and shall be punishable on conviction on indictment by a fine not exceeding €5 million."

Note:

These heads are intended to address the operation amber issue, the absence of any provision in the new operating licences requiring service providers to have an adequate capability to intercept and the issue of penalties to deal with the failure of service providers to comply with a section 110 direction. .

New section 110A (a) is self explanatory. How to ensure that the arrangements made are adequate would have to be worked out administratively. The issue of cost would also have to be addressed. Since the condition to maintain an adequate interception capability is not included in the new operator licenses there may be legitimate claims for compensation. In those circumstances if the State did not want to be liable for the costs of providing or, as the case may be, maintaining an interception capability it might be better to provide accordingly in the legislation, if it were constitutionally possible to do so. As respects (b) it is not clear whether this capability exists in the service providers or whether special arrangements are required. [The reference to "an area where the service provider provides a service" and to "specified area" and "area" in section 110B might be unwelcome]

Section 110B (a) provides that a direction under section 110 of the 1983 Act can be for the purposes of ceasing service to an individual or any number of individuals [or specified area]where such direction is required in the national interest (the phrase used in section 110 itself) [or in the interests of national security]. It is for consideration whether this approach, which aims to be fairly neutral as to the specific reasons and circumstances surrounding a shut down in service, would be sufficient to enable service to be shut down in a specific area without specifically providing for this. It would probably also be necessary to provide for judicial oversight of directions to cease service to an individual or individuals. Section 110B(b) provides that no liability shall attach to the service provider [and the State] where such a cessation occurs. Advice on the constitutionality of avoiding all liability on behalf of the State for a cessation of service will be required.

Section 110C provides for a penalty where a service provider fails to carry out a direction given under section 110, as amended by sections 110A and 110B. The fine proposed is steep but the bigger telecommunications' players can make huge profits.

Pending you consideration of the above possible approach I haven't drawn up heads to deal with the offence of disclosing details of interception and interference capabilities or in camera hearings (in so far as they may be permissable) to deal with offences relating to interception/interference.

[redacted]

20.09.2006

(P.S. I'll be away from the Office until 3 October)

CODIFYING THE CRIMINAL LAW: MODERN INITIATIVES

Stakeholders
Court: CJ Act 2006 | 2007 Report
DPP/AG:

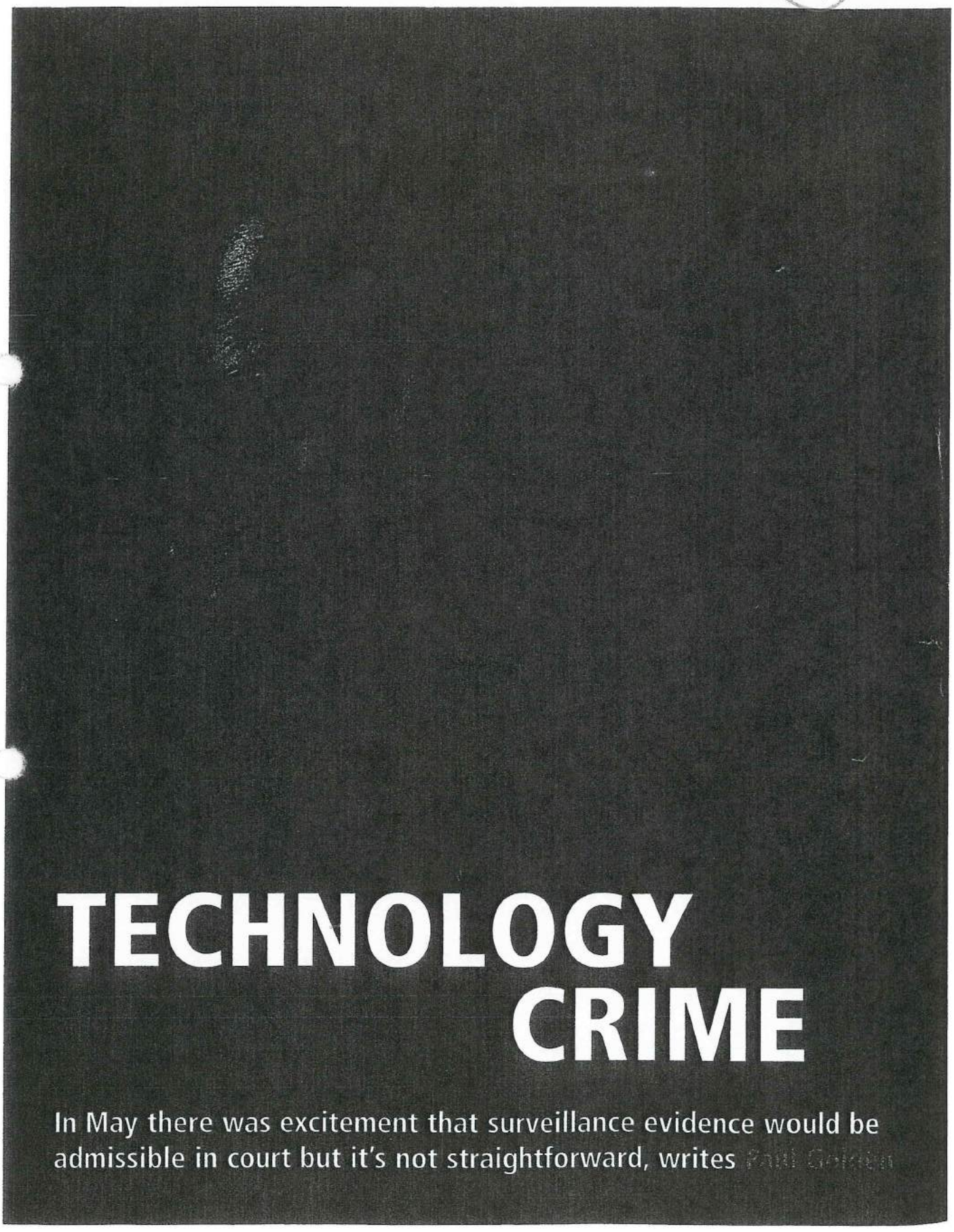
24/9/08 (16)

Rule 85 I. 7 No

one
(1) 3 months period. — should be period
— 3 months permissible ✓
(2) — offence — sects 8 — amended CJ Act 2006. ✓
"full report": — restrictive — judicial discretion (MS)
(3) (see below opt)
— use Superintendents for arrests and Head 4 (+ deputy).
Specialist 5 Grade.
Buy (4) an offence of the offence Force not otherwise covered (cleared)
— [New 6 Months.] 6 months [Get on side of AG]
Note 6 Months not zero
— double new
— over 6 Months ex by Rule
— do Rules new
(5) + Medical Report. "full set of tests"
(6) GSR exclusion

Criminal Law Codification Advisory Committee
An Coiste Comhairleach um Chódú an Dlí Choiriúil
DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM
AN ROINN DLÍ AGUS CIRT, COMHIONANNAIS AGUS ATHCHÓIRITHE DLÍ

(17)



TECHNOLOGY CRIME

In May there was excitement that surveillance evidence would be admissible in court but it's not straightforward, writes Paul Gilmartin

Earlier this year, when Brian Lehihan was Minister for Justice, he brought forward legislation that would make evidence obtained through Garda surveillance admissible in court. But this is exercising the minds of legal and civil liberties groups as well as those directly involved in the fight against crime.

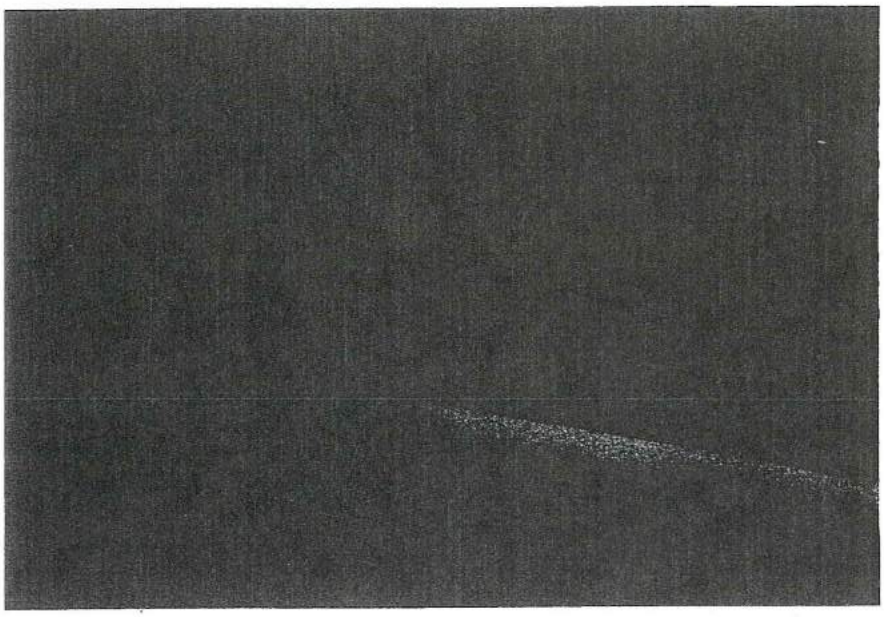
The European Convention on Human Rights, Article 8(1), provides that 'everyone has the right to respect for his private and family life, his home and his correspondence'. However, a public authority has a defence under Article 8(2) if the interference takes place 'in accordance with the law' and is necessary 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'.

Mark Kelly, director of the Irish Council for Civil Liberties (ICCL) said his organisation has made it clear to senior Garda management that the absence of a lawful basis for surveillance is problematic and potentially leaves Ireland in breach of article 8 of the European Convention on Human Rights.

"We need a clear legal framework within which surveillance can take place," he said, "but the law needs to make it clear that it must be necessary and that the interference with privacy has to be proportionate in a democratic society. We welcome the prospect of legislation but it will require to be human rights proofed."

In 1996 the Law Reform Commission produced a consultation paper on surveillance and the interception of communications, which was followed in 1998 by a report. One of the report's recommendations was that surveillance by a member of An Garda Síochána of any private place using any optical or hearing device, without the consent of the occupier, may be authorised either for an initial period (non-renewable) of 14 days by a chief superintendent or for any period of up to three months (renewable) by a judge of the district court.

The ICCL is very much in favour of what Mark Kelly describes as 'intelligence led policing' and would prefer that there is enhanced legal provision for the proportionate use of surveillance and other forms of intelligence led policing rather than a diminution in the rights of people accused of crimes.



REASONABLE EXPECTATION

Ironically, one of the most significant cases of this type to come before the European Court of Human Rights concerned a senior police officer. Alison Halford, who was assistant chief constable with Merseyside Police, claimed her office phone calls were intercepted because her employers were trying to obtain information to use against her in a sex discrimination claim she had brought against them.

"THE LAW NEEDS TO MAKE IT CLEAR THAT IT MUST BE NECESSARY AND THAT THE INTERFERENCE WITH PRIVACY HAS TO BE PROPORTIONATE IN A DEMOCRATIC SOCIETY"

In 1997 the European Court of Human Rights held that the interception of calls amounted to an unjustifiable interference with her right to respect for her privacy and correspondence contrary to Article 8(1). One of the factors underpinning the court's ruling was that Halford had not been warned that calls made using the internal telephone system were liable to be intercepted. She, therefore, had a reasonable expectation of privacy.

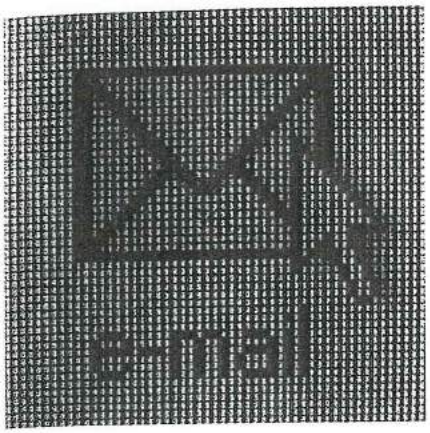
The Halford case forced a review of UK legislation and was a major factor in the establishment of the Regulation of Investigatory Powers Act, which legislates for using methods of surveillance and information gathering to help the prevention of crime, including terrorism.

Brian Lenihan made a commitment at the GRA annual conference to introduce similar legislation in Ireland, saying officials in his department had begun drafting legislation to provide a clear statutory basis for certain forms of surveillance. To date evidence obtained this way has not been used for legal and/or operational reasons.

Pat Rabitte, Labour's justice spokesperson said most people would have been shocked to learn that the Gardaí had no legal powers to undertake electronic surveillance of criminal suspects, although these powers form a central part of the anti-crime armoury of most other countries.

"There is, as far as we know, no rule of law or constitutional or human rights provision that prevents evidence acquired from lawful covert surveillance being presented in court," he said.

"But, historically, there has been a reluctance to do so, both in this jurisdiction and in the UK. The impression seems to be that covert surveillance is regarded as a useful tool for acquiring background information but not for acquiring evidence that will be put forward in court.



"The belief, in so far as we can judge it is that presenting as evidence in court rmation acquired from covert surveillance might expose to robust and public questioning Garda methods that, although lawful and necessary, should best be kept confidential."

PROOF

In other words, if the covert record of a conversation is presented as proof in court, the prosecution will be asked why they put in the recording equipment – in other words, what did they know at that stage that motivated them to mount surveillance on this suspect? The risk would be, explained Rabitte, that policing methods and their sources of information, which are necessarily confidential, would be exposed to a degree of publicity that would destroy their future usefulness.

"There seems therefore to be an oric institutional reluctance to expose investigative policing methods to the sort of exposure that would inevitably result from a decision to make direct use as evidence in court of the information acquired from covert surveillance. But a decision seems to have been taken that a complete ban on the use in evidence of information acquired from such methods is self-defeating. Excluding from evidence all the material so acquired can prevent cases being brought to a successful prosecution."

Rabitte, who last year introduced a private members bill 'to provide additional powers for the Garda Síochána with respect to surveillance; and to provide for related matters' acknowledged that there is a balance to be struck between protecting confidential policing methodology and making the most effective use of the information available for a criminal prosecution.

This view is shared by Data Protection Commissioner spokesperson Gary Davis. "Such a balance is provided, for example, in our legislation permitting the Gardaí to covertly intercept and record phone conversations of suspects (the Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993). The legislation provides that such covert surveillance is only permitted where serious crime is involved and subject to safeguards which are specified in the legislation."

GARDA TECHNIQUES

However, the commissioner has repeatedly expressed his unhappiness with legislation in relation to retention of telecommunications data (the Criminal Justice (Terrorist Offences) Act 2005, Part 7). In his view, by requiring telecommunications companies to retain traffic and location data on everyone - including the great majority of people who are not involved in criminal activity – the legislation is disproportionate.

"The fact that the Gardaí can access such data in relation to any crime, however minor, makes matters worse," said Davis. "A situation, as with telephone interception, where action is targeted at suspects rather than the whole population is highly preferable. In the case of telecommunications data, this can be achieved by providing power to order the retention of the data of people who are suspects."

"THE LEGISLATION PROVIDES THAT SUCH COVERT SURVEILLANCE IS ONLY PERMITTED WHERE SERIOUS CRIME IS INVOLVED AND SUBJECT TO SAFEGUARDS WHICH ARE SPECIFIED IN THE LEGISLATION"

The commissioner's view is that any new forms of surveillance should be similarly targeted and subject to legal constraints to prevent abuse. "From a privacy perspective, the main risk is of interfering with the right to privacy of innocent individuals," Davis added. "This is why it is important that such surveillance be subject to proper legal restrictions."

It is understood that the Minister was not in favour of using covertly taped phone conversations. He said that while the use of such evidence may in some cases help secure convictions "we have to avoid as much as possible Garda techniques for intelligence gathering being compromised."

Fine Gael justice spokesman Charlie Flanagan questioned this logic. "Stopping short of allowing the use of taped phone conversations is a lost opportunity, as it could make vital evidence available which would otherwise be inadmissible. Case law suggests that telephone evidence would be admissible under the constitution on the basis that the public interest is served."

Aengus Ó Snodaigh, Sinn Fein justice spokesperson said the bill should make provisions governing when it is permissible to engage in covert surveillance in the first place and what forms of surveillance are proportionate in what scenarios as well as vesting the power of authorisation in judges.

Charlie Flanagan also suggested that more manpower should be devoted to surveillance. "Greater resources are required across An Garda Síochána, including in the area of surveillance. I have called for 24 hour surveillance operations to be mounted on leading gangland figures to the extent that they are unable to conduct their criminal operations. However, this measure is entirely dependent on adequate resourcing and it is particularly worrying that the Government is now preparing to cut back on overtime for Operation Anvil, which has proved so effective in tackling gangland crime."

Whatever new legislation comes in needs to include a human rights reasoning test and the European Court of Human Rights is very clear on that point, concluded Mark Kelly. "The person using or authorising surveillance has to show it is lawful, necessary and proportionate and we would like to see these principles being respected in the decision-making process. The decision maker has to be able to be held to account."

The extent to which the ICCL (or any other organisation) can influence the wording of the final bill depends on whether the department issues a draft bill or provides the heads of the bill to interested parties. Either way, its director explained that if the wording raises human rights concerns, these would be raised with the Minister. **GR**

(18)

[redacted]/JUSTICE
07/11/2007 16:30

To [redacted]/JUSTICE@JUSTICE, [redacted]
[redacted]IELR/JSECTOR@JUSTICE
cc
bcc
Subject Meeting re Surveillance legislation

[redacted] has suggested Thursday 15 November at 11.00am for a meeting. He will be accompanied by [redacted] and one other Garda (no name yet).

Can you let me know if this suits you. I'll arrange for the conference room in 94 to be booked.

[redacted]
07/11

(9)

Fears over wire-tap evidence

LONDON TIMES 5/11/07

Francis Elliott, Philip Webster
Richard Ford

The Home Secretary wants an independent review into whether to allow the use of intercept evidence in court to protect secret new eavesdropping methods.

Jacqui Smith is understood to be particularly concerned to prevent terrorists from learning about new techniques for listening in to calls made over the internet.

Hopes were raised that the Government would overrule the objections of the security and intelligence services when an independent review into the admissibility of wire-tap evidence was set up this summer. The review group, made up of Privy Counsellors, has been working without publicity since July. It is expected to take evidence from prosecutors, MI5, GCHQ and others before recommending whether the law should be changed.

Sir Ken Macdonald, the Director of Public Prosecutions, is among those who want juries to see transcripts of tapped calls. He is supported by David Davis, the Shadow Home Secretary, and Nick Clegg, the Liberal Democrat spokesman for home affairs, who both argue that the move could reduce the need for more draconian measures.

The Home Secretary, however, is not convinced and believes that any benefits may well be outweighed by the risks, particularly of revealing to terrorists the capabilities of GCHQ.

In the past ministers have played down the value of intercepts, saying that encrypted communication over the internet could not be tapped. But it is understood that GCHQ may have cracked the problem and could already be listening in to such calls. In assessing the balance of risk the Privy Council group has been told to consider the "exposure of interception capabilities and techniques". The Home Secretary indicated that she was hardening her position against making wire-tap evidence admissible when she gave evidence to MPs last month.

OFFICE OF THE SECRETARY GENERAL, DEPARTMENT OF JUSTICE, EQUALITY AND LAW REFORM
OIFIG AN ARD-RÚNAÍ, AN ROINN DLÍ AGUS CIRT, COMHIONANNAIS AGUS ATHCHÓIRITHE DLÍ

20

20/08/08

[redacted]
Principal Officer
Criminal Law Reform

Re: Garda Síochána (Powers of Surveillance) Bill 2007

Dear [redacted]

The Secretary General has requested that I forward the enclosed document to you for your attention. The enclosed document is a copy of the French Act No. 2004 – 04, (9th of March, 2004), which legislates for provisions relating to new forms of crime and delinquency control.

Yours sincerely,

[redacted]
Secretary General's Office

94 St. Stephen's Green, Dublin 2 / 94 Faiche Stiabhna, Baile Átha Cliath 2
Telephone/Teileafón: (01) 602 8316 Fax/Facsuimhir: (01) 661 6612 E-mail/Ríomhphoist: info@justice.ie

204.

LAWS

ACT No 2004 -204 of 9 March 2004 adjusting justice to the crime evolutions (1)

NOR: JUSX0300028L

The National Assembly and Parliament adopted,

Having regard to the ruling of the Constitutional Council No 2004-492 DC of 2 March 2004;

The President of the Republic promulgates the law whose content follows:

TITLE I

PROVISIONS RELATING TO THE NEW FORMS OF CRIME AND DELINQUENCY CONTROL

CHAPTER I

Provisions relating to the organised crime and delinquency control

Section 1

Provisions relating to the special procedure applicable to organised crime and delinquency

Article 1

The Book IV of the Code of Criminal Procedure is completed by a title XXV which is drafted as follows:

TITLE XXV

"PROCEDURE APPLICABLE TO ORGANISED CRIME AND DELINQUENCY"

"*Art. 706-73* - The procedure applicable to the inquiry, prosecution, investigation and trial of the following offences is as provided for by the present Code, subject to the provisions of the present title:

"1° Murder committed by an organised gang provided for by the 8° of article 221-4 of the Penal Code;

"2° Torture and acts of barbarity committed by an organised gang provided for by the article 222-4 of the Penal Code;

"3° Offences relating to drug trafficking provided for by articles 222-34 to 222-40 of the Penal Code;

"4° Offences relating to kidnapping and false imprisonment committed by an organised gang provided for by article 224-5-2 of the Penal Code;

"5° Aggravated offences relating to human trafficking provided for by articles 225-4-2 to 225-4-7 of the Penal Code;

"6° Aggravated offences relating to procuring provided for by articles 225-7 to 225-12 of the Penal Code;

"7° Theft committed by an organised gang provided for by article 311-9 of the Penal Code;

"8° Aggravated offences of extortion provided for by articles 312-6 and 312-7 of the Penal Code;

"9° Offence of destroying, defacing or damaging property committed by an organised gang, provided for by article 322-8 of the Penal Code;

"10° Offences relating to counterfeiting provided for by articles 442-1 and 442-2 of the Penal Code;

"11° Offences which constitute acts of terrorism provided for by articles 421-1 to 421-5 of the Penal Code;

"12° Offences relating to weapons committed by an organised gang provided for by article 3 of the Law of 19 June 1871 which repealed the Decree of 4 September 1870 on the manufacture of military weapons, articles 24, 26 and 31 of the Decree of 18 April 1939 determining regulations relating to war material, weapons and munitions, article 6 of Law No 70-575 of 3 July 1970 reforming the regulation of gunpowder and explosive substances, article 4 of Law No 72-467 of 9 July 1972 prohibiting the development, manufacturing, possession, stocking, acquisition and transfer of biological and toxic weapons;

"13° offences relating to the assistance in the illegal entry, movement and residence of a foreigner in France committed by an organised gang, provided for by the fourth paragraph of I of article 21 of Order No 45-2658 of 2 November 1945 relating to the conditions of entry and residence for foreigners in France;

"14° money laundering offences provided for by articles 324-1 and 324-2 of the Penal Code, or receiving stolen property provided for by articles 321-1 and 321-2 of the same Code, of the products, income and items resulting from the offences mentioned in 1° to 13°;

"15° offences of criminal association provided for by article 450-1 of the Penal Code, where their aim is the preparation of one of the offences mentioned in 1° to 14°.

"For the offences mentioned in 3°, 6° and 11°, the provisions of the present title as well as those of titles XV, XVI and XVII are applicable, unless otherwise indicated.

"*Art. 706-74* - Where the law so provides, the provisions of the present title are also applicable:

"1° to offences committed by organised gangs, other than those which come under article 706-73;

"2° to offences of criminal association provided for by the second paragraph of article 450-1 of the Penal Code, other than those which come under 15° of article 706-73 of the present Code.

"CHAPTER I

"JURISDICTION OF SPECIALISED TRIBUNALS

"*Art. 706-75* - The territorial jurisdiction of a district court or an assize court may be extended into the jurisdiction of one or more appeal courts for the purposes of inquiries, prosecutions, investigations and judgment of offences which fall within the scope of articles 706-73, with the exception of 11°, or 706-74, in cases which are or appear to be extremely complex.

"This jurisdiction extends to related offences.

"A decree lists these jurisdictions and their territorial areas; they are composed of a section of the public prosecutor's office and specialist investigation and judgment divisions to take cognizance of these offences.

"*Art. 706-76* - The district prosecutor, investigating judge, specialist correctional unit of the district court and the assize court mentioned under article 706-75, are competent over the whole of the jurisdiction determined in accordance with this article, which is concurrent with that which arises under articles 43, 52, 382 and 706-42.

The jurisdiction seized remains competent, whatever inculpations are established at the closure or judgment of the case. However, if these facts constitute an

Jenny's doc (21)

[redacted]/JUSTICE
04/04/2008 16:43

To [redacted]/JELR/JSECTOR@JUSTICE
cc
bcc
Subject Re: Fw: Points arising from discussion with Gardaí

[redacted]

I think this approach is a considerable improvement. I would just add two little teasers for you.

(a) Would it be better for urgent intrusive surveillance warrants to be issued by Assistant Commissioners and above rather than Chief Supers as a safeguard. Previous experience might suggest that the line Chief Super is either too close to the investigation to be objective or signs warrants without careful reflection. A/Cs would normally be that bit removed.

(b) You will have to consider the position of a vehicle or boat that might also be someone's home (houseboat, camper van ?)

[redacted]

[redacted]/JELR/JSECTOR

[redacted]
[redacted]/JELR/JSECTOR
04/04/2008 11:51

To [redacted]/JUSTICE@JUSTICE
cc
Subject Fw: Points arising from discussion with Gardaí

[redacted]

For information only at this stage.

----- Forwarded by [redacted]/JELR/JSECTOR on 04/04/2008 11:50 -----

[redacted]
[redacted]/JELR/JSECTOR
04/04/2008 11:48

To [redacted]/JUSTICE, [redacted]/JUSTICE
cc
Subject Points arising from discussion with Gardaí

[redacted]

Arising from our 21/2 hours discussion with the Gardaí yesterday, I have set out below what I think are the main points which will form the basis for a re redraft of the Heads of the Bill on the substantive issue of covert surveillance. You will see that I have had to fill in some blanks.

Would you throw your eyes over it and let me know if I have missed anything or misinterpreted what we wanted to achieve?

Thanks

[redacted]

Criminal Law Reform Division.

Draft 2 **4 April, 2008**

The draft Heads of a Garda Síochána (Regulation of Covert Surveillance) Bill to provide for the issuing of authorisations for the purposes of covert surveillance, amendments to the Interception of Postal Packets and Telecommunications Messages Act (Regulation) Act 1993, and related matters, were discussed with senior members of the Garda Síochána on 3 April, 2008.

The main changes to be made to the draft insofar as the covert surveillance issue is concerned are as follows :-

(a) to ensure that normal policing surveillance activities such a, say, keeping an eye on or watching a particular person, persons or premises at the local level, are not brought within the scope of the Bill;

(b) to make a distinction between what is defined in the Bill as intrusive and non-intrusive surveillance activities. The former will involve surreptitious entry onto premises, including a dwelling, for the purposes of search or the placing of covert recording devices, and for their maintenance and removal. In these cases it is proposed that a judicial authorisation will be required. Non-intrusive surveillance will normally involve the placing of tracking devices (which may be capable of recording voices) on vehicles of any description, or recording images or voices from a remote location outside of a premises or dwelling;

(c) to provide that authorisations for intrusive surveillance may only be issued by a Judge, on the application of an officer not below the rank of Chief Superintendent. It is proposed that an application for such an authorisation will be made on an ex-parte basis to a Judge of the Circuit Court. The President of the Circuit Court will have the power to designate Judges (and alternatives) for this purpose. The authorisation will be valid for a period of up to 3 months. It will be renewable on further grounded applications for subsequent periods of up to 3 months.

(d) to provide that authorisations for non-intrusive surveillance may be applied for by members not below the rank of Superintendent and issued by a Chief Superintendent. They will be valid for a period of 28 days and will be renewable on further grounded applications for subsequent periods of 28 days.

(e) to provide that cases of exceptional urgency necessitating the immediate use of intrusive surveillance, an authorisation may be issued by a Chief Superintendent on the application of a an officer not below the rank of Superintendent. This authorisation will be valid for a period of [3] days during which time a grounded application must be made to a designated Judge for the issue of a Judicial authorisation which will cover the period in the initial Chief Superintendent's authorisation and grant a new authorisation for an additional period of up to 3 months, if required. Provision will be made for the

validity of the previous emergency authorisation and any action taken thereunder, if the Designated judge has any reservations about its legality.

[redacted] 21/2

[redacted]r/JUSTICE
04/04/2008 15:11

To [redacted]JELR/JSECTOR@JUSTICE
cc [redacted]/JUSTICE@JUSTICE
bcc
Subject Re: Points arising from discussion with Gardaí

History: This message has been replied to.

[redacted]

From my recollection, I think you've hit most nails on the head. For what it's worth, I'll add the following:

Head 1
Change definition of 'member of the Garda Síochána' here and throughout Heads to ensure consistency of use.

Definition of 'surveillance' requires redrafting to reflect your points (a) and (b).

Expand definition of 'place' to include reference to 'object' and standardise throughout Heads.

Head 2
Reference should be to 'security of the State' rather than 'national security'. ✓

Head 3
Include reference to 'object' in (1)(a).

Point (c)
As you state, we want the power to designate judges, preferably in Dublin, to authorise applications. However, their title of 'designated judge' should be changed so that we don't become confused with 'the designated judge' providing oversight, as per Head 10.

Point (e)
On your point (e), my memory is that the authorisation should be valid for 7 (rather than 3) days.

Hope this helps.

[redacted]
Security & Northern Ireland Division

4 April, 2008

[redacted]/JELR/JSECTOR

[redacted]/JELR/JSECTOR
04/04/2008 11:48

To [redacted]/JUSTICE@JUSTICE, [redacted]/JUSTICE@JUSTICE
cc
Subject Points arising from discussion with Gardaí

[redacted]

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[redacted]

Criminal Law Reform Division.

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[redacted] 21B

[redacted]/JUSTICE
04/04/2008 15:53

To [redacted]/JELR/JSECTOR@JUSTICE
cc [redacted]/JUSTICE@JUSTICE
bcc
Subject Re: Points arising from discussion with Gardaí

[redacted],

I know that [redacted] has given some obs already. The following points struck me:

- Para. (a): The reference to "at the local level" may need to be looked at as ordinary policing activities involving surveillance (even at present) can have a national dimension and it might be interpreted as implying that anything involving police not connected with the locality should come within the terms of the Bill.
- Para. (b): Is it in order to provide that "search" may be part of the reason for entry? Will this only confuse matters?
- Para (b): This paragraph also provides that a tracking device (which may be capable of recording voices) is non-intrusive. I thought that the view was taken that such a dual device made the surveillance intrusive
- Para. (c): For the present perhaps we should put square brackets arounf references to the Circuit Court. I know I suggested that the Circuit Court could be the authorising court but by analogy with search warrants it might be as well to leave open the possibility that the District Court would do this. We will still have to resolve the issue of whether all DJ's will have the power or certain nominated DJ's.

[redacted]
04/04

[redacted]/JELR/JSECTOR

[redacted]/JELR/JSECTOR
04/04/2008 11:48

To [redacted]/JUSTICE@JUSTICE, [redacted]/JUSTICE@JUSTICE
cc
Subject Points arising from discussion with Gardaí

[redacted],

Arising from our 21/2 hours discussion with the Gardaí yesterday, I have set out below what I think are the main points which will form the basis for a re redraft of the Heads of the Bill on the substantive issue of covert surveillance. You will see that I have had to fill in some blanks.

Would you throw your eyes over it and let me know if I have missed anything or misinterpreted what we wanted to achieve?

Thanks

[redacted]

Criminal Law Reform Division.

Draft 2 4 April, 2008

The draft Heads of a Garda Síochána (Regulation of Covert Surveillance) Bill to provide for the issuing of authorisations for the purposes of covert surveillance, amendments to the Interception of Postal Packets and Telecommunications Messages Act (Regulation) Act 1993, and related matters, were discussed with senior members of the Garda Síochána on 3 April, 2008.

The main changes to be made to the draft insofar as the covert surveillance issue is concerned are as follows :-

(a) to ensure that normal policing surveillance activities such a, say, keeping an eye on or watching a particular person, persons or premises at the local level, are not brought within the scope of the Bill;

(b) to make a distinction between what is defined in the Bill as intrusive and non-intrusive surveillance activities. The former will involve surreptitious entry onto premises, including a dwelling, for the purposes of search or the placing of covert recording devices, and for their maintenance and removal. In these cases it is proposed that a judicial authorisation will be required. Non-intrusive surveillance will normally involve the placing of tracking devices (which may be capable of recording voices) on vehicles of any description, or recording images or voices from a remote location outside of a premises or dwelling;

(c) to provide that authorisations for intrusive surveillance may only be issued by a Judge, on the application of an officer not below the rank of Chief Superintendent. It is proposed that an application for such an authorisation will be made on an ex-parte basis to a Judge of the Circuit Court. The President of the Circuit Court will have the power to designate Judges (and alternatives) for this purpose. The authorisation will be valid for a period of up to 3 months. It will be renewable on further grounded applications for subsequent periods of up to 3 months.

(d) to provide that authorisations for non-intrusive surveillance may be applied for by members not below the rank of Superintendent and issued by a Chief Superintendent. They will be valid for a period of 28 days and will be renewable on further grounded applications for subsequent periods of 28 days.

(e) to provide that cases of exceptional urgency necessitating the immediate use of intrusive surveillance, an authorisation may be issued by a Chief Superintendent on the application of a an officer not below the rank of Superintendent. This authorisation will be valid for a period of [3] days during which time a grounded application must be made to a designated Judge for the issue of a Judicial authorisation which will cover the period in the initial Chief Superintendent's authorisation and grant a new authorisation for an additional period of up to 3 months, if required. Provision will be made for the validity of the previous emergency authorisation and any action taken thereunder, if the Designated judge has any reservations about its legality.

21C

[redacted] JELR/JSECTOR
04/04/2008 11:40

To [redacted] JUSTICE, [redacted] JUSTICE
cc
bcc
Subject Points arising from discussion with Gardaí

[redacted]

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[redacted]

Criminal Law Reform Division.

Draft 2 **4 April, 2008**

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21D

[redacted]
[redacted]/JELR/JSECTOR
04/04/2008 11:48

To [redacted]JUSTICE@JUSTICE, [redacted]
[redacted]JUSTICE@JUSTICE
cc
bcc
Subject Points arising from discussion with Gardaí

[redacted],

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Thanks

[redacted]

Criminal Law Reform Division.

Draft 2 **4 April, 2008**

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216

[redacted]/JUSTICE
01/04/2008 14:07

To [redacted]/JELR/JSECTOR@JUSTICE
cc [redacted]/JUSTICE@JUSTICE
bcc
Subject Surveillance Bill

[redacted]

Would Thursday @ 11 o'clock here in 94 St Stephen's Green suit you for a meeting with the Gardaí on the Surveillance Bill?

[redacted]
01/04

EUROPEAN COURT OF HUMAN RIGHTS

22

490
1.7.2008

Press release issued by the Registrar

CHAMBER JUDGMENT
LIBERTY & OTHER ORGANISATIONS v. THE UNITED KINGDOM

The European Court of Human Rights has today notified in writing its Chamber judgment[1] in the case of ***Liberty & Other Organisations v. the United Kingdom*** (application no. 58243/00).

The Court held unanimously that there had been a **violation of Article 8** (right to respect for private and family life and correspondence) of the European Convention on Human Rights.

Under Article 41 (just satisfaction) of the Convention, the Court considered that the finding of a violation constituted sufficient just satisfaction for any non-pecuniary damage caused to the applicants, and awarded them 7,500 euros (EUR) for costs and expenses. (The judgment is available only in English.)

1. Principal facts

The applicants are Liberty, British Irish Rights Watch and the Irish Council for Civil Liberties, a British and two Irish civil liberties' organisations based in London and Dublin, respectively.

The case concerned the applicant organisations' allegation that, between 1990 and 1997, their telephone, facsimile, e-mail and data communications, including legally privileged and confidential information, were intercepted by an Electronic Test Facility operated by the British Ministry of Defence.

The applicants lodged complaints with the Interception of Communications Tribunal, the Director of Public Prosecutions and the Investigatory Powers Tribunal to challenge the lawfulness of the alleged interception of their communications, but to no avail. The local courts found, in particular, that there was no contravention to the Interception of Communications Act 1985.

2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 9 September 1999.

Judgment was given by a Chamber of seven judges, composed as follows:

Lech **Garlicki** (Polish), ***President***,
Nicolas **Bratza** (British),
Ljiljana **Mijović** (citizen of Bosnia and Herzegovina),
David Thór **Björgvinsson** (Icelandic),
Ján **Šikuta** (Slovak),
Päivi **Hirvelä** (Finnish),
Mihai **Poalelungi** (Moldovan), ***judges***,

and also Lawrence **Early**, ***Section Registrar***.

3. Summary of the judgment[2]

Complaints

The Court's judgments are accessible on its Internet site (http://www.echr.coe.int).

Press contacts
Adrien Raif-Meyer (telephone: 00 33 (0)3 88 41 33 37)
Tracey Turner-Tretz (telephone: 00 33 (0)3 88 41 35 30)
Paramy Chanthalangsy (telephone: 00 33 (0)3 90 21 54 91)
Sania Ivedi (telephone: 00 33 (0)3 90 21 59 45)
The European Court of Human Rights *was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.*

[1] Under Article 43 of the Convention, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

[2] This summary by the Registry does not bind the Court.

- -

(24)

[redacted]/JUSTICE
25/02/2008 14:24

To [redacted]ELR/JSECTOR@JUSTICE
cc [redacted]JUSTICE@JUSTICE [redacted]
[redacted]USTICE@JUSTICE
bcc

Subject Re: Covert Surveillance Draft Heads

[redacted]

I mentioned at the Program Meeting that you had produced draft heads and that the intention would be that ourselves, yourselves and the Gardaí would get together to go through them. The Minister is anxious to talk about the matter at some stage. I got the impression that this would be after the meeting I've mentioned but before we start preparing a memorandum. [redacted] will be in touch with you at some stage to set up a meeting.

[redacted]

From: [redacted] on 25/02/2008 12:35

From: [redacted] on 25/02/2008 12:35

To: [redacted]/JUSTICE@JUSTICE [redacted]JUSTICE@JUSTICE [redacted]
[redacted]JUSTICE@JUSTICE
cc:
Fax to:
Subject: Re: Covert Surveillance Draft Heads

Thanks for the comments on the draft [redacted]

1. Your point about the role of Chief Superintendents is well made. No doubt we'll return to it in the course of further discussions. Both the LRC and the Private Member's Bill fix the threshold at that level, but they differ in the duration of the authorisation. The former suggest 14 days and the latter go for 7 days. Maybe that's where the axe will fall as my suggested period is 28 days!

On the other hand, the Gardaí are coming from a situation where they have a totally unregulated system at the moment. It will be difficult enough for them to adapt. If we move the grade up to Assistant Commissioner level it could cause practical problems for them in terms of access and availabilty. This might have the unwanted side effect of relatively "ordinary cases" being forced by them out of expediency into the Head 6 category of surveillance without authorisation. We don't want that either. At the end of the day we might settle for the Chief Superintendent, but cut the period of validity to, say, 7,10 or 14 days.

2. As to admissibility in evidence of material/information obtained through the use of *covert surveillance,* the Gardaí don't seem to be too keen on it so I have left it out - for the moment. We will raise the matter again at the next meeting with them. In the UK, material obtained through covert surveillance may be used as evidence in criminal proceedings under the common law and statute. The product of such surveillance is also subject to the ordinary rules for retention and disclosure of material under Criminal Procedure and Investigations Act 1996.

However, the general rule in relation to *intercept material* in the UK (like ourselves) is that neither the possibility of interception or the intercepted material itself plays any part in legal proceedings (section 17 of The Regulation of Investigatory Powers Act 2000). This position may change. The use in evidence of call content obtained through intercepts in the UK is the subject of a very recent (January, 2008) Report on the Review by the Privy Council to the Prime Minister and the Home Secretary. They have agreed with the principle that *intercept as evidence* should be introduced only if, on balance, it would at one and the same time safeguard national security, facilitate bringing cases to trial, and allow the effective use as intercept as intelligence to continue. They conclude that it would be possible to provide accordingly in England and Wales only, by developing a robust legal model based in statute and ECHR compatible. A new cross party group to examine the detailed arrangements necessary to implement the proposed changes has just been established. My own feeling is that the Gardaí would

not welcome any change in the position here.

3. Head 4 already provides for applications for authorisations to be made *ex parte* and in private, but as you say, we should also include a local jurisdictional provision.

I'm copying this material to [redacted] and [redacted] for their information. [redacted] told me that this subject was mentioned briefly by the Minister at the Programme Meeting this morning. The Minister has asked for a meeting to discuss the various issues involved. I already have a briefing note which I prepared for the Sec. Gen. in connection with a meeting he had with the Commissioner recently, which could be edited down a bit to suit. Such a meeting would be very useful because a decision has to be taken now on two fundamental points about the precise scope of the legislation and our attitude to the relevant Labour Party Private Member's Bill - some aspects of which dealing with the issuing of authorisations are useful and could be followed in the Bill, as I have proposed.

The draft heads which I have sent to you have been prepared in the basis of the most pressing matters to be addressed. This is on the basis that if we are to deal with all the issues that have been raised, particularly those on the technical regulatory side, there are strong arguments for a detailed Bill along the lines of the UK Act of 2000. This would take some time because of the consultations that would have to take place with other Departments/Offices and the various service providers.

[redacted]

Criminal Law Reform Division

25 February, 2008.

24A

[redacted]/JELR/JSECTOR
25/02/2008 10:10

To [redacted]/JUSTICE, [redacted]/JUSTICE, [redacted]/JUSTICE
cc
bcc
Subject Re: Covert Surveillance Draft Heads

Thanks for the comments on the draft [redacted].

1. Your point about the role of Chief Superintendents is well made. No doubt we'll return to it in the course of further discussions. Both the LRC and the Private Member's Bill fix the threshold at that level, but they differ in the duration of the authorisation. The former suggest 14 days and the latter go for 7 days. Maybe that's where the axe will fall as my suggested period is 28 days!

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The draft heads which I have sent to you have been prepared in the basis of the most pressing matters to be addressed. This is on the basis that if we are to deal with all the issues that have been raised, particularly those on the technical regulatory side, there are strong arguments for a detailed Bill along the lines of the UK Act of 2000. This would take some time because of the consultations that would have to take place with other Departments/Offices and the various service providers.

Criminal Law Reform Division

25 February, 2008.

24B

[redacted]/JUSTICE To [redacted]/JELR/JSECTOR@JUSTICE
22/02/2008 17:55 cc
bcc
Subject Re: Covert Surveillance Draft Heads

[redacted]

Good work.

A few thoughts -

1. I would have some rservations about allowing a Chief Super authorise Gardaí to enter someone's home for surveillance purposes. I know the period is limited to days but their track record is not good and what is to stop them giving futher authorisation every few days.

2. Are we dealing with admissibility of such material ?

3. If I want to have surveillance in cork does the application have to be made to in the relevant court district and should we specify such applications are to be heard in private?

[redacted]

[redacted]/JELR/JSECTOR

[redacted]/JELR/JSECTOR To [redacted]/JUSTICE@JUSTICE, [redacted]/JUSTICE@JUSTICE, [redacted]/JUSTICE@JUSTICE
22/02/2008 15:48 cc
Subject Covert Surveillance Draft Heads

[redacted]

For information and any comments.

As you will see, in relation to the pure regulatory aspects, I have drawn on both the Law Reform Commission's draft heads of a Bill published in their 1998 Report and Labour Party Private Members' Bill currently before the Dáil. The latter is quite good in my opinion in this area as it simplifies and approaches the matter in a pragmatic way. However, its oversight section is way off in proposing to give the GSOC a role. This is just not on on several grounds. It already has powers in the area of access to subscriber information under the 1993 Act provision, and it has already asked to be given interception powers which I'm ignoring. The freedom of information provision in section 8 is way off.

Would you copy the material to the relevant people in Garda HQ so that we can have another meeting to discuss their concerns.

Regards,

[redacted]
22 February, 2008

Covert Surveillance Draft Heads.doc

24D

Preparation of heads of Bill to amend the 1993 Interception Act to provide for statutory rules governing the gathering of information by the security forces by means of covert surveillance methods.

Secretary General,

Further to our discussion on 11 February, 2008, I attach a note for your information on the main issues which are relevant to this subject matter.

Initially, the matter arose of work connected with the "incorporation" of the European Convention on Human Rights into domestic law on 31 December, 2003 by means of the ECHR Act 2003. In order to be Convention compliant in this area, it is clear that we need to put in place a statutory regulatory regime. This matter was examined earlier by the Law Reform Commission in its 1998 Report on Privacy entitled "Surveillance and the Interception of Communications". It had come to the same conclusion even before further effect had been given to the Convention in our law. In fact the substance of the Labour Party Private Members' Bill published last November draws heavily on the LRC's Draft Heads of a Bill in this area.

The fact that the 2003 Act allows breaches of Convention rights to be pleaded directly before our courts has made the problem more acute. There is no question that Garda operations are illegal or prohibited under the Convention, but as the whole area is not regulated by law, it would be open to a person to seek an award of damages for a breach of a Convention right by an organ of the State. It was the intention that an appropriate Bill, dealing solely with this issue and largely following the Law Reform Commission's model, would be enacted along with the proposed Privacy Bill. However, the previous Minister later indicated that this would not be a priority.

A possible factor in this decision was the increasing possibility that any such Bill would also have to take into account a number of other complex matters, some of which arose out of a review of security arrangements connected with Operation Amber and conducted by the former Garda Commissioner as far back as 2001 following the 9/11 attacks in the USA. In addition, other related aspects were being put forward for consideration. This included (a) the complex question of the use in evidence not only of material on call content obtained through the use of the existing interception mechanism, but any information obtained through secret surveillance and targeting of suspects by other methods, and (b) the extension of intercept powers to the Revenue Commissioners (Customs and Excise) and now more recently the Garda Síochána Ombudsman Commission. As a result it appeared that instead of amending the 1993 Act, a totally new and comprehensive measure would have to be prepared similar to the UK Regulatory and Investigatory Powers Act 2000.

The arguments in favour of such an approach are strong, though it would have to be acknowledged that such Bill would be controversial and the debate highly polarised as between civil liberties on the one hand and state/public security on the other. However, a policy decision could still be taken to deal with the most pressing issue i.e., covert surveillance, in a relatively short Bill, and leave the other matters over for a more comprehensive Bill. Given the need for detailed consultations with the relevant Service Providers, ComReg, and the Department of Communications on

many of the issues involved outside of the core objective, that approach would have certain advantages. Assistant Secretary ([redacted] will have views on this aspect.

The attached note sets out the main issues in summary which could be considered for inclusion in new legislation and it takes account of points made by the garda Síochána at a meeting with [redacted] (NI and Security Division) and myself last November.

[redacted]

12 February, 2008

(24E)

Outline of possible measure to be contained in a Covert Surveillance Bill, either by appropriate amendments to the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 as well as the Postal and Telecommunications Services act 1983, or a comprehensive new stand alone Bill.

Main provisions

These will provide principally as recommended by the Law Reform Commission -

- The issuing of Surveillance Warrants by a Garda Officer not below the rank of Chief Superintendent for an initial period of, say, up to 28 days (not 14 days as the LRC suggest). ***Note:*** *This is similar to section 4 of the Labour Party Bill, which provides for an Authorisation for up to 7 days. That Bill also provides that if the circumstances do not reasonably allow, the need for a written application and Authorisation may be deferred. This could usefully be followed.*

- After the expiry of this period, the Warrant may be extended by a Judge of the District Court for a further period of up to 3 months. ***Note:*** *This is similar to provisions in the Labour Party Bill.*

- It will also be possible to apply for a Warrant from a Judge of the District Court from the beginning for up to 3 months, and this may be renewed from time to time by any such Judge for further periods of up to 3 months. ***Note:*** *This is similar to the Labour Party Bill.*

- All such Judicial applications will be *ex parte*. ***Note:*** *No mention in Labour Party Bill*

- A written Authorisation for a period of up to 3 months (renewable) from a Garda Officer not below the rank of Chief Superintendent will be required for the use of any overt or covert camera or audio recording of a person in a public place. ***Note:*** *No mention in Labour Party Bill.*

Note: *The Labour Party Bill also has a useful provision dispensing with the need for an Authorisation, subject to a later report being made, dealing specifically with a case of exceptional urgency where a person may abscond, obstruct the course of justice, or commit a serious offence.*

- Supervision of the Warrant/Authorisation arrangements by the designated Judge of the High Court who makes an annual report to the Taoiseach on the operation of the interception provisions in the 1993 Act. ***Note:*** *The Labour Party Bill is completely unacceptable on this point. It provides for the Oversight/Supervisory role to be performed by the Garda Síochána Ombudsman Commission. Apart from the fact that this would entail an amendment of the Garda Síochána Act 2005,*

the primary role and functions of the Commission is to investigate general complaints against the Gardaí involving possible criminal offences, or for misbehaviour connected with breaches of the new Garda Disciplinary Code, or connected with deaths of or serious injury to persons as a result of Garda operations or while in Garda custody.

Technical amendments to the 1983 and 1993 Acts recommended by the LRC

- amend section 98 of the 1993 Postal and Telecommunications Services Act to cover transmission by means of any public telecommunications system. At present that section refers only to Bord Telecom Éireann.

- replace the term " postal packet" with "postal communication" which term might be defined as "any communication in the course of transmission by post".

Additional Provisions (designed, inter alia, to address the operation amber issue, the absence of any provision in new operating licences for service providers to have an adequate capability to intercept and penalties)

- Provide for an amendment to section 10 of the 1983 Act for the purposes of the making of a direction to service providers for the cessation of mobile telephone services to an individual or any number of individuals, or a specified area where such is required in the national interest or in the interests of national security for such period as is specified in the direction.

- Provide for judicial oversight of such directions.

- Provide that no liability shall attach to the State, the Security Services(Gardaí or Defence Forces) or the Service Provider in question for any loss that may be caused by such cessation.

- Provide for a statutory obligation to be placed on service providers to establish and maintain the capability to intercept messages, communications etc., delivered by the service provider, including the technical requirements necessary to ensure that that such capability is adequate.

- Provide that failure by a service provider to comply with a direction shall be an offence punishable by conviction on indictment by a fine not exceeding €5 million.

- Provide that the costs of interception etc., associated with interception should be borne by service providers. This is controversial and may have constitutional implications.

- Provide for new statutory based Protocols as between the Garda Síochána in relation to response times for production of intercept material.

- Provide for transfer of copies of relevant computer files on billing information to the Garda Síochána for easier and speedier access to call-related information.

- Provide for registration criteria to enable tracking of "pay as you go" phones, as referred to by the Designated Judge in his recent Report to the Taoiseach.

Other possible amendments

- Provide for interception Warrants under the 1993 Act to be applied for by the Revenue Commissioners (Customs and Excise). This is the casein the UK insofar as HM Revenue and Customs is concerned.

- Provide similarly for the Garda Síochána Ombudsman Commission.

- Provide for intercept evidence and possibly, evidence obtained through covert surveillance methods to be used in evidence. At present there is general restriction on disclosure in the case of the former in section 12 of the 1993 Act. This coincides with the practice of the Gardaí not to use intercept product as evidence in prosecutions. They have not sought any change in this regard. However, the recently published Privy Counsel Chilcot Review of Intercept as Evidence (30 January, 2008), focuses attention on this complex policy issue in the neighbouring jurisdiction, which together with Malta and Ireland are the only common law countries subject to the ECHR. The main conclusion in that Review is that the UK Government should now take the next steps recommended to provide in statute for the use of intercept material as evidence subject to strict legal and operational requirements. No change is recommended for Scotland or Northern Ireland.

- The possible use in evidence of material legally obtained under foreign intercept or surveillance warrants in prosecutions before Irish Courts. This would not raise the same policy issues as domestically produced material. Such use would be permissible under EU Mutual Legal Assistance Instruments now being taken on board in the MLA Bill currently before the Dail and which will be enacted later this year.