REPORT PURSUANT TO SECTION 12 OF THE CRIMINAL JUSTICE (SURVEILLANCE) ACT 2009

REVIEW OF OPERATION OF THE ACT BY THE DESIGNATED JUDGE FOR THE YEAR FROM 1st AUGUST, 2010 TO 31st JULY, 2011

REPORT:

1.1 At its meeting on the 30th September, 2009 the Government designated Mr. Justice Kevin Feeney as the designated judge pursuant to section 12 of the Criminal Justice (Surveillance) Act 2009 (the Act). In October 2010 I forwarded to the Taoiseach my first report as "Designated Judge" under the Act. The Act was signed into law on the 12th July, 2009 and became operative as of that date and the first report covered the period from the date that the Act came into operation up to and including the 31st July, 2010. This report covers the twelve month period thereafter, that is, for the year up to and including the 31st July, 2011.

1.2 Under section 12(3) of the Act, the functions of the designated judge are to:

(a) keep under review the operation of sections 4 to 8, and

(b) report to the Taoiseach from time to time and at least once every twelve months concerning any matters relating to the operation of those sections that the designated judge considers should be reported.

The purpose of the Criminal Justice (Surveillance) Act 2009 is identified in its title where it states –

> "An Act to provide for surveillance in connection with the investigation of arrestable offences, the prevention of suspected arrestable offences and the safeguarding of the State against subversive and terrorist threats, to amend the Garda Síochána Act 2005 and the Courts (Supplemental Provisions) Act 1961 and to provide for matters connected therewith."

Section 3 of the Act states:

> "A member of the Garda Síochána, a member of the Defence Forces or an officer of the Revenue Commissioners shall carry out surveillance only in

accordance with a valid authorisation or an approval granted in accordance with s. 7 or 8."

Surveillance is defined in section 1 of the Act and means –

(a) monitoring, observing, listening to or making a recording of a particular person or group of persons or their movements, activities and communications, or

(b) monitoring or making a recording of places or things,

by or with the assistance of surveillance devices.

In my first report I included within the text a brief analysis of the relevant sections of the Act. I have reviewed that section of my first report and I now set out an up-dated and revised analysis of the relevant sections of the Act.

1.3 The Act provides that surveillance may only be carried out by a member of An Garda Siochana, the Defence Forces or an officer of the Revenue Commissioners in accordance with a valid authorisation issued by a judge of the District Court, or, in certain limited circumstances, in accordance with an approval issued by a senior officer of a designated rank. Surveillance is defined in section 1 of the Act to mean:

"(a) monitoring, observing, listening to or making a recording of a particular person or group of persons or their movements, activities and communications or

(b) monitoring or making a recording of places or things,

by or with the assistance of surveillance devices."

Surveillance device is defined in the same section as "an apparatus designed or adapted for use in surveillance" and certain apparatus are expressly excluded as being surveillance devices for the purpose of the Act. The legislation was enacted in circumstances where non-trespassory surveillance that is not specifically authorised

by statute had been found by the European Court of Human Rights to be unlawful and in breach of the rights to privacy under the Convention. The 2009 Act provides statutory authorisation for non-trespassory surveillance in identified circumstances.

Sections 4 to 8 are the sections of the Act which are the subject of report by the designated judge. The starting point is that before any surveillance may be validly carried out, it must be covered by a valid authorisation or an approval. To obtain an authorisation an application is made to the District Court. In cases of "urgency" surveillance may be carried out without Court authorisation if it has been approved by a superior officer in accordance with section 7. Surveillance carried out under that section is limited to a maximum period of 72 hours from the time at which the approval is granted. Section 4 of the Act allows certain persons to apply for authorisation under the Act, those being "a superior officer" of An Garda Siochana, the Defence Forces and the Revenue Commissioners. The minimum rank of the superior officer is designated in the Act. An application for authorisation is made *ex parte* to a District judge assigned to any District Court district. The scheme under the Act therefore does not require the application to be made to the District Court district where it is intended to carry out the surveillance. An application under section 4 to authorise surveillance is heard in camera, that is in private. Under the Act the application must be grounded on information sworn by the applicant which establishes that that person has reasonable grounds for believing a number of matters, namely:

(a) that the least intrusive means available having regard to its objectives has been adopted,

(b) that the surveillance is proportionate to its objectives having regard to all the circumstances including its likely impact on the rights of any person, and

(c) that the duration for which such surveillance is sought is reasonably required to achieve the objectives envisaged.

Only officers of three identified bodies are entitled to seek authorisation, those bodies are An Garda Siochana, the Defence Forces and the Revenue Commissioners. Section 4 of the Act identifies the information which each of those bodies must establish to show that the surveillance is necessary.

Certain designated persons are therefore entitled to make an application for authorisation for surveillance under the Act. That application is made *ex parte* to the District Court and the District judge hearing the application may issue the authorisation or may issue it subject to conditions or may refuse the application.

Section 5 of the Act deals with authorisation and provides that, when an authorisation is issued, following a District Court application that such authorisation authorises the applicant, accompanied by any other person he/she considers necessary, to enter any place (if necessary by reasonable force), for the purpose of initiating or carrying out the authorised surveillance and withdrawing the authorised surveillance device without the consent of the owner/person in charge of the place. Section 5 also provides that the authorisation must be in writing and must specify the particulars of the surveillance device authorised to be used, the subject of the surveillance, that is the person or the place or thing that is to be the subject of the surveillance, the name of the superior officer to whom authorisation is issued and any conditions imposed by the order together with the expiry date of the authorisation. The authorisation issued by the Court is valid in respect of any part of the State and is not restricted to the

District Court district in which the order is obtained. The duration of the authorisation is identified on the face of the order and the District Court judge states the date upon which it will expire which is a date which cannot be later than three months from the date of issue.

The Act provides in section 6 for the possibility of renewal or variation of an order and an application may be brought to renew or vary the authorisation but that application must be done prior to the expiration of the original order. An application for renewal or variation must be grounded on information sworn by the person applying and must state the reasons for such application justifying a renewal or variation of the authorisation.

Section 7 of the Act deals with surveillance in urgent cases which may be carried out without an authorisation from the District Court, provided that such surveillance is approved in accordance with that section. In cases of urgency section 7 provides that surveillance may be carried out with the approval of a senior officer of a minimum designated rank. Before granting an approval, the superior or senior officer must be satisfied that there are reasonable grounds for believing that an authorisation would be issued by the District Court and that one or more of the following conditions of urgency apply:

(a) it is likely that –

a person would abscond for the purpose of avoiding justice,

obstruct the course of justice or

commit an arrestable/a revenue offence;

(b) information or evidence in relation to the commission of an arrestable offence or a revenue offence is likely to be destroyed, lost or otherwise become unavailable, or

(c) the security of the State would be likely to be compromised.

An approval granted under section 7 may be granted subject to conditions including the duration of the surveillance which in any event cannot exceed 72 hours. The Act provides that if the superior officer has reasonable grounds for believing that surveillance beyond the period of 72 hours is warranted that he or she must make an application to the Court prior to the expiration of the period of 72 hours for an authorisation to continue the surveillance. Section 7 of the Act also identifies the obligations on a superior officer who grants an approval.

Section 8 of the Act deals with tracking devices. That section provides a statutory basis by which the movements of persons, vehicles or things may be monitored using a tracking device for a period of not more than four months provided that the use of such tracking device is approved by a superior officer. Such approval does not require any application to Court. A tracking device is defined and the minimum rank of the superior officer who may approve the use of a tracking device is set out in the section. The section provides that a person applying for authorisation must believe on reasonable grounds that the use of a tracking device would be sufficient for obtaining the information/evidence sought and that the information/evidence sought could reasonably be obtained by the use of a tracking device for a specified period and that such period is as short as is practicable to allow the information or evidence to be obtained. An approval may be granted subject to conditions including the duration of the surveillance.

A number of Statutory Instruments have been introduced which are relevant to the operation and function of the Act. Three Statutory Instruments, dealing with written records of approval, for An Garda Siochana, the Revenue Commissioners and

the Defence Forces were introduced, namely, Statutory Instruments No. 275/209, 290/209 and 80/2010. District Court Rules dealing with the procedures to be applied by the District Court were introduced by two Statutory Instruments, namely, Statutory Instrument No. 314/2010 and Statutory Instrument No. 360/2010. An order under 34A of the District Court Rules is also relevant.

1.4 In carrying out my review under section 12 of the Act, I was in contact with and visited the office of the Colonel designated as my point of contact within Óglaigh na hÉireann. I was in contact with both the Assistant Secretary identified by the Revenue Commissioners and the Assistant Commissioner of An Garda Síochána designated by the Commissioner of An Garda Síochána as the officer in charge of the operation and use by An Garda Síochána of surveillance under the Criminal Justice (Surveillance) Act 2009.

1.5 During the months of September and October 2011 I visited McKee Barracks, the Investigations and Prosecutions Division of the Revenue and Garda Headquarters in Phoenix Park. In October 2011 I visited Garda offices in Dublin Castle and in Harcourt Street for the purposes of reviewing documentation and meeting with officers involved in particular surveillance operations.

1.6 In carrying out my review I had made available to me any documentation that I requested including access to original documentation and video and audio recordings. The main use of the provisions of the Act is made by An Garda Síochána. An Garda Síochána is responsible for dealing with crime and the prevention of crime and maintaining the security of the State. During my visits to An Garda Síochána I sought and was provided with a demonstration of the manner in which surveillance devices and tracking devices operate. I also listened to and viewed certain product obtained as a result of the use of surveillance devices and tracking devices.

1.7 The Act has now been in operation for over two years and the point of time has now been reached where the earlier use of the Act and the information and product obtained as a result of surveillance carried out under the Act forms part of pending prosecutions before the Court. No trial where the use of material obtained under the Act has yet taken place but it is envisaged that such a trial or trials will occur within a matter of months. I have indicated that upon the completion of the trial or trials that future reviews of the operation of the Act can extend to the use of surveillance material and product in completed court cases. Section 14(1) of the Act provides that evidence obtained as a result of surveillance carried out under an authorisation or under an approval may be admitted in evidence in criminal proceedings. Section 14(2) of the Act provides that nothing in the Act is to be construed as prejudicing the admissibility of information or material obtained otherwise than as a result of surveillance carried out under an authorisation or under an approval. Neither of those two sub-sections have yet been considered by the courts and the admissibility of evidence obtained as a result of surveillance and any issues arising in relation to information or material obtained otherwise than as a result of surveillance or the nature of such material has yet to be the subject of review by the courts. As material and product obtained as a result of surveillance is put before the courts as evidence, the organisations conducting such surveillance under the provisions of the Act will develop knowledge and guidance as to the operation of the Act.

2. <u>An Garda Síochána</u>

2.1 During the year under review a different Assistant Commissioner became responsible for the operation and use of the provisions of the Act by An Garda

Síochána. I met with and dealt with the new Assistant Commissioner and his senior officers.

2.2 An Garda Síochána continue to operate a centralised process for all instances of surveillance carried out under the Act. There continues to be a centralised written record of all occasions and instances in which there have been applications for authorisations, variations or renewals of authorisations or approvals for surveillance in cases of urgency and the use of tracking devices. The documentation was made available to me for review together with data extracted from such documentation concerning the nature, use and extent of use of the Act by An Garda Síochána. Due to the fact that the same procedures were in place for the year under review as were in place when I previously reported, I am in a position in this report to compare the twelve months under review with the preceding period so that any alteration in the use and operation of the Act by An Garda Síochána can be identified and incorporated in this report. I arranged for data and statistics to be prepared on an identical basis for the twelve months to the 31st July, 2010 and the twelve months to the 31st July, 2011. In my previous report the period under review was slightly more than twelve months as the period commenced on the 12th July, 2009 and ended on the 31st July, 2010. For the purposes of comparison I arranged for the twenty day period up to the 31st July, 2009 to be excluded from the statistics and data so that the figures which I reviewed both covered a twelve month period. The data which was produced identified each and every instance when the Act was used in the two twelve month periods, including the date of application, the date of authorisation, the date of approval, the nature of the device, the person, place or thing covered by the authorisation or approval, the duration provided for in the authorisation or approval together with other relevant details. The nature of the data enabled me to choose a number of cases on a random

basis for further consideration. I chose four different types of approvals and/or authorisations from the data. I shall deal with those specific cases later in this report.

2.3 In considering the documentation I had available the documentation used by An Garda Síochána for applications for authorisation. As those applications are considered and ruled on by a District Judge, I did not review that documentation other than to ascertain that the relevant documentation used in applications for authorisation and the authorisations granted are retained and form part of the records maintained by An Garda Síochána. I examined a sample.

2.4 In my first report I indicated that An Garda Síochána had sought legal advice in relation to the operation of the Act including consideration of international case law from other common law jurisdictions where surveillance had been permitted by statute and also that consideration had been given to reported decisions in relation to surveillance from the European Court of Human Rights. In my last report I stated that part of that ongoing consideration was the preparation of an internal policy document which was in the process of completion and that it was envisaged that it would be available for circulation within An Garda Síochána prior to the end of 2010. During the preparation of that document a number of additional and further matters arose which required legal advice. I have discussed with the Assistant Commissioner the present position in relation to the internal policy document. It is now envisaged that a written protocol will be complete and available for circulation within An Garda Síochána before the end of 2011. The protocol is in final draft form and when it is complete it will be made available in the form of a Headquarters Directive which can be accessed by Gardaí on the Garda portal. The availability of the written Directive on the Garda portal will ensure that it is available to all Gardaí. Such availability is for the purpose of ensuring that all and any use of the Criminal Justice (Surveillance)

Act 2009 will be conducted in accordance with identified procedures and will operate through specified senior officers and in such a manner as to ensure that a full and comprehensive record is maintained. The protocol will endeavour to ensure that the manner in which An Garda Síochána operates the Act continues to be based upon a process where all requests for use of and all applications for use or authorisations under the Act and all requests for use of tracking devices are dealt with by one Assistant Commissioner operating at the head of a small team of senior officers. That process is designed to ensure that there is a comprehensive and complete record. It is that documentation which has been available to me on the occasions of my visits. The operation and retention of the relevant documentation in a complete and comprehensive form in a centralised location facilitates my review under section 12 and enables me to identify individual uses of the Act for further consideration.

2.5 In my first report I indicated that the operations of the provisions of the Act by an entity such as An Garda Síochána involved considerable time, effort and cost and required extensive manpower to ensure the effective operation of the provisions of the Act. During my review for this year's report I extended my inquiries to include actual demonstrations of how the different forms of surveillance are carried out. It is apparent from that review that the operation and use of certain surveillance devices requires the extensive use of equipment and/or vehicles and manpower including in some instances twenty four hour coverage. Surveillance must be covert and this requirement increases the manpower necessary to ensure that any surveillance remains undetected. The considerable resource implication involved in the use of surveillance under the Act continues to result in a situation where surveillance is only used in carefully selected and targeted cases. The manpower required includes not only the use of sufficient persons to try and ensure that the surveillance will remain

undetected but also provision has to be made for security of the members of An Garda Síochána involved in the surveillance.

2.6 In my first report I indicated that there was currently available on a commercial basis surveillance devices and counter-surveillance devices which can be purchased by members of the public. That availability was confirmed during the year under review where an instance was brought to my attention where a surveillance device was identified as having been installed by an unknown third party who had nothing to do with An Garda Síochána.

2.7 In carrying out my review I have been able to extend my inquiries to include an examination of particular cases chosen on a random basis. In those cases I arranged for access not only to the documentation concerning the authorisation and use of devices but also the material and product obtained from the surveillance. I arranged to have present at the time of such review a senior officer or officers involved in the actual investigations so that the documentation, material and product could be explained to me and put in context. From such review I was able to identify real and obvious tangible benefits accruing to An Garda Síochána both in relation to crime and national security. The information and product generated included information leading to criminal prosecutions, and information and material relating to matters of national security and concerning the manner and mode of operation of organised crime. I have had made available to me audio recordings together with the transcripts generated therefrom of material not only leading to criminal prosecutions but also concerning the operation of paramilitary organisations. One of the cases which I reviewed concerned a Garda investigation into a particular aspect of national security with a significant international dimension. From my review of the documentation and information it was apparent that the persons targeted had been

clearly identified and that the location of the targeted surveillance was both specific as to location and time and therefore could be restricted to the minimum necessary for effective surveillance. The ability to target the surveillance has the benefit of limiting the potential for collateral intrusion. It was also apparent from my examination of the documents and records that, where there was sufficient time available from the receipt of the intelligence to the actual event sought to be targeted to enable an application for authorisation to be made under section 4 of the Act, such procedure was followed. The use of section 7 approvals came in situations where there was not such time period available.

2.8 One of the cases which I reviewed was where a tracking device was approved and used under section 8 of the Act as part of an investigation into illicit drug activities. The documentation available demonstrated that the use of the tracking device had been of assistance in providing information and intelligence into various constituents of the illegal activity including information in relation to the production, importation, storage and distribution of the illegal drugs. The information available from the tracking device assisted in the identification of the persons involved and provided the investigating officers with information in relation to the actual movements and whereabouts of particular persons, vehicles and things. From my own examination of records relating to one of the uses of an approved tracking device under section 8, it was apparent that the results obtained from that device provided an indication of the pattern of behaviour of a particular suspect.

2.9 The review provided for in section 12 of the Act to be carried out by a judge of the High Court is a review of the operation of sections 4 to 8 of the Act. The first of those sections, section 4, deals with applications for authorisation. In my first report I dealt with the occasions when a request for an application was refused. I

indicated that in the period under review at the time of my first report there were less than ten cases where members of An Garda Síochána had sought to have an application for authorisation made but where such request had been refused. In the current year under review there has been a marginal increase in such cases but the figure is still less than ten. Due to the small number of cases involved I was able to go through each of those cases with senior officers. The reasons identified included one instance where a request by a Chief Superintendent for an application for the use of an audio device was refused as being not proportionate to the identified objectives. There were a small number of cases where the requests were refused on the basis that either the thing or premises where the device was to be located had not been confirmed as being either available or appropriate. There was also an instance where a request was refused in relation to a drugs investigation on the basis that more specifics would be required. My review confirms the position which I ascertained in my previous report that there have been a number of instances where requests to use the Act have been refused because the applications were premature, excessive or did not provide sufficient information. In the light of the procedure which is followed within An Garda Síochána in relation to the 2009 Act, the number of refusals should remain reasonably small in number. As all applications go through one section and where there is already in place a set procedure which will be formalised in an internal written Directive, it is unlikely that there will be a substantial number of cases where applications by individual Garda for the making of an application for authorisation under section 4 of the Act will be refused.

2.10 In the year under review An Garda Síochána made a number of applications under section 4 and authorisations were granted under section 5 by the District Court. At the time of my first report a number of cases within the above category were

identified as representing a small double figure number. In the year under review there has been a small increase in the number of such authorisations. The number increased by one and the total number in the year under review remains a small double figure number. This year I adopted a different procedure in relation to the review of these cases. I discussed each of the cases with senior officers from An Garda Síochána and had identified to me the type of device which was involved in each case, the person who or the place or thing that was the subject of surveillance, the nature of the operation, the duration for which it was granted, the actual expiry date of the surveillance and whether or not the device was retrieved and if so on what date. In all cases the documentation relied upon for District Court authorisations was available and that documentation confirmed in writing details of the specific requirements laid down in section 5(6) of the 2009 Act. The applications were made to a number of different District Judges and there was no indication of any tendency for the applications to be directed towards any particular District Judge. From the documentation it was apparent that in each and every instance where an approval was granted that the application leading to such approval had been made on an information on oath in a set format as identified in Statutory Instrument No. 360/2010, subject to the individual facts of a particular case. Invariably the information on oath was sworn by the same senior Garda officer who has operational responsibility for the installation, use and monitoring of surveillance devices.

The procedure provided for in section 5 of the 2009 Act provides that an authorisation can only be issued by a District Court and sub-section (4) of that section provides that:

"The judge shall not issue an authorisation if he or she is satisfied that the surveillance being sought to be authorised is likely to relate primarily to communications protected by privilege".

Section 5 also provides that an authorisation under that section has a maximum duration of three months from the day upon which it is issued. It was only on four occasions that an authorisation was granted for the maximum period of three months. In each of those instances, from my examination of the records and from my discussions with senior members of An Garda Síochána, it was apparent that all four cases represented long-term investigations into organised criminal and subversive activities. In only one instance was the device actually in place for the full three month period. In one of the four cases the device could not be deployed. In two of the four cases where the authorisation extended to the maximum three month period, the device was retrieved during the three month period as the circumstances giving rise to the authorisation had altered. Some of the authorisations the duration provided for was as a number of hours where the device was targeted at an anticipated event or happening which was envisaged as entirely taking place within a short timeframe.

2.11 There were a small number (less than ten) of applications for variation or renewals of authorisations under section 6 of the Act during the year. They were all made to the Court and were for renewals where the earlier orders were disclosed to the Court.

2.12 Section 7 of the Act provides for approval for surveillance in cases of urgency. Approvals under that section are not subject to consideration by the District Court. Therefore, as was the case with my previous report, I paid particular regard to those approvals during my review. In the year to the 31st July, 2011 there was a reduction of almost 20% in such approvals from the previous year. All the documentation and

records relating to such approvals were made available. The number of approvals granted in the year was in the small double figure range. Section 7, sub-section (8) provides that approval for surveillance under section 7 shall not be carried out for a period of more than 72 hours from the time at which the approval is granted. The urgent nature of the approvals was demonstrated by the fact that out of all the approvals granted, only two were for the maximum 72 hours and over half were for a period of a short number of hours. Due to the urgent nature of the approvals, the vast majority related to audio surveillance only and only in a small number did the approval also cover the use of a camera. The main area of investigation related to subversive activities but the approvals also covered other criminal activities. From my examination of the documents and records it was clear that the nature of the investigations and the locations of the operations and the duration for which such approvals were granted established that the information concerning the potential location for surveillance had only lately become available and the proposed use or happening for which such surveillance was required was so imminent that there was no real opportunity to apply to court for authorisation under section 5. The documents and records established that urgent approvals were required in circumstances where information crystallised as to the potential location or event which was to be the subject of surveillance immediately prior to the actual intended surveillance.

In my first report I formed the view that section 7 approvals were being used by An Garda Síochána in circumstances where there was neither time nor circumstances which would allow or permit for an application under section 4 to obtain an authorisation under section 5. My examination of the records and documents confirms that that remains the situation. An Garda Síochána continue to

maintain a written record of approvals granted under section 7 which provides particulars of the surveillance device, the person, place or thing that is to be the subject of the surveillance, the name of the member of An Garda Síochána to whom such approval is granted and the conditions imposed on such approval including the time at which such approval is granted.

2.13 As was the case in the previous year which I reviewed, the main use of surveillance devices by An Garda Síochána was the use of tracking devices. Such use is approved under section 8 of the Act. In the previous year tracking devices had been approved for use on a substantial number of occasions, the number of such approvals being less than one hundred. There was a very slight increase in the number of approvals in the year under consideration but the overall figure remained less than one hundred. The use of tracking devices as opposed to audio or video surveillance is less intrusive. Given that part of the statutory requirement under section 4 is that when an officer making an application for an authorisation for audio and/or video surveillance must be satisfied that it is the least intrusive means available, it is to be expected that there will be more approvals granted under section 8 than authorisations under section 5 or approvals under section 7. The total number of authorisations under section 5 and approvals under section 7 added together amounts to considerably less than half of the approvals granted under section 8. It is also the case that not only are tracking devices less intrusive but they involve, in most instances, the requirement to use less manpower than audio or video devices and that fact provides a further explanation for the greater use of section 8 than other sections of the Act.

2.14 Approval for tracking devices does not require any application to court and a member or officer can apply to a superior officer for the grant of an approval to use a tracking device provided the requirements laid down in section 8, sub-section (2) of

the Act are met. In carrying out this review I paid particular regard to section 8, sub-section (2), sub-section (b) which places an obligation on a member applying for approval for the use of a tracking device has to have reasonable grounds that the information or evidence sought could reasonably be obtained by the use of a tracking device for a specified period that is as short as is practical to allow the information or evidence to be obtained. I therefore had regard to the duration of use granted in section 8 approvals. I looked at the period for which authorisation was granted in every case. In less than 20% of the cases the duration granted was for the maximum four month period. In almost half the instances where the four month period was granted, the device was in fact deactivated and retrieved within the four month period. From my examination of the documents and records it was apparent that the duration granted varied depending upon the nature of the surveillance which was required and the place where such device was to be located.

Section 8, sub-section (9) of the Act states:

> "A superior officer who approves the use of a tracking device under this section shall make a report as soon as possible and, in any case, not later than 7 days after its use has ended, specifying the grounds on which the approval was granted, and including a copy of the written record of approval and a summary of the results of the monitoring."

In all cases where the use of the tracking device had ended, as of the date of my review, the records identified that fact and contained a report to the Assistant Commissioner within the statutory period provided for in section 8, sub-section (9).

2.15 As part of my review for the year ended 31st July, 2011, I identified a small number of cases, where I arranged to review not only the records relating to the authorisation, approval and use of surveillance devices but also the records and

documents of the investigation file including audio and video records. The cases where I carried out such review were chosen randomly by reference to an I.D. number in the records kept by An Garda Síochána. The first case which I reviewed contained extensive audio records. That case, led to a prosecution and therefore I cannot deal with it further at this stage. Another case, which I reviewed, concerned a section 5 authorisation for the use of video and audio surveillance. The documents, records and file identified that the device was placed in accordance with the authorisation and that no activity took place until almost the end of the one month period for which authorisation had been approved. Since that activity related to matters different from the apprehended illegal activity envisaged at the time of the authorisation, the surveillance was discontinued. One of the other cases which I randomly selected related to an authorisation provided under section 5 for the use of audio and video surveillance and an examination of the documents and records identified that for operational reasons the device was not in fact deployed. I also reviewed the documents, records, file and video product arising out of a section 7 approval. That approval had been granted for a period of 72 hours and during that period the video recorded a number of matters. As that investigation is ongoing and since the period of authorisation provided under section 7 has long since elapsed, it is not appropriate to further comment on that particular case.

2.16 During my review of An Garda Síochána's use of sections 4 to 8 of the Act, nothing came to my attention that would suggest any improper or inappropriate use and the procedures adopted and followed by An Garda Síochána ensure that the documentation required by the Act is kept in a central location and is readily available for review.

3. The Revenue Commissioners

3.1 In October 2011 I visited the Investigations and Prosecution Division of the Revenue Commissioners. I met with an assistant secretary and another senior official who had available all the necessary and relevant documentation and records of the use made by the Revenue Commissioners of surveillance devices under the Act. The Revenue continue to use a system whereby all operations under the Act are made through one office and are made using the instruction manual on the Criminal Justice (Surveillance) Act 2009 which was issued by the Revenue Commissioners in July of 2010. That instruction manual remains in force and it provides that any application for use by a Revenue official of a surveillance device in support of an investigation or Revenue operation must be grounded on an application for such use which must be submitted through a principal officer to one of the officers nominated for that purpose. There are two nominated officers who are principal officers. That system ensures that all the records in relation to the use by the Revenue of the provisions of the 2009 Act are supervised by a small number of senior personnel who are responsible for the maintenance and preservation of the necessary records.

3.2 I examined the records and documents in the premises of the Investigation and Prosecutions Division of the Revenue Commissioners and all the documents and records relating to the use and operation of the Act by the Revenue Commissioners during the relevant period were available for my review.

3.3 During the year under review the provisions of sections 5 and 8 of the Act were used by the Revenue. Section 8 provides for the use of tracking devices and the vast majority of uses by the Revenue related to tracking devices rather than authorisations under section 5. The number of approvals and/or authorisations

granted under s. 5 was very limited. I was therefore able to review the documentation of the use of section 5 of the Act by the Revenue during the year. I examined the documentation and records in relation to section 5 use and they confirmed that the requirements of section 5 were fulfilled. The records were retained. The number of authorisations were almost identical to the previous twelve months. In relation to the use of section 5 the particulars of the surveillance device was identified as was the person, place or thing which was to be the subject of surveillance. In one case the papers relating to a section 5 authorisation demonstrated that the container which was the subject of the authorisation had a jammer or jamming device attached. The presence of that jammer meant that whilst the tracking device operated and provided information and product, that the audio component of the device failed to operated.

3.4 No use of sections 6 or 7 of the Act was made by the Revenue Commissioners during the period under review.

3.5 There were a number of approvals for the use of tracking devices under section 8. I reviewed papers and documents in relation to each of the instances in respect of which approval was granted. These cases included customs and excise cases and tax fraud with the majority relating to customs and excise. The records maintained identified the particulars of the tracking device that was approved, the person, vehicle or thing that was to be monitored, the officer of the Revenue Commissioners to whom the approval was granted, the conditions including the duration in respect of which approval was granted and the time at which such approval was granted. In all but one case where tracking devices were approved the records indicated that it proved possible to deploy a tracking device. In one case the tracking device was not deployed and the records indicated that there had been no opportunity to deploy it on the vehicle which was to be monitored. It was therefore

apparent that prior to seeking approval that consideration had been given as to the practicality of the deployment of a tracking device and that applications for approval were made in circumstances where real consideration had been given to the practicalities of the use and operation of a tracking device. The majority of tracking devices were deployed on vehicles or things that were being monitored in respect of the illegal importation of goods into this country, particularly cigarettes. Section 8, sub-section (2) of the Act requires that a member applying for a grant of approval must believe on reasonable grounds certain matters. In a significant number of cases where tracking devices were deployed in respect of feared illegal importation of cigarettes, the out turn of the investigation resulted in the seizure of substantial numbers of cigarettes. From the papers that I examined, I identified one instance where 4.6m cigarettes were recovered, another where 2.5m cigarettes were recovered, another where 7.4m cigarettes were recovered, another where 9.5m cigarettes were recovered and another where 7m cigarettes were recovered and also another where 4.2m cigarettes were recovered. In a number of instances in the Customs and Excise investigations where goods were not recovered the papers indicated that the vehicle or thing that was being monitored crossed into Northern Ireland and left the jurisdiction.

I also examined the file and records in relation to an investigation being carried out of alleged VAT fraud. I ascertained that the duration of the approval was for an identified period less than the maximum. As that investigation is continuing I will refrain from any further comment on that case. From my discussions with the officials from the Revenue Commissioners and from the documentation and records it was apparent that in a number of cases where approvals had been granted for tracking devices that the investigations had progressed to the stage that papers had been sent to the Director of Public Prosecutions with a view to criminal prosecutions.

3.6 Given the nature of smuggling and the illicit importation of goods into the jurisdiction and the efforts made to avoid the payment of duties and taxes, it is not surprising that the majority of the use of the provisions of the Act by the Revenue relates to tracking devices. The records and explanations from the Customs and Excise show that information becomes available which make it probable that goods are being smuggled into the country. In an attempt to monitor those goods tracking devices are approved. The areas of investigation which Customs and Excise were involved in included the illegal importation of tobacco, the importation of chemicals to assist in the laundering of diesel, the illegal importation of drugs and the avoidance of tax in respect of alcohol. The seizure of substantial quantities of goods in cases where tracking devices were approved is supportive of a conclusion that tracking devices are only approved where there are reasonable grounds for believing that surveillance is justified. As pointed out in my previous report the cost and manpower involved in the use of tracking devices and, in particular, surveillance devices is such that the use of such devices is carefully targeted and is only initiated when there are clear grounds for justifying the use of such surveillance devices.

3.7 I was able to review all the cases where the Act was used by the Revenue during the year in question. There was a written record of approval consistent with section 8, sub-section (7) of the Act in each and every instance. There was available information and records to confirm that such tracking devices were approved where there were reasonable grounds to do so. During my review nothing came to my attention which would suggest any improper or inappropriate use of sections 4 to 8 of the Act by the Revenue Commissioners and it remains the position that the procedures which are in place provide for a consistent and targeted use of the provisions of the Act.

4. The Defence Forces

4.1 In October 2011 I met with the Director of Intelligence and the designated officer to review the operation of sections 4 to 8 of the Act by the Defence Forces in the twelve months up to the 31st July, 2011. There was available to me the documents and records kept by the Defence Forces in relation to the occasions upon which authorisations and approvals were granted or issued during the year. I received full and detailed explanations in relation to all matters.

4.2 In the year under review there had been a marginal increase in the usage by the Defence Forces of the provisions of the Act. In every instance when surveillance was carried out under the provisions of the Act it was carried out following a section 4 application to the District Court. Those applications were made available to me and it was apparent from those documents and the matters disclosed that the proposed subject of the surveillance and the means of surveillance were identified. Every time an application for authorisation was made under section 4 an authorisation was obtained from the District Court. The information available demonstrated that following such authorisation, surveillance was carried out consistent with the authorisation. In every instance the authorisation was in writing and specified the particulars of the type of surveillance devices which were to be used, the person or thing that was to be the subject of the surveillance, the name of the superior officer to whom it was issued, the duration of the authorisation and the date of expiry of the authorisation. In all instances the period of authorisation was less than the three month maximum period provided for in the Act. The period sought and obtained varied depending upon the individual circumstances involved.

4.3 The procedures operated by the Defence Forces is that each and every application under the Act is under the direct control and supervision of the designated officer and in every instance it was the designated officer who swore the necessary oath in support of the application for authorisation. He was also present in person when the applications were made to the District Court. In each instance when authorisation was obtained by the Defence Forces a surveillance device was deployed. There were no applications by the Defence Forces under paragraph 6 of the Act for variation or a renewal of authorisation, nor were there any approvals granted under section 7 in respect of surveillance in cases of urgency. The only instance of the use of a tracking device by the Defence Forces was in respect of one of the section 4 applications. That application and the authorisation granted in the District Court was in respect of video, audio and a tracking device. No approvals pursuant to s. 8 of the 2009 Act were granted during the year under review.

4.4 Due to the relatively small number of occasions upon which surveillance was carried out by the Defence Forces pursuant to the Act, I was able to review every case. In all instances the circumstances giving rise to the applications and authorisations for surveillance were matters impacting upon and for the purpose of maintaining the security of the State. In all cases there was an international dimension to the surveillance.

4.5 As is apparent from the foregoing, my review confirmed that in each and every instance a District Justice was satisfied to grant an authorisation under section 5 and that the surveillance carried out thereafter was consequent upon such authorisation. The orders permitting such surveillance were available for review. I received full and comprehensive co-operation from the Defence Forces in relation to my review and all and any documentation that I requested was made available. I was

provided with detailed explanations and information concerning each and every instance when surveillance was carried out by the Defence Forces pursuant to the provisions of the Act. During my review nothing came to my attention in relation to the Defence Forces use of the Act which would suggest any improper or inappropriate use of the provisions of sections 4 to 8 of the Act.

5. Conclusions

5.1 As is apparent from the contents of this report, each of the three parties entitled to avail of the provisions of sections 4 to 8 of the Act have put in place procedures to ensure that all use is directed through a designated person, section or branch. This ensures that the documentation and records concerning such surveillance are readily available at the time of review. All and any documentation that I sought was made available and I was free to choose at random any application, authorisation or approval for consideration. It was also the case that when I sought from senior officers or officials explanations in relation to the implementation of the surveillance and the outturn or product thereby generated, that details and information were readily and openly provided together with any documentation, recording or video that was requested.

5.2 It remains the case that the cost and manpower commitment of surveillance carried out under the Act is such that its usage is limited by the costs involved in such surveillance. It follows that since there is a considerable cost and manpower commitment involved in carrying out surveillance under the Act, that the occasions upon which such surveillance are carried out are occasions which have been carefully considered both as to suitability for deployment and the requirement for surveillance. This self-limiting process results in surveillance under the Act being limited to

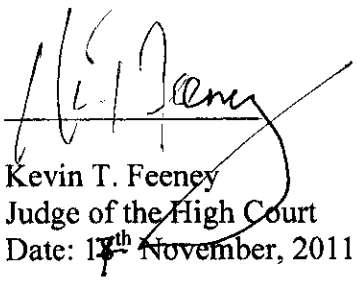
significant cases involving the commission of crime or the prevention of the commission of crime or the maintenance of the security of the State. The cost also ensures that from a practical point of view consideration would always have to be given to less technical and cheaper forms of investigation or the use of alternative means. That consideration involves the use of other and less intrusive means than surveillance under the Act.

I have already, in my previous report, commented on the introduction of the Statutory Instrument No. 360/2010 which has brought a procedural consistency to applications for authorisations under section 5 and that continues in force. I have also pointed out that it is envisaged that by the end of this year, An Garda Síochána will have issued a Headquarters Directive in relation to the operation of the Act which can be accessed by all Gardaí on the Garda portal. The Revenue Commissioners operate under an instruction manual and the Defence Forces operate under the direct control and supervision of the Director of Intelligence who personally supervises and directs all and any usage by the Defence Forces of surveillance under the Act.

As indicated earlier in this report, the Act has now been in operation for a sufficiently long period of time that the first criminal trials involving the use of the Act are likely to occur before the end of this year. Any matters which arise in relation to the admissibility of evidence or the provisions of the Act within those trials are a matter which can be considered in future reports.

It is appropriate to reiterate that I received full and open co-operation from the senior officers and officials in An Garda Síochána, the Revenue Commissioners and the Defence Forces responsible for the operation of the provisions of the Act. This has greatly assisted me in the preparation of my report.

Having reviewed the operation of the Act as the designated judge pursuant to section 12 of the Act, I make this report to the Taoiseach and confirm that there are no other matters relating to the operation of sections 4 to 8 of the Act which I consider should be reported.



Kevin T. Feeney
Judge of the High Court
Date: 14th November, 2011