

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

**REVIEW OF THE OPERATION OF THE ACT BY THE
DESIGNATED JUDGE FOR THE YEAR 1ST AUGUST 2012 TO
31ST JULY 2013**

By letter dated 13th October 2013, the Minister for Justice and Equality notified Mr Justice Michael Peart that at its meeting on the 24th September 2013 the Government had designated him to be the ‘designated judge’ for the purposes of undertaking the duties specified in Section 12 (3) of the Act which are to:

- (a) keep under review the operation of sections 4 to 8 of the Act, 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 sections 4 to 8 of the Act which the designated judge considers should be reported.

There have been three previous reports to the Taoiseach under the section which were made by the late Mr Justice Kevin Feeney, and which covered the periods 9th July 2009 – 31st July 2010; 1st August 2010 to 31st July 2011; and 1st August 2011 to 31st July 2012.

This report covers the following period of twelve months, namely 1st August 2012 to 31st July 2013.

For the purpose of preparing this report I had three meetings in Garda Headquarters with the Assistant Commissioner in charge of Crime and Security of An Garda Siochana, as well as with other relevant senior officers within that section. In addition, I attended two meetings with the Assistant Secretary, Investigations and

Prosecutions Division of the Revenue Commissioners, and other relevant senior officials within that division of Revenue.

I have not met with the Director of Intelligence of the Defence Forces as he has confirmed in writing to me that the Directorate of Intelligence did not carry out any operations during this current reporting period which required an authorisation under section 4 of the Act, or an approval under sections 7 or section 8 of the Act, and I therefore considered that it was unnecessary to arrange a meeting with the Director of Intelligence for the purpose of preparing this report.

The reports already provided by the late Mr Justice Feeney, to which I have referred, have set out in detail the statutory scheme, and in particular the provisions of sections 4, 5, 6, 7 and 8 of the Act of 2009 which are relevant for this report, and in addition any Statutory Instruments relevant to the operation of the Act. It is unnecessary for same to be repeated herein.

The Act has been in operation for nearly four years. By now, considerable use has been made of the powers provided for in the Act, and on the basis of what I have been told by the senior officers to whom I have spoken in both Revenue and An Garda Síochana, and documentary records which I have been able to inspect, that use has resulted in significant success both in terms of crime prevention as well as successful prosecution of crimes committed.

The resources of An Garda Síochana and Revenue in terms of manpower, time, and indeed finance, are necessarily limited and finite. These considerations mean that the

powers under the Act will be invoked with the necessary approval or authorisation only in cases where there is a reasonable likelihood that a benefit will accrue from the carrying out of the requested surveillance. This has been a consideration where for instance an approval has been sought from a superior officer under section 7 of the Act by a member of An Garda Síochána or Revenue officer, and is refused.

By now a number of cases have been successfully prosecuted, which have been assisted by the use of powers under the Act. That has continued to be the case.

By the time the late Mr Justice Feeney provided his last report to the Taoiseach there had been no judgment handed down by the Court of Criminal Appeal, the High Court or the Supreme Court in relation to the interpretation of any aspect of this legislation. In recent times, though not within the current reporting period, a judgment was delivered on the 23rd January 2014 by Mr Justice McMenamin sitting in the Court of Criminal Appeal in the case of *Sunny Idah v. The Director of Public Prosecutions*, which gives some assistance in relation to what activities are and are not covered by the word “surveillance” as used in the Act. It is not part of this report’s function to set out in any detail or even in summary form what is stated by way of conclusion in that judgment. But it will be of assistance to officers who have to decide whether an authorisation or approval is required in any particular case, and will assist judges in deciding on the admissibility of evidence in circumstances similar to those pertaining in the *Idah* case. I am not presently aware of any other judicial decision dealing with the interpretation of the Act of 2009 either during the present reporting period or later.

The Revenue Commissioners:

I have had, as already stated, two meetings with Revenue. At the first of those meetings, a general discussion took place between us as to how I proposed conducting my review for the purpose of this report, given that it is the first report to be provided by me following the death of the late Mr Justice Feeney. I indicated that I proposed in a general way to follow his modus operandi. Having had a detailed and helpful discussion at this first meeting, I arranged a second meeting at which all files relating to cases in which powers under the Act had been invoked during this reporting period were made available to me.

According to the information provided to me, Revenue has not used its powers under section 4 or section 7 of the Act during this reporting period. However, during the relevant period 17 approvals were given by the superior officer under section 8 of the Act for the deployment of a tracking device on a vehicle or other object, such as a container or fishing vessel. These devices provide assistance to Revenue in their investigations into the importation and distribution of illegal drugs and cigarettes/tobacco products, as well as laundered fuel and products related to the laundering of fuel, particularly in circumstances where criminals involved in such activities are very aware that their movements may be followed by Revenue officers or An Garda Siochana.

The superior officer who gave his approval in these 17 cases was present at both meetings with me, and provided me with comprehensive information in relation to each case, and full explanations as to why it was considered desirable that an

approval be given. I also had the benefit of perusing each case file and therefore satisfying myself that in each case in which an approval was given under section 8 of the Act, the Act was complied with in every respect.

In addition to being provided with the file in respect of each such approval, I was provided with a very helpful and detailed document which sets forth the registration number of the vehicle, or otherwise gives details of object on which a tracking device had been placed, together with a summary of what offence was suspected in each case, and finally details of when the approval was given, the date of any extension of such approval, when the device was deployed, and finally the date on which the device was removed. This summary document also gives sufficient details to indicate in a general way the purpose of placing the tracking device and the result achieved. Having the file for each case available to me meant that I was able to satisfy myself that in each case the information provided to me both by way of this summary document and by way of oral information was consistent with what appeared from the documentary file. In each instance this was the case.

I should add that in three instances where an approval was given, it subsequently proved impossible to deploy the tracking device on the vehicle or object. The reason for this is contained on each file, and the device was returned to the superior officer. In one other case it appears that the device failed to function following deployment, and the explanation for this is contained on the file in question.

I wish to acknowledge the complete cooperation and assistance provided to me by Revenue for the purpose of this report. I also can confirm that from the information

and material provided to me it is clear that the greatest care is being taken by the relevant personnel in Revenue to ensure not only that the provisions of the Act are fully complied with, but that a full written record is maintained in each case in which statutory powers under the Act are exercised. It is important that such a written record be maintained, not only to assist in ensuring that the provisions of the Act are in every case followed and strictly adhered to, but also to ensure that this can be seen to be so, particularly by the designated judge whose function it is to review and report upon the operation sections 4 to 8 of the Act.

An approval under section 8 for the use of a tracking device may be made by a Revenue officer, to a superior officer (i.e. any officer not below the rank of principal officer). Application for such an approval may be made where the officer concerned believes on reasonable grounds that the provisions of section 4(3) are fulfilled, namely that in relation to the operation or investigation by Revenue concerning a revenue offence the surveillance is necessary for the purpose of obtaining information as to whether the offence has been committed, or as to the circumstances relating to the commission of the offence, or to obtain evidence for the purpose of proceedings in relation to the offence, or for the purpose of preventing the commission of a revenue offence. Secondly, the applicant officer must believe not only that surveillance is justified in the sense of being proportionate to its objective and of a reasonable duration, but that the use of a tracking device is sufficient for obtaining the information or evidence in all the circumstances, and the information or evidence sought can be reasonably obtained by the use of a tracking device for a specified period that is as short as is practicable to allow it to be obtained.

In turn, the deciding superior officer must be satisfied having regard to the information provided in the application for approval that there are reasonable grounds for believing that an authorisation would be issued by a District Judge under section 5 of the Act, and that the conditions in section 4(3) are satisfied and that it is proportionate and justified in all the circumstances.

From the information provided to me, and from my perusal of the available records, I am satisfied that in every case in which Revenue have exercised the powers conferred by section 8 of the Act, all these statutory requirements have been observed, and in each case the approval was properly given.

I have been provided with a copy of the Instruction Manual prepared and used by Revenue in relation to the use of its powers under the Act. This Manual was issued in July 2010, and, as noted in each of the reports in previous years by Mr Justice Feeney, a copy thereof had been made available to him also, and he referred in detail to it. I am informed that this Manual is still in use by Revenue. Having read the document, I am satisfied that its content is correct as far as its explanation of the Act is concerned, and it sets out clear procedures for the use of surveillance by Revenue under the Act which must in every case be adhered to by officers. The document makes clear to officers that not only is it a serious disciplinary matter to conduct surveillance in breach of the prescribed procedures, but also a criminal offence to do so, or even to make an unauthorised disclosure of any information in relation to the operation of the Act.

I am satisfied that based on the information provided to me there has been no improper or unlawful use of the powers given to Revenue under sections 4, 5, 6, 7 or 8 of the Act of 2009, and that all necessary and required records are carefully prepared and maintained.

I am also satisfied from information and assurances given to me by Revenue that the surveillance equipment in use under the Act is securely stored centrally, and when its use is approved or authorised the particular device is logged out to a particular task, and upon retrieval of the device it is logged in again. This equipment is stored, distributed and retrieved centrally from and to one secure location. I have no concerns that this equipment might, through a lack of proper security, vigilance or deployment systems and record keeping on the part of Revenue, come into the wrong hands.

An Garda Siochana:

As already stated, I have received full cooperation from the Assistant Commissioner of An Garda Siochana in charge of Crime and Security, and other senior officers within that division with whom I had discussions for the purpose of this report. I was provided with a copy of the Commissioner's Policy document which issued on the 11th July 2012. This document was available to Mr Justice Feeney also, and he refers to it in his last report. However, given that his last report covered a period ending on 31st July 2012, and the Policy issued on the 11th July 2012, it was not possible for Mr Justice Feeney to assess its use and practicality. However, he had been provided with a copy of same, and having had an opportunity of considering same he expressed his view that the procedures set forth in Part B thereof are in fact those which were already in place prior to the 11th July 2012.

The Policy sets forth a clear centralised procedure for applications for deployment of surveillance and tracking devices, all of which are coordinated by the National Surveillance Unit (NSU) through the office of the Assistant Commissioner in charge of the Crime and Security Division at Garda Headquarters. The Policy informs all members that the Assistant Commissioner has nominated a particular Detective Superintendent within the National Surveillance Unit to be the “Superior Officer” for the purposes of the Act, and through whom all applications for the use of surveillance devices or a tracking devices under the Act must be processed.

The Policy sets out and explains the relevant sections of the Act, but making it clear also that the provisions of the Act apply only to surveillance which requires the use of a surveillance device or a tracking device. In this regard it explains that under section 1 of the Act “surveillance” is interpreted as meaning:

“(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” [emphasis added].

Other forms of surveillance not assisted by such devices are not affected by the Act, and the Policy document explains this clearly.

Having in Part A of the document set out and explained in a clear way the relevant statutory provisions, the Policy goes on in Part B to set out the steps to be taken in relation to each type of application. It explains the circumstances in which it is appropriate to seek approval or authorisation, the procedures for doing so, and the conditions which are required to be satisfied before such approval or authorisation is likely to be granted (e.g. necessity and proportionality), and the considerations to be taken account of, such as risk to personnel, operational effectiveness, and the intended outcome of any information gained.

A clear requirement is contained within the Policy, as mandated by the Act, for the keeping of all original recordings made with the use of surveillance devices, as well as all written records of approvals, authorisations, documents and other information or evidence in any particular case. It specifies clearly, that once a device has been deployed, the Superior Officer who applied for the authorisation or approval under the Act shall ensure, as mandated under the Act, that all such recordings, written records of approvals/authorisations etc. are retained for the period required under the Act, and not destroyed until the relevant period has passed, and specifies also that such material shall be held so that it is available to the designated judge for examination in relation to the annual review and report.

I am satisfied that this Policy dated 12th July 2012 contains adequate guidance and information to members of An Garda Síochána to reasonably ensure a proper understanding of the relevant provisions of the Act, and that adherence to those procedures and guidelines will ensure that in relation to the use of surveillance

devices under the Act, the required procedures are followed, so that their use is in accordance with law.

During my visits to Garda Headquarters for the purpose of this review and report, I met with the Assistant Commissioner in charge of Crime and Security as well as with senior officers involved in the deployment and use of surveillance devices. During one of these visits I was given the opportunity of seeing 'live' the monitoring of a tracking device which had been placed on a vehicle. I was also shown a number of different types of monitoring devices. I was also able to hear and see the fruits of some monitoring. I was able to discuss with those officers who actually place the devices on a vehicle or thing, or place in situ a recording/video device, their *modus operandi*. It is clear that in many cases their safety could be compromised if their covert activities were discovered, and that additional back-up resources are necessarily present on such occasions in order to ensure their safety as far as possible. The officers concerned are specially trained and experienced in such activities.

My review was greatly assisted by being provided with a spreadsheet generated from the comprehensive record maintained and updated at Garda Headquarters in relation to each case in which an authorisation under section 5 of the Act was obtained in the District Court, each case in which an approval was granted by the superior officer under section 7 of the Act (urgent cases), and each case where an approval was given under section 8 for the deployment of a tracking device.

The insertion of the required information into this record ensures that there is a permanent record made of the use of surveillance equipment under the Act, and in a

form that is easy to consult and review. I am assured that each and every case in which a surveillance device has been deployed under the provisions of the Act is recorded on this database from which the spreadsheet for the period under review has been generated. This has ensured that I can know how many applications for authorisation or approval under the provisions of the Act have been made during the relevant reporting period.

In addition to being able to consult this spreadsheet, the original file for each case recorded was available to me.

During the present reporting period less than 50 authorisations were granted by the District Court under section 5 of the Act for the use of a surveillance device. In addition, during the same period, a very small number of such applications were refused/not pursued by the superior officer for reasons appearing on the database as well as on the original file itself.

In most cases, the applications made under section 5 of the Act were made to a District Judge sitting in the Criminal Courts of Justice, Parkgate Street, Dublin, situated immediately adjacent to Garda Headquarters, and by the particular Detective Superintendent within the National Surveillance Unit who has been nominated by the Assistant Commissioner to be the "Superior Officer" for the purposes of the Act. Perhaps no more than two such applications were made by another superior officer.

During the period under review, a small number of approvals were granted under section 7 of the Act, which provides that in a case of urgency a superior officer may

give an approval for the carrying out of surveillance under the Act without an authorisation from the District Court under section 5. In effect this permits such approval to be given where it is not feasible or reasonably possible to get an application made in the District Court in time for the proposed surveillance to be conducted. Where such an approval under section 7 is given by a superior officer, its duration must not exceed 72 hours. In only one of the section 7 approvals during the period of this review was an approval given for the full 72 hour duration permitted under the section, and the reason for this was apparent from the file available to me and was explained in discussion with me. In all other cases, the approval was for 24 hours or less.

The records kept in relation to applications under sections 5 and 7 of the Act have enabled me to be satisfied that in each case the application was properly made, and in all respects the provisions of the Act were complied with, and in each case where the device was deployed it was retrieved before the expiration of the authorisation or approval.

Applications to a superior officer for approval under section 8 of the Act for the use of a tracking device for surveillance purposes are the most common form of application under the Act, with almost all being granted. Where such an application is refused, the reason for that is recorded on the database to which I have referred, and was apparent also from the original file made available to me.

In the presence of the relevant senior officers within the NSU I conducted an examination of a randomly-selected number of the cases appearing on the spreadsheet

provided to me. Given the number of such section 8 applications, time would not permit an examination of each and every application. I examined 20 individual cases, which I deemed to be sufficient for the purposes of establishing that in these applications the correct procedures were followed, that the approvals granted were justified and in accordance with the provisions of the Act, and that appropriate written records are maintained and available to the designated judge.

Section 8 of the Act allows a superior officer to grant an approval for the use of a tracking device, as already referred to in relation to the Revenue Commissioners, but may not be granted for a period exceeding 4 months.

When reporting on the use of section 8 of the Act by Revenue earlier in this Report I detailed the requirements and conditions to be complied with. It is therefore unnecessary to do so again in any detail in relation to An Garda Síochána. But I would draw attention to the statutory requirement under section 8 (7) of the Act which mandates that a written record of approval shall be in such form as may be prescribed by the Minister by regulations, and containing specified information to be included in the record. I also draw attention to the fact that under section 8 (9) of the Act, the superior officer who approves the use of a tracking device must make a report as soon as possible and, in any case, not later than 7 days after the use of the device 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 that was carried out as a result of the approval. In the case of An Garda Síochána such a report is to be made to an Assistant Commissioner.

I can confirm that my examination of the sample of cases where approval was granted under section 8 of the Act satisfies me that in each case examined, the requirements of the Act have been complied with, and that the required record has been kept, and report made within the specified period of time after use of the device ended. I am satisfied that appropriate consideration is given in every case to considerations such as the proportionality of the actions for which approval is sought, which involves a consideration of whether the deployment of the device can be justified in terms of the likely return on the investment of the resource in question, as well as in terms of manpower, time and cost, including risk to the safety of officers involved in the deployment.

I have been informed by relevant personnel, and indeed it is evident from the files inspected, that the use of such devices has been of great assistance to An Garda Síochána in the detection and prosecution of offences, such as the importation and distribution of illicit drugs, tobacco products, and laundered fuel, and in the monitoring of persons suspected of being involved in activities which could threaten the security of the State or persons in the State.

As noted by Mr Justice Feeney in his last report, as evidence gained from surveillance under the Act comes to be used in Court during trials for offences committed, issues will arise inevitably touching upon the interpretation of ‘surveillance’, ‘surveillance device’, and ‘tracking device’ under the Act. Indeed, other issues affecting the admissibility into evidence of the material gained from surveillance under the Act will be raised and will have to be the subject of judicial determination. Thus far, as I have already stated, only the case of *Sunny Idah v. DPP* has yielded a judgment on an

issue under the Act. It will be important to have regard to such judgments as they arise, and for An Garda Siochana, Revenue and the Defence Forces to keep their procedures and practices under review in a timely fashion as any such judgments issue. Where necessary, any Policy or other guidance document in existence will have to be examined and adapted to conform to any changes in interpretation of the Act, or in the light of any guidance handed down judicially in the future.

I have conducted the review required by section 12 of the Act for the current reporting period. I am satisfied that in all cases brought to my attention as part of this review the Act has been complied with in every respect.



Michael D. Peart
Judge of the High Court

Date: 14th May 2014