

**REPORT**  
**TO**  
**AN TAOISEACH,**  
**ENDA KENNY TD**

**ON A**

**REVIEW OF OPERATION OF THE  
CRIMINAL JUSTICE (SURVEILLANCE)  
ACT 2009 FOR THE PERIOD THE 1<sup>st</sup>  
AUGUST 2013 – 31<sup>st</sup> JULY 2014**

**MR JUSTICE ROBERT EAGAR  
(DESIGNATED JUDGE)**

## Introduction

1.1 This review is prepared for An Taoiseach in respect of the provisions of section 12 of the Criminal Justice (Surveillance) Act 2009 (herein after referred to as “the Act”).

1.2 In December 2014 the President of the High Court, Mr Justice Nicholas Kearns invited me (a serving Judge of the High Court) to become the Designated Judge under the provisions of section 12 of the 2009 Act for the purpose of keeping the operation of sections 4 to 8 of the Act under review and to report to the Taoiseach any matters relating to the operation of the those sections that the I consider should be reported.

1.3 On the 19<sup>th</sup> January 2015 the Minister for Justice and Equality, Frances Fitzgerald T.D., wrote to me to indicate that the Government at its meeting on the 16<sup>th</sup> December 2014 designated me as the Designated Judge for the purposes of this section of the Act.

1.4 In preparing for the review of section 12 of the Act I had a meeting with Mr Justice Michael Peart, the former Designated Judge and reviewed his report which was a review of the operation of the Act for the year 1<sup>st</sup> August 2012 to 31<sup>st</sup> July 2013.

2.1 For the purpose of preparing this report I had two meetings in Garda Headquarters with Assistant Commissioner John O’Mahoney, Crime and Security, Garda Headquarters, Phoenix Park together with members of his management team. .

The first of these meetings was on the 20<sup>th</sup> February 2015 and the second meeting was on the 2<sup>nd</sup> April 2015.

**2.2** I had a meeting with the Director of Intelligence of the Defence Forces, Colonel Joe Mulligan and the Lieutenant Colonel who was the appointed officer of the Director of Intelligence on the 25<sup>th</sup> March 2015 and had a further meeting with the relevant officer on the 9<sup>th</sup> April 2015, both at McKee Barracks.

**2.3** I had a meeting with the Assistant Secretary, Investigations and Prosecutions Division, and another senior official in that division the appointed officer of the Revenue Commissioners for the purposes of section 4 to section 8 of the Act. On the 24<sup>th</sup> March 2015 and had a subsequent meeting at the Office of the Revenue Commissioners on the 22<sup>nd</sup> April 2015 and further met both these officials on that occasion.

**3.1** In addition to the report prepared by Mr Justice Peart dated the 14<sup>th</sup> May 2014 I am aware that reports were provided by the late Mr Justice Feeney and, as indicated by Mr Justice Michael Peart, the reports provided by the late Mr Justice Feeney 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 and I believe it is unnecessary for same to be repeated here.

## An Garda Síochána

4.1 On the 20<sup>th</sup> February 2013 I attended at the Garda Headquarters and met Assistant Commissioner John O'Mahony, who is the Assistant Commissioner for Crime and Security. I also met two members of his management team. I outlined how I propose to keep the operation of the Act under review. Assistant Commissioner O'Mahony provided a policy document which sets out the law in respect of the 2009 Act and outlined the Commissioner's policy in relation to the operation of the 2009 Act. Having considered same I approve this document as it is a most helpful outline of the purpose of the Act. The Commissioner's policy document provides an appropriate approach of applications under the 2009 Act in the interest of operational efficiency which is the hallmark of the methodology.

4.2 I arranged to inspect the paperwork on the 2<sup>nd</sup> April 2015 at Garda Headquarters and Assistant Commissioner O'Mahoney indicated that I would have an opportunity of viewing the surveillance equipment used. I was also given a record of the section 5 authorisation, the section 7 applications and the section 8 applications between the period of the 1<sup>st</sup> August 2013 to the 31<sup>st</sup> July 2014.

4.3 On the 27<sup>th</sup> February 2015 I wrote to Assistant Commissioner O'Mahony notifying him that on the 2<sup>nd</sup> April I would proposed to examine the paperwork with regard to a number of specific applications under sections 4, 5, 7 and 8 of the Act but reserved the right to check a number of other authorisations without giving any notice. This correspondence was duly acknowledged by the Assistant Commissioner.

**4.4** On the 2<sup>nd</sup> April 2014 I attended at the Offices of Crime and Security Branch, Garda Headquarters and met Assistant Commissioner O'Mahoney, and two members of his management team. The paperwork in relation to all of the relevant applications were in folders which were kept in a secure place. I examined the paperwork in respect of the five section 5 approvals, one section 7 approval and seven approvals under section 8 which I had notified to Assistant Commissioner O'Mahoney. I also, in addition, inspected two further section 5 approvals, two further section 7 approvals and three separate section 8 authorisations which I had sought in the course of this examination. I am absolutely satisfied that the paperwork provided to me was appropriately presented to me and also maintained in accordance with the Commissioner's policy document.

**4.5** The management team included the superior officer, who was the person in each case who made the application to a District Judge for authorisation as part of the operation or investigation being conducted, and he provided me with comprehensive information in relation to each case and full explanations as to why it was considered desirable that an authorisation be given. I also had the benefit of perusing each case file and therefore satisfying myself that in each case in which an authorisation was given, the Act was complied with in every respect. I was also provided with a very helpful and detailed document which sets forth the detail of the results of the surveillance in the case of section 4 applications and section 5 authorisations.

**4.6** In relation to section 7 authorisations where approval for surveillance in cases of urgency may be approved the superior officer who gives his approval in these cases sets out the reasons for the urgency and 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 7 of the Act, the Act was complied with in every respect.

4.7 In relation to approvals for tracking devices under section 8 of the Act the superior officer who gave his approval in all of these cases, while I was viewing the files, explained the basis of his approval of the use of tracking devices. From time to time issues can arise in relation to the retrieval of tracking devices. This is a particular issue for the team operating from Crime and Security.

4.8 I am satisfied that the approvals granted were justified and in accordance with the provisions of the Act and that appropriate written records were maintained and available to me. A document on yearly statistics was provided to me which showed a reduction in section 5 authorisations, a substantial reduction in urgent authorisations and a slight reduction in section 8 authorisations for the period. There was also one section 8 refusal.

4.9 I was then given the opportunity of seeing the equipment, the live monitoring of a tracking device which was placed on a vehicle. I was also able to hear and see the fruits of some monitoring and to see an arrest which lead to a charge of possession of explosives in circumstances where without the authorisation for surveillance would certainly have been very difficult to establish. I was also able to discuss with the officers the difficulties of placing devices on vehicles or things and was shown an occasion in which a video recording device was located. I am also satisfied that the officers concerned are specially trained and experienced in such activities.

**4.10** Applications made under section 5 of the Act can be made to any District Judge sitting in the State. A member of the management team of Assistant Commissioner O'Mahoney is nominated by the Assistant Commissioner to be the superior officer for the purpose of the Act.

**4.11** It is evident from the files inspected that the use of surveillance devices has been of great assistance to An Garda Síochána in the detection and prosecution of offences such as the importation of illicit drugs, tobacco products and laundered fuel and the possession of explosives 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.

**4.12** My attention was drawn to the recommendations of the use of surveillance provided by the Act and it is centralised within the National Surveillance Unit. The Garda Inspectorate Report dated October 2014 noted the use of the properly trained surveillance officers as a crucial resort in safeguarding the security of the State and tackling serious criminality. It also notes that the demand for surveillance units far and exceeds their capability and that the Garda Síochána had made a significant investment in the skilled resources deployed by the National Surveillance Unit.

**4.13** Part of the work of the NSU is targeted towards dissident activity and serious and organised criminality and in 2013 the NSU were involved in operations that lead to 19 arrests for cases that appeared before the Special Criminal Court. The Garda Inspectorate Report also notes that it is a national unit, they operate outside Dublin and try to help when requests are made for their service. The report also notes that

during an operation involving other units events invariably unfold that require fast time decision making. With surveillance this could include dangerous driving by the persons being followed or the commission of a crime that is unconnected to the operation. The Inspectorate recommended that the Garda Síochána conduct a review of the training and development for decision making and recording of decisions for those managing pre-planned and spontaneous incidents.

**4.14** It appears to me that the centralised nature of recording of decision making and the monitoring of the use of surveillance devices is a matter which is at the moment more than satisfactorily undertaken by the National Surveillance Unit. I understand that the NSU are considering the recommendations of the Garda Inspectorate Report. I, however, feel that there would be no reason to seek to develop another team in a different part of the country as the key to the operation of the Act of 2009, and the admissibility of evidence gathered by the surveillance requires a centralised coordination by the National Surveillance Unit through the Office of the Assistant Commissioner, Crime and Security.

**4.15** As many of the successful operations lead to charges in the Special Criminal Court an issue has arisen in relation to the workload of the Special Criminal Court. At present if a person is arrested at the date of this report the likelihood is that the earliest possible trial would be in January or February 2017. This appears to me to be an unsatisfactory state of affairs. Part of my function as designated Judge is to report to the Taoiseach concerning any matters relating to the operation of the sections. It is my view that the Government should consider the possibility of having two Special



Criminal Courts sitting to reduce the substantial backlog of files in the single Special Criminal Court.

**4.16** A final issue in respect of the operation by An Garda Síochána of the Act is the issue of the obligation of the prosecutor to disclose documents to the legal representatives of a person charged with an offence either before the Special Criminal Court or any Criminal Court. The requirement of disclosure is usefully summarised in the Director of Public Prosecutions' Guidelines for Prosecutors, the revised version being published by the Director in November 2010. The Director of Public Prosecutions states that the constitutional rights to a fair trial in due course of law and fair procedures place a duty on the prosecution to disclose to the defence all relevant evidence which is within its possession. The issue of disclosure of evidence obtained by way of surveillance is of course a particularly difficult one. In certain cases the privilege can be claimed and the determination has to be made by the Trial Judge or the Special Criminal Court in relation to applications for disclosure of surveillance evidence.

**4.17** Section 14(4) of the 2009 Act grants a Trial Judge a discretion to admit "surveillance evidence" obtained in non-compliance with a valid authorisation/approval if certain conditions are have been satisfied. The recent judgment of the Supreme Court in the Director of Public Prosecution v. J.C. has implications for the use of Section 14(4) of the Act.

**4.18** However the Guidelines for Prosecutors of the Office of the Director of Public Prosecutions state that the investigation and prosecution of offences are separate and

distinct functions within the criminal justice system. The Director as a general rule has no investigative function and no power to direct the Gardai or other agencies in their investigations. While the Director is not responsible for the conduct of the investigations she is free to indicate what evidence would be required to sustain a prosecution (my emphasis). As a general rule requests for advice from the Director of Public Prosecutions by An Garda Síochána or other investigators should be made in writing. This includes advice in relation to, *inter alia*, the disclosure of evidence. It appears to me that it would be prudent for the Director of Public Prosecutions to assign a senior officer of the Director's Office, or the Chief Prosecution Solicitor's Office, to consider the issue of disclosure of evidence in any case involving the use of the Act.

4.19 I wish to acknowledge the assistance and courtesy of the Assistant Commissioner and his colleagues.

### **The Defence Forces**

5.1 On the 25<sup>th</sup> February 2015 I attended a meeting at McKee Barracks with Colonel Joe Mulligan. Colonel Mulligan is the Director of Intelligence and is the relevant officer for the purposes of the Act for the Defence Forces. I also met with a Staff Officer of Lt. Col. rank. Colonel Mulligan said that he was the authorised officer who had given evidence in the District Court and that it was his experience that it was better for him to give evidence to a District Judge due to the nature of the surveillance being sought.

5.2 Colonel Mulligan indicated that they had a standard operational procedure. He said that the surveillance devices are stored in a secure location with restricted

access when they are not in use. I was satisfied with the nature of the security which was attached to the operation of these devices.

5.3 I was shown a copy of the standard operation procedure and I read through the document which set out issues which arise prior to applications for authorisation. I reviewed the paperwork in relation to the three applications under section 4 of the Act. I was also absolutely satisfied that the authorisations for surveillance were appropriately sought and were sought in accordance with law.

5.4 Details of all investigations are communicated to the appropriate authorities and appropriately secured.

5.5 I am satisfied that the Defence Forces involved in surveillance are very clear as to their role and are very clear as to the steps to be taken and have complied for the relevant period with the provisions of sections 4 to 8 of the Act.

5.6 I wish to acknowledge the assistance and courtesy of the Director of Intelligence and his staff.

### **The Revenue Commissioners**

6.1 On the 24<sup>th</sup> March 2015 I attended at the Office of the Revenue Commissioners Investigations and Prosecutions Division in Ashtowngate, Ashtown, Dublin 15. I met the Assistant Secretary and a senior official of the Revenue Commissioners who was one of the two authorised persons under the Act. I outlined how I proposed to keep under review the operations of sections 4 to 8 of the Act and

indicated that I would be reviewing the period from the 1<sup>st</sup> August 2013 to 31<sup>st</sup> July 2014.

6.2 The senior official said that a Principal Officer in the region would contact him and it was his duty, along with the other authorised officer to approve all tracking devices under section 8 of the Act.

6.3 The actual operation of attaching the tracking devices and their removal could present challenges. Details included:

- 1) The trackers applied.
- 2) The nature of the suspected activity.
- 3) The details of the approval given by the authorised officer who within 7 days of the completion of the tracking must make a written report to the Assistant Secretary providing details of the case and including a copy of the written approval granted.
- 4) A copy of these documents were maintained by the authorised officer.

6.4 I inspected a copy of the documents and noted:-

- 1) A number of the approvals concerned cases in which the target vehicle or vessel was suspected of being used in connection with the distribution of illicit tobacco products.
- 2) A number related to drugs or prohibited goods.
- 3) A number concerned illicit alcohol products.
- 4) A number related to the distribution of laundered fuel.

**6.5** I noted that there were instances which resulted in it not being possible to deploy the due to operational factors. I reviewed the documents and was satisfied that the documentation complied completely with the requirements of section 8 of the Act.

**6.6** I noted a number of issues that seemed to arise consistently:-

- 1) Suspects were very surveillance conscious.
- 2) There was an excellent use of mutual assistance with other jurisdictions.
- 3) In a number of cases there was an extension of time given and in each case this was appropriate.
- 4) In one case there was a failure to transmit but this was due to a failure of the device and there was no suggestion of it being found and interfered with.
- 5) In many cases a good deal of information was provided to the Revenue Commissioners albeit that there was no actual arrest.
- 6) There were a small number of applications under section 4(5) of the Criminal Justice (Surveillance) Act 2009.

**6.7** I am satisfied that the Revenue Commissioners acted in accordance with the provisions of the Act and that appropriate written records were maintained and available to me.

**6.8** After I had finished reading the documentation the senior officials attended a meeting with me and I was shown examples of the tracker devices.

6.9 I wish to acknowledge the assistance and courtesy of the Assistant Secretary and her senior official of the Revenue Commissioners.



**Criminal Justice (Surveillance) Act 2009, Section 12(1)**

**Report to the Taoiseach**

**Statement pursuant to Section 12(6) of the Act**

This is to certify that no matter has been excluded from the attached report, dated 8 July 2015, in pursuance of subsection 12(7) of the Criminal Justice (Surveillance) Act 2009.

Assistant Secretary General  
to the Government

20 July 2015