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

The Government, at its meeting on the 30th September, 2009, designated Mr. Justice Kevin Feeney as the designated judge pursuant to s. 12 of the Criminal Justice (Surveillance) Act 2009 (the Act). By letter of the 14th October, 2009 the Minister for Justice, Equality and Law Reform wrote to Mr. Justice Feeney informing him of the fact that he was to be "the designated judge" under the Act.

Under section 12(3) the functions of the designated 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 12 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."

The functions of the designated judge include keeping under review sections 4 to 8 of the Act. Section 4 provides for applications for authorisation for surveillance, section 5 provides for authorisation, section 6 provides for variation or renewal of

authorisation, section 7 provides for approval for surveillance in cases of urgency and section 8 provides for tracking devices.

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 s. 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.

As this is the first report under the Act, it is appropriate to provide a brief overview of sections 4 to 8 of the Act which are the sections the subject of this report. The starting point is that before any surveillance may be validly carried out, it is necessary to obtain an authorisation either from the District Court under section 5 or 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 and surveillance

carried out under that section may not be carried out for a period of more than 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 surveillance is necessary,

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

(c) 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

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

Only officers of the three identified bodies are entitled to seek authorisation, those bodies being 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 the authorisation and where an authorisation is issued, following a District Court order, 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. 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, place or thing, the name of the superior officer to whom authorisation is issued, any conditions imposed by the order and 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 was 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 pursuant to a District Court order as provided for in section 5. Approval for surveillance in cases of urgency is dealt with in section 7 and such surveillance must be carried out with the approval of a senior officer of a minimum designated rank. Before granting the 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 in a case of urgency may be granted subject to conditions including the duration of the surveillance which 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 identifies the obligations on a superior officer who grants an approval.

Section 8 of the Act deals with tracking devices which 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 where approved by a superior officer without any necessity of making an 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. That section provides that in addition to satisfying the normal grounds for issuing an authorisation, a person applying for such authorisation must show 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 that 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 record 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.

The Act was signed into law on the 12th July, 2009 and became operative as of that date. I was not notified of my appointment as the designated judge pursuant to section 12 until I received the letter of the 14th October, 2009. In those circumstances I determined, that in the first year of its operation, that it would be appropriate to

review the operation of the Act from its inception date to the date of the 31st July, 2010 and to review the operation and use of sections 4 to 8 under the Act during that period.

After my nomination as the designated judge, I was contacted by the office of the Chief of Staff of the Defence Forces, the Commissioner of An Garda Siochana and the Chairman of the Revenue Commissioners who in each instance identified a senior person who would act as a point of contact and would facilitate me in the carrying out of my functions under section 12 of the Act. On being informed of the contact person in each of the three bodies, I made written contact with each of those persons in October 2009. In November 2009 I attended at McKee Barracks and at Garda Headquarters in Phoenix Park for the purpose of discussing the procedures which had been followed to that date and/or were to be followed by both of those bodies. In particular, I observed the initial procedures and documents used by An Garda Siochana in operating the provisions of the Act and ascertained that adequate and sufficient documentary records were being kept. Records were being kept of every occasion when the provisions of the Act were used.

By the 19th November, 2009, which was the date of my attendance in Garda Headquarters where I met with an Assistant Commissioner and a number of other officers, it was apparent that An Garda Siochana had already availed of the provisions of the Act and had put in place a centralised written record of all occasions and instances in which there had been applications for authorisations, the granting of authorisations, the variation or renewal of authorisations, the approval of surveillance in the case of urgency and the use of tracking devices.

After the Act had been in use for a period of slightly in excess of one year, I again made contact with each of the contact persons within the three organisations

and arranged to attend at a relevant location where each of those three bodies held the relevant documentation and information. Meetings were arranged with each of the three bodies in the month of September 2010 and I attended at McKee Barracks where I met with the Colonel in charge of the operation. The Colonel in charge had available the written records in relation to each and every occasion upon which the provisions of section 4 to section 8 of the Act had been operated by the Defence Forces in the period from the commencement of the Act up to the 31st July, 2010. I will deal later with each of the three bodies in separate paragraphs. In September 2010 I also attended at the headquarters of An Garda Siochana where I met with the Assistant Commissioner in charge of the use and operation of surveillance under the 2009 Act and had made available to me the documentation and records relating to each and every occasion upon which An Garda Siochana had availed of the provisions of section 4 to section 8 of the Act. Similarly in September 2010 I attended at the Investigations and Prosecution Division of the Revenue Commissioners and met with the Assistant Secretary in charge of the use and operation of surveillance under the Act by the Revenue Commissioners. I was provided with documentation and records dealing with each and every use by the Revenue Commissioners of the provisions of section 4 to section 8 of the Act during the relevant period up to the 31st July, 2010.

The Defence Forces

My consideration of the documents and records kept by the Defence Forces and made available to me established that the Defence Forces had availed of the provisions under the Act on a limited number of occasions during the twelve and a half month period under review. The Defence Forces had used the provisions of the Act on less than ten occasions and therefore I was in a position to review and consider

the documents available in relation to each and every use by the Defence Forces of the provisions of sections 4 to 8 of the Act. On every occasion upon which surveillance was carried out by the Defence Forces during the twelve and a half month period, such surveillance was carried out pursuant to an authorisation issued by the District Court following an application for such authorisation. On each occasion upon which an application was made to the District Court, the Colonel in charge was present and was available for examination by the District Court judge. I reviewed the documentation and was satisfied that from those records each and every occasion upon which the Defence Forces had operated the provisions of section 4 that an authorisation from the District Court had been obtained. On every occasion the Colonel in charge was the instigator of the application for authorisation under section 4. In each instance the authorisation issued by the District Court under section 5 was available to me. On no occasion was an authorisation granted for the maximum period and the period of authorisation was in each instance limited to a period less than three months. The basis for the application under section 4 in each and every instance was that the surveillance sought was necessary for the purpose of maintaining the security of the State. In each instance upon which an application under section 4 was granted the District judge was satisfied to make an order. For such an order to be made the District judge is required to be satisfied by information on oath of the superior officer concerned. The authorisation granted provides particulars of the surveillance device to be used, the person or place or thing that is to be the subject of surveillance, the name of the superior officer to whom it was issued and the conditions upon which the authorisation was issued including the date of expiry. In no instance was section 6 of the Act used by the Defence Forces, that is, an application for variation or renewal of authorisation. In one instance a person who

had been previously the subject matter of a surveillance order was the subject of a subsequent application to the District Court. The documentation indicated that in that case there had been an authorisation for a period of one month in respect of a particular person but that the surveillance device had been removed before the end of that period and that due to the need to extend the scope and nature of the surveillance a fresh application was made to the District Court for an authorisation under section 5. The fact of the earlier surveillance order was disclosed to the Court at the time of the making of the second application.

As indicated earlier in this report an application for authorisation can be made to any District judge and I therefore consider it appropriate to identify whether or not one particular District judge was being used as the person to whom applications were made by the Defence Forces. The position identified by the documentation was that every authorisation issued during the period was issued by a different District judge.

I had the opportunity of speaking with the Colonel in charge of the operation of the Act and I was able to discuss with him the operation of sections 4 to 8 of the Act and to review the use by the Defence Forces of the provisions under the Act during the twelve and a half month period after the Act came into operation. The Defence Forces did not avail of the provisions under section 7 for the approval of surveillance in cases of urgency on any occasion during the period nor had they availed of the provisions under section 8. Due to the limited number of uses by the Defence Forces in the period under consideration I was able to review the files and documents available in respect of each and every use by the Defence Forces of the provisions of the Act. That review demonstrated that in each and every instance a District judge was satisfied to grant an authorisation under section 5 and that such authorisation was available for review. I spoke to the Colonel in charge and obtained

an oral account of the circumstances giving rise to the application for authorisation. That information is confidential and it relates to criminal investigations which are progressing. The documentation available and the information provided to me by the Colonel in charge enabled me to review the operation of sections 4 to 8 by the Defence Forces for the twelve and a half month period in question. The implementation of Statutory Instrument No. 360/2010 will facilitate a standardisation of information available in relation to applications brought under section 4 for an authorisation under section 5.

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.

An Garda Siochana

In November 2009 I visited the Assistant Commissioner in charge of the operation and co-ordination of all applications for authorisation or use under sections 4 to 8 of the Act. I met with the Assistant Commissioner and a number of other members of An Garda Siochana and ascertained that early use had been made by An Grda Síochána of the provisions of the Act after its introduction. I reviewed the make up of the documentation and information which was kept and recorded. The documentation and records were retained in a centralised location and were available to me for review. The system in operation was such that all applications under the Act were directed through the Assistant Commissioner in charge.

In September 2010 I met with the Assistant Commissioner in charge of the operation of the Act for An Garda Siochana and a number of other senior members of the Gardaí. The manner in which An Garda Siochana operates the Act is that 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. All documentation and records generated are available centrally and were available to me on the occasion of my visit.

The period of review was from the commencement of the Act until the 31st July, 2010. The use of a central point for all uses under the Act results in all applications for usage being directed through one section and that section has senior officers who have been trained in relation to the operation of the Act so as to ensure that the procedures and record keeping which have been laid down are maintained.

From my discussions with the Assistant Commissioner and the other senior members, it was apparent that early consideration was given as to the mode of operation which the Gardaí would adopt in seeking to avail of the provisions of the Act. Legal advice was sought including consideration of international case law from other common law jurisdictions where surveillance has been permitted by statute and also consideration was given to decisions of the European Court of Human Rights. Part of that ongoing consideration is that an internal policy document is in the process of completion and it is envisaged that it will be available for circulation within the Gardaí prior to the end of this calendar year. When that document has been completed a copy of it will be made available to me as part of my review of the operation of the Act as designated judge. The policy document will apply throughout An Garda Siochana.

The surveillance permitted under the Act is operated by An Garda Siochana in such a manner that in practise no individual Guard, no matter of what rank, can instigate a usage under the Act without going through the internal procedures which

direct the usage through a particular section. This applies in every case. That approach was apparent from my inspection as all the documentation and records relating to all and any usage under the Act had been directed through the one section. The scope of usage related to all areas of serious organised crime and subversive activities.

The considerable resource implications involved in the use of the Act results in a situation where surveillance is only used in carefully selected and targeted cases. An examination of the documents and records available to me and an examination of the breakdown of the usage by the Gardaí of the provisions of the Act confirms this situation. It is also the case that some usage involves real risk to the persons involved in assisting in the application for or the usage of surveillance devices. Surveillance devices can and are operated in a covert manner but the position is that the usage of the product of such surveillance in Court proceedings involves the operation in question being the subject of review in public with the actual or potential identification of parties involved in the process. This results in deployment of devices in carefully selected and considered cases.

It is to be noted that there is currently available on a commercial basis surveillance devices and counter-surveillance devices which can be purchased by members of the public. The use of such devices by third parties, including criminals, is a matter of ongoing concern to the Gardaí.

All the documentation and records generated by the Gardaí in their use of the provisions of the Act in the relevant period were made available to me in Garda Headquarters. Records relating to each and every section 5 application were available and it was apparent from an examination of those records that no individual Guard

could pursue an authorisation without him or her being directed to the section which controlled and monitored the operation of the Act.

In relation to the section 4 applications, which are applications for authorisation, I had regard to the occasions where a request for an application was refused. There were less than ten cases where members of the Gardaí had sought to have an application for authorisation made but where such request had been refused. All the files relating to those cases were available to me and I chose at random 50% of the cases. That review indicated that requests for an application for authorisation to be made had been made in circumstances where they were premature or where such requests did not provide the necessary information to ground an application for authorisation or where circumstances were such that it was deemed that such application was not proportionate. In those cases no application was made. Given that the procedure which is followed by An Garda Siochana is that all applications go through the section dealing with these matters and given the imminent introduction of a written internal protocol, it would appear unlikely that there will be a substantial number of cases where applications by individual Gardaí for the making of an application for authorisation under section 4 of the Act will be refused. However, the procedures which are in place provides a filtering process to endeavour to ensure that the requirements for the granting of an authorisation are present prior to an application for authorisation being made.

In the relevant period, An Garda Siochana made a number of applications under section 4 and authorisation was granted under section 5 by the District Court. The number of cases represented a small double figure number and therefore I was able to review 33% of the section 5 authorisations on a random basis. The documents and records relating to all applications were available and I chose 33% of the cases at

random. A review of those cases demonstrated that usually applications were made to the District judge assigned to the District Court area where the surveillance was envisaged to occur. In all instances applications were made on information on oath and since the introduction of Statutory Instrument No. 360/2010 that information is in a set format. The cases reviewed indicated that the Act had been used in an appropriate manner and the surveillance dealt with such matters as the delivery of controlled drugs and investigations of crimes of serious violence invariably targeted against organised criminal or subversive groupings. Consideration of the documents demonstrated that the period of authorisation was invariably less than the maximum period and was targeted to the nature and circumstances of the proposed surveillance. Also in a number of instances, notwithstanding the grant of an authorisation under section 5, no deployment occurred due to altered circumstances.

In each and every one of the cases chosen at random I was provided with information concerning the circumstances as to why such surveillance took place, how such surveillance occurred, the nature and extent and type of information which was gleaned and the extent to which deployment was possible.

There were no applications for variation or renewal of authorisations made by An Garda Siochana during the relevant period.

A number of authorisations under section 7 for approval of surveillance in cases of emergency were made during the relevant period. As those applications were not the subject of consideration by the District Court I paid particular regard to those approvals during my review. As in the other cases all the documentation and records relating to such approvals were available for my consideration. The number of authorisations was a double figure number representing roughly twice the number of section 5 authorisations. In reviewing the records it was apparent that a number of the

approvals for surveillance in cases of emergency proceeded to subsequent section 4 applications and the grant of a section 5 authorisation. That sequence could be gleaned from a cross-reference of the documentation. I reviewed a substantial number of the section 7 approvals and in each and every instance the order was limited to a period of no greater than 72 hours. In the vast majority of cases the order was for a duration of considerably less than 72 hours. In reviewing those approvals I paid regard to the information which was present on the documents and records concerning the urgency of such approvals. That review demonstrated that in the cases reviewed there was in each instance an identifiable urgency for granting an approval under section 7. In a number of cases information had only become available immediately prior to the approval being granted under section 7 and such approval related to events which were imminent. In a significant number of cases where approval was granted under section 7 the duration of the approved surveillance was so limited in time that such surveillance would have been completed within a matter of hours and prior to any opportunity to apply to Court for an authorisation under section 5. Examination of the records and documents also demonstrated that urgent approvals were required in circumstances where information crystallised immediately prior to the actual surveillance itself. The use of section 7 and the other sections of the Act and the grant of approvals for surveillance in case of urgency related to organised criminal activity and to matters of State security.

From my examination of the section 7 approvals and from the information provided to me at my meeting it is indicated that section 7 approvals are used in circumstances where there is neither the time nor circumstances which will allow or permit for an application under section 4 for an authorisation under section 5. The nature of the surveillance, the location of such surveillance and the duration identified

in the documents is entirely consistent with there being urgency in each of the cases which was considered.

A written record is kept 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 Siochana to whom such approval is granted, the conditions imposed on such approval, the time at which such approval is granted and the duration of the approved surveillance. In at least one instance where a file was reviewed, the documents demonstrated the imposition of conditions which were consistent with the protection of third parties' privacy.

The final section of the Act which the designated judge is required to keep under review is section 8 which deals with tracking devices. During the relevant period tracking devices were approved for use on a substantial number of occasions, the number of such approvals being less than 100. As with the operation of the other sections of the Act, all documentation and records relating to such approvals for the relevant period were available. I was able to review a number of the cases at random and it was apparent that tracking devices had been placed on vehicles and objects. As tracking devices are less intrusive than surveillance devices the approval of the use of such devices does not require any application to Court. 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. An examination of the records demonstrated that tracking devices were invariably used as an aid to traditional Garda investigative methods for the purposes of giving the location and direction of vehicles and objects if moved. The cases which I reviewed demonstrated that the approvals under section 8 were granted in

circumstances where there was extensive information available from earlier investigations.

The review of the approvals granted under section 8 including the conditions as to duration and use of the tracking devices and the information provided concerning the circumstances and reasons for granting such approvals indicated that such tracking devices were invariably used as part of ongoing investigations and as an aid to traditional Garda investigative methods.

During my review of An Garda Siochana's use of sections 4 to 8 of the Act, nothing came to my attention which would suggest any improper or inappropriate use and the procedures in place are designed to ensure that such event should not occur.

The Revenue Commissioners

In September of 2010 I visited the Investigations and Prosecutions Division of the Revenue Commissioners and spoke to an Assistant Secretary who was accompanied by two other officials at principal officer level. The Revenue also operates a system where all applications under the Act are made through the one office. All the documents and records relating to the use and operation of the 2009 Act by the Revenue Commissioners during the relevant period were available for my review. To assist in a considered and consistent approach to the operation of the provisions of the Act, the Revenue Commissioners have issued written operational instructions in the form of an instruction manual on the Criminal Justice (Surveillance) Act 2009 which was issued in July 2010. A copy of that manual was made available to me. That manual identifies the criteria for the use of surveillance and sets out in detail approved procedures and the procedures to be observed by

nominated officers. It also provides, in an appendix, details of the statutory law relating to surveillance.

An examination of the documents and records demonstrated that in the majority of cases the usage by the Revenue Commissioners related to tracking devices under section 8. During the relevant period there had been a number of applications under section 5 and since those applications were relatively few I was able to review the documentation and records relating to all those applications. Applications under section 5 were based upon information on oath of superior officer specifying the grounds and the format followed in the applications was almost identical to the format ultimately identified in Statutory Instrument No. 360/2010. The authorisation granted to the Revenue Commissioners under section 5 in each instance was in writing and specified the particulars required in section 5, sub-section (6) of the Act. A review of all of the section 5 authorisations identified that in each instance the particulars of the surveillance device was identified, the person, place or thing which was to be the subject of the surveillance was identified, the name of the superior officer to whom it was issued was identified and the conditions including the duration were identified. The duration varied dependent upon the nature of the surveillance required. As with An Garda Siochana the grant of an authorisation did not necessary result in the activation of a device as the circumstances which gave rise to the application and the grant of the authorisation had altered by the time it came to place or to activate the surveillance device.

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

A number of approvals for the use of tracking devices under section 8 were granted to officers of the Revenue Commissioners during the period under review.

The number of approvals granted under section 8 was in small double figures. All the documentation and records in relation to such approvals were available and on a random basis I chose 33% of the approvals for review. In each and every instance applications for approval were made to an officer of the Revenue Commissioners of not less than principal officer. The principal officers to whom such applications for approval were made were in every instance one of the principal officers directly involved in operating and monitoring the Act for the Revenue Commissioners. It was apparent from consideration of the documentation and records and from the information provided to me that the cost and manpower involved in the use of tracking devices and in particular surveillance devices is such that they are targeted and limited to cases where there is already existing information. In all the cases which were reviewed there was a written record of approval consistent with section 8, sub-section (7) of the Act and there was available to me information and records to confirm the appropriateness of the use of such devices.

During my review nothing came to my attention which would suggest any improper or inappropriate use of sections 4 to 8 of the Act and the procedures in place provide for a consistent and targeted use of the Act.

Conclusions

Each of the three entities entitled to avail of the provisions of sections 4 to 8 of the Act have put in place a procedure to ensure that all use is directed through a designated person, section or branch. In each instance the documentation and records necessary to assist in the review were available in a central location and I was free to choose at random any application, authorisation or approval for consideration. The documentation relating to same was available and when explanations were requested in relation to the individual circumstances they were readily provided. The three

entities have put in place procedures and record keeping to facilitate the ongoing review of the operation of sections 4 to 8. During the first year of operation the Revenue Commissioners have prepared and circulated an operational instruction and an internal policy document within An Garda Siochana is near completion and it is envisage will be circulated before the end of this calendar year. To date, usage of the provisions of the Act by the Defence Forces has been limited but in that organisation applications, authorisations and approvals under the Act are dealt with in one office under the control of one officer and the requirement for written operational instructions or internal policy guidelines is considerably less than in the Revenue Commissioners or in An Garda Siochana.

The introduction of Statutory Instrument No. 360/2010 has established a basis for ensuring that the information upon which authorisations under section 5 are granted is set forth in a consistent and coherent manner.

My consideration of the operation of the Act has also identified that every District judge was circulated with an explanatory memorandum in relation to the operation of the 2009 Act during the year under review. That circulation took place in circumstances where a section 5 authorisation hearing takes place *ex parte* and otherwise in public and can be made to any District judge assigned to any District Court district.

Having reviewed the operation of the Act under the provisions of section 12, 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.

21.10.2010

Kevin T. Feeney
Judge of the High Court

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

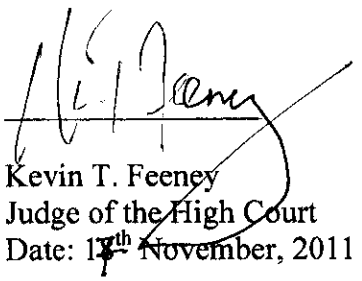
significant cases involving the commission of crime or the prevention of the commission of crime or the maintenance of the security of the State. The cost also ensures that from a practical point of view consideration would always have to be given to less technical and cheaper forms of investigation 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

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, 2011 TO 31st JULY, 2012

Report

1.1 At its meeting on the 30th September, 2009 the Government designated Mr. Justice Kevin Feeney as the designated Judge pursuant to s. 12 of the Criminal Justice (Surveillance) Act 2009 (the Act). This is the third report that I have prepared as the designated Judge under the Act. The Act was signed into law on the 12th July, 2009 and became operative as of that date. My first two reports covered the periods from the date that the Act came into operation up to the 31st July, 2010 and the following twelve month period, that is, from the 1st August, 2010 to the 31st July, 2011. This report covers the following twelve months, that is, the period from the 1st August, 2011 to the 31st July, 2012.

1.2 In my first two reports I set out in detail the statutory provisions contained in the Criminal Justice (Surveillance) Act 2009 and it is unnecessary to repeat those provisions in detail. Section 12(3) of the Act delegates certain functions to the designated judge which include keeping under review the operation of ss. 4 to 8 of the Act and to report to the Taoiseach from time to time concerning any matters relating to the operation of those sections of the Act.

1.3 The purpose of the Act is set out in its long title and is identified as 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. Surveillance is defined in s. 1 of the Act and s. 3 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 section 7 or 8."

1.4 The review by me under the Act covers the operation of sections 4 to 8 of the Act. Section 4 deals with applications for authorisation, s. 5 which deals with authorisation, s. 6 which deals with variation or renewal of authorisation, s. 7 which deals with approval for surveillance in cases of urgency and s. 8 which deals with tracking devices. I shall deal with each of those five sections.

1.5 A number of Statutory Instruments have been introduced which are relevant to the operation and function of the Act. Those Statutory Instruments deal with written records of approval, for An Garda Síochána, the Revenue Commissioners and the Defence Forces and are set out in Statutory Instruments No. 275/2009, 290/2009 and 80/2010. District Court Rules dealing with the procedures to be applied by the District Court when dealing with applications for authorisations under s. 5 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 to the operation of the Act.

Review 2011/2012

2.1 In carrying out this review I was in contact with An Garda Síochána, the Defence Forces and the Office of the Revenue Commissioners. I was in written and oral communication with the Director of Intelligence of the Defence Forces. I was also in contact with the Assistant Secretary in charge of Investigations and Prosecutions Division of the Revenue Commissioners and I met with her and another officer from the Revenue Commissioners. I was also in contact with and met the Assistant Commissioner in charge of Crime and Security of An Garda Síochána and met with him and a number of his officers on a number of occasions.

2.2 I attended at the offices of the Investigations and Prosecutions Division of the Revenue Commissioners and examined the documentation relating to each and every use by the Revenue Commissioners of the Act in the relevant twelve month period. The documentation in relation to each and every such use was available and considered by me and all requests for information was provided.

2.3 In the months of September, October and November, 2011, I visited the headquarters of the Crime and Security Branch of An Garda Síochána and spoke to a number of officers. All the documentation relating to the use by An Garda Síochána of the provisions of the Act during the year under review was available and was examined by me. The documentation giving rise to the use of the Act was available in each individual case but due to the number of cases I determined to proceed on the basis that I would make a random selection of individual cases for further and more detailed review. In those cases I arranged to meet with and to speak to a senior investigating Guard involved in each of the operations in respect of which I had made a random selection. In those cases the documentation and material generated as a result of surveillance, including recordings, transcripts and other material, was available for review. As in the previous year, I requested access to original documentation and material and that was made available to me. On this occasion I not only reviewed the documentation and material which was available but also spoke to a senior investigating officer in a number of cases.

2.4 The Act has now been in operation for over three years and a number of developments have occurred as a result of that fact. As part of my review I was in a position to consider three criminal prosecutions and trials which came to Court where material obtained under the provisions of the Act was part of the evidence. I shall return to those three cases later in this report.

2.5 In my first two reports 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 was given to the reported decisions in relation to surveillance from the European Court of Human Rights. In both my earlier reports I commented upon the preparation of an internal policy document concerning the operation of the Act which was in preparation. In my last report I indicated that a written protocol being prepared by An Garda Síochána was likely to be available before the end of 2011. That protocol was issued in the format of a written document of the Commissioner's policy in relation to the operation of the Criminal Justice (Surveillance) Act 2009 and was dated the 11th July, 2012. The policy document was circulated to members of An Garda Síochána on the 11th July, 2012. I had previously requested that when the protocol or written policy was completed that it should be made available to me for my consideration. In accordance with my request, a copy of the Commissioner's policy was sent to me. The Assistant Commissioner stated that it had been envisaged that the policy would have been circulated prior to the end of 2011 but, due to a number of legal issues which necessitated the consideration of the law officers, the document was not finally ready for circulation until the 11th July, 2012.

2.6 The policy document deals with the provisions of the Criminal Justice (Surveillance) Act 2009 in detail and lays down in the Commissioner's policy section of the document the procedures and protocols to be followed, which are, in fact, ones that were already in place prior to the circulation of the document. I am aware from my scrutiny of the use made by An Garda Síochána of the provisions of the 2009 Act that there is and has been in place for a considerable period of time a centralised

process for the consideration of applications for authorisation and the renewal of authorisations and for the use of s. 7 orders and for the placing of tracking devices pursuant to s. 8. It is the use and implementation of such procedures that has enabled me to review and consider all applications and uses made by An Garda Síochána under the Act. The oversight and supervision maintained by the Assistant Commissioner in charge of Crime and Security together with his senior officers ensures that the documentation and records concerning the use of the Act are readily available for inspection and scrutiny. It was also clear from the procedures and policy which have been put in place in relation to s. 7 concerning urgent applications that the use of that section is and should only be availed of where an authorisation cannot be obtained from a judge of the District Court.

2.7 In last year's report I indicated that the envisaged protocol or Commissioner's policy document would be for the purpose of ensuring that all and any use of the 2009 Act would be conducted in accordance with identified procedures and would operate through specified senior officers and in such manner as to ensure that a full and comprehensive record would be maintained. Having had the opportunity of considering the content of the Commissioner's policy document it is apparent that that is achieved.

3.1 In both my earlier reports I pointed out that the operations of the provisions of the Act by a body such as An Garda Síochána involved considerable time, effort and cost and required the use of extensive manpower to ensure effective operation. As I have had the opportunity in the past two years of reviewing specific uses of the Act, chosen on a random basis, it is evident that the use and operation of certain surveillance devices requires not only the use of technical equipment but also the

involvement of extensive manpower and in some instances on a twenty four hour basis. The position, therefore, remains the same as was indicated in last year's report, which is that due to the considerable resource implications involved in the use of surveillance devices under the Act, that such surveillance is used in carefully selected and targeted operations.

3.2 In last year's 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 as a result of certain events that occurred prior to last year's report and since that date, the availability of such devices has been further confirmed as a result of investigations and inquiries.

4.1 One of the major developments in the evolution of the use and application of the provisions of the 2009 Act since my last report is that there has now been a number of trials in which the product of surveillance has formed part of the evidence put before the Court. Section 14 of the Act deals with the issue of admissibility of evidence in the specific context of evidence obtained by means of surveillance. In carrying out my review, I considered information available in respect of the three criminal prosecutions where part of the evidence placed before the Court was evidence obtained following the use of the 2009 Act. I will deal briefly with each of those cases. Prior to doing so, it is important to note that the use and operation of surveillance under the 2009 Act will increasingly be the subject of review in open court and arising from rulings and decisions of the Court, additional guidance and knowledge as to the use and application of the 2009 Act will become available.

4.2 The first of the trials which I considered took place in the Circuit Criminal Court and during the course of that trial certain preliminary matters were raised in relation to the s. 4 application for authorisation under the 2009 Act. Following legal argument and consideration by the trial Judge it was ruled that the authorisations in question were lawful and that there had been no illegality in obtaining authorisations under s. 4 of the Act. After that ruling the trial recommenced and following on from certain unrelated matters, including the swearing of a new jury, the accused pleaded guilty to a lesser charge and on a re-arraignment a plea of guilty was entered.

4.3 In the second case which I considered, evidence obtained as a result of the use of the 2009 Act formed part of the book of evidence and the prosecution was at the Special Criminal Court. Prior to the commencement of the trial a plea of guilty was accepted in respect of one of the charges. It followed that there was no consideration or issue in relation to the use or applicability of the 2009 Act.

4.4 The third case which I considered related to a criminal prosecution before the Circuit Court. I had available copies of the transcript of that trial and was in a position to consider the relevant extract from the transcript which dealt with the issue of the use of the 2009 Act. A ruling was made by the trial Judge based on the facts of the particular case which emerged in evidence. The trial Judge held that the issue could be decided based on the facts of the case. The trial Judge ruled that, even though authorisation had been granted under the 2009 Act, the particular facts and circumstances of the case in issue were such that those facts and circumstances did not come directly or indirectly or impliedly within the ambit of the definition of surveillance under the 2009 Act. It followed from that determination that there was no need for any further consideration of the provisions of the 2009 Act as the matters under consideration did not amount to surveillance. This case illustrates the

importance of the definition of surveillance in the 2009 Act and that definition is likely to be the subject of further judicial consideration.

The Defence Forces

5.1 In last year's report I indicated that there had been a marginal increase in the usage by the Defence Forces of the provisions under the Act in the year under review as opposed to the previous year. This year, as a result of an oral discussion with the Director of Intelligence and from correspondence received, I am satisfied that there was not any use of the provisions of the Act which would require to be reviewed in this report.

The Revenue Commissioners

6.1 In October 2011 I visited the Investigations and Prosecutions Division of the Revenue Commissioners. I met with the Assistant Secretary of the Investigations and Prosecutions Division and another senior official of the Revenue Commissioners. The relevant documentation and records relating to the use by the Revenue Commissioners for the period 1st August, 2011 to the 31st July, 2012 was present. As was the case at the time of my last report, the Revenue Commissioners continue to use a system whereby all uses under the Act are made through one office and are made using the instruction manual on Criminal Justice (Surveillance) Act 2009 which was issued by the Revenue Commissioners in July of 2010. That instruction manual remained in force for the year under review and it provides that any application for use of a surveillance device by a Revenue official in support of an investigation or Revenue operation must be grounded on an application for such use and must be submitted to a Principal Officer being one of the officers nominated for that purpose.

There are two nominated officers and both are Principal Officers. The implementation of the system provided for in the instruction manual ensures that all records in relation to the use by the Revenue Commissioners 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 records.

6.2 I examined the records and documents which were present in the office of the Investigations and Prosecutions Division of the Revenue Commissioners and they covered each and every use by the Revenue Commissioners of the provisions of the Act during the year.

6.3 In the year under review all usage by the Revenue Commissioners of the provisions of the Act related to s. 8 usage. Section 8 provides for the use of tracking devices. Due to the relatively limited number of occasions on which the Revenue Commissioners used the provisions of the 2009 Act, I was able to review the records relating to each and every usage. There was an increase in relation to the number of approvals granted for the use of tracking devices under s. 8 in the year under consideration. However, the number of approvals was of a sufficiently limited number that I was able to review each case where an approval was granted. The records maintained identified the particulars of the tracking device that was approved, the person, vehicle or thing that was to be monitored and the officer of the Revenue Commissioners to whom the approval was granted. The records also identified the conditions placed upon such approval and the duration in respect of which such approval was in place together with the time at which the approval was granted. I was provided with information in relation to the deployment of the devices which were approved and the nature, extent and outcome of such investigations. The tracking devices were deployed in relation to operations covering the illegal importation of

goods into Ireland, including illegal drugs. As I reported in my last report, given the nature of smuggling and the illicit importation of goods into the jurisdiction and the efforts made by persons smuggling goods into this country to avoid the payment of duties and taxes, it was not surprising that the majority of the uses of the provisions of s. 8 of the Act by the Revenue Commissioners related to tracking devices. In the year under review all uses were under s. 8. The use of tracking devices resulted in the seizure of not only illegally imported goods but also illegal drugs and cash.

6.4 Having reviewed each of the cases where the Act was used by the Revenue Commissioners during the relevant year, I was able to identify that there was a written record of approval consistent with s. 8, subs. (7) of the Act in every case. In all instances the period provided for, for the use of such tracking devices, was for four months or less and there was information and records available to confirm that such tracking devices were approved where there was reasonable grounds to do so. During my review nothing came to my attention which would suggest any improper or inappropriate use of ss. 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 documented, consistent and targeted use of the provisions of the Act.

An Garda Síochána

7.1 Earlier in this report I have already dealt with material matters which occurred in relation to the Act of 2009 during the year under consideration in relation to the use and application of the Act by An Garda Síochána. The first was the publication and circulation of the Commissioner's policy. That set out in writing and formalised the procedures and processes which were already in place and which are referred to in my first two reports. The second noteworthy occurrence in relation to the use made by

An Garda Síochána of the 2009 Act which occurred during the year under review was the fact that the Act had been in operation for a sufficiently long period that a stage has now been reached where evidence obtained following authorisations and approvals made and granted under the Act are now forming part of the evidence considered at trial. This is likely to increase in coming years and insofar as it impacts on the review of the operation of the Act will require ongoing consideration.

7.2 In my first two reports I had stated that An Garda Síochána operated a centralised process for all instances of surveillance carried out under the Act and that there was a centralised written record of all locations and instances where there had been applications for authorisations, variations or renewals of authorisations or approvals for surveillance in cases of urgency and the use of tracking devices. That process continued throughout the year under review. The process was formalised in the Commissioner's policy document of the 11th July, 2012 which was at the very end of the year under review. However, consideration of the information and documents available confirms that up to the date of the circulation of the Commissioner's policy, the same procedures and processes were followed and already in place.

7.3 I met with the Assistant Commissioner in charge of the Crime and Security Division and certain senior officers on a number of occasions. I also arranged, after having randomly selected a number of cases from the statistical database, to interview the senior investigating officer in charge of certain investigations and to have access to original documentation. I received considerable assistance from the senior officers in the Crime and Security Division of An Garda Síochána and arrangements were made for other senior officers to attend at Garda Headquarters so that I could review individual cases and have access to original material including that produced as a result of surveillance.

7.4 As the same procedures have now been in place for a number of years, it is possible to compare the twelve months under review with the two previous twelve month periods. To assist me in carrying out that review, data was produced which identified each and every instance when the Act was used in each of the three 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. As was the case with last year's report, the nature of the data enabled me to choose a number of cases on a random basis from the records which had been prepared. In the cases which I selected, I considered the documentation and in a selected number of cases not only was the documentation considered but I arranged to meet with and to interview a senior investigating officer.

7.5 Section 4 applications are considered by a District Judge for authorisation under s. 5 of the Act and it is for the District Judge to grant or refuse such application. I had available the original documentation in relation to each of the applications but I did not review that documentation other than to ascertain that the relevant documentation used in such applications for authorisations was retained and available as part of the records. It is for the District Judge hearing such an application to consider and determine whether or not to grant an application and he has available, if necessary, oral evidence to deal with any matters that arise. Such hearings are held in private.

7.6 Part of the records maintained by An Garda Síochána is a record of refusals of applications for authorisations applied for by senior Gardaí where no application for authorisation was pursued. There are a small number of such instances in each of the three years under review and there has been a slight increase in the numbers.

However, the numbers involved are so small that it is clear that the detailed procedures and processes in place are such that in the vast majority of cases where a senior officer formally applies for an application to be made under s. 5, that such application is approved. I examined the small number of cases where applications were refused and the reasons for refusal included such reasons as the object in respect of which such application was being made was no longer in the jurisdiction, or that evidence could be obtained or had been obtained by other means or that arrests had already been made. In each instance a reason for the refusal was identified and I considered such reasons and in each case the reason for the refusal of the application for authorisation was based upon an identified and clear rationale.

7.7 Under s. 5 of the Act an application under 4 for an authorisation is made ex parte and in private to a District Judge. During the year under review there was a considerable increase in such applications, the number increasing by almost threefold from the previous year. The documentation and records in relation to each of those applications was available and I chose approximately 15% of the cases where authorisations were granted under s. 5 for detailed review. In each of those cases the original documentation was available and formed part of the records maintained by An Garda Síochána. The cases which I reviewed all had an identified period of duration for the surveillance. In all cases where the investigation was ongoing when the authorisation date expired, there was a fresh and new application made to the District Court wherein the existence of the previous order was disclosed. It was also the case that in a number of instances where authorisations were granted that the device authorised was not deployed. In a number of cases where I carried out a detailed review and where such had occurred, I was provided with a satisfactory explanation for the reason why such device was not deployed. The fact and reason

why such device was not deployed was detailed in writing. Some of the cases reviewed related to audio and video surveillance and some related solely to audio surveillance. Where video surveillance was authorised, I considered whether the surveillance by video could be viewed as the least intrusive means available having regard to the circumstances of the case and whether or not it could be considered proportionate. I also considered whether the duration was reasonably required to achieve the objectives. In carrying out this examination on a randomly selected number of cases, I had available the documentation, the original files and the product of surveillance. In a number of cases I met with and spoke to a senior investigating officer. In each of the cases which I reviewed I was satisfied that the least intrusive means available had been used and that the application had been proportionate and for a reasonable duration. As was the case in previous years, the cost and expense involved in the obtaining of s. 5 authorisations and the subsequent deployment of surveillance devices together with the Garda backup required to benefit from any product produced by such surveillance is such that the cases chosen for surveillance are cases involving serious criminal activities and State security. The deployment, operation, the requirement for an evidential chain and the security of the Garda personnel involved in such operations, when taken together, result in the use and deployment of audio and video surveillance devices being an expensive and time consuming process.

7.8 In randomly selected cases where devices were deployed, I had access to the material or product generated from such surveillance. The position remains the same as was the case when I prepared last year's report in that I was able to identify real and obvious tangible benefits accruing to criminal investigations arising from such surveillance both in relation to crime and national security. That benefit arises for

both evidence being obtained which can be used in subsequent criminal prosecutions but also results in information being obtained material to ongoing criminal activities and national security.

7.9 An examination of the data also demonstrates that the duration in respect of which application was made for the use of surveillance devices was often for a very limited period. This follows from two inter-related matters. First, that the application is made for a period that is deemed reasonably required to achieve the objectives sought by such surveillance and secondly, that applications for authorisation are not made until there is detailed and persuasive information available to demonstrate that the cost and expense of deploying such device or devices is worthwhile and that thereafter a limited period can be identified.

7.10 There were no applications for variation or renewal of authorisations made during the year under review. As I previously indicated there were a number of instances where fresh applications were made in respect of the same suspect or investigation but those applications were made not by use of s. 6, but rather by applications under s. 4 for a new authorisation under s. 5 and were made to the District Court. That process ensured that the District Judge hearing the application would have to consider a new application and be satisfied that at the time of such application that the surveillance being sought should be granted and it was open to the District Judge to impose any conditions as the Judge considered appropriate.

7.11 Section 7 of the Act of 2009 provides for approval for surveillance in cases of emergency. That section facilitates the carrying out of surveillance in cases of urgency without an authorisation by a court under s. 5 but is limited to a period not exceeding 72 hours. There was a significant reduction in s. 7 approvals in the year under review. There were only a small number of such approvals in the full year and

I was therefore able to consider the facts and circumstances of every approval. It would appear that the reason for the decline in the number of s. 7 authorisations is that with experience and usage, that it has become possible to make urgent applications to the District Court under s. 5 even at short notice. Because s. 7 is for use in "cases of urgency", I had particular regard to the duration of the period granted under s. 7 approvals. In all but one case the period granted was 24 hours or less and in some instances was for a period of no more than 2 hours. In a number of cases where s. 7 approvals were granted for a period of 24 hours or less and where it was considered appropriate to continue the surveillance of such person or place, applications were made under s. 5. In the only case where the duration of the s. 7 approval was greater than 24 hours, I was provided with an explanation as to the circumstances why such duration was granted, both as to the location of the surveillance and the availability of a District Judge in the particular rural area.

7.12 Section 8 of the Act of 2009 deals with tracking devices. The number of approvals for the use of tracking devices in the year under consideration was slightly less than the previous year but an examination of the data indicates that there is very little variation in the total numbers between each of the three years which I have considered in my reports.

7.13 Due to the fact that the most commonly used provision of the 2009 Act is the use of tracking devices, and that, therefore, there are a greater number of approvals under s. 8 than under any other section, I conducted a randomly selected review of some 10% of the s. 8 approvals. I also considered the data available in relation to every one of the s. 8 approvals. As was the case with my previous report, the documentation and information available in relation to s. 8 tracking devices demonstrated that the use of tracking devices has been of assistance in providing

information and intelligence into various constituents of illegal activity including information and evidence in relation to the movements and whereabouts of persons involved in serious criminal offences, the location and movement and place of sale and distribution of illegal drugs. Section 8 devices are also used in matters relating to the security of the State. The overall data demonstrates that even though s. 8 provides that approval for tracking devices can be granted for a period of not more than four months, that in the vast majority of cases the period granted is considerably less. The maximum period of four months was granted in less than 15% of the s. 8 approvals. In a significant number of cases the period granted was for a number of weeks rather than months.

7.14 The review provided for in s. 12 of the Act to be carried out by a Judge of the High Court is a review of the operation of ss. 4 to 8 of the Act. I have adopted a different and varied approach when carrying out my duties in each of the three years. I have always sought and had made available to me records, data, documents and information concerning each and every usage. I continue, where there are a substantial number of authorisations and approvals, to select a random number of cases for more detailed consideration. That has included access to a senior investigating officer in some cases.

7.15 Section 5 applications are heard by a District Judge and the Judge hearing such application must be satisfied that it is reasonable to issue an authorisation and can do so on such terms and conditions as the Judge considers appropriate. From my examination of the documentation and records it is clear that the applications for such authorisations are made in writing and there is sworn information available to support such applications and that there is, where an authorisation has been granted, a record of such authorisation. It is also the case that when the period covered by such

authorisation has expired and where an operation is ongoing that the procedure followed is that a fresh application is made where the District Judge hearing that application must be satisfied based upon the information available at the time of that application as to whether an authorisation can be granted.

7.16 Section 7 deals with approvals for a limited period in cases of urgency. As approvals under that section are not subject to consideration by the District Court, I have had particular regard to those approvals. There has, in the year under consideration, been a significant reduction in the number of such approvals and the period of approval contained in the s. 7 approvals has been limited. In each of the cases where s. 7 approval was granted, the documents and records establish 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. It remains the case that given the limited number of s. 7 approvals and the information available concerning the nature of the intended surveillance that such approvals are being used by An Garda Síochána in circumstances where there was neither time nor circumstances which would allow or permit for an application to the District Court. This is confirmed by the fact that even within the limited number of s. 7 approvals, there were a number of instances where there was a subsequent application to the District Court when there was time available and where there was a need that the surveillance should continue after the period provided for in the s. 7 approval.

7.17 There was a small number of cases where applications for approval to use a tracking device under s. 8 was refused by a superior officer in accordance with the provisions of s. 8. The reasons for such refusal included an inability to identify a location where the tracking device could be deployed, insufficient information or the

requirement for additional intelligence to justify the use of a device. Section 8(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 the cases which I selected for consideration where s. 8 approvals had been granted and where there had been a deployment, I confirmed that 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 the Act.

7.18 During my review of An Garda Síochána's use of ss. 4 to 8 of the Act, nothing came to my attention that would suggest any improper or inappropriate use of the provisions of the Act. The procedures adopted and followed by An Garda Síochána ensure that the documentation required to be kept and maintained under the Act is kept and maintained and is available at a central location in a readily available format.

Conclusions

8.1 As is apparent from the contents of this report, each of the three parties entitled to avail of the provisions of ss. 4 to 8 of the Act are discharging their obligations under the Act when availing of their entitlements under ss. 4 to 8. Having reviewed the operation of the Act as the designated Judge pursuant to s. 12 of the Act, I make this report to the Taoiseach and confirm that there are no other matters relating to the operation of ss. 4 to 8 of the Act which I consider should be reported.

8.2 I would like to confirm that I received full and thorough co-operation from the senior officers and members with An Garda Síochána, the Revenue Commissioners and the Defence Forces responsible for the operation and implementation of the provisions of the Act and that those persons greatly assisted me in the preparation of this report.

8.3 As pointed out earlier in this report, as evidence gleaned as a result of surveillance carried out under the Act of 2009 comes to be used in criminal trials and considered during the course of those trials, further and additional matters will arise in relation to the use of devices permitted under the Act. The nature and extent of the definition of surveillance and the fact that s. 3 of the Act of 2009 provides that a member of An 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 ss. 7 or 8 of the Act means that the issue of what is and what amounts to surveillance will arise in future criminal prosecutions.

8.4 I have now conducted the review of the operation of this Act under s. 12 for three years and it is evident that the use of surveillance and monitoring devices is and remains an important asset in the investigation of arrestable offences and the prevention of suspected arrestable offences and the safeguarding of the State against subversive and terrorist threats.

Kevin T. Feeney
Judge of the High Court

Date: 8th January, 2013

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 Siochana, 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 Siochana 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 Siochana 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 Siochana 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 Siochana. 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 Siochana 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 Siochana 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