

Heads of Draft Surveillance Bill

PART 1

Provisions relating to existing covert surveillance by the Garda Síochána

Head 1 - Definitions

1. Provide that -

“ the Act of 1983” means the Postal and Telecommunications Services Act 1983;

“ the Act of 1993” means the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993, as amended by the Criminal Justice (Terrorist Offences) Act 2005;

“ the Act of 1999” means the Postal and Telecommunications Services (Amendment) Act 1999;

“ the Act of 2003” means the European Convention of Human Rights Act 2003;

“the Act of 2005” means the criminal Justice (Terrorist Offences) Act 2005;

“apparatus” includes any equipment, machinery or device and any wire or cable.

“arrestable offence” means an offence for which a person of full capacity and not previously convicted may, under or by virtue of any enactment or the common law, be punished by imprisonment for a term of 5 years or by a more severe penalty and includes an attempt to commit an offence.

“authorisation” means an authorisation issued under Head 2.

“Complaints Referee” means the holder of the office of Complaints Referee under the Act of 1993:

“designated judge” means the person standing designated for the time purposes of this Act under section 7 of this Act;

“document storage facility” means any place or thing or part of a place in which documents are held or stored manually, mechanically or electronically:
(see section 99(10) of the Garda Síochána Act 2005)

“Garda Síochána station” means any premises, or part of a premises where a member of the Garda is stationed; (see section 99(10) of the Garda Síochána Act 2005)

“General Officer” means a general officer as defined in section 2 of the Defence Act 1954.

“judge” means a judge of the District Court.

“member of the Garda Síochána” means a member not below the rank of superintendent;

“Minister” means the Minister for Justice, Equality and Law Reform.

“officer of the Defence Forces” means an officer not below the rank of Colonel;

“place” means any physical location and includes –

- (a) any land, including any road within the meaning of the Roads Act 1993;
- (b) any building or part of a building, including any moveable structure, dwelling, residence, abode, site, or other premises whether occupied or not, as well as the curtilage of such a place, and
- (c) any vehicle whether propelled or not,
- (d) any vessel whether sea-going or not,
- (e) any aircraft whether capable of operation or not, or
- (f) hovercraft.

irrespective of whether or not the place is open to the public whether on payment of a fee, by invitation or otherwise.

“relevant international instrument” means an international instrument as set in Schedules 1,3, 4, 5, and 7 to the Act of 2005;

“Referee” means the holder of the Office of Complaints Referee under the Act of 1993.

“surveillance” for the purposes of this Bill means -

- (a) monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications;

- (b) recording anything monitored, observed or listened to in the course of surveillance; and
- (c) surveillance by or with the assistance of a surveillance device;

during the course of a specific investigation or a specific operation in any place or in any vehicle, but does not include -

- (d) surveillance which is carried out by means of a surveillance device in relation to anything taking place in any residential premises or in any vehicle, but which is carried out without that device being present on the premises or in the vehicle unless the device is such that it consistently provides information of the same quality and detail as might be expected to be obtained from a device actually present on the premises or in the vehicle, or

“surveillance device” means

- (a) any apparatus designed or adapted for use in surveillance, but does not include a device that is designed or adapted principally for the purpose of providing information about the location of a vehicle; and
- (b) references in this provision, in relation to a vehicle, to the presence of a surveillance device in the vehicle include references to its being located on or under the vehicle and also include references to its being attached to it

Head 2 – Application and details of surveillance authorisation

Provide that

- (1) An application for an authorisation for surveillance may be made by a member of the Garda Síochána or an officer of the Defence Forces to a judge and the judge may, having heard evidence on oath given by such member or officer, if he or she is satisfied that the conditions specified in Head 3 are fulfilled, issue the authorisation.
- (2) An authorisation shall expire on such day as the judge shall decide, but not more than 3 months from the date on which it is granted.
- (3) An authorisation may from time to time be renewed by order of a judge for any period or periods not exceeding three months.
- (4) An authorisation
 - (a) shall be in writing and shall specify –
 - (i) the person, place and any other relevant information about the use of the surveillance device;
 - (ii) the member of the Garda Síochána or officer of the Defence Forces to whom it is issued; and
 - (iii) the mode of surveillance authorised by the surveillance, and
 - (b) where appropriate, may authorise the member of the Garda Síochána or officer of the Defence Forces to whom it is granted, accompanied by such other members or other persons as the member or such officer considers necessary, to enter any place for the purposes of –
 - (i) surveillance as authorised by the authorisation, and
 - (ii) to do such things as are necessary or expedient for the purpose of initiating, maintaining or withdrawing such surveillance, and
 - (c) may impose conditions in respect of the surveillance.
- (5) An application for an authorisation for surveillance shall be made ex parte and, if so made, shall be heard and determined otherwise than in public.
- (6) An authorisation for surveillance shall not be issued under this Head if it appears that it is directed or substantially directed to the surveillance of communications which are protected by privilege.

Head 3: Conditions justifying the issue of an authorisation for surveillance

Provide that

- (1) An authorisation shall not be issued or renewed unless the following conditions are fulfilled:
- (a) (i) that a specific investigation or operation is being carried out by the Garda Síochána concerning an arrestable offence, or in the interests of the security of the State, or pursuant to the State's obligations under a relevant international instrument, or by the Defence Forces in the interests of the security of the State, and in the case of an arrestable offence, there is a reasonable prospect that the surveillance would be of material assistance in providing information to show whether the offence has been committed or as to the facts relating to it, or evidence for the purpose of criminal proceedings in relation to the offence, or
 - (ii) that, in the case of an arrestable offence that is apprehended but has not been committed, a specific investigation or operation is being carried out for the purpose of preventing the commission of the offence or of enabling it to be detected, if it is committed, by the Garda Síochána and that there is a reasonable prospect that surveillance would be of material assistance in preventing or detecting the offence; and
 - (b) that the surveillance is, in all the circumstances and having regard to other lawful means for the specific investigation of offences or operation, justified, having regard to the likely impact of the surveillance on the rights of any person and to other relevant circumstances.

Head 4 - Surveillance without authorisation in cases of exceptional urgency

Provide that

- (1).a member of the Garda Síochána, or an officer of the Defence Forces may, if he or she considers that a matter which fulfils the conditions specified in Head 3 is one of exceptional urgency, without an authorisation, carry out surveillance where he or she, with reasonable cause, suspects that –
 - (a) before an authorisation could be obtained in accordance with the provisions of Head 2, a person may abscond for the purpose of avoiding justice, obstruct the course of justice, or commit an arrestable offence, or
 - (b) information or evidence in relation to the commission of an arrestable offence may be destroyed, lost or otherwise become unavailable.
- (2).the period in respect of which surveillance may be carried out in accordance with the provisions of subhead (1) shall be not greater than 14 days which period shall not be renewable.
- (3).a written report of any surveillance carried out under subhead (1) shall be made in the case of the Garda Síochána to, and certified by, an Assistant Commissioner, or in the case of the Defence forces to a General Officer, as soon as possible, and such report, shall include a statement of the grounds of exceptional urgency relied upon by the member of the Garda Síochána or the Defence Forces who would have otherwise applied for such an authorisation.

Head 5 - Retention of official documents

Provide that all official documents relating to surveillance and the application therefore under the provisions of Head 2 shall be retained for a period of 3 years from the date on which the authorisation ceases to be in force, and in the case of reports under Head 3, 3 years from the date on which the report was made.

Head 6 – Restriction of disclosure of existence of authorisations issued under Head 2 and reports under Head 4

Provide that –

- (1).the Minister in the case of the Garda Síochána and the Minister for Defence in the case of the Defence Forces shall ensure that arrangements as he or she considers necessary exist –
 - (a) to limit to the minimum extent necessary the disclosure of –
 - (i) the fact that an authorisation in accordance with Head 2 has been given, or a report made in accordance with Head 4, and
 - (ii) any information or evidence obtained resulting from such authorisation, or report, and
 - (b) to secure in relation to subsection (a)(ii) that in the case of such information or evidence –
 - (i) copies are not made to any extent greater than is necessary, and
 - (ii) such copies are destroyed as soon as their retention is no longer necessary.
- (2).In paragraphs (a) and (b) of subsection (1) of this section “necessary” means necessary for the purpose of the prevention or detection of serious offences, or in the interests of the security of the State, or as a result of obligations under a relevant international instrument.

Head 7 - Saving provision

Provide that a contravention of a provision of this Act, or a failure to fulfil a condition specified in Head 3 in relation to an authorisation shall not of itself render the authorisation invalid or constitute a cause of action at the suit of a person affected, but any such contravention shall be subject to investigation in accordance with the provisions of Head 8 and nothing in the Head shall affect a cause of action for the infringement of a constitutional right or any right under the Act of 2003.

Head 8 – Review of the operation of this Act by designated Judge

Provide that –

- (1).After consulting with the Minister and the Minister for Defence, the President of the High Court shall invite a judge of the Court to undertake (while serving as a judge) the functions specified in subhead (3), and, if the invitation is accepted, the Government shall designate the judge for the purpose of performing those functions.
- (2).The designated judge holds office in accordance with the terms of his or her designation.
- (3).The functions of the designated judge are –
 - (a) to keep under review the operation of Heads 2 and 4, and
 - (b) to report to the Taoiseach from time to time concerning any matters relating to the operation of those Heads that the judge considers should be reported.
- (4).For the purpose of performing his or her functions, the designated judge –
 - (a) may investigate any case in which an authorisation is issued by a judge under section 2, or a report made by an Assistant Commissioner or a General Officer under section 4,
 - (b) is entitled to access to and may inspect any documents relating to such matters, and is entitled to access to any Garda Station, or property of the Defence Forces or part of a Garda station or such property, or document storage facility in such station or property where such authorisations or reports are kept.
- (5).The Taoiseach shall ensure that a copy of a report under subhead (3) is laid before each House of the Oireachtas together with a statement of whether any matter has been excluded under subhead (6) from the report.
- (6).If the Taoiseach considers, after consulting with the designated judge, that the publication of any matter in a report copies of which are to be laid before the Houses of the Oireachtas under subhead (5) would be prejudicial to the security of the State, the Taoiseach may exclude the matter from those copies.

Head 9 – Complaints procedure

Provide that –

- (1). A person who believes that they may be the subject of an authorisation or a report made under Heads 2 or 4 may apply to the Referee for an investigation into the matter.
- (2). If an application is made under this section (other than one appearing to the Referee to be frivolous or vexatious), the Referee shall investigate –
 - (a) whether an authorisation or report was made as alleged in the application, and
 - (b) if so, whether any provision of Heads 2 or 4 have been contravened in relation to the matters raised in the application.
- (3). If, after investigating the matter, the Referee concludes that a provision of this Act has been contravened, the Referee shall –
 - (a) notify the applicant in writing of that conclusion, and
 - (b) make a report of the Referee's findings to the Taoiseach.
- (4). In addition, in the circumstances specified in subhead (3), the Referee may, if he or she thinks fit, by order to do either or both of the following:
 - (a) direct the destruction of any authorisation or report made and any further material made as a result of, or obtained on foot of, such an authorisation or report;
 - (b) make a recommendation for the payment to the applicant of such sum by way of compensation as may be specified in the order.
 - (c) report the matter to the Garda Síochána Ombudsman Commission in the case of the Garda Síochána or the Minister for Defence in the case of the Defence Forces.
- (5). If, after investigating the matter, the Referee concludes that no provision of Heads 2 or 4 have been contravened, the Referee shall notify the applicant in writing to that effect.
- (6). A decision of the Referee under this section is final.
- (7). For the purpose of an investigation under this section, the Referee is entitled to access to and has the power to inspect any official documents or records relating to the relevant application.

- (8). Any person who was concerned in, or has information relevant to the matter being investigated by the Referee, shall give the Referee, on his or her request, such information relating to the request as is in the person's possession.

Head 10 – Confidentiality of information

Provide that –

(1).a person who is or was a member of the Garda Síochána or the Defence Forces or the civilian staff of either body or who is or was engaged under a contract or other arrangement under this Act to work with or for the Garda Síochána or the Defence Forces shall –

- (i) not disclose, in or outside of the State, any information obtained in the course of carrying out duties connected with the operation of the provisions of this Act in relation to the matter of surveillance, or
- (ii) reveal the existence of an application for surveillance

unless such disclosure to an authorised person is required for the purposes of the prevention, investigation or detection of crime, the prosecution of offences, the interests of the security of the State or as required in compliance with the State's obligations under the provisions of any relevant international instrument.

(2).A person who contravenes subhead (1) is guilty of an offence and is liable –

- (a) on summary conviction, to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both, or
- (a) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

Head 11: Provisions relating to the disclosure of information in criminal proceedings

Provide that –

(1) Without prejudice to any rule of law,

- (i) any information in relation to the existence or otherwise of applications for or authorisations issued under Head 2(1) or reports made by an Assistant Commissioner or General Officer under Head 4; or
- (ii) any documentary evidence in relation to any matter referred to in Head 2(4) or Head 4(2);

shall not be disclosed by way of discovery or otherwise in the course of any legal proceedings, save with the authority of the Court.

(2) In any case to which subhead (1) applies, the Court shall have particular regard to -

- (a) the risk to the security of the State;
- (b) the protection of persons within the State from terrorist activity, terrorist – linked activity, subversive crime, organised crime, or serious crime;
- (c) the need in the particular circumstances of the foregoing provisions to maintain the integrity, effectiveness and security of the operations of the Garda Síochána and the Defence Forces in the area of surveillance;
- (d) the potential risk to and the protection of witnesses;
- (e) the responsibilities of the State under a relevant international instrument.

before making a decision in the matter.

(3). In this Head “terrorist activity” and “terrorist-linked activity” have the same meaning as those terms are defined in section 4 and Schedule 2 of the Act of 2005.

Head 12: Non-application of the provisions of the Act to the Garda Síochána Ombudsman Commission.

Provide for an amendment to section 98(5) of the Garda Síochána Act 2005 by

- (1).the deletion of “and” at the end of paragraph (a);
- (2).the insertion of “and ” at the end of paragraph (b);
- (3).and the insertion of a new paragraph (c) as follows :-
“(c) the provisions of the Covert Surveillance Act 2008;”