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Sean Gillane BL
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Criminal Justice (Surveillance) Bill 2009

The Criminal Justice Surveillance Bill 2009

Our most personal details are shared with increasing willingness among Government Departments. All recorded telephone calls and emails are to be stored. The police officers, when we do encounter them, are ostentatiously equipped with devices to restrain, gas and club us when once they managed with no more than a tactfully concealed truncheon. The new equipment makes it plain the public are not to be trusted and may at any time need to be pursued, gassed or manacled. The modern police officer is not a public servant except in name. Like his continental counterparts he is a powerful representative of the State with whom it is unwise to argue. The old police deference to the middle class was not just as a consequence of simply snobbery. It was an expression of the old truth that the law was our servant not our master. A new type of officer who defers to nobody but his chiefs does not care who you are, if you support the law or loathe it; it is all the same to him, although stardom and celebrity, the classless society's aristocracy, may gain his deference. He is the State and you are not. That is why he now has far greater licence to enter our homes and search them than ever before, to listen to our telephone conversations and read our mail. A right to have our guilt assessed by a jury of people like ourselves has also been seriously undermined and may in effect seem to disappear forever for most accused people. This is a physical expression of a new type of thought.

Peter Hitchen in "A Brief History of Crime: The Decline of Order, Justice and Liberty in England":

The Criminal Justice (Surveillance) Bill of 2009 represents the latest 'watershed' in the policing of serious or 'gangland' crime. It takes its place in a raft of legislation (both in place and proposed) where each proposal lays claim to being the silver bullet in the fight against crime. The Bill itself raises a number of very interesting questions of a political and legal nature; not least in respect of the relationship that is to be expected between An Garda Síochána, and the citizens An Garda Síochána are to police. The Bill also raises interesting questions of language, not just in relation to the provisions of the Bill itself but also the manner in which it was launched and the claims made in respect of its aims.

The search for a starting point is difficult, although one could do worse than use the pithy encapsulation of constitutional privacy rights in *Kennedy –v- Ireland*[1]*:* "the right to be left alone". In so far as the bill attempts to remove an impediment in the way of detecting and fighting crime privacy or the right to be left alone appears to be the target. One's right to privacy, whether sourced under the Constitution or the European Convention on Human Rights, is obviously not without

[1] [1987] IR 587

limit and is susceptible to interference by State and private entities. It is worth remembering, perhaps, the answer the Law Reform Commission gave to the question, 'Why is Privacy so important?' The language used as recently as 1998 almost seems quaint in the context of the current storm:

a. Privacy is closely connected to notions of human dignity and goes to the ***very core*** of what it means to be human. It relates to our physical and moral integrity;

b. Privacy is closely related to human freedom, autonomy and self determination;

c. Privacy is an organising principle of civil society;

d. Privacy is closely connected to the democratic life of society. A violation of privacy can be characterised as a violation of the person.

The Bill, therefore, can be regarded as going to the heart of what it means to be free, although obviously is presented as another instrument of government control that will help make us free.

It seems in reality that the Bill is attempting in this context to do two things: firstly, its sets out a statutory framework through which members of An Garda Síochána can legitimately monitor and retain details of personal conversations and communications; and secondly, acknowledges that there never has been a right to be left alone, merely you had a right not to have such invasions of your privacy as existed used against you in a court of law.

In launching the Bill Minister for Justice Dermot Ahern declared with some gusto that:

> *"With the advent of better and increasingly sophisticated surveillance gathering technology, and the growing ruthless nature of gangland criminals in particular, the stage has been reached where surveillance evidence can play a crucial role in the fight against crime. We live in a modern world and if covert recordings will help nail crime gang bosses then we must advance this new law as quickly as feasible. In a nutshell the Bill provides that secret surveillance can be used as evidence either to support other direct evidence on criminal charges or as a basis on its own for a charge of conspiracy."*

Here the importance of language is evident. The official proclamation (as opposed to a lazy interpretation of what a Minister is saying) is that the aim of the bill (don't forget we live in a 'modern world') is to **nail** people. This deterioration in the style of official language is regrettable but increasingly commonplace in this area. This language is an important marketing tool however, linking the bill inextricably to an aim that will perhaps never be fulfilled, and deflecting attention from the complexity of what is involved or the nuances of what citizens are being asked to give up.

The explanatory memorandum which sets out the purpose of the Bill in, perhaps, a more sober tone is quite clear in indicating that the purpose of the Bill is simply to address the admissibility of secret and covert surveillance rather than dealing with the question of surveillance *per se*. The main purpose of the Bill is described as being:

> *"To buttress the work of the work of An Garda Síochána, the defence forces and the Revenue Commissioners in the prevention and detection of serious crime and in safeguarding the security of the State against subversion and terrorism. It is has not been the practice to use the material gained by means of secret surveillance as evidence for legal and operational reasons. In regulating this area by law the Bill ensures that any possible legal obstacles to the admissibility of such material in criminal trials are removed in cases involving arrestable offences. A key section in the Bill deals with the admissibility of evidence gained by surveillance".*

It is, perhaps, for this reason that unusually in the context of debates regarding the criminal justice system there was a degree of concord as between what are generally regarded as the left and right wings. The Irish Council for Civil Liberties surprisingly indicated that it welcomed the Bill, albeit in tepid terms, and stated:

> *"This Bill will at last place Garda surveillance on a lawful basis that broadly conforms to article 8 of the European Convention on Human Rights".*

The director of the ICC and Mr Mark Kelly went on to say that:

> *"Intelligence led policing of the sort to which this Bill relates and not the further restriction of fair trial rights is the most effective way to tactical gangland crime."*

And so it seems that the consensus is that we are all being bugged anyway and, therefore, we should regularise the way in which that is done and regulate the manner in which any evidence gathered can be presented before a court. This view is not without support; the Morris Tribunal, lamented the failure to put in place any formal policy within An Garda Síochána in relation to covert surveillance. Despite the existence of a 'Television and Telecommunications' within An Garda Síochána with the relevant equipment or expertise the tribunal found that there was little or no, legal or ethical, guidance given to An Garda Síochána by statute or statutory instrument, or in the Garda Síochána Code, concerning covert surveillance whether by Gardaí in person or audio/visual electronic devices or recorders. The obverse side of this lack of guidance is of course that the citizen is similarly at sea in relation to his/her expectations in this area. The Tribunal found that the reason for surveillance must be clear and the level of intrusion proportionate in order to comply with Convention obligations. Indeed as the Law Reform Commission had pointed out "[c]onferring discretion on officials is not, as such, inherently violative of Article 8. What matters is how adequately that discretion is bound by law and the adequacies of the remedies available in the event of its misuse."[2]

The Bill provides for surveillance to be undertaken by three State agencies:

(1) An Garda Síochána;
(2) the Defence Forces; and
(3) the Revenue Commissioners.

For today's purposes I will concentrate on the first. The offences to which the Act relates are what are classically regarded as "arrestable offences" which essentially means just about any offence beyond very minor public order matters and offences of that class. This is notwithstanding the fact that the Bill, at least in the manner of its presentation, is married to the necessity to protect us from terrorism and serious gangland crime.[3] As all prosecutors will be aware the routine receipt of

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[2] The Law Reform Commission Report on Privacy page 200.
[3]Peter Hitchens has observed in this context: "[Terrorism] is a crime the Government pretends to treat with special horror but with which it is in truth happy to negotiate when it suits it. So if the horror is false we have the right to suspect that terrorism is no more than an excuse for the taking of powers that the State wants anyway." From A Brief History of Crime.

evidence of mobile phone communications is itself applied for and obtained under the provisions of the Criminal Justice (Terrorist Offences) Act, 2005. It is a matter of some embarrassment in the context of routine cases to inform juries that the evidence of which they are about to hear was obtained as a result of opinions being formed pursuant to powers created under legislation so described. While these powers are being regularised and their application routinised the importance of an appropriate language is such that there is a reluctance to house these provisions in legislation that is not described as 'emergency', 'extraordinary' or 'temporary' and draped in references to 'terrorism' or 'gangland'.

In the 2009 Bill surveillance itself is described in a very general way and under the legislation 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.

Surveillance device means an apparatus designed or adapted for use in surveillance but does not include a camera to the extent to which it is used to take photographs of people in public places or CCTV footage captured by facilities as are provided for under section 38 of the An Garda Síochána Act, 2005, i.e. CCTV operations which are authorised by the Garda Commissioner for the preservation of public order and safety in public places.. This is perhaps a legislative recognition of the reality that we are all now subject to round the clock visual surveillance by CCTV cameras. While this kind of surveillance has given rise to debate all over the world we have become so accustomed to it that it is outside the purview of the Act.

The mechanism provided for in the Act is an application to a District Court Judge for an authorisation to carry out surveillance and specifically provides that a member of An Garda Síochána, the defence forces or the Revenue Commissioners shall carry out surveillance only in accordance with a valid authorisation.

Section 4 provides the following:

(1) A superior officer of An Garda Síochána may apply to a judge for an authorisation where he or she has reasonable grounds for believing that:

(a) as part of an operation or investigation being conducted by An Garda Síochána concerning an arrestable offence the surveillance being sought to be authorised is necessary for the purposes of obtaining information as to whether the offence has been committed or as to the circumstances relating to the commission of the offence or obtaining evidence for the purposes of proceedings in relation to the offence;

(b) the surveillance being sought to be authorised as necessary for the purpose of preventing the commission of arrestable offences; or

(c) the surveillance being sought to be authorised is necessary for the purpose of maintaining the security of the State".

The superior office in question must also have reasonable grounds for believing that the surveillance being sought is:

(a) the least intrusive means available having regard to its objectives and other (unspecified) relevant considerations;
(b) proportionate to its objectives, having regard to all circumstances including its likely impact on the rights of any person, and
(c) of a duration that is reasonably required to achieve its objectives.

This appears to be an acknowledgement of a potential proportionality problem in the context of the European Convention of Human Rights. However, this will undoubtedly form part of a standard form printed application which will involve the ticking of boxes in relation to the relevant matters.

Under section 5 a judge is obliged to issue an authorisation if satisfied by information on oath of a member of An Garda Síochána not below the rank of Superintendent that the requirements of section 4 are themselves fulfilled.

Section 5(4) further provides that the authorisation shall **not** issue if the Judge is satisfied that the surveillance being sought to be authorised is likely to relate **primarily** to communications protected by privilege. The nature of the privilege contemplated is not specified. This is a matter of tremendous practical importance and a problem of no little difficulty scarcely addressed by the terse subsection dealing with it. It might be remembered that the question of surveillance was raised in the Morris Tribunal in the context of suggested bugging of rooms where solicitors and clients consulted in Garda stations. An application to bug a solicitor's office might admit of an easy answer. But what of communications to a legal adviser from a house or mobile phone, the subject of an authorisation, which might ordinarily be regarded as privileged? Do we expect the Gardaí to stick their fingers in their ears or in the case of preservation are privileged portions of communications to be destroyed? They will have to be listened to in order for a determination to be made in any event. Is there a duty to disclose that a privileged communication has been captured and to whom should this be communicated? Will the need for secrecy trump that duty, if it exists at all? The fact that the captured communication is privileged does not itself affect the validity of the authorisation and in this respect the Act could not be plainer: evidence obtained as a result of surveillance carried out under an authorisation is admissible in criminal proceedings. What of the vestigial remains of marital privilege? While that concept has been substantially eroded marital privacy still has considerable constitutional protection.

The application **may** be made ex parte and **shall** be heard otherwise than in public. In that regard it is lamentable that there is no provision for the recording of the application itself.

The Bill provides that the authorisation itself shall last no longer than three months from the date of its issuance, shall be in writing and shall specify the particulars of the surveillance device that is authorised to be used and any conditions subject to which the authorisation is issued. As might be expected the three month time limit can be renewed on application by the superior officer to whom the authorisation was issued. The temporal limit on the authorisation is a 'protection' for the

citizen. The six hour detention limit introduced in 1984 is morphing into a seven day period; what price on a call for the extension or removal of the time limit within a year?

The Act does not specify that the renewal application itself shall be held *ex parte* and/or otherwise than in public but it is to be presumed that this is the position.

Authority is granted under section 5 for any member of An Garda Síochána accompanied by any other person whom he or she considers necessary to enter if necessary by the use of reasonable force any place for the purposes of initiating or carrying out the authorised surveillance or withdrawing the authorised surveillance without the consent of a person who owns or who is in charge of the place. This will also apply where the property owner himself is not the target of the operation.

Section 7 provides for what are described as 'cases of urgency' and authorises a member of An Garda Síochána to conduct surveillance without an authorisation. Instead the surveillance is carried out under an 'approval'! This can be done where a member of An Garda Síochána applies to a superior officer (Superintendent) for the grant of an approval to carry out surveillance where:

(d) it is likely that a person will abscond for the purpose of avoiding justice, obstruct the course of justice or commit an arrestable offence, or a revenue offence as the case may be, or

(e) where information or evidence in relation to the commission of an arrestable offence as the case may be is likely to be destroyed, lost or otherwise become unavailable, or

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

This 'approval' is subject to a 72 hour time limit and can be converted into an authorisation by applying to the District Court.

Section 8 entitles members of An Garda Síochána to use tracking devices with the approval of a superior officer to monitor the movement of persons, vehicles or things.

An application for an authorisation under section 4 or 6 and any documents supporting the application must be retained until three years after the authorisation ceases to be enforced, or the day in which they are no longer required for any prosecution or appeal to which they are relevant, whichever is the later. The Minister for Justice Equality and Law Reform is charged with the duty of ensuring that all documents and information to which the Act applies are stored securely and that only persons who he/she authorises for that purpose have access to them. Provision is made for the making of regulations outlining the persons or categories of persons that are to have access to these documents. This is clearly a very wide ranging provision in terms of the making of regulations.

An elaborate complaints procedure is set out in section 11 of the Act which actually entitles a person who "believes that he or she might be the subject of an authorisation" to apply to the Referee for an investigation into the matter. (The Referee is the holder of the office of Complaints Referee under the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993. The Referee is entitled in circumstances where he or she is of the opinion that there has been a contravention of a material nature of the authorisation to recommend payment of compensation up to a ceiling of €5,000. Many of these matters themselves will never be the subject of any serious investigation and/or challenge in circumstances where the application shall be made *in camera*, may be made *ex parte* and may never result in any actual criminal prosecution.

While section 11 of the 2009 Bill provides for the making of a complaint there is an odd quality about this provision in circumstances where the Act itself clearly contemplates that the person who is the subject of a surveillance authorisation should not know that he is so subject. Presumably one can complain on the basis of a hunch that one is subject to surveillance and can repeatedly complain. Regard should be had for a decision of the European Court of Human Rights in the case of the Association for European Integration and Human Rights and the *Ekimdzhiev –v- Bulgaria*, a judgment of 28th June 2007, where the European Court of Human Rights considered the question of the consequences of the lack of a provision for informing those under surveillance who had not been prosecuted that they had been under surveillance and that such surveillance had ceased. (The Bulgarian legislation in question was titled "The Special Surveillance Means Act, 1997. Note the use of the word Special.) The Court held at paragraph 91:

"The result of this absence is that unless they are subsequently prosecuted on the basis of the material gathered through covert surveillance or unless there has been a leak of information, the persons concerned cannot learn whether they have ever been monitored and are accordingly unable to seek redress from lawful interferences with their Article 8 rights. Bulgarian law thus eschews an important safeguard against the improper use of special means of surveillance."

Worse is the position of the person whose property is so subject even though he is perfectly innocent e.g. the owner of a public house.

A High Court Judge is to be designated to keep under review the operations of sections 4 – 8 and report to the Taoiseach from time to time and at least once every year concerning matters relating to the operation of the Act.

Section 13 provides for the creation of a new criminal offence of: disclosure of any information in connection with the operation of the act in relation to surveillance carried out under an authorisation or an approval or to reveal the existence of an application for the issue of an authorisation or its variation or renewal unless that disclosure is to an authorised person. This new criminal conviction carries a penalty of 12 months imprisonment on summary disposal or a maximum period of imprisonment of 5 years or €50,000 fine on indictment. These penalties effectively apply to a member of An Garda Síochána or other authorised persons. A maximum penalty of 2 years or 6 months applies in respect of those people who are not in that category.

Section 14 subsection 1 contains the following:

"Evidence obtained as a result of surveillance carried out under an authorisation or under an approval granted in accordance with section 7 or 8 is admissible in criminal proceedings."

The simple phrase 'is admissible' provides no guidance in relation to the relationship between the Bill and the ordinary rules of evidence. Presumably then if gangster A is torturing gangster B and this is being recorded, gangster B's words are admissible and indeed evidence as against him. Indeed, gangster C's exculpatory remarks are presumably admissible in his favour.

Section 14 then goes on to prefigure what is perhaps imminent from the Supreme Court in relation to its reconsideration of the exclusionary rule. Subsection 3 provides that information or documents obtained as a result of surveillance shall, notwithstanding any error or omission on the face of the authorisation or written record of approval concerned, be admissible if the Court decides that the error or omission concerned was inadvertent and the information or document ought to be admitted in the interests of justice. A taxonomy of factors which a court can have regard to in coming to this conclusion include the following:

(1) whether the error or omission concerned was serious or merely technical in nature;

(2) the nature of any right infringed by the obtaining of the information a document concerned;

(3) where there are any circumstances of urgency;

(4) the possible prejudicial effect of the information or document concerned;

(5) the probative value of the information or document concerned.

No guidance is offered by the Bill in respect of how those individual clauses might relate to each other.

Section 15 of the Bill attempts to deal with the question of disclosure. This provides that unless authorised by the Court the existence or non – existence of the following shall not be disclosed by way of discovery or otherwise in the course of any proceedings:

(a) an application under section 406;
(b) an authorisation;
(c) an approval granted under section 7 or 8;
(d) surveillance carried out under an authorisation or under an approval;
(e) the use of a tracking device; and
(f) documentary or other information related to the above categories.

Practitioners might well fear a disclosure nightmare. Where no one is prosecuted we can all operate on the basis that there is nothing to disclose. Once someone is prosecuted however this position will be impossible to maintain. If evidence gleaned is to be used in Court then obviously it will have to be served. Can service of all the material gleaned really be avoided in those circumstances? What of the mechanism of surveillance and its duration? Can the 'validity' of the authorisation be challenged without sight of the preserved backing documents? What is to become of the privacy rights of innocent third parties whose communications are captured and are now to be disclosed? What of a request in respect of surveillance on a co-accused? How dangerous in a literal sense is all of this going to be?

It is all very well making a provision for a time period during which the material is to be preserved. The absence of a provision relating to the destruction of that material is questionable. It appears that tracking devices are to be subject to no more than a requirement than the superior officer who authorises same makes reports to a superior officer over the course of the use of the device and further provides a full report to the relevant Minister after the cessation of the use of the device.

The commodification of insecurity and the relationship with the private sector is another issue which arises in relation to the Bill. The contemplated devices are not themselves going to be manufactured by An Garda Síochána. It will be interesting to observe how the private sector targets this area.

How can privileged communications really be protected by this legislation which effectively is silent on the issue. The European Court of Human Rights in Ekimdzhiev has determined that for an interference with privacy to be "in accordance with the law" there is a requirement that the impugned measures should have some basis in domestic law and in reference to the quality of the law demands that it should be accessible to a person concerned who must and moreover be able to foresee its consequences for him or her.

It is this last aspect which can be very troublesome in relation to the question of an individual's ability to foresee the consequences for him or her. The Court held that a law of this class must be sufficiently clear in its terms to give citizens an adequate indication of the conditions and circumstances in which the authorities are empowered to resort to this secret and potentially

dangerous interference with the right to respect for private life and correspondence. The Court held that it was absolutely essential to have clear detailed rules on the subject, especially if the technology in question is continually becoming more sophisticated. Minimum safeguards were identified by the Court as being a clear law:

(1) identifying the nature of the offences giving rise to orders of this class;
(2) a definition of the categories of people liable to have their communications monitored;
(3) a limit on the duration of such monitoring;
(4) the procedure to be followed for examining, using and storing the data obtained;
(5) the precautions to be taken when communicating the data to other parties;
(6) the circumstances in which data obtained may or must be erased or the records destroyed.

The Court noted a question of safeguards must be examined not just from the point of view of the authorisation and implementation of surveillance or orders but also from the point of view of what might take place once the surveillance has actually ceased being carried out.

The Court noted at paragraph 87 that the:

> *"overall control over the system of secret surveillance is entrusted solely to the Minister of Internal Affairs who not only is a political appointee and a member of the Executive but is directly involved in the commissioning of special means of surveillance."*

At paragraph 90 the Court noted that under Bulgarian law the persons subject to secret surveillance are not notified of this fact at any point in time and under any circumstances. Obviously the Court was cognisant of the fact that the unawareness of surveillance is the fact which ensures its efficacy. It concluded, however, that as soon as notification can be made without jeopardising the purpose of the surveillance after its termination information should be provided to the persons concerned. The Court concluded that there had been a violation of Article 8 of the Convention on the basis of the shortcomings of the system in relation to the provision of guarantees against the risk of abuse.

Whether it is of any use, the statistics available to the Court found that more than 10,000 warrants were issued over a period of 24 months excluding the tapping of mobile phones for a population of less than 8 million. Use had been made of this figure in only 269 criminal proceedings.

We may soon need to readdress the meaning of to be policed by consent. This is a precious thing embracing the concept that An Garda is a citizen in uniform. If the use of surveillance of this type is to become routine another blow will have been dealt to that concept. Prosecutors too, who prosecute in the name of the People of Ireland, may also find that the spread of surveillance (or the apprehension of same) will dilute that mandate. Ultimately the judgment calls in this area will come down to us; we will, as never before, be invited to address the fruits of covert surveillance and asked to address questions of admissibility. Lawyers and writers in other jurisdictions are now stirring themselves on this topic as the security apparatus in the western world grows with the same vigour as our sense of actual security shrinks. We may yet have cause to recall Pitt: "*Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves.*"

Sean Gillane BL
Law Library