



**AN BILLE UM CHEARTAS COIRIÚIL (FAIREACHAS) 2009
CRIMINAL JUSTICE (SURVEILLANCE) BILL 2009**

EXPLANATORY MEMORANDUM

Purpose of Bill

1. The main purpose of the Bill is to buttress the work of the 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 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.

2. The Bill provides for the creation of written records in all cases where surveillance is used. In most cases a prior authorisation for surveillance from the District Court will be required. Authorisations may be for a period of up to 3 months and are renewable on application. It will be possible in cases of urgency to undertake surveillance without an authorisation from the Court for a period of up to 72 hours, subject to strict conditions. The use of tracking devices, a less intrusive form of surveillance, is also regulated by the Bill and is subject to prior written approval by a superior officer.

3. Provision is also made in the Bill for a judicial mechanism for dealing with complaints, and for separate oversight of the operation of the Bill by a judge of the High Court.

Provisions of Bill

Section 1 provides the definitions of the key words and phrases that are used throughout the Bill, including the meaning of arrestable offence, surveillance, surveillance device and tracking device.

Section 2 provides that the Bill applies to the three agencies of the State as set out above, and *Section 3* provides that they shall carry out surveillance only in accordance with the provisions of the Bill.

Section 4 makes it clear that only members/officers of a sufficiently high level in each of the agencies concerned may apply to the District Court for authorisations, on the basis of strict criteria. In each case, reasonable grounds must exist also for believing that the surveillance

sought to be approved is the least intrusive means available, is proportionate from a rights perspective, and is for a period which is limited to its objectives.

Section 5 provides that an authorisation may be applied for to a District Court Judge on oath on an *ex parte* basis in private. The authorisation will be in writing and contain the relevant details as set out in *section 5(7)*. It will be valid for a period of up to 3 months, which is renewable or variable in accordance with the provisions of *section 6*. It may allow the authorised member/officer, accompanied if necessary by any other person to gain entry to property for the purposes of surveillance. This may involve the use of such reasonable force as is necessary in the particular circumstances.

Section 7 deals with a situation where time is of the essence and the matter is urgent to prevent a person absconding to avoid justice, the possible destruction of evidence, or where the security of the State would likely be compromised. In such a case, a superior officer, as defined, in the relevant agency may give approval for surveillance on grounds connected with the issuing of an authorisation for a limited operational period of up to 72 hours. If continued surveillance is required, an authorisation will have to be obtained from a judge of the District Court. The section requires the keeping of written records and the making of reports by the parties involved.

Section 8 is concerned with internal approvals for the use of tracking devices for a maximum period of 4 months. Judicial authorisations are not required for their use, but the approval of a superior officer is necessary based on the strict qualifying criteria set out in the Bill. The Bill requires that written records and reports have to be maintained in these cases.

Section 9 provides for the retention for specified periods of all official documents relating to authorisations for surveillance, reports, written records of approval sanctioning surveillance in urgent cases, the use of tracking devices and surveillance.

Section 10 deals with the secure storage of, and authorised access to, information and documents generated as a result of the carrying out of surveillance, to protect privacy and other rights. The Minister for Justice, Equality and Law Reform in the case of the Garda Síochána, the Minister for Defence in the case of the Defence Forces and the Minister for Finance in the case of the Revenue Commissioners may make Regulations in this regard insofar as their respective functional areas are concerned. The Minister for Justice, Equality and Law Reform may, in the interests of privacy and other rights, make Regulations prescribing a period of less than 4 months for the use of tracking devices, or for different periods for different purposes.

Section 11 provides for a procedure for dealing with complaints where a person believes that they may be the subject of surveillance. In such cases, the matter will be dealt with by a Complaints Referee who is the judge of the Circuit Court who handles similar issues arising from the operation of the telephone interception legislation i.e., the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993. In a case where there has been a contravention of a provision of sections 4 to 8 of the Bill, the Referee has the power to recommend payment of compensation up to €5,000. The matter may also be referred to the Garda Síochána Ombudsman Commission, the Minister for Defence or the Minister for Finance depending on the particular State agency concerned.

Section 12 also follows the 1993 Act in relation to the appointment of a judge of the High Court to oversee the operation of the main provisions of the Bill and to make regular reports to the Taoiseach in the matter. Such reports will be laid before both Houses of the Oireachtas.

Section 13 is a confidentiality provision. It prohibits the disclosure of any information about the operation of the Bill, unless it is made to an authorised person, as defined, and it is connected with specified criteria. The section applies both to members/officers of the agencies concerned, as well as to persons engaged on contract work. It also applies to persons generally.

Section 14 is a core provision of the Bill. It deals with the issue of admissibility of evidence in the narrow and very specific context of evidence obtained by means of surveillance. It provides that such evidence, notwithstanding any error or omission on the face of an authorisation or a written record of approval, or notwithstanding any failure by any member/officer to comply with a requirement of an authorisation or written record, is admissible in certain clearly defined circumstances as set out in the section. In effect, this means that a breach of statute-based procedures or a failure to fulfil particular statutory requirements will not, of themselves, mean that the material in question must be excluded.

Section 15 deals with the issue of disclosure of information about surveillance in proceedings. It provides that disclosure by means of discovery or otherwise shall not be made unless a Court authorises otherwise.

Section 16 provides that, as already noted, the Minister for Justice, Equality and Law Reform, the Minister for Defence and the Minister for Finance may make Regulations insofar as their areas of functional responsibility are concerned. Any such Regulations have to be laid before each House of the Oireachtas.

Section 17 amends the Garda Síochána Act 2005 to provide, in line with existing policy, for the non-application of the provisions of the Bill to the Garda Síochána Ombudsman Commission.

Section 18 amends the Courts (Supplemental Provisions) Act 1961 to take account of the provisions of the Bill in relation to the issuing, renewal and variation of authorisations for surveillance by a judge of the District Court.

Section 19 provides for the short title of the Bill.

*An Roinn Dlí agus Cirt, Comhionannais agus Athchóirithe Dlí,
Aibreán 2009.*