



# **REPORT OF THE FENNELLY COMMISSION**

## **Commission of Investigation**

**(Certain Matters relative to An Garda Síochána and other persons)**

The Hon. Mr. Justice Nial Fennelly

Sole Member

31<sup>st</sup> March 2017

## Acknowledgement

I wish to express my personal thanks to the team who have worked with me on this Commission. It would not have been possible to complete this task in as comprehensive or timely a manner without their energy, dedication and support. It is not appropriate to single out any individual in this acknowledgment as each brought their unique expertise to the task and therefore I shall simply record their names and in doing so recognise a truly remarkable group of people who worked tirelessly to ensure that this Report delivered an accurate, considered and truthful account of the facts as found. It was both an honour and a pleasure to work with them. I express my thanks to them all.

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## Introductory Remarks

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Recording of multiple telephone lines onto Digital Audio Tapes (DAT) commenced, with the approval of the Garda Telecommunications Section, at some twenty Divisional Garda Stations outside the Dublin Metropolitan Area late in 1995. In that way, An Garda Síochána, for the first time, operated systems for the recording of non-999 lines including, in particular, the main station line.

At some unknown date in 1996, the telecommunications technician in Bandon, apparently by mistake, connected to the recording system a number of lines, which went outside what had been approved for recording in 1995.

Madame Sophie Toscan du Plantier, a French citizen, was brutally murdered at her holiday home in West Cork on 23 December 1996.

From early 1997, part of the Garda investigation of the murder of Madame du Plantier was conducted from Bandon Garda Station. A number of telephone lines used by members of the investigation team at Bandon were recorded during this period, apparently without the knowledge of the members concerned. Tapes of these recordings were retained in Bandon Garda Station.

Thus some telephone conversations of Gardaí working on the murder investigation came to be recorded. All the retained tapes, save for a small number, of recorded telephone calls were destroyed in a flood at Bandon Garda Station in November 2009.

Mr Ian Bailey, who was identified by the Gardaí as the chief suspect for the murder and twice arrested, commenced a High Court action against the Garda Commissioner in 2007 in which he alleged ill-treatment by certain Gardaí.

In 2013, in the course of compliance with an Order for Discovery of documents made by the High Court in Mr Bailey's action, the small number of surviving DAT tapes was brought to the attention of the Garda discovery team by the technician at Bandon. A number of recorded calls that were clearly not 999 calls, some of which were private conversations between members of An Garda Síochána, were judged to contain material which was damaging to An Garda Síochána.

When these matters were reported to the senior levels of An Garda Síochána in October 2013, inquiries were immediately initiated as to whether such recording activity had been conducted at Garda stations other than Bandon. The results of these inquiries caused surprise and alarm at the highest levels of the force. The Garda Commissioner, Mr Martin Callinan, had been unaware that there had been any recording save for 999 calls. He issued immediate instructions that all recording other than of 999 calls was to stop.

The Garda Commissioner, by a letter dated 10 March 2014, reported to the Secretary General of the Department of Justice that it had been discovered that recording of telephone calls had been taking

place in certain Garda stations since the 1980s. Regrettably, this letter was not brought to the attention of the Minister for Justice until 25 March 2014. When the facts about telephone recording came to the attention of the Attorney General and the Taoiseach, they regarded it as a very grave matter. They were not aware of the Garda Commissioner's letter of 10 March reporting on the matter. The Taoiseach caused it to be conveyed to the Garda Commissioner late on 24 March that the matter of telephone recording was considered to be very serious. The Garda Commissioner gave notice of his retirement on 25 March 2014.

The Government considered the recording of telephone calls to Garda Stations to be a matter of significant public concern and, at its meeting on the same day, decided to establish this Commission of Investigation.

It is apparent from the outset that, from 1995, An Garda Síochána had operated systems to record the main line into at most, twenty-two Divisional Stations, though the recording ceased once the call was transferred to an extension. It is also apparent that a quite different category of recording took place at Bandon Garda Station. More generally, it is clear that the entire history of the matter is associated with error and misunderstanding.

Nial Fennelly

31 March 2017

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## EXECUTIVE SUMMARY

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### 1. Establishment of the Commission

- 1.1. The Government, by Order dated 30 April 2014 (S.I. No. 192 of 2014) made pursuant to the provisions of the Commissions of Investigation Act 2004 (the “2004 Act”), appointed Mr Justice Nial Fennelly as the Sole Member of the Commission of Investigation regarding certain matters relative to An Garda Síochána and other persons.
- 1.2. The task of any Commission established under the 2004 Act is to investigate and report on specific matters considered by the Government to be of “significant public concern” (s. 3(1) (a) of the 2004 Act). The matters of significant public concern to be investigated in this instance are set out in the Terms of Reference of the Commission, which are contained in the Order of 30 April 2014. All of these matters, to a greater or lesser degree, relate to the operation by An Garda Síochána of systems that recorded telephone conversations into and out of Garda stations.
- 1.3. This is the Final Report of the Commission. It addresses all of the matters outlined in the Terms of Reference, with the exception of the issues raised in sub-paragraphs 1(n) and 1(o), which were reported on in the Second Interim Report of the Commission. The Commission is unable to report on paragraph 1(p) of its Terms of Reference, as Judge Michael Reilly died in November 2016 before he had completed his report.

## 2. An Garda Síochána: History and Structure

2.1 A brief account of the history and structure of An Garda Síochána is set out in Chapter 2 of the Report. The account covers the legislative origins of the force and its relationship with the Department of Justice. It also summarises the geographical and hierarchical structure of An Garda Síochána during the period with which the Commission is concerned (1980-2013).

2.2 In the context of Garda telephone recording systems, the Commission makes the following general observations about the structure and organisation of An Garda Síochána:

1. The management structure of An Garda Síochána is hierarchical, in common with police forces around the world. Such structures only work if there are open and accessible lines of communication between all ranks and between all sections and in particular if there is a strong oversight of the overall policing activity of the force. This cohesiveness and oversight were not present in the operation of Garda telephone recording systems, particularly those operated at Divisional Stations outside the Dublin Metropolitan Area (DMA) from 1995 onwards.
2. In terms of both the operation of telephone recording systems and the knowledge of their existence, the Commission has found distinct differences between the DMA and the rest of the country. Since the 1970s, telephone recording in the DMA was centralised, firstly at Dublin Castle and later at Harcourt Square. No telephone recording occurred at Divisional Stations in the DMA. The Commission found that many of the Gardaí in Senior Management positions had spent most or all of their careers in the DMA. As a result, they had limited knowledge and understanding of telephone recording practices in stations outside Dublin.
3. Telephones are the fundamental tool of communication between the force and the public. Their operation and use are an area of basic governance. It should not be possible that senior members of the force would not fully understand how communications with the public occur and are recorded.

4. The Commission has found that, although the Department of Justice had a role in sanctioning expenditure on equipment sought by An Garda Síochána, its officials did not consider that they had an obligation to monitor whether An Garda Síochána had the legal authority to operate that equipment. Ultimately, the responsibility for ensuring that the activities of An Garda Síochána are carried out in a lawful way is that of the Garda Commissioner and Garda Management.

### 3. Telephone Recording Systems in An Garda Síochána

- 3.1 The Terms of Reference of the Commission require it to investigate and report on the operation of Garda Síochána telephone recording systems, in particular those intended to record calls, other than 999 calls, to the Emergency-Call Answering Service.
- 3.2 The investigation covers the period from 1 January 1980 to 27 November 2013, except in the case of any telephone recording system already in existence on 1 January 1980.
- 3.3 While 999 calls to the Emergency-Call Answering Service are, *prima facie*, excluded from the scope of the investigation, in practice, the recording of non-999 calls that has taken place has occurred as part of a system that also recorded 999 calls and / or Garda radio traffic. Thus, it is not feasible to conduct the investigation without consideration of 999 recording systems.
- 3.4 Moreover, there is no absolute distinction between 999 and non-999 calls; many calls made on 999 lines are not of an emergency nature and, similarly, emergency calls are frequently made to the ordinary number of local Garda stations.
- 3.5 The Commission has discovered that the history of the Garda Síochána telephone recording systems falls into three periods, each of which is the subject of a chapter of the Report:
  - (i) 1980 – 1995
  - (ii) 1995 – 2008
  - (iii) 2008 - 2013



## 4. Garda Telephone Recording Systems, 1980-1995

4.1 Between 1980 and 1995, the following telephone recording systems were installed and / or operated by An Garda Síochána:

- Communications Centre, Dublin Castle
  - Installed: 1973
  - Duration: 16 years
  - Removed: 1989
  
- Command & Control, Harcourt Square
  - Installed: 1989
  - Duration: 6 years
  - Removed: 1995
  
- Divisional and District Stations (DMA)
  - Installed: 1985-86
  - Duration: 5-10 years
  - Removed: 1991-95
  
- Divisional Stations (outside DMA)
  - Installed: 1983-85
  - Duration: 5-12 years
  - Removed: 1991-1995

### Communications Centre, Dublin Castle

4.2 The systematic recording of telephone calls by An Garda Síochána has its origin in the 1970s, when a decision was taken to record lines to and from the Communications Centre (also known as the Radio Control Room) at Dublin Castle. The Communications Centre received all 999 calls for the DMA and coordinated the appropriate Garda response.

- 4.3 Two 24-track, reel-to-reel tape recorders were installed to enable recording, storage and playback of all emergency-related communications coming through the consoles used by telephone operators in the Radio Control Room. These included 999 calls and radio messages to and from the Control Room. Incoming and outgoing calls on certain non-999 telephone lines connected to the consoles also appear to have been included.
- 4.4 The system used large reels of analogue tape. These needed to be changed on a daily basis as they held no more than 24 hours of recordings. The cost of the tapes, as well as their physical bulk, imposed a limit on the number that could be kept. A practice, therefore, emerged of keeping enough tapes to record 30 days of audio, after which time the oldest tape was reused. Any tapes containing calls that were required for an investigation were taken out of rotation until those calls were no longer needed.
- 4.5 In or around 1978, additional short-term ‘loop’ recorders were installed into the operators’ consoles, allowing them to play back recent calls to check information received or transmitted. The recorders held up to 60 minutes of audio. They recorded on a continuous loop, so recordings were not retained.
- 4.6 In or around 1989, the handling of emergency calls for the DMA was transferred to a newly developed Command and Control Centre at Harcourt Square.

Command and Control, Harcourt Square, Dublin

- 4.7 During the 1980s, a Radio Advisory Committee, with representatives from An Garda Síochána, the Department of Justice and the Department of Finance, was established to oversee the upgrading of the Garda communications network.
- 4.8 As part of this process, the Committee sanctioned the purchase of telephone recording equipment for Harcourt Square which mirrored that previously in place at Dublin Castle. The lines recorded at Harcourt Square included certain non-999 lines connected to the operators’ consoles, as had been the case in Dublin Castle.
- 4.9 In April 1989, the Garda Commissioner, in an application for registration as a Data Controller under the recently enacted Data Protection Act, 1988, described the system as follows:

“Command & Control logging system for recording and logging the handling of 999 calls from the general public to the Communications Centre at Dublin Metropolitan Area Hqrs., Harcourt Square, Dublin 2.”

- 4.10 Requests to play back and / or copy recordings from the multi-track recorder were generally dealt with by a Sergeant from the Telecommunications Section, who would instruct the technicians to locate and play back the relevant audio, as required. If a copy of a call was made at the request of an officer investigating a particular matter, that copy would be kept with the investigation file, rather than at the Control Room. No policy documents in relation to accessing recordings have been found. The technicians dealing with access requests do not appear to have kept written records of such requests, although it seems likely that the investigation file for the incident to which a given request related would include a note of the request and its outcome.

#### Divisional Stations

- 4.11 Outside the DMA, the handling of emergency calls during this period was not centralised. 999 calls were received and dealt with at Divisional and District levels. In part, this was due to the poor quality of the Garda radio network, particularly in rural areas.
- 4.12 In the early 1980s, in the context of improving the overall Garda radio network, proposals were made to extend the Control Room concept for handling emergency calls to Divisional Stations outside the DMA. Toward this end, the Radio Advisory Committee oversaw the purchase and installation of communications consoles similar to those in use at Dublin Castle. The consoles, provided by a company called Standard Elektrik Lorenz (S.E.L.), were intended to handle 999 calls and radio communications. They were also to have lines connecting them to the main telephone exchange in the station, allowing non-999 calls to be made to or from the consoles.
- 4.13 As in Dublin Castle, the new consoles included a facility for short-term recording of up to 60 minutes of audio using a cassette-based recorder. It is clear that this was intended as an aid to the operators working at the console, allowing them instant access to recent messages in order to check information received or given. These recordings were not intended to be retained and there is no evidence that they were retained in any station.

There is some evidence to suggest that the consoles at Divisional Stations were purchased with the intention that the built-in recorder could be switched between 999

lines, radio channels and any other telephone extension connected to the console. However, there is no evidence that this was done in practice.

- 4.14 Similar consoles and recorders were installed in Divisional and District Stations throughout the DMA, although 999 calls were not answered in these stations. The Commission has not found any evidence that these recorders were ever used.

### **Conclusions**

- 4.15 Between 1980 and 1995, the installation of telephone recording systems by An Garda Síochána was authorised by the Government on the advice of the Radio Advisory Committee, an interdepartmental group with Garda representation and independent technical expertise.
- 4.16 The Radio Advisory Committee was fully aware of the capacity of the recording equipment installed and its intended purpose, which was to record emergency-related communications to and from Garda Control Rooms.
- 4.17 The only systems on which non-999 calls may have been recorded during this period were those operated at the Communications Centre, Dublin Castle and later at Command and Control, Harcourt Square.
- 4.18 The recording of non-999 calls at these locations was limited to certain lines, used mostly by Control Room operators to contact members in Garda stations throughout the DMA. These lines were recorded in pursuance of the overall goal of recording all emergency-related communications.
- 4.19 Recordings at Dublin Castle / Harcourt Square were retained for no longer than a month, unless required for a particular investigation or court proceedings. This was a matter of practice rather than policy.
- 4.20 Short-term cassette recorders were installed in Divisional Stations throughout the country in the mid-1980s. Insofar as they were used at all, the Commission is satisfied that they were used only to record 999 calls. These recordings were not retained.

- 4.21 No written policy was formulated by An Garda Síochána in relation to the recording, retention, access and use of telephone calls during this period, whether 999 or otherwise. In the absence of any such policy, the technicians and officers working in the relevant Control Rooms devised their own practices and procedures
- 4.22 No tapes or access records from any of the telephone recording systems in place during this period have been located.

## **5. Garda Telephone Recording Systems, 1995-2008**

- 5.1.1 Chapter 5 is probably the most important chapter in the Final Report. It deals in particular with the installation, commencing in 1995, of Digital Audio Tape (DAT) recorders in Divisional Stations outside the Dublin Metropolitan Area (DMA). From 1995, for the first time, An Garda Síochána had the capacity to record multiple telephone lines in those stations. This resulted in the systematic recording of telephone calls from members of the public to Divisional Stations outside the DMA that were not 999 or emergency calls.
- 5.1.2 Between 1995 and 2008, the following telephone recording systems were installed and operated by An Garda Síochána:
- Command and Control, Harcourt Square, Dublin
    - Installed: 1995
    - Duration: 12.5 years
    - Removed: 2008
  - Communications Centre, Anglesea Street, Cork
    - Installed: 1995
    - Duration: 12.5 years
    - Removed: 2008
  - Divisional Stations (outside DMA)
    - Installed: 1995-96
    - Duration: 12-13 years
    - Removed: 2008

## **Command and Control, Harcourt Square, Dublin**

- 5.1.3 In 1989, Harcourt Square became the Command and Control Centre for the DMA, responsible for coordinating the Garda response to all 999 calls in that area. It was equipped with a 40-track analogue tape recorder to record all communications traffic to and from the Call Answer and Dispatch consoles in the Control Room. At some point between 1992 and 1995, the possibility of replacing this recorder with more up-to-date equipment began to be considered by the Garda Telecommunications Section.
- 5.1.4 The Radio Advisory Committee, an interdepartmental group with Garda representation that had overseen the purchase of Garda radio and recording equipment during the 1980s, was replaced early in 1994 by the IT (Information Technology) & Telecommunications Executive Committee.
- 5.1.5 It is likely that the purchase of recording equipment for Harcourt Square and Anglesea Street, Cork, was raised at a meeting of the IT and Telecommunications Committee in March 1995, though the extent to which it was considered is not known. No minutes of the meeting have been found. Members of the Committee who gave evidence to the Commission in person were unable to recall any discussion of the telephone recording systems at this or any other meeting. This suggests that if the matter was considered, it did not generate controversy or significant debate. In one sense, this was not surprising; as far as Harcourt Square was concerned, the proposal was framed as an upgrade of existing equipment.
- 5.1.6 Sanction to purchase the new DAT recorder for Harcourt Square was granted by the Department of Justice on 24 May 1995. The equipment was purchased in October 1995 and installed shortly afterwards.
- 5.1.7 The evidence before the Commission suggests that the new recording equipment was installed as a direct replacement for the old multi-track recorder and that the same lines were connected to it for recording purposes. This included 999 lines, radio channels and some non-999 telephone extensions that connected the operator consoles with the main PABX<sup>1</sup> telephone exchange in the building.
- 5.1.8 In general the recorded non-999 lines at Harcourt Square were used to communicate with Garda stations within the DMA, although it was possible that some personal or other non-emergency calls may have been recorded on those lines.

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<sup>1</sup> Private Automated Branch Exchange. These networks can switch calls between internal extensions, while allowing all users to share one or more external lines.

5.1.9 As a matter of practice, recordings at Command and Control, Harcourt Square, were kept for a minimum of 30 days, after which time the oldest available tape was re-used. The evidence suggests that this 30-day retention period arose solely from the practical limitations imposed by the previous reel-to-reel recording system<sup>2</sup> and not from any legal or operational considerations.

### **Communications Centre, Anglesea Street, Cork**

5.1.10 Anglesea Street Station became the Divisional Station for Cork City around November 1991. From the available information, it appears that the purchase of telephone recording equipment for Anglesea Street in 1995 was part of a broader plan to develop the station as a Communications Centre for Cork City, in order to centralise the response to emergency calls across the city.

5.1.11 The tendering process was linked to the purchase of similar equipment for Command and Control, Harcourt Square. Following sanction from the Department of Justice, the equipment was ordered and installed in or around October 1995.

5.1.12 The Control Room at Anglesea Street was equipped with 3 'Dispatcher Consoles' used to answer 999 calls and alarm calls and to dispatch radio messages. Calls could also be made to and from each of the Dispatcher Consoles *via* direct dial or through the internal Garda telephone exchange. This facilitated contact between the Dispatchers and local Garda stations. All calls going through the Dispatcher Consoles were recorded.

5.1.13 Unlike Harcourt Square, calls to the main station number at Anglesea Street were also answered in the Control Room, on 2 'Attendant Consoles' that were separate from the Dispatcher Consoles and were not connected to any 999 lines. It appears that the Attendant Consoles were also connected to the DAT recorder at or around the time of its installation. As a result, all calls to and from the main station number were recorded, although recording ceased if and when the call was transferred to another extension.

5.1.14 This was the first time that the main telephone number of any Garda station was connected to a telephone recording system.

5.1.15 In the absence of any instruction from Garda Headquarters (HQ), the technicians at Anglesea Street implemented a policy, identical to that in place at Harcourt Square, of reusing tapes on a 30-day cycle unless required for an investigation or court proceedings.

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<sup>2</sup> See para. 4.4 above.

### **Divisional Stations (outside DMA)**

- 5.1.16 In 1995, there were 18 Divisional Headquarter Garda Stations outside the DMA, including Anglesea Street. Three more were added in subsequent years as Divisional boundaries were redrawn.
- 5.1.17 Towards the end of 1995, in response to complaints from local technicians and operational Gardaí about the reliability and fitness for purpose of the short-term S.E.L. recorders installed in Divisional Control Rooms during the 1980s,<sup>3</sup> the Telecommunications Section at Garda HQ began the process of tendering for replacement equipment.
- 5.1.18 The tendering process appears to have been carried out without any input from the IT & Telecommunications Executive Committee, which at that time had overall responsibility for directing, monitoring and controlling Telecommunications policy and its implementation. The reason for this seems to have been that the purchase was perceived as a replacement of failing equipment and not as a new initiative.
- 5.1.19 The tender specification document drawn up by the Telecommunications Section set out minimum requirements for the system which included:
- Simultaneous recording on 8 channels;
  - A digital recording medium (such as Digital Audio Tape) with at least 240 hours of recording time; and
  - A facility to expand the recording capacity of the system if required.
- 5.1.20 These requirements marked a significant increase in capacity relative to the one-track, 60-minute S.E.L. recorders that were being replaced. Nonetheless, there are clear reasons why a multi-track recorder could have been deemed necessary, even if only to record 999 calls. In the first place, a number of Divisional Stations had more than one 999 line. In some stations, 999 calls could also be transferred through to other lines in the event that the dedicated 999 lines were busy or unanswered. Finally, having multiple recording channels would mean that some spare channels were available for use as a backup, in the event that a recording channel ceased to function properly.
- 5.1.21 It remains unclear why the minimum number of recording channels was fixed at 8 in the tender specification. It is possible that 8 was the minimum number on all the commercially available recorders at that time, but this has not been confirmed.

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<sup>3</sup> See para. 4.11 above.



- 5.1.22 Following technical evaluation of the bids, the tender was ultimately awarded to Dictaphone Ltd – the same company that had recently been awarded the contract to install DAT recording systems in Harcourt Square and Anglesea Street.
- 5.1.23 On or about 21 November 1995, the purchase was approved by an Assistant Commissioner. An order for 16 units was placed with Dictaphone Ltd on 24 November 1995. For unknown reasons, a recorder was not purchased for the Limerick Divisional Station until 1998. The other remaining Divisional Station, Anglesea Street, already had a DAT system installed.
- 5.1.24 The Commission understands that, in 1995, sanction would also have been required from the Department of Justice before the purchase of this new equipment could be completed. Documentary evidence confirms that this was done in relation to the purchase of systems for Harcourt Square and Anglesea Street. However, searches by An Garda Síochána and the Department of Justice have not found any documentation to show that sanction was sought from the Department for the purchase of DAT systems for Divisional Stations.
- 5.1.25 The first of the new units to be installed was at Bandon Garda Station on 19 December 1995. The evidence suggests that this was done as a form of preliminary field trial. A second recorder was installed at Portlaoise Garda Station in or around February 1996, again for field trial purposes. The remaining recorders were installed some months later, between November 1996 and May 1997, and, as stated above, in Limerick in 1998.
- 5.1.26 In February 1996, a Superintendent from the Telecommunications Planning Section at Garda HQ wrote to the Inspector with responsibility for Telecommunications in the Southern Region, including Anglesea Street. He asked the Inspector for his views on what telephone or radio circuits should be connected to the new recorders at Divisional Stations. The Inspector responded with a number of suggestions which included the “Telephone Attendant Offset Console” – that is, the main station number, as recorded at Anglesea Street.
- 5.1.27 The Inspector’s recommendations were conveyed to the Chief Superintendent, IT & Telecommunications for his approval. On 18 April 1996 the Chief Superintendent replied, giving his approval, subject to compliance with the Data Protection Act, 1988, for the recording of voice traffic on the lines suggested.
- 5.1.28 This letter from the Chief Superintendent, IT & Telecommunications represents the sole written evidence of a formal decision taken by An Garda Síochána to record telephone

calls other than 999 calls. It is thus of central importance to the entire subject of the Commission's investigation of "the operation of Garda Síochána telephone recording systems".

- 5.1.29 Unfortunately, from the evidence given by the former Chief Superintendent to the Commission, it appears that his decision to approve recording of the main station number was based on a crucial misunderstanding: he did not know what was meant by the "Telephone Attendant Operators Set", as it was described in the letter seeking his approval. He believed it was associated with the 999 system, which he knew had been recorded for many years.
- 5.1.30 This misunderstanding is explained, in part, by the fact that the Chief Superintendent's background and expertise was in IT rather than telecommunications. The fact remains, however, that in spite of not understanding the expression, he gave his approval without seeking any further explanation or clarification. If he had done so, he would have been told that it was not a 999 line.
- 5.1.31 In evidence to the Commission, the former Chief Superintendent indicated that he would have considered the recording of the main telephone line to represent a major change in policy, which would have had to have been approved at Commissioner level. As a member of the IT and Telecommunications Executive Committee, the Chief Superintendent could have brought this proposed change to the attention of that Committee for discussion. It is particularly unfortunate, therefore, that he did not appreciate the nature of the change to which he had given his approval.
- 5.1.32 The DAT recorders were installed in the relevant Divisional Stations on varying dates between November 1996 and May 1997. Recorders of the same model were later installed at Divisional Stations in Limerick (1998) and Fermoy (1999).
- 5.1.33 Following queries in relation to the data protection implications of the new recording systems, the Chief Superintendent, IT & Telecommunications was made aware of the practice at Anglesea Street and Harcourt Square of retaining recorded tapes for one month. In October 1996, he wrote to each of the Divisional Chief Superintendents, advising that "*the tapes used in conjunction with the equipment should be stored in a secure cabinet for one month unless subject to an investigation, when tapes should be stored until completion of the investigation*".
- 5.1.34 The statement that tapes were to be stored for one month was not accompanied by an express statement that they were to be destroyed at the end of that period. In the event,

practice varied widely from one Divisional Station to another; some simply retained them, while some reused tapes after the one-month period had elapsed.

- 5.1.35 In cases where tapes were to be retained in connection with an investigation, no protocols were put in place to ensure that such tapes were only kept for as long as they were required. As a result, some tapes were retained long past the point when they were needed for any investigative reason.
- 5.1.36 Only in one station were tapes systematically destroyed. In the event, more than 3,000 tapes survived to be collected in 2014 prior to the establishment of this Commission.
- 5.1.37 The quality and quantity of access records kept by technicians and made available to the Commission varied significantly from one station to the next. The documentation that is available, together with oral evidence from the technicians themselves, suggests that requests for access to recordings generally fell into one of the following categories:
- (i) Requests from a Control Room operator to play back a recent emergency call in order to check the details of information received;
  - (ii) Requests from a Garda member to play back or copy an emergency call in connection with an ongoing investigation;
  - (iii) Requests from a Garda member to play back or copy a call as part of an investigation into a complaint received from a member of the public. Such complaints could involve allegations that an emergency call was not responded to, or that the response was in some way inadequate or inappropriate.

### **Conclusions**

- 5.1.38 The general picture that emerges is that a major change in policy took place, commencing in 1995 when An Garda Síochána began to record telephone lines other than 999 lines in Divisional Stations outside the Dublin Metropolitan Area (DMA).
- 5.1.39 Prior to and following the purchase of recording equipment for those stations in 1995, the Senior Management of An Garda Síochána failed to formulate or promulgate any policies or Directives regarding:
- What lines were to be recorded at Garda stations;
  - What lines were not to be recorded;

- Who could authorise the addition or removal of lines from the recorders;
- For how long tapes containing recordings were to be kept;
- Whether and when recordings should be destroyed; and
- The authorisation of, and conditions governing, access.

5.1.40 In the absence of any formal policy statement on these issues from Garda Management, the Telecommunications Section devised practices and procedures which became, by default, the policy of the organisation. These procedures were implemented to varying extents across the country, but did not carry the authority of a formal Circular or Directive from Garda HQ.

5.1.41 In the absence of any clear statement from Garda HQ as to what should and should not be recorded, decisions were taken at Anglesea Street and Bandon (the first Divisional Stations to receive the new recording equipment) to record the main station number, which was answered in the Control Room, as well as the 999 and radio circuits. This was done for the following reasons:

- To ensure that 999 calls diverted to the main station line by the 999 service provider would be recorded;
- To ensure that calls made to the main station line that turned out to be of an emergency nature would be recorded;
- To ensure that Control Room operators, conscious of being recorded, would be courteous and efficient in their handling of calls to the main station line.

5.1.42 From an operational perspective, the recording of the main station number had much to recommend it. It is also important to note that calls to the main station number ceased to be recorded if and when the call was transferred to another extension. Nonetheless, the inevitable result was that a considerable number of non-emergency calls from members of the public to the station would be recorded, as well as calls of an emergency nature. There is no evidence that the decision to record this line gave rise to any consideration of the potential legal implications of doing so.

5.1.43 Because of a series of failures of communication, understanding and oversight, set out in detail in this and other chapters of the Commission's Report, the fact that Divisional Stations outside the DMA were recording and retaining non-999 calls was not understood by the Senior Management of An Garda Síochána until November 2013.

- 5.1.44 As no Directive or Circular concerning telephone recording was issued from Garda HQ, there was nothing, in principle, to stop Superintendents and Chief Superintendents in the Divisions from requesting additional lines to be connected to the recorder where they saw an operational need to do so. Although answerable to the Telecommunications Section, Garda HQ, in technical matters, Divisional technicians were under the operational control of their local Superintendents and felt obliged to carry out such requests when made.
- 5.1.45 The failure to draw up any formal set of rules or protocols governing the operation and management of the DAT recording system is surprising and unfortunate. At the time of installation, several technicians expressed surprise at the absence of any policy. Others were concerned at the lack of proper training. Some wrote seeking directions. Regrettably, such expressions of concern as made their way to the Telecommunications Section at Garda HQ do not seem to have resulted in the kind of comprehensive review of policy and practice that might have been expected. In some cases, they were not even answered.
- 5.1.46 For the most part, insofar as additional lines were connected in some stations, this was done in pursuit of the overall goal of the recording system – that is, the capturing of emergency calls. In some stations, for logistical and other reasons, 999 and other emergency calls could be diverted to lines in other parts of the station, such as the Public Office. For that reason, decisions were taken in a small number of stations to record those additional lines.
- 5.1.47 In making these decisions, it appears little or no consideration was given to the fact that recording such lines would also mean that more non-999 calls involving members of the public would be recorded, almost certainly without their knowledge. In a small number of stations, the recording of such lines also resulted in the inadvertent recording of phone calls to and from prisoners at the station.
- 5.1.48 In two stations – Bandon and Galway – decisions were taken at local level to record certain telephone lines for reasons other than the capturing of emergency calls. In the case of Galway, a line in the Incident Room was set to record, apparently on the instructions of the District Superintendent, for reasons unknown. In Bandon, a number of additional non-999 lines were connected to the recorder for varying periods of time, for reasons that could not now be established. These lines included a telephone in a room that was used from time to time as an Interview Room, and was also used by some members to make telephone calls of a private and confidential nature. It is clear that the conversations of members were recorded without their knowledge. All records kept by

the technician in relation to the operation and management of the system at Bandon Station, together with almost all of the DAT tapes then in existence, were destroyed when the station was flooded in 2009.

- 5.1.49 It emerges from a general view of all the evidence heard by the Commission that there was a great deal of confusion, amounting to ignorance, at the highest level in An Garda Síochána as to what lines were recorded in Divisional Stations outside the DMA. Most strikingly, some of the key witnesses believed that the Control Rooms at Divisional Garda Stations received only 999 calls. They failed to appreciate, as appropriate inquiries would have disclosed, that these Control Rooms also received all calls to the main station number. This may be explicable by reference to the fact that officers who spent most or all of their careers in Dublin could have mistakenly assumed that the Control Rooms in Divisional Stations outside the DMA were replicas of Command and Control at Harcourt Square, where only emergency calls were dealt with.
- 5.1.50 In default of any official rules or guidance emanating from Garda HQ, the technicians and their Regional Sergeants developed local practices in managing access to recordings. These practices varied from Division to Division. It is fair to say that, by and large, the technicians attached to the Divisional Stations exhibited a high sense of responsibility. To their credit, even in the absence of guidance, many of them were properly sensitive to the fact that telephone conversations were private and that access should not be granted except for valid operational reasons, and only then in response to a formal application supported by the District Officer, i.e., the Superintendent.
- 5.1.51 The Commission has found no evidence of widespread abuse of the system. Nonetheless, it is a fact that a large volume of private telephone calls were retained in the possession of An Garda Síochána and the possibility of instances of abuse by members cannot be ruled out.

## 6. Garda Telephone Recording Systems, 2008-2013

- 6.1 In 2008, the existing Garda telephone recording systems at Command and Control, Harcourt Square, and the Divisional Stations outside the DMA were replaced by a modern, computer-based system known as NICE. This comprised locally-installed hard-disk recorders with limited storage capacity, combined with a central-archive facility for storing and accessing all recorded data. This included certain metadata for each call, namely, the date, time, call duration and, where available, caller-line identification.

### Recording policy

- 6.2 The decision to replace the existing systems was made against the background of a long-running review of the functions and performance of Garda Control Rooms nationwide. Final decisions in relation to the new radio network and Control Room strategy had yet to be made when, in 2004, it became clear that the systems in Harcourt Square and the Divisional Stations were approaching obsolescence and would have to be replaced. Suggestions were made as to the form of a possible replacement system, but no further action was taken at that time.
- 6.3 The matter of replacing the recorders was revived in April 2005 and came before the IT and Telecommunications Executive Committee. An Inspector from the Telecommunications Section, Garda HQ, was given the task of drafting the specification documents for the required equipment. He investigated the existing system, relying principally on information provided by the technicians employed at Divisional Stations, as he could find little or no documentation. He became concerned at the apparent variation between stations in relation to what was being recorded and for how long the recordings were being kept. In May 2005, he reported to the Chief Superintendent, Information and Communications Technology (ICT) stating that he thought it was “*necessary to agree:*”
- *What items should be recorded?*
  - *How long the recordings should be stored?*
  - *Who is responsible for the data?”*
- 6.4 Rather than engaging with such policy questions, the Chief Superintendent decided that the approach of the Telecommunications Section should be to replace the existing equipment on a “*one for one basis*”, without waiting for the organisation as a whole to define a new recording policy. This was because of the urgent need for replacement of the existing equipment and because he assumed that no policy issues would arise if the new equipment was used solely to record lines that were already being recorded.

- 6.5 The Chief Superintendent maintained this belief notwithstanding the Inspector's report that local management decisions had created variations in the period for which recordings were being held, and that such decisions might also have affected the lines being recorded. It seems the information provided by the Inspector did not prompt any further inquiry into whether the policy outlined in 1996 was, in fact, being adhered to. This limited approach meant that, for example, no consideration appears to have been given to rules about access to recordings of calls.

### **Procurement and purchase**

- 6.6 A draft tender specification document was approved by an Assistant Commissioner in September 2005 but the project was not advanced further until July 2007, when a revised business proposal for a new recording system was approved by a new Assistant Commissioner.
- 6.7 At or around this time, a Project Board, chaired by the Assistant Commissioner and including representatives from the Department of Justice, had been set up to oversee development of the proposed new Garda radio networks and Control Room strategy. In August 2007, a document circulated to the Project Board proposed that both emergency and non-emergency telephone calls into and out of Divisional Control Rooms should be recorded.
- 6.8 This proposal, included consistently in relevant subsequent documents, does not seem to have attracted any attention or debate, perhaps due to a basic and widespread misunderstanding of what was meant by the recording of non-emergency Control Room calls. For example, a representative of the Department of Justice, who attended one of the meetings, told the Commission in evidence that he had assumed the reference to non-emergency call recording meant only the recording of calls made to 999 or other emergency lines that turned out not to have been genuine emergencies.
- 6.9 The final approved version of the Request for Tender document in relation to replacing the existing telephone recording system was advertised on the Government's eTenders website on 26 October 2007 and published in the Official Journal of the European Union on 30 October.
- 6.10 The successful tender was that of Sigma Wireless Ltd, an Irish company that had proposed installing a digital recording system made by NICE Ltd, an Israeli company. With sanction from the Director of Finance for An Garda Síochána, the tender was



awarded to that company. The system supplied was known as the NICE system. A contract was signed by both parties on 17 July 2008.

### **Installation and operation**

- 6.11 Installation of the new system took place between May and October 2008. No formal written instruction was issued from Garda HQ setting out the telephone lines that were to be connected to the NICE system. The Divisional technicians who assisted the Sigma Wireless engineers with the installation process understood that they were to transfer any lines previously recorded on the DAT system onto the NICE recorders. This meant that, in Divisional Stations outside the DMA, the main station telephone number continued to be recorded, as it had been since 1995.
- 6.12 The technician at Garda HQ who enabled the recording facility on lines connected to the NICE system was not aware of any written policy or direction regarding what should and should not be recorded. It was his understanding that lines “*of importance to the discharge of Garda duties*” could be recorded.
- 6.13 In 5 Divisional Stations, details of which are set out in the body of Chapter 6, some new lines were added that went beyond those generally recorded during the DAT period. The reasons for recording these additional lines were diverse, but all of the additions appear to have been prompted by a perceived operational need at local level. There is no evidence of any intention on the part of those who requested and sanctioned these additions to misuse the confidential information obtained as a result.
- 6.14 In one case (Sligo Garda Station), the Telecommunications Sergeant for the region contacted the Telecommunications Section at Garda HQ to inquire about national policy regarding what should be recorded because he “*felt uncomfortable*” about a proposal, approved by the Divisional Chief Superintendent, to record the telephones in the Incident Room there. He received no response, and the line was duly installed.
- 6.15 The NICE system contained a number of safeguards that were not available on the previous recording systems. In the first place, the enabling of recording on each local recorder was controlled centrally. It was not enough simply to connect a telephone line to the recorder; each line had also to be configured for recording on the system at Garda HQ. This meant that, in every case where a new recording line was added to the NICE system, one or more members of the Telecommunications Section at Garda HQ were aware that this was being done.

- 6.16 A second safeguard was that access to a recorded telephone call could only be obtained by means of individual usernames and passwords, created by the System Administrator. Almost without exception, accessing of calls on the system was limited to Divisional technicians and certain members of the Telecommunications Section, Garda HQ.
- 6.17 Thirdly, the system retained a record of every act carried out by every user on the system using the standard software application, known as “Inform”. An alternative search application, known as “Toolbar”, could be used to access the local hard disks at each Division. This was intended for use only as a backup in the event of problems occurring with the central archive. There was no audit trail when Toolbar was used.
- 6.18 Most technicians began using Inform in or around November 2008. Some, who had been trained in September when Inform was not yet available, changed over gradually between 2008 and 2009. Others, however, continued to use Toolbar rather than Inform until sometime in 2010, either because they found it easier and quicker to use or because of problems experienced with Inform. One technician continued to use Toolbar until December 2013 because he found it easier and quicker.
- 6.19 Apart from the use of Toolbar and Inform to search the system, technicians with access to the NICE system in Divisional Stations and at Garda HQ had a facility to listen to calls on a given channel while they were being recorded. The purpose of this ‘live-monitoring’ facility was to allow technicians to conduct random spot checks for the purpose of confirming that the system was recording. Audit trails from the NICE system examined by the Commission show that live monitoring was carried out infrequently and generally for no more than a few seconds at a time.
- 6.20 Technicians questioned by the Commission stated in evidence that they were never asked to conduct live monitoring for any operational or investigative purpose and that they did not do so. The Commission has no reason to disbelieve this evidence.
- 6.21 Although the NICE system offered an improved degree of control over access to recorded calls, there should have been clear written rules or guidelines regarding the use of these facilities. There was, in fact, no clear general set of official rules.
- 6.22 In every Divisional Station outside the DMA, playback and downloading of calls remained the responsibility of the local Garda technician. In dealing with access requests, some technicians adopted the rule set out in a draft NICE policy document created by the Telecommunications Section in 2009, which required written authorisation from the District Superintendent. Others simply continued with whatever their practice had been before the installation of the NICE system. The practice was

highly variable and inconsistent. Record-keeping practices in relation to access requests also varied widely.

### **Retention of recordings**

- 6.23 In contrast to the tape-based DAT system, under the NICE system, technicians had no power to erase or edit recordings; nor could they erase or edit any of the associated metadata retained by the system. The level of clearance given to technicians on the new system only allowed them to search, play back and download recordings, and to monitor channels by listening ‘live’.
- 6.24 The specification for the tender that resulted in the purchase of the NICE system provided that “*calls must be capable of being played back for at least ten years after being archived*”. This 10-year period was arrived at without any consideration being given at higher levels of An Garda Síochána to law or policy on the matter. How this came about is explained in the body of Chapter 6.
- 6.25 Equally, no consideration was given to, and no policy was adopted about, what was to be done with the existing tapes from the now defunct DAT systems. As noted in this Report, more than 3000 DAT tapes were retained in total, at Harcourt Square and Divisional Stations throughout the country. However, this fact remained unknown to anyone at Garda HQ until February 2014, when an audit of existing tapes was completed.

### **Termination of non-999 recording**

- 6.26 Chapters 6 and 7 of the Commission’s Interim Report, relating to sub-paragraphs 1(n) and 1(o) of the Terms of Reference, outlined the circumstances through which the then Garda Commissioner, Mr Martin Callinan, came to be informed that recording of non-999 lines had taken place in Bandon Garda Station and in other Garda stations around the country. In response to that information, Commissioner Callinan immediately took the view that there could be no lawful justification for such recording practices. He issued a verbal instruction (sometime between 8 and 11 November 2013) to the effect that the recording of non-999 calls should be stopped immediately. Following some delays, that task was completed on or around 27 November 2013.
- 6.27 The Commissioner’s instruction, when conveyed to officers and technicians in Divisional Stations, produced a sometimes vigorous reaction. These events are described in the body of Chapter 6.

6.28 The fact that the instruction was communicated by email from an ordinary technician at Garda HQ, rather than in writing from the Commissioner's Office, caused confusion. Some technicians and Divisional Officers did not consider it a valid instruction and sought confirmation that the Commissioner had indeed sanctioned what they saw as an unprecedented step.

6.29 Some objected strongly to the instruction as they saw clear and important operational benefits from the recording that was now being terminated. Mr Callinan told the Commission that he was made aware of these objections at the time but that, in his view, none of them could provide a justification to continue recording in the absence of any lawful authority to do so. The Commission considers this to be correct, although it is unfortunate that the manner in which his instruction was conveyed to the technicians and Divisional Officers meant that this overriding reason for the cessation of recording was not made clear to all.

### **Conclusions**

6.30 In essence, the changeover from the DAT to the NICE system was seen, by those responsible for the change, as a straightforward replacement of obsolete equipment, with no new policy implications.

6.31 A significant consequence of this limited view was that no consideration was given to the legal, constitutional or human rights implications of the recording of non-999 telephone calls by An Garda Síochána. The upper ranks of An Garda Síochána, who had been unaware of the existence of non-999 recording at Divisional Stations outside the DMA since 1995, remained unaware.

6.32 As a matter of fact, the new hard-drive system was significantly more than just a mere replacement of the former DAT system. It had a much greater capacity for recording, both in terms of the number of lines that could be connected and the volume of calls that could be retained. It was much easier to search for, play back and copy recordings. Also, for the first time, the centralised structure of the new system allowed Telecommunications personnel at Garda HQ to access and download recordings from any part of the country.

6.33 The new system had certain built-in safeguards that were not present in the old DAT system:

- No new recording lines could be added without the knowledge and approval of Telecommunications personnel at Garda HQ;

- Access to recordings was limited to those persons for whom specific, password-protected accounts had been created on the system;
- All activity on the system *via* the Inform software tool was audited and could be reviewed.

6.34 Nonetheless, the purchase of a system with such a significant increase in capacity and functionality should have prompted a review and restatement by An Garda Síochána of its policies and procedures in relation to telephone recording at Garda stations. This did not happen.

6.35 As a result, there was no regulatory control over a number of matters of crucial importance. They were, in particular:

- What lines were to be recorded;
- Whether, and in what circumstances, additional lines could be recorded,
- The conditions and period of storage of recordings;
- The rules regarding who could have, or could authorise, access to recordings.

6.36 The Commission believes it is important to record that, in spite of these very real, indeed fundamental, and regrettable defects in how the NICE recording system was managed, it has found no evidence of any general intention on the part of An Garda Síochána to invade the personal privacy of the persons whose calls were recorded. It has not come across any cases of abuse of such facilities as existed for access to recordings. On the whole, the technicians attached to the Divisional Stations approached their task responsibly and conscientiously. Given the almost total absence of any administrative structure or of appropriate guidance or instructions, they insisted, in many cases on their own initiative, on respect for proper safeguards and refused access to recordings other than for what they saw as proper operational reasons.

## **7. Level of Knowledge of Recording Systems: An Garda Síochána**

- 7.1 The Commission has been asked to report on “the level of knowledge of the existence, operation and use” of non-999 telephone recording systems within every rank of the force, from ordinary members up to the Garda Commissioner, over a period of more than 30 years. Taken literally, this is a daunting, not to say impossible, task. The Commission has, of necessity, had to adopt a realistic view of this assignment.
- 7.2 The Commission examined a very large volume of documentation, mostly provided to it by An Garda Síochána, in relation to the installation, operation and use of Garda telephone recording systems between 1980 and 2013. It received statements and heard oral testimony from more than 100 serving and former members of An Garda Síochána, drawn from all ranks up to and including Garda Commissioner.
- 7.3 In addition, the Commission administered questionnaires to a large number of current and former holders of offices from Superintendent up to Assistant Commissioner. It also conducted, with the assistance of An Garda Síochána, a survey of all serving Garda members via the Garda internal information network, the Garda Portal. It was unable, for reasons explained in Chapter 7, to conduct a similar survey of retired members.

### **Telecommunications Section (Divisional Stations)**

- 7.4 The Commission has heard evidence from almost all of the Divisional technicians and Regional Telecommunications Sergeants who served during the relevant period. It is satisfied that all the Telecommunications technicians outside the DMA, from whom it heard evidence, were aware that the telephone lines being recorded in their areas included the main Divisional Station number. They had either assisted in connecting those lines or had become aware of those connections in the course of operating and maintaining the system.

### **Telecommunications Section (Garda HQ)**

- 7.5 As set out in Chapter 5, the Chief Superintendent, Telecommunications, in April 1996, approved the recording of lines on the new DAT system for Divisional Stations outside the DMA. In doing so, he did not understand that he had, in fact, approved the recording of a non-999 line, that is, the main station number.
- 7.6 Below the rank of Chief Superintendent, it appears that most staff in the Telecommunications Section at Garda HQ were aware in 1996 / 97 that the main Divisional Station number was being recorded. However, the Commission does not

believe that they were aware that, in some stations and for different reasons, additional non-999 lines such as Public Office and Incident Room lines were subsequently recorded. There was no system in place to ensure that such information was provided. Decisions to add these lines appear to have been made at local level, in response to locally perceived needs.

- 7.7 Furthermore, it is clear that over time, the knowledge of what was being recorded in Divisional Stations was gradually lost to those working in the Telecommunications Section at Garda HQ. When it was decided in 2005 to draft a tender specification to replace the DAT recording system, little documentation could be found about the existing system and it became necessary to ask local technicians about the system and its use.

### **Ranks below Superintendent**

- 7.8 In order to communicate with as broad a cross-section as possible of the force, the Commission, with the cooperation of An Garda Síochána, placed a notice on the Garda Portal, or private intranet, inviting all serving members to participate in an automated survey relating to their knowledge of telephone recording systems. The Commission received 1,143 responses representing 9% of the serving Garda membership. These responses showed:

- Just over 77% of respondents were aware that 999 calls were recorded in Divisional Stations and at Command and Control in Harcourt Square in Dublin;
- Over 68% did not know that all calls answered by the telephone operator in the Control Room in all Divisional Stations outside the DMA were recorded. Thus, almost 32% did know this;
- The vast majority of those surveyed said that they never requested a copy of a recorded call either for an investigation or for criminal proceedings.

- 7.9 These replies demonstrate a mixed picture. About one third of serving Garda members generally were aware that the main telephone line to Divisional Stations was recorded. That result, however, relates only to serving members. The value of the result is also limited by the fact that it makes no distinction between members who served in the DMA and those who served elsewhere. It is reasonable to assume that the proportion of

members who were unaware of non-999 recording would be much higher amongst those who served only within the DMA.

- 7.10 The Commission is conscious that its Terms of Reference require it to investigate the operation of Garda telephone recording systems over more than three decades. Many members of the force will have retired over that period. Regrettably, however, the Commission has been unable to secure the agreement of the Garda Síochána Retired Members' Association (GSRMA) to participate in a similar survey of the knowledge of retired members. In the circumstances, it is fruitless to speculate on what the result might have been.
- 7.11 One means of ensuring that those working in Divisional Stations knew what was being recorded would have been to place notices or labels on the telephones stating as much. This would, at least, have informed Gardaí using those lines that they were being recorded. Prior to 2011, no instructions issued to Divisional technicians requiring them to affix such notices or labels. Some technicians told the Commission in evidence that they had labelled telephones on their own initiative.

### **District Superintendents**

- 7.12 Outside the DMA, each Divisional Station also functioned as the Headquarters for the particular District in which it was located. Although the Divisional Chief Superintendent retained overall authority, the day-to-day operation of each Divisional Station was overseen by the District Superintendent, who also had operational authority over any technicians attached to that Division. The question of what those Superintendents knew about the recording systems is therefore of some importance.
- 7.13 The Commission devised and sent out a questionnaire to 76 serving Superintendents outside the DMA in relation to their knowledge of telephone recording systems. It received 51 responses. Knowledge of the operation and use of the DAT and NICE systems varied from one officer to another.
- 7.14 The Commission also examined requests for access to recordings during the DAT and NICE periods. Although most Superintendents were not involved in authorising access requests during the DAT period, there is some evidence of Superintendents making requests on their own account. Access records provided from Divisional Stations during this period are incomplete, but there is evidence of requests being made by Superintendents at 7 Divisional Stations. Even in these cases, it is not always clear whether the Superintendent who made the request was aware that some recorded calls were on non-999 lines.



7.15 The DAT system was replaced by the NICE system in 2008. The Telecommunications Section prepared a draft policy document which proposed that all requests for playback and copying of recordings should require an official written application from the District Superintendent. From the evidence given to the Commission it is clear that awareness and application of this policy varied from one Division to the next. However, over time it seems that just over half the existing Divisional Stations adopted this practice. To that extent there was knowledge of the NICE recording system among District Superintendents.

### **Divisional Chief Superintendents**

7.16 Divisional Chief Superintendents were never formally notified of the decision taken within the Telecommunications Section to approve the recording of the main station number as well as radio and 999 lines. Accordingly, whether they came to know this fact was fortuitous. It depended on the extent to which they made enquiries on their own initiative or were informed by local officers or technicians. In cases where Chief Superintendents did know that the main station number was being recorded, it would have been reasonable to assume that the decision to approve recording had the approval of Senior Management at Garda HQ, although, as the Commission has reported in Chapter 5, this was not in fact the case.

7.17 In order to explore this matter further, the Commission devised and sent a questionnaire to 25 serving and 105 retired Chief Superintendents. The questionnaire sought to identify the level of knowledge of those officers and former officers about telephone recording systems. Responses were received from 20 serving officers and 95 retired officers. This was clearly a very satisfactory response rate.

7.18 Taken as a whole, the results tend to confirm that, while most Divisional Chief Superintendents were aware of the existence of telephone recording systems, they had never been formally briefed as to what was being recorded or why. As a result, the level of knowledge of the operation and use of these systems varied from one Chief Superintendent to another. Perhaps most importantly, none of the respondents could recall being made aware of any rules or policy concerning the operation of the recording system, including the retention, storage, access and use of recordings. Nor could they recall participating in any policy discussion regarding such matters.

### **Assistant / Deputy Commissioners**

- 7.19 The Commission sent questionnaires to 14 former Regional Assistant Commissioners in An Garda Síochána. Of those who responded, only one was aware of non-999 recording taking place in a station under his control. Three said they had no knowledge whatsoever of any form of telephone recording at Divisional Stations, even 999 calls. The remainder were aware only of 999 recording.
- 7.20 The Commission was able to make contact with all of the officers who had served as Deputy Commissioner during the period 1995-2013. None of them appeared to have had any knowledge of the recording of non-999 telephone lines.
- 7.21 The Chief Administrative Officer (CAO) was a civilian role of equivalent rank to Deputy Commissioner, with responsibility for overseeing the Information and Communications Technology (ICT) Section among others. The Commission made contact with two former CAOs, neither of whom had any knowledge of non-999 recording prior to its emergence as an issue in October 2013.
- 7.22 These responses present an extraordinary picture of almost complete ignorance, at the highest levels of An Garda Síochána below the Commissioner, of the incontestable fact that the main telephone line into Divisional Garda Stations had been routinely recorded outside the DMA from 1995 onwards.

### **Garda Commissioners**

- 7.23 As well as the current Garda Commissioner, Ms Nóirín O’Sullivan, the Commission heard evidence of 5 former Commissioners. They were: Mr Patrick Culligan (1991-1996); Mr Patrick Byrne (1996-2003); Mr Noel Conroy (2003-2007); Mr Fachtna Murphy (2007-2010) and Mr Martin Callinan (2010-2014). All had served as Commissioner during either the DAT period (1995-2008) or the NICE period (2008-2013). Each had also served for a period as Deputy Commissioner Operations, prior to appointment to the position of Garda Commissioner.
- 7.24 The evidence of knowledge of the 6 present and former Garda Commissioners is simple. They all knew, to some extent, that 999 calls or emergency calls were recorded. None of these 6 holders of the highest post in An Garda Síochána was aware of the systematic recording of non-999 calls. In particular, none knew that the main station number at Divisional Stations outside the DMA had been recorded as a matter of routine since 1995.

7.25 An important common feature of the evidence given by the 6 people who have served as Garda Commissioner since 1991 was that that they were essentially Dublin-based. None of them had any significant experience of service outside the DMA. They were aware that the reception of 999 calls in Dublin was centralised at a Control Room in Harcourt Square that was dedicated to handling emergency communications and did not deal with ordinary calls to the building. They appear to have assumed, without making any inquiries, that the same model applied to the Control Rooms in Divisional Stations outside the DMA. It did not occur to any of them to ask where and how calls on the main telephone line to Divisional Stations were answered. They remained unaware that, for reasons of space, logistics and staff resources, Divisional Control Rooms were the first point of contact for members of the public in relation to any matter, from the most trivial to life-and-death emergencies.

### **The 'Holness' case**

7.26 In July 2011, evidence was given in Waterford Circuit Court during the trial of 4 members of An Garda Síochána which ought to have alerted the senior ranks of the force to the fact of non-999 telephone recording. Admittedly, that would have been late in the day. Recording had been taking place in Divisional Stations since 1995. The entire matter came to light in late 2013.

7.27 Four Gardaí were tried before Her Honour Judge Leonie Reynolds and a jury for offences of assault on a Mr Anthony Holness late at night on a street in Waterford on 8 February 2010. This case was of considerable importance, for both the Garda Síochána Ombudsman Commission (GSOC) and An Garda Síochána. The charges were made against 4 officers, two of whom held the rank of Sergeant.

7.28 An issue arose as to the admissibility in evidence of the content of two telephone calls made by two of the Accused on the night of the alleged assault to the main station number and answered in the Control Room. All calls to the main station number had been recorded as a matter of course in Waterford Station since 1996.

7.29 On 22 July 2011, the Court ruled that the telephone recordings were inadmissible in evidence. The Court held that the recording of calls on the public lines at Waterford Station, without knowledge of the parties to those calls, was in breach of s. 98 of the Postal and Telecommunications Service Act 1983 as amended.

7.30 Although the ruling of Judge Reynolds was not delivered in open court, its import was conveyed to Garda HQ in reports from the District Superintendent, the Divisional Chief Superintendent and the Assistant Commissioner for the South Eastern Region. These

reports provided an opportunity for senior ranks to learn that non-999 recording was taking place in Waterford Garda Station.

- 7.31 The then Garda Commissioner, Mr Martin Callinan, was informed of the ruling *via* an email from the Internal Affairs Section of An Garda Síochána, but he was not told that the recordings in question were on non-999 lines. He remained of the belief that only 999 lines into Divisional Control Rooms were recorded. Nonetheless, he wrote a note to the Deputy Commissioner, Operations, Ms Nóirín O’Sullivan, enquiring as to the legal implications of the ruling. Although Commissioner Callinan’s note clearly required a response, the evidence before the Commission suggests that no written response was provided to the Commissioner at any point. The present Garda Commissioner Noirín O’Sullivan told the Commission in evidence that the normal practice for an issue such as this would be to wait until responses had come back from the various sections of the organisation dealing with the problem.
- 7.32 Other reports were received by the then Deputy Commissioner, Nóirín O’Sullivan in July and August 2011. They were forwarded, along with Commissioner Callinan’s query regarding the legal implications of the ruling, to the Assistant Commissioner, Crime and Security, and ultimately to the Crime Policy and Administration Unit for a response. Although these reports contained information that indicated that non-999 recording was taking place in Waterford Station, this information was either not seen or not understood by Deputy Commissioner O’Sullivan and the other officers at Garda HQ whose task it was to provide a response to the Commissioner.
- 7.33 Between October 2011 and May 2012, the Telecommunications Section engaged in correspondence with the Legal Affairs Section of An Garda Síochána as to what actions, if any, required to be taken in order to ensure the admissibility of recorded telephone evidence in future cases. None of the parties to this correspondence seem to have been conscious of the fact that non-999 calls were being recorded in Divisional Stations outside the DMA.
- 7.34 A view was adopted that the lawfulness of recording at Garda stations could be addressed simply by ensuring that Garda members answering telephones were aware, through labels and signs, that they were being recorded. A HQ Directive to this effect was circulated in February 2012. The question of whether non-999 calls could be recorded at all was not considered.
- 7.35 In June 2013, GSOC published and sent to An Garda Síochána a report on the Holness case in compliance with its obligations under s. 103 of the Garda Síochána Act, 2005. The report spoke of “*the lawfulness or otherwise of the Garda Síochána at Waterford*

*Garda Station recording incoming and outgoing calls on their public lines, and the admission of the evidence obtained during the use of such practices...*” It suggested that the Garda Commissioner might “*wish to re-evaluate his practice regarding the recording of such calls and the consents required if it is to be permissible to use such recordings in evidence.*”

- 7.36 However, by this stage both the Telecommunications Section and the Senior Management of An Garda Síochána had come to believe that any potential issues arising from the Holness case had been resolved by the placing of labels and signs on recorded telephones. As a result, this very direct reference both to the fact and to the lawfulness of telephone recording at a particular Garda station did not receive the attention it deserved.

### **Conclusions**

- 7.37 For all practical purposes, knowledge that certain non-999 lines were being recorded at Harcourt Square and, more significantly, at Divisional Stations outside the DMA, remained confined to members of the Telecommunications Section and an unknown proportion of local Garda officers who learned of the practice either directly from the technicians or through requesting recordings of emergency calls.
- 7.38 As set out in Chapters 5 and 6, the question as to what lines to record was decided essentially at Divisional level. From there, the recording of certain non-999 lines took place, unnoticed and without review, for decades. It appears that most, if not all, of those members who were aware of this fact, either did not consider it a significant change in policy, or believed that it was a policy approved by the Senior Management of the force.
- 7.39 The fact that, in 1996, the Chief Superintendent, IT & Telecommunications approved the recording of the main station number at Divisional Stations, without understanding that this is what he was doing, crucially inhibited the transmission of knowledge of non-999 recording to the upper ranks of An Garda Síochána.
- 7.40 The Commission has found almost total ignorance at the highest levels of the force of the fact that the main station number at Divisional Stations outside the DMA was being recorded since 1995 / 96. The Commission regards this as one of the most surprising findings made in this Report.
- 7.41 One contributing factor to this situation was the lack of any clear policy statement, sanctioned by the Garda Commissioner, regarding telephone recording at Garda stations. At no stage in the entire period covered by the Commission’s investigation, since the first recording system was installed at Dublin Castle in the 1970s, did An Garda

Síochána as an organisation or any Garda Commissioner adopt or circulate any formal statement setting out the policy of the organisation on the operation of telephone recording systems. An important incidental consequence is that the organisation never, at any time, gave any consideration to the lawfulness of recording telephone calls either from the general public or between members of the force.

7.42 A second contributing factor was the lack of effective oversight, particularly between 1995 and 2008, when the DAT system was in place. It is striking that when the time came to replace that system, an Inspector from the Telecommunications Section at Garda HQ had to ask individual technicians what was being recorded in their stations. The local variation in recording practices that emerged came as a complete surprise to him.

7.43 The same lack of oversight was apparent in November 2013, when the then Deputy Commissioner, Nóirín O’Sullivan, sought information on what was being recorded at Garda stations nationwide. Once more, some of the information uncovered came as a surprise to those who should have known about it – from officers in the Telecommunications Section, Garda HQ, all the way up to the Executive Director, ICT and the Chief Administrative Officer.

7.44 A third contributing cause of the continuing lack of knowledge of the senior ranks was that most senior officers served the majority of their careers in the DMA so that their understanding of how 999 calls were handled was shaped by Command and Control, Harcourt Square – that is, a Control Room dedicated specifically to emergency call response, while ordinary calls to the building were handled elsewhere. On the evidence before the Commission, even those Dublin-based officers who spent much of their careers carrying out investigations in other parts of the country seemed to have no clear knowledge of how calls were handled in Divisional Stations outside the DMA. They were not familiar with the geography or configuration of Control Rooms in those stations and did not appreciate that ordinary calls to the main station number were answered in the Control Room alongside 999 calls.

7.45 However, the lack of understanding at higher levels concerning the operation and use of non-999 recording systems does not excuse the fact that no formal policy or Directive was issued from Garda HQ covering such essential matters as:

- What lines should and should not be recorded;
- Who had authority to approve recording of additional lines;
- The time for which recordings should be retained;
- Where they were to be stored;

- Whether and when they should be destroyed; and
- By whom access to or downloading of recordings should be authorised and in what circumstances.

7.46 Within the hierarchical structure and culture of An Garda Síochána, rank and file Gardaí would not generally have considered it their responsibility to question actions taken by senior officers in terms of the provision of equipment and the use of that equipment. Many ordinary members of the force spoke, either in evidence before the Commission or in writing, of their expectation that Senior Management would ensure that they were acting legally in the way in which they conducted policing operations. Nonetheless, as Chapters 5 and 6 make clear, some technicians and other officers did raise questions and concerns from time to time over the operation of the telephone recording systems, in the expectation that those concerns would be put to senior management; but it seems that these concerns were either not understood, not put before Senior Management or simply not responded to.

7.47 The imperviousness of even the most senior ranks to clear information is also demonstrated by the reaction to reports concerning the Holness case in July 2011. The evidence given in Waterford Circuit Court during the trial of 4 members of the force ought to have alerted the senior ranks of the force to the fact of non-999 telephone recording at Waterford Garda Station. Although a number of senior Garda officers up to and including the Deputy Commissioner, Operations, received reports conveying this fact, the senior levels of the force did not properly or adequately consider the information. In the result, it was a further two years before the matter came to light generally, in October 2013.

## 8. Level of Knowledge of Recording Systems: Department of Justice and Others

8.1 Chapter 8 is concerned with the level of knowledge of the existence, operation and use of non-999 telephone recording at Garda stations within the following Government Departments and State bodies:

- The Office of the Minister for Justice and Equality
- The Department of Justice and Equality
- The Office of the Attorney General
- The Chief State Solicitor's Office
- The Office of the Director of Public Prosecutions
- The Office of the Data Protection Commissioner
- The Garda Síochána Ombudsman Commission

### **Department of Justice**

#### Governance and reporting structures

8.2 Prior to July 2006, An Garda Síochána could not purchase any telecommunications equipment without the sanction of the Department of Justice.

8.3 With the coming into effect of s. 43(1) of the Garda Síochána Act 2005, the Garda Commissioner became the accounting officer for the force. Nonetheless, the Department of Finance, as a matter of practice, continued to insist that applications to purchase equipment be passed through the Department of Justice. This remained the case until November 2013 and beyond.

8.4 Between 1980 and 1994, the primary source of information for the Department of Justice regarding Garda communications equipment was the Radio Advisory Committee – an interdepartmental group with Garda representation and independent technical expertise.

8.5 In 1994, oversight of Garda telecommunications requirements passed from the Radio Advisory Committee to the newly created IT & Telecommunications Executive Committee. This was a high-level committee chaired by a Deputy Commissioner with representatives from the Department of Justice and Finance. While continuing to have



oversight of all Garda telecommunications projects, the Committee was mainly focused on directing and monitoring Garda policy at a strategic level.

- 8.6 In or around 2007, the Committee was disbanded and a new ICT Advisory Committee was created to fulfil the strategic and policy analysis functions in relation to IT and telecommunications. An ICT Programme Board (later called the ICT Executive Board) assumed more direct oversight of telecommunications projects. Individual projects were assigned to Project Boards, which, in turn, reported to the Programme Board.

#### Level of knowledge

- 8.7 The level of knowledge within the Department as it related to the various recording systems in place between 1980 and 2013 can be summarised as follows:

#### **1980-1989 (Dublin Castle)**

- 8.8 As of 1 January 1980, the only telephone recording system operated by An Garda Síochána was in the Radio Control Room at Dublin Castle. It had been installed in or around 1973 and continued in use until 1989 with the intended purpose of recording emergency-related communications traffic coming into and going out of the Radio Control Room.

- 8.9 In fulfilment of this purpose, the system appears to have recorded certain non-999 telephone lines into and out of the Control Room, as well as the 999 lines and radio traffic. On the evidence before it, the Commission could not establish whether the Department of Justice was aware of this fact.

#### **1983-1995 (Divisional Stations)**

- 8.10 In the early 1980s, members of the Radio Advisory Committee, including Mr Des Matthews of the Department of Justice, took an active role in researching and sanctioning the purchase of radio/telephone consoles for installation in Divisional stations throughout the country, as well as District Stations within the DMA.

- 8.11 The consoles were purchased with a built-in cassette recorder, capable of recording one radio or telephone line at a time. In circumstances where the Commission is satisfied, on the balance of probabilities, that the cassette recorders contained within the consoles were not used to record any calls other than 999 calls, the question of the Department's level of knowledge concerning non-999 recording at Divisional Stations during this period does not arise.

### **1989-1995 (Harcourt Square)**

- 8.12 In or around 1989, the functions of the Radio Control Room at Dublin Castle were transferred to a new Command and Control Centre at Harcourt Square. This was done with the knowledge and approval of the Radio Advisory Committee.
- 8.13 Multi-track recording equipment, similar to that in Dublin Castle, was purchased and installed in the new Command and Control, Harcourt Square, in or around 1988. The technical specification for the new equipment, which was approved by the Radio Advisory Committee, clearly indicated that certain non-999 lines could be recorded.
- 8.14 From this, the Commission concludes that officials within the Department of Justice were aware that the new Harcourt Square recording system would record certain non-999 lines, in addition to 999 calls and radio traffic. However, as Chapter 4 of this Report makes clear, it would also have been understood that such recording only occurred in the context of capturing emergency calls. The recording of any calls that were not emergency-related was a by-product of this overriding aim.
- 8.15 The legal implications of recording telephone calls, whether 999 or otherwise, do not appear to have been considered by the Radio Advisory Committee or by those within the Department of Justice with responsibility for approving the purchase of this system.

### **1995-2008 (Harcourt Square and Anglesea Street)**

- 8.16 In May 1994, after the founding of the IT & Telecommunications Executive Committee, the Telecommunications Section of An Garda Síochána began researching telephone recording equipment with a view to replacing the system then in place at Command and Control, Harcourt Square and purchasing a new system for a proposed Communications Centre at Anglesea Street, Cork. On 1 December 1994, a tender specification document was prepared.
- 8.17 The agenda for a meeting of the IT & Telecommunications Executive Committee on 13 March 1995 included “*purchase of equipment/voice recording equipment*”. However, in the absence of minutes of that meeting, the Commission could not establish what discussion, if any, took place.
- 8.18 It is not possible for the Commission to make a definitive finding as to what extent the Department of Justice was aware of the nature or purpose of the recording equipment, the purchase of which was under consideration at that time. As far as Harcourt Square was concerned, the Commission concludes it would have been reasonable for the

Department of Justice to assume that its replacement did not involve any departure from existing policy and practice.

8.19 In the case of Anglesea Street, the proposed equipment, although new, was intended to replicate the recording system in place in Harcourt Square, in a manner proportionate to the requirements of a Communications Centre for Cork City. Again, there was no reason, on the face of it, why the Department should have been aware that a change of recording policy was about to take place as a result of this purchase.

8.20 That change in policy (described in detail in Chapter 5) involved a decision, made at local level in Anglesea Street, to include the main station telephone number as one of the lines to be recorded. That decision was subsequently adopted by the Telecommunications Section, Garda HQ, as a policy for the installation of similar recorders in the other Divisional Stations outside the DMA.

#### **1995-2009 (Divisional Stations outside DMA)**

8.21 Beginning in December 1995, new multi-track recorders using Digital Audio Tapes (DAT) were installed in Divisional Stations outside the DMA. This was the first time that these stations had the facility of recording more than one telephone line simultaneously.

8.22 In 1995, sanction would have been required from the Department of Justice before An Garda Síochána could purchase this DAT recording system. The Commission has not seen any documents to confirm that sanction was sought for the purchase of the DAT recording systems for Divisional Stations.

8.23 The installation of the DAT recorders in Divisional Stations marked a change in recording practice, whereby the main station number in those stations began to be recorded alongside the 999 lines. As described elsewhere in this Report, this arrangement was approved by the Chief Superintendent, IT and Telecommunications, in circumstances where he failed to understand that he was, in fact, approving the recording of the main number for each Divisional Station.

8.24 As the Chief Superintendent remained unaware that the proposed lines for recording included the main number for each Divisional Station outside the DMA, he could not have brought this to the attention of the IT & Telecommunications Executive Committee. Equally, there is no evidence that this change in policy was brought to the attention of any of the Senior Management in An Garda Síochána at that time.

8.25 In cases of requests for sanction for the purchase of equipment by An Garda Síochána, it was presumed, within the Department of Justice, that the equipment would be used lawfully. The officials in the Department were concerned with the financial element of the replacement, rather than the recording of non-999 phone lines or any policy attached to same.

8.26 The policy with regard to the use of the DAT systems for the recording of particular lines at Divisional Garda Stations was devised and adopted in An Garda Síochána. It was never notified to the Department of Justice.

**2008-2013 (Harcourt Square, Anglesea Street and Divisional Stations outside the DMA)**

8.27 As outlined in Chapter 6 of this Report, the DAT recording systems installed in Harcourt Square and Divisional Stations outside the DMA were replaced in 2008 by a hard-disk recording system with central archiving, known as the NICE system.

8.28 The decision to replace the existing DAT recorders was made against the background of a long-running review of the functions and performance of Garda Control Rooms nationwide. The extent to which the Department of Justice was aware of this process is unclear.

8.29 The evidence suggests that policy concerns, which were voiced within An Garda Síochána at that time by Inspector Thomas O’Dea, were not brought to the attention of the IT & Telecommunications Executive Committee. From this, it is reasonable to conclude that the Department of Justice was not made aware of the apparent lack of recording policy and variations in recording practice that the Inspector had identified in 2005.

8.30 In August and September 2007, documents in relation to the recording of calls at Garda stations were circulated to a Project Board set up to oversee development of various Garda telecommunications projects. The Board included representation from the Department of Justice.

8.31 The Department of Justice representative on the Board was aware of references to recording both emergency and non-emergency calls. Crucially, however, he did not understand this to mean that non-999 telephone lines were being or would be recorded. He assumed that the references to non-emergency calls meant only calls made on 999 lines that turned out not to be of an emergency nature.

8.32 As stated above, the Commission has found that, on the balance of probabilities, the Department of Justice remained unaware that, during the period 1995-2008, the main station number was routinely recorded in Divisional Stations outside the DMA. On the evidence before the Commission, this lack of knowledge continued when the NICE system replaced the DAT system in 2008, notwithstanding the references in documents to the recording of non-emergency Control Room calls.

### **Office of the Minister for Justice**

8.33 Eight Ministers for Justice held office during the years from 1980 to 1995. Only one of these recalled the Radio Advisory Committee and he (Mr Michael Noonan) had no knowledge of recording capacity relating to 999 calls.

8.34 Three persons held the office of Minister for Justice from 1995 to 2008 which was the period during which the DAT system operated. These were Mrs Nora Owen (1994-1997), Mr John O'Donoghue (1997-2002) and Mr Michael McDowell (2002-2007). None of these former Ministers had any memory or knowledge of telephone recording systems in An Garda Síochána.

8.35 Three persons held the office of Minister for Justice from 2008 to 2013, which was the period during which the NICE system operated. These were Mr Brian Lenihan (RIP), Mr Dermot Ahern and Mr Alan Shatter. The two former Ministers whom the Commission could contact had no knowledge of Garda recording systems until the matter came into the public domain in March 2014.

### **Office of the Attorney General (AGO)**

8.36 If An Garda Síochána had sought legal advice on any aspect of voice-recording systems in Garda stations, that advice would have been sought from the Office of the Attorney General (AGO). The Commission asked the AGO whether any such advice had been sought, in particular, during the time when recording systems were being installed or upgraded: (i) early 1970s; (ii) 1983/84; (iii) 1995/96 and (iv) 2008.

8.37 A thorough search of all relevant files was carried out by the AGO and no such advice was found as having being requested or given.

8.38 The Commission asked for details of three specific instances where the AGO may have been asked for advice on voice recording generally, although not necessarily in respect of recording non-999 calls. These were in relation to the National Digital Radio Service

(NDRS); the Criminal Justice (Surveillance) Act 2009 and the consequences of the Holness case.

- 8.39 In relation to voice recording of radio traffic, it appears that, although An Garda Síochána stated in documentation that advice had been sought from the AGO, there is no evidence of that advice having been sought by An Garda Síochána or given by the AGO.
- 8.40 In July 2011, in the course of the trial of 4 members of An Garda Síochána at Waterford Circuit Court, referred to in this Report as the ‘Holness’ case, Her Honour Judge Reynolds refused to admit evidence of voice recordings of certain telephone calls to the main number at Waterford Garda Station. An Garda Síochána does not appear to have sought legal advice from the AGO following this ruling. As Chapter 7 of this Report makes clear, the fact that the calls in question were on non-999 lines was not understood or appreciated by the Senior Management of An Garda Síochána.
- 8.41 In December 2011, Advisory Counsel for the AGO stated that it might be advisable to introduce authorising legislation for 999 calls. She was not aware at that time that non-999 calls were also being recorded. This matter was referred to the Department of Justice but did not proceed further.

#### **Office of the Chief State Solicitor (CSSO)**

- 8.42 The Office of the Chief State Solicitor (CSSO) is a constituent element of the Office of the Attorney General and its function is to act as solicitor to Ireland, the Attorney General, Government Departments and offices and State agencies.
- 8.43 The Commission has examined documentation received from the CSSO in relation to the civil case taken by Mr Ian Bailey and Ms Catherine Jules Thomas against the Garda Commissioner and others. It has also heard evidence from an official from that office. It is satisfied that the CSSO had no knowledge of the recording of non-999 calls in Divisional Stations prior to such recordings emerging as part of the Discovery in that case in 2013.

#### **Garda Síochána Ombudsman Commission (GSOC)**

- 8.44 The Garda Síochána Ombudsman Commission (GSOC) was established in May 2007 under the Garda Síochána Act 2005, with the overall function of investigating complaints received of possible misconduct by members of An Garda Síochána.

- 8.45 As part of this statutory function, GSOC investigators requested audio recordings from An Garda Síochána where it was thought that such calls existed. From November 2013, any request from GSOC would specify whether the requested call was a 999 or a non-999 call.
- 8.46 Prior to the Holness case, which was the first prosecution of serving Gardaí brought by GSOC that resulted in custodial sentences, GSOC was not made aware that non-999 calls were routinely recorded. It became aware of this only as a result of the evidence presented in the Holness case.
- 8.47 As outlined in Chapter 7 of this Report, in the course of the Holness trial in Waterford Circuit Criminal Court, evidence emerged that telephone calls from two of the accused Gardaí to the Communications Room in Waterford Garda Station were recorded on the NICE system. The prosecution sought to have these recordings used as evidence in the trial. Her Honour Judge Leonie Reynolds refused to admit this evidence on the ground that it was obtained in breach of the provisions of s. 98 of the Postal and Telecommunications service Act 1983 as amended by s. 13 of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993.
- 8.48 In June 2013, GSOC published its report in accordance with s. 103 of the Garda Síochána Act 2005. In that report, GSOC stated that the Garda Commissioner “*may wish to re-evaluate his practice of regarding the recording of such calls and the consents required if it is to be permissible to use such recordings in evidence*”. As has been stated in Chapter 7, no such review took place.
- 8.49 GSOC conducted a review of all their files since 2007 to identify instances where telephone recordings had arisen. Ten such files were discovered as a result of this exercise. Seven contained recorded calls that had occurred after November 2013 and were thus outside the Terms of Reference of the Commission but which, in any event, could only be 999 calls as all recording of non-999 calls had ceased from that time.
- 8.50 The Commission reviewed all the files identified by GSOC and in the other three files there was no reference to the recorded call being non-999.

### **Office of the Data Protection Commissioner**

- 8.51 The Office of the Data Protection Commissioner was established under s. 9 of the Data Protection Act 1988. Under that Act, as amended by the Data Protection (Amendment) Act 2003, the Data Protection Commissioner has a supervisory role in relation to the processing of personal data by data controllers, including An Garda Síochána.

8.52 An application by An Garda Síochána to register as both a Data Controller and Data Processor was made in 1989. The description of personal data retained by the organisation included reference to the Command and Control system at Harcourt Square for “*recording and logging the handling of 999 calls...*”. This register entry was updated in 1995 to include the proposed new Communications Centre at Anglesea Street. The systems were now described as:

*“Command and control logging systems, and other incidents requiring a Garda response, for recording and logging the handling of 999 calls from the general public...”*

8.53 The Commission has been furnished with an internal Garda report from January 1997, headed “*Voice Logging Recording Equipment and the Data Protection Act*”. The context for this report is not known and no other documentation in relation to it was provided to the Commission. The report concluded: “*the recordings from the Voice Logging Systems or the Confidential Call System in use by An Garda Síochána should not be regarded as Personal Data under the Act*”.

8.54 The Commission was not provided with any other entries in the Data Protection Register covering the period when the DAT recorders were in operation, save for that in 2002, which predated the coming into force of the Data Protection (Amendment) Act 2003. At this point, all reference to “*recording*” of 999 calls had been completely removed. The next available Register entry, for 2008-2009, contains no reference to the recording of telephone calls.

8.55 It is probable that the exclusion of any reference to audio recording in the Garda Register entries, from at least 2002 and possibly earlier, can be attributed to the view, expressed in the internal Garda report of January 1997, that such recordings did not constitute personal data.

8.56 In November 2007, the Garda Síochána Data Protection Code of Practice, developed with the cooperation and approval of the Office of the Data Protection Commissioner, was launched. The definition of “*personal data*” in the Code was said to include “*communications data (excluding content)*.” This suggests that An Garda Síochána remained of the view that the audio from the DAT recording systems did not constitute personal data. The introduction of the NICE system in 2008 does not appear to have changed this view.



- 8.57 In an extensive audit of An Garda Síochána by the Office of the Data Commissioner, carried out in November 2012, no reference was made to audio recordings and, as no details of these recordings appeared on the Register, the Data Commissioner and his team remained unaware of their existence.
- 8.58 Following the Discovery of the tapes in the Bailey case, the then Garda Commissioner, Mr Martin Callinan, sought the advice of the then Data Protection Commissioner, Mr Billy Hawkes, as to whether he should destroy the tapes that had been collated from around the country. On the basis of the information furnished to him by Mr Martin Callinan, and on the understanding that there was no lawful reason for retaining the tapes, Mr Hawkes advised that the tapes should be destroyed subject to consideration of the National Archives Act 1986. This was not in fact done, as is outlined in the Second Interim Report of the Commission.

### **Office of the Director of Public Prosecutions**

- 8.59 The Office of the Director of Public Prosecutions (DPP) was established by the Prosecution of Offences Act 1974, which conferred on the DPP the function of prosecuting both indictable and summary crime.
- 8.60 The Commission identified 151 calls that had been accessed by An Garda Síochána for possible prosecutions nationwide between January 1980 and November 2013 and which were not clearly identified as 999 calls. Of these, 50 were identified by the Office of the DPP as having been used, either at direction stage or during the course of a prosecution, as evidence or disclosure.
- 8.61 Of these 50 calls, 44 were described in the relevant case files as either “999” calls or “*emergency*” calls. The remaining 6 were described as “*control room*” calls.
- 8.62 Accordingly, the Commission accepts that the Office of the DPP would not have known that any recordings referred to it by An Garda Síochána during the relevant period emanated from a line other than a “999” line.
- 8.63 The 2011 ‘Holness case’ in Waterford, which involved the prosecution of 4 members of An Garda Síochána and during which certain non-999 telephone recordings were presented as evidence, was conducted, in practical terms, by GSOC and the Office of the DPP was not directly involved. The Office of the DPP did not appreciate the significance of the witness statement that detailed that the NICE system was used to record phone lines going into the Communication Room.

## Conclusions

### Department of Justice

- 8.64 The Department of Justice was aware of the existence of a telephone recording system in the Radio Control Room at Dublin Castle. It was also aware, through the work of the Radio Advisory Committee, of the purchase and installation of a similar system at Command and Control, Harcourt Square, in 1989. The Department understood the aim and purpose of these systems to be the recording of communications relating to emergency calls. It could not be established whether the Department was aware that some non-999 telephone lines were recorded in pursuance of this aim.
- 8.65 In 1995, the Department was made aware of, and gave sanction to, the purchase of a replacement recording system for Harcourt Square and a new system for the Communications Centre at Anglesea Street, Cork. As set out in Chapter 5 of this Report, the system at Anglesea Street was subsequently used to record calls to the main station number as well as 999 calls. The Commission has found no evidence that the Department of Justice was made aware of this change in recording practice.
- 8.66 Also in 1995, new multi-track recorders were purchased for Divisional Stations outside the DMA. Sanction was required from the Department of Justice for this purchase, but the Commission has been unable to confirm whether such sanction was sought and given.
- 8.67 The recorders purchased for Divisional Stations were used to record the main station number as well as 999 lines. In a small number of stations, some additional non-999 lines were also recorded. The Commission found no evidence that the Department was aware of this.
- 8.68 On the evidence before the Commission, the Department's lack of knowledge concerning non-999 recording continued when the NICE system replaced the DAT system in 2008, notwithstanding the fact that correspondence between An Garda Síochána and Department officials included documents that referred to the recording of non-emergency Control Room calls.

### Office of the Minister for Justice

- 8.69 Although the Minister for Justice was formally responsible for sanctioning Garda Telecommunications expenditure from 1980 until 2006, neither the Office of the Minister for Justice nor any individual Minister for Justice had any knowledge of the

operation, existence or management of Garda telephone recording systems during that period of time.

- 8.70 The Commission has seen no evidence to suggest that any Minister for Justice was informed or put on notice, in any way, of the fact of Garda telephone recording. The lack of knowledge of successive Ministers for Justice is the simple consequence of the fact that senior ranks of An Garda Síochána were almost totally unaware of such recording systems as existed, as well as the lack of such knowledge in the Department.

Office of the Attorney General

- 8.71 The Commission is satisfied that there is no evidence that An Garda Síochána sought legal advice from the Office of the Attorney General regarding the recording of non-999 calls, at any time during the installation or upgrade of the recording systems that are the subject matter of this Report.

- 8.72 The Commission is satisfied that the Office of the Attorney General had no knowledge of the practice of recording telephone calls in Divisional Stations, prior to being informed of it by the Garda Commissioner in November 2013, as explained in the Commission's Second Interim Report.

Office of the Chief State Solicitor

- 8.73 The Commission finds that the Chief State Solicitor's office had no greater knowledge of the existence, operation or use of telephone recording systems than the branches of Government for which it acted in a legal capacity. In particular, it was not aware of the systematic recording of non-999 calls at Divisional Garda Stations until November 2013, at the earliest.

Garda Síochána Ombudsman Commission (GSOC)

- 8.74 The Commission accepts that GSOC was first on actual notice that a telephone recording system was in place within Garda stations from February 2010, once the relevant GSOC officials had heard the recording during their investigation in the Holness Case. There is no evidence to suggest that GSOC could have been on constructive notice before February 2010 at the earliest.

- 8.75 As a result of the ruling in the Holness case, GSOC suggested to the Garda Commissioner that An Garda Síochána might wish to "*re-evaluate the practice*" of

recording calls on their public lines. It was entitled to expect that such a recommendation would have been followed up on.

- 8.76 While GSOC has the power to examine the practices, policies and procedures of An Garda Síochána in order to prevent complaints arising, the Commission finds no reason why they should have done so in relation to the recording of telephone calls within An Garda Síochána.

Office of the Data Protection Commissioner

- 8.77 From 21 June 1989, An Garda Síochána was registered as a Data Controller and Data Processor with the Office of the Data Protection Commissioner. At this time, reference was made to the recording of 999 calls received in Command and Control, Harcourt Square. In 1995, the Register entry was changed to include the proposed new recording system at Anglesea St, Cork. Only 999 call recording was mentioned.

- 8.78 It appears that, at some point, in January 1997 or thereafter, An Garda Síochána adopted the view that audio recordings on the DAT systems installed at Harcourt Square, Anglesea Street and Divisional Stations outside the DMA did not come within the definition of “personal data” under the Data Protection Act, 1988, and that it was, therefore, unnecessary to inform the Data Protection Commissioner of their existence. This view remained unchanged in subsequent years. It was reflected in the Code of Practice devised by An Garda Síochána with the assistance and approval of the Office of the Data Protection Commissioner, and published in 2007.

- 8.79 In carrying out an audit of data processing within An Garda Síochána under Ss. 10 (1A) and (1B) of the Data Protection Acts between 2011 and October 2013, the Office of the Data Protection Commissioner was not made aware of the recording of telephone calls in Garda stations by An Garda Síochána.

- 8.80 The Commission finds that the Office of the Data Protection Commissioner had no knowledge of the existence, operation or use of non-999 telephone recording at Garda stations until 19 March 2014, when An Garda Síochána sought the advice of the Data Protection Commissioner as to what was to be done with the DAT recordings that were still in existence.

Office of the Director of Public Prosecutions

- 8.81 The Commission is satisfied that there is no material from which it could be inferred that the Office of the Director of Public Prosecutions (DPP) had reasonable means of knowing that non-999 calls were being recorded in Divisional Garda Stations outside the

DMA and / or in Command and Control, Harcourt Square, until such time as the DPP was informed in 2014 of the existence of non-999 Garda telephone recording systems.

8.82 In particular, the Commission has been unable to uncover any evidence that the Office of the DPP, in the course of handling evidence for prosecutions, had any reason to believe that statements regarding telephone calls received related to the recording of telephone calls other than 999 calls.

## 9. Garda Telephone Recording Systems: Whether Authorised by Law

9.1 Paragraph 1(g) of its Terms of Reference requires the Commission:

“To establish whether the installation, operation and use of the said telephone recording systems was authorised by law”.

9.2 The Commission is thus required to report on the fundamental question of whether it considers the operation of the telephone recording systems at Garda stations to have been lawful.

9.3 The Commission, not being a court of law, can do no more than express its own considered view as to whether the recording systems were lawful, in the sense that they were operated pursuant to a legal power, or unlawful, in the contrary sense that they were operated in breach of or in contravention of the law. The Commission has considered the matter in the following contexts:

- (i) **Common law:** Whether the telephone-recording systems were lawful under the common law;
- (ii) **Statute:** Whether those systems were authorised by statute, which necessarily includes an inquiry as to whether they were prohibited by statute;
- (iii) **The Constitution:** Whether the systems involved an invasion of constitutional rights, in particular, the constitutional right to personal privacy;
- (iv) **European Convention on Human Rights:** Whether the operation of the systems constituted a violation of the European Convention on Human Rights and Fundamental Freedoms (“the Convention”) as applied in the domestic law of the State by the provisions of the European Convention on Human Rights Act 2003;
- (v) **European Union law:** Whether the systems infringed the law of the European Union, including the Charter of Fundamental Rights of the European Union.

9.4 The Terms of Reference of the Commission require it to consider the period from 1980 to 2013. During that period, some fundamental changes occurred to the applicable law. The manner in which the recording systems were operated also changed over time. Therefore, the analysis required by paragraph 1(g) is necessarily complex.

#### **Authority at common law**

9.5 An Garda Síochána enjoy such powers as originate under common law or are authorised by statute. The question, therefore, arises as to whether An Garda Síochána had a common-law power to record and use non-999 calls in the manner in which they did between 1980 and 2013.

9.6 As a matter of historic fact, the State operated, for many decades prior to 1983, a system of administrative warrants from the Minister for Justice, which was used to authorise the interception or ‘tapping’ of private telephone calls. Although the recording of calls to Garda stations was not an “interception” in the commonly understood sense of that term, the Commission has found it instructive to examine the history of this system. The Commission is of the opinion that there was no common law power to operate that system. It considers the governing principle to be that expressed by Lord Justice Laws in *R v Somerset County Council ex parte Fewings*, that “...For public bodies the rule is...that any action taken must be justified by positive law.”<sup>4</sup>

9.7 Similarly, in the case of the systems operated at Garda stations to record non-999 calls, the Commission is of the view that there was no power at common law entitling An Garda Síochána to operate those systems, without the consent of those persons being recorded, in the absence of clear statutory power.

9.8 Thus, An Garda Síochána was not authorised by the common law to operate non-999 telephone recording systems in the manner in which it did.

#### **Statutory authority**

9.9 An Garda Síochána is a body established by statute. It was first established pursuant to the Garda Síochána Act 1924 and was continued in existence by the Garda Síochána Act 2005. It enjoys only such powers as are conferred upon it either expressly or by necessary implication. The law on the matter was authoritatively stated by Costello J in

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<sup>4</sup> *R v Somerset County Council ex parte Fewings* [1995] 3 All ER 20, per Laws L.J.

*Howard and others v Commissioners of Public Works in Ireland*<sup>5</sup> in the following terms:

“It has long been established as a general principle of the construction of the powers of statutory corporations that whatever may be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*....

What the statute does not expressly or impliedly authorise is to be taken to be prohibited.”<sup>6</sup>

9.10 The Commission is satisfied that the operation of a system that recorded non-999 telephone calls required statutory authority. It is clear that no power to establish such a telephone recording system was expressly conferred on An Garda Síochána by any statute.

9.11 It is equally clear, in the view of the Commission, that the recording and retention of all calls to certain non-999 lines by An Garda Síochána was not incidental to its principal statutory function and that no such power was conferred by necessary implication. The operation of the telephone recording systems was, consequently, *ultra vires* the powers of An Garda Síochána. The Commission is satisfied that, not being authorised by statute, it was unlawful.

#### **Recording was not interception**

9.12 The Commission has also considered in detail, in Chapter 9 of this Report, the question of whether the operation by An Garda Síochána of the telephone recording systems involved members of An Garda Síochána in the commission of the offence of interception of communications contrary to s. 98 of the Postal and Telecommunications Services Act 1983, as amended by s. 13 of the Postal Packets and Telecommunications Messages (Regulation) Act, 1993. It has concluded that it did not, essentially because the recording effected by An Garda Síochána did not take place “in the course of transmission”, as required by the definition inserted by the Act of 1993. The Commission has been assisted in this respect by advice relating to similar United Kingdom legislation, received from distinguished counsel practising at the Bar of England and Wales.

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<sup>5</sup> *Howard and others v Commissioners of Public Works in Ireland* [1994] 1 IR 101.

<sup>6</sup> *Howard and others v Commissioners of Public Works in Ireland* [1994] 1 IR 101, at pages 112-113.



## **Constitutional rights**

- 9.13 The right to personal privacy, though not explicitly guaranteed by the Constitution, is one of the unenumerated personal rights which the State guarantees, pursuant to Article 40.3, to respect and, by its laws, to defend and vindicate. The right specifically extends to the privacy of telephone calls, following the decision of the High Court in *Kennedy v Ireland*.<sup>7</sup> In *Digital Rights Ireland Ltd v Minister for Communications*<sup>8</sup> it was held that the right to communicate was implicit in the rights of free speech and freedom of association under Article 40.6.1(a) In any event, the constitutional right to privacy implies, as a necessary corollary, the right to confidential communication.
- 9.14 The operation of the Garda telephone recording systems consisted of three distinct but closely related acts: recording of telephone calls, retention in permanent electronic form of the recorded calls, and enabling access to be had to the recordings.
- 9.15 It is clear that, generally, the persons whose communications were recorded on the Garda telephone recording systems, enjoyed a constitutional right to the privacy of their telephone communications. These rights are not absolute and may be regulated by law. There was, however, no statutory authority for the recording systems as operated by An Garda Síochána to record non-999 calls. An Garda Síochána, as an organisation, never adopted any formal policy statement setting out a coherent purpose or rationale for the recording that took place. Nor did it adopt any coherent set of rules or procedures governing the lines to be recorded, storage of recorded calls, periods of retention, destruction of recordings or access to recordings. The systems operated so as to record calls on certain lines indiscriminately and stored those calls indefinitely, in circumstances where this was unknown to many members of the force.
- 9.16 The operation of the recording system was unlawful and contrary to the Constitution. Its operation breached the duty placed on the Gardaí to respect the confidentiality of private information. For those reasons, it was operated contrary to the Constitution and breached the Constitutional rights of those persons it has recorded.

## **European Convention on Human Rights**

- 9.17 Article 8.1 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter “the Convention”) provides that “everyone has the right to respect for his private and family life, his home and his correspondence”.

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<sup>7</sup> *Kennedy v Ireland* [1987] IR 587.

<sup>8</sup> *Digital Rights Ireland Ltd v Minister for Communications* [2010] 3 IR 251.

9.18 Article 8.2 provides that there “shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law.”

9.19 Article 29. 6 of the Constitution provides: “No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.” The European Convention on Human Rights Act 2003 gave effect to the Convention, in several respects, in the domestic law of the State. Most materially, s.3 of that Act provides:

“Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.”

9.20 There can be no doubt that An Garda Síochána is both “an organ of the State”, for the purposes of s. 3 of the Act of 2003, and “a public authority” for the purposes of Article 8.2 of the Convention. It follows that, since the coming into operation of the Act of 2003 on 31 December 2003, An Garda Síochána has been obliged to perform its functions in a manner compatible with the obligations imposed on the State by Article 8 of the Convention.

9.21 The European Court of Human Rights has adopted a broad interpretation of the terms “private life” and “correspondence” in Article 8. Since its judgment in 1978 in *Klass v Germany*, the Court has consistently held that telephone conversations “are covered by the notions of “private life” and “correspondence” referred to by this provision.”<sup>9</sup>

9.22 Examination of whether a State has committed a violation of Convention rights, for present purposes Article 8, involves a three-stage analysis:

- (i) Whether the complaint comes within the scope of the Article, i.e., whether the Article is engaged;
- (ii) Whether there is an interference with the right in question;
- (iii) If so, whether the interference is in accordance with law and, if so, necessary in a democratic society.

9.23 In the view of the Commission, there is no question but that the recording of the telephone conversations and associated and consequential acts such as retention of the

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<sup>9</sup> *Klass v Germany* (1978) 2 EHRR 214, *Malone v United Kingdom*, (1984) 7 EHRR 14; *Halford v United Kingdom*, [1997] 24 EHRR 523 at paragraph 44; *Kopp v Switzerland* (1998) 27 EHRR. 91

recordings and the possibility of access to the contents of such calls of persons on telephone lines at Garda stations fall within the scope of Article 8 of the Convention. An Garda Síochána, as a “public authority” for the purposes of Article 8.2, is obliged not to interfere with the right guaranteed by Article 8.1 except where the interference is “in accordance with law” as required by Article 8.2.

9.24 The Commission has come to the conclusion that the telephone recording systems, as installed, operated and used at Garda stations, amounted to an interference with the rights of persons recorded to [their] “private and family life, [their] home and [their] correspondence.”

9.25 The recording systems operated so as to record all calls to certain non-999 lines, regardless of content. This included calls made from and to the homes or the places of work of the callers. Many, perhaps most, were made for normal and legitimate reasons concerned with the work of An Garda Síochána. Clearly, however, many would have been of a personal or family nature. Even those related to Garda matters would often, in the nature of things relate to the personal life of those concerned. No notice was given, whether by recorded message or otherwise, of the fact that the calls were being recorded.

9.26 It follows that the recording and retention of non-999 calls in this manner constituted an infringement of the rights to private and family life protected by Article 8.1 of the Convention. Since An Garda Síochána, as an organ of State, was obliged by s. 3 of the European Convention on Human Rights Act 2003 to perform its tasks in a manner compatible with the Convention provisions, the installation, operation and use of the Garda telephone recording systems constituted an infringement of the rights of the persons whose calls were recorded. Since there was no statutory authority for the recording, it was not “in accordance with law” as required by Article 8.2 of the Convention. It follows that, it was not, insofar as paragraph 1(g) of the Commission’s terms of reference is concerned, ‘authorised by law.’

### **European Union law**

9.27 Since the mid 1990’s, the European Community and now the European Union have established principles aimed at the protection of personal data and personal privacy. Most relevantly, certain directives have laid down a principle of confidentiality of communications. The object, as stated in Article 1(1), in of the Data Protection Directive,<sup>10</sup> is “to protect the fundamental rights and freedoms of natural persons, and in particular their privacy with regard to the processing of personal data”.

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<sup>10</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

9.28 Furthermore, corresponding with Article 8 of the Convention, Article 7 of the Charter of Fundamental Rights of the European Union states:

“Everyone has the right to respect for his or her private and family life, home and communications”.

9.29 Article 8 of the Charter makes special reference to personal data:

“Everyone has the right to the protection of personal data concerning him or her”.

9.30 Directive 97/66/EC on Privacy in the Telecommunications Sector was adopted to further particularise and complement the aims of the Data Protection Directive. That directive was repealed and replaced by Directive 2002/58/EC on Privacy and Electronic Communications. Each of these directives required the Member States to introduce laws guaranteeing respect for the principle of confidentiality of communications.<sup>11</sup> As a Member State, Ireland had not implemented the principle of the confidentiality of communications in the telecommunications sector within the times provided.

9.31 The key requirement is contained in Article 5(1) of Directive 2002/58 (replacing Directive 97/66). It provides:

“Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorised to do so in accordance with Article 15(1). This paragraph shall not prevent technical storage which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality.” [emphasis added]

9.32 In summary, Article 5 requires Member States to enact legislation to ensure confidentiality of communications and, in particular, to prohibit activities described as: “listening, tapping, storage or other kinds of interception or surveillance of communications...” without the consent of the users concerned and except when legally authorised under Article 15(1). A “user” is defined under Article 1 of the Directive as

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<sup>11</sup> For brevity the Report quotes Directive 2002/58.

a “natural person”. As An Garda Síochána are not a natural person, in the view of the Commission, the issue of consent does not arise. While Article 15(1) entitles a Member State to legislate to restrict the scope of the right to the confidentiality of communications where such a restriction is justified in areas such as defence, public security, and the prevention, investigation, detection and prosecution of criminal offences, the general recording system did not benefit from any legislative basis. Therefore, the Commission is satisfied that the derogation available under Article 15 was not availed of by An Garda Síochána.

- 9.33 The Commission is satisfied that the principle in EU law of direct effect of directives meant that the principle of confidentiality of communications expressed in those directives applied to An Garda Síochána as an emanation of the State, in a situation where Ireland had failed to transpose the principle into Irish law within the time stipulated. It considers it to be sufficiently clear, precise and unconditional to enable a national Court to find that the provision is, in principle, capable of having direct effect.
- 9.34 The principle of confidentiality of communications laid down by the directives was ultimately transposed into Irish law by Regulation 5 of S.I. 336/2011. An Garda Síochána were therefore prohibited, as a matter of national law, from July 2011, from operating systems of recording telephone calls which breached that principle.
- 9.35 Article 7 of the Charter of Fundamental Rights of the European Union replicates in substance the provisions of Article 8.1 of the Convention. The Commission has concluded that An Garda Síochána acted in breach of Article 8 by operating the telephone recording systems to record and retain, indiscriminately, all calls on certain non-999 lines at certain Garda stations. It follows that An Garda Síochána was similarly in breach of Article 7 of the Charter from 1 December 2009, the date upon which the Charter had full legal effect. Furthermore, to the extent that the operation of the systems infringed the provisions of Article 7 or Article 8 of the Charter, it was not “provided for by law” as required by Article 52 of the Charter for any limitation on those rights. As stated previously, the Commission has concluded that the systems as operated by An Garda Síochána were not authorised by any national legal provisions.
- 9.36 In these circumstances, the Commission has considered the recent judgment of the Grand Chamber of the Court of Justice delivered as recently as 21 December 2016 in *Tele2 and Watson*, which considered the interpretation and scope of Article 5 of Directive 2002/58. The Commission is conscious that that case concerned more or less universal retention obligations imposed on providers of publicly available electronic communications services.

9.37 The telephone recording systems operated by An Garda Síochána differed in important respects from the activities considered by the Court of Justice in *Tele 2 and Watson*. With some exceptions, as a general proposition, the systems they operated recorded up to the time the call was transferred to an extension only persons who telephoned certain lines at some twenty Garda stations. While it seems, in principle that the obligation to respect the principle of confidentiality applied to An Garda Síochána, the Commission observes that, there has to date been no authoritative judicial interpretation of the scope of the principle or of the particular prohibited acts, namely “listening, tapping, storage or other kinds of interception or surveillance of communications...”. Thus, while the Commission cannot, therefore, be definitive about that matter the telephone recording systems operated by An Garda Síochána to record non-999 calls were, in the view of the Commission, not authorised by law within the meaning of paragraph 1(g) of the Terms of Reference.

### **Conclusions**

9.38 The Commission is satisfied that the systems that were installed and operated at Garda stations to record and retain non-999 calls were not authorised by law. That conclusion has been reached under several headings of law, namely:

- An Garda Síochána had no authority at common law to install and operate these systems;
- An Garda Síochána was not authorised by statute to install and operate these systems;
- An Garda Síochána, in operating these systems, infringed the rights of the persons recorded to personal privacy as guaranteed by the Constitution;
- An Garda Síochána, in operating these systems as an organ of State for the purposes of the European Convention on Human Rights Act 2003 and as a public authority for the purposes of Article 8 of the Convention, violated the rights to respect for private life, home and correspondence guaranteed by that Article;
- An Garda Síochána, in operating these telephone recording systems, infringed the principle of confidentiality of communications laid down by Directives adopted by the European Union and the

provisions of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.

9.39 It follows from this that An Garda Síochána was not authorised by law to use the recorded information obtained from non-999 calls as a result of operating these systems.

9.40 Although the installation, operation and use of these systems was not authorised by law, the Commission is of the view that the operation of these systems did not involve the commission of the offence of interception under the Postal and Telecommunications Services Act, 1983, as amended by the Postal Packets and Telecommunications Messages (Regulation) Act, 1993.

## **10. Recording of Solicitor/Client Calls**

### **Introduction**

10.1 The Terms of Reference of the Commission, at paragraphs 1(h) and (i), require it to investigate and report on the following matters:

- Whether any telephone conversations between solicitors and their clients were recorded by the said telephone recording systems;
- Whether any information obtained from the said telephone recording systems by An Garda Síochána was used by it either improperly or unlawfully and, in particular, whether any recordings as may have been made by An Garda Síochána of Solicitor/Client telephone conversations were used for any purpose whatsoever.

10.2 The issue of solicitor/client calls arose very shortly after the existence of a recording system for non-999 calls became known. In her evidence to the Commission, during the investigation into the retirement of former Garda Commissioner, Mr Martin Callinan, the Attorney General stated that it had occurred to her as a potential problem when the matter was discussed at a meeting in her office on Thursday, 20 March 2014.

10.3 It was clear from the outset that solicitors in general, and especially solicitors practising in the area of criminal law, would necessarily have a particular interest in the investigation by the Commission into the possible recording at Garda stations of conversations between them and their clients. The Law Society made early contact with the Commission to outline its concerns, describing the issue as “*deeply disturbing*”. This

was at a time when much was still unknown about the nature and extent of recording that had taken place at Garda stations.

- 10.4 Needless to say, any such activity by An Garda Síochána would have been a matter of extreme seriousness. It is a fundamental tenet of our criminal justice system that a person suspected of the commission of a criminal offence is, as of right, entitled to reasonable access to legal advice. It is axiomatic that the right of a suspect to consult a solicitor implies that he or she must be entitled to do so privately. That right was put on a statutory footing in regulation 11 of the Criminal Justice Act 1984 (Treatment of Persons in Custody) Regulations 1987.
- 10.5 Apart from the constitutional and statutory rights involved it is, of course, also the case that communications between solicitor and client are privileged. This privilege is binding on An Garda Síochána and also binds the Commission.
- 10.6 Therefore, the Commission has taken the view that it is not entitled to listen to recordings of telephone calls for the purpose of deciding, by reference to their content, whether they were calls between solicitor and client, unless the privilege attached to such conversations had been waived by the client. This has not prevented the Commission from assessing the likelihood of solicitor/client recording using other significant evidence, including custody records, audit trails, access records, and evidence from Garda technicians and other relevant witnesses.

### **Methodology**

- 10.7 For the purposes of Chapter 10, the recording of calls at Garda stations can be divided into two periods:
- 1995-2008  
During this period, calls on certain non-999 lines at Divisional Stations outside the Dublin Metropolitan Area (DMA) were recorded and stored on Digital Audio Tapes (DAT). Calls on these tapes can be located by time and date, but not by telephone number.
  - 2008-2013  
During this period, calls were recorded on the NICE hard-disk system and stored centrally on an archive which could be searched using a variety of metadata, including telephone numbers. For almost all of this period, technicians were instructed to access the archive using Inform, a software application which created an audit trail of all activity on the system.



### **1995-2008 (The DAT period)**

- 10.8 Because the DAT recordings could not be searched by telephone number, the Commission was forced to limit the scope of its investigations for this period. Even if the problems of observing legal privilege and callers' privacy rights were somehow overcome, to listen to every recorded call on the 3,000 or more tapes still in existence would take years, if not decades, to complete.
- 10.9 At a meeting with the Commission to agree the best method for addressing the issues in Terms of Reference sub-paragraphs 1(h) and 1(i), it was suggested by the Law Society that the examination of custody records at Garda stations would be the most effective method of identifying solicitor/client calls that may have been recorded. The Commission undertook a pilot project. It examined the custody records for Ennis Divisional Station for the year 2008. It became clear, however, that it would take three weeks to investigate each year of custody records. Given the time involved and the number of Divisional Stations in question, this was seen as not feasible, having regard to the time required and the resources available to the Commission.
- 10.10 Adopting a more general approach, the Commission sought to identify, firstly, those stations where the recording of solicitor/client calls was either impossible or inherently unlikely during this period, based on the location of recorded telephones within the station.
- 10.11 Outside the DMA, recording took place only at Divisional Stations. In almost all of these stations, the only non-999 telephone line to be recorded was the main telephone number for the station.
- 10.12 Although it is not impossible for a solicitor/client conversation to have been recorded on the main station line, it is extremely unlikely, for the following reasons:
- The telephone for the main station line was located in the Control Room of each Divisional Station. This room was, in effect, the nerve centre of Garda operations for the Division, where emergency calls were handled and Garda resources were managed *via* radio communications. Notice-boards in the room would often contain sensitive and confidential information. As a matter of principle and practice, members of the public, including prisoners, were not admitted to these rooms.

- All Divisional Stations had telephones in other parts of the station that were not recorded and could be used by prisoners to call their solicitor. In many cases, there was a dedicated telephone extension set aside for this purpose. Thus, if a solicitor called the main station line, it would be a simple matter for the Control Room operator to transfer the call to an unrecorded extension somewhere in the station. Transferring the call would also mean that the main station line was then free to receive other calls from members of the public. Because of this, there is no reason to believe that prisoners would be brought into a room containing sensitive information and allowed to use the main station telephone line to talk to their solicitor.

- 10.13 As detailed in Chapter 5 of this Report, the Commission found a total of 4 Divisional Stations where non-999 lines, other than the main station line, were recorded during this period. The Commission has investigated, insofar as it can, whether solicitor/client calls were or could have been recorded on these lines.
- 10.14 In Mill Street station, Galway, a line in a room used as an Incident Room for major criminal investigations was recorded, apparently on the instruction of the District Superintendent. The technician who connected the line told the Commission in evidence that he labelled the telephone as being recorded, and that there were other lines in the room that were not recorded. The Incident Room was on the second floor of the station and, by its nature, would often contain sensitive information. Prisoners were processed on the ground floor in a dedicated area; there was no reason for them to be brought up to the Incident Room at any time. Accordingly, there is no reason to believe that solicitor/client calls would have been recorded on this line at any point.
- 10.15 In both Waterford and Wexford Stations, lines in the Public Office of the station were recorded. In both stations, calls to the main station number would transfer automatically to the Public Office if they were unanswered in the Control Room. The decision to record the Public Office lines appears to have been motivated by the desire to capture the transferred calls from the main station number but, in doing so, all calls to these Public Office lines were recorded.
- 10.16 Although the Commission has established that these lines were not recorded with the intention of capturing solicitor/client calls, it is possible that some such calls were recorded. In both stations, prisoners were processed in areas either in or near the Public Office and it is possible that a prisoner may have been instructed or allowed to use a recorded line to communicate with his or her solicitor.

- 10.17 Finally, in Bandon Station, a number of non-999 lines were recorded, for varying periods, for reasons that are mostly unknown. The details are set out in Chapter 5 of this Report. In the course of its work under paragraph 1(m) of the Terms of Reference, which instructs the Commission “to identify and review” recordings relating to the Garda investigation of the death of Madame Toscan du Plantier, the Commission found evidence that 4 solicitor/client calls had been recorded at Bandon Stations, on lines other than the main station line.
- 10.18 The Commission has established that one or more members of An Garda Síochána listened to these calls as part of an exercise in identifying calls of potential relevance to the Toscan du Plantier investigation, carried out by An Garda Síochána in response to a Discovery Order made by the High Court in the case of *Bailey v The Commissioner of An Garda Síochána and Others*. The Commission has not been able to establish whether any of these solicitor/client calls had been accessed, at any other time, by An Garda Síochána. The Commission has not found any evidence that they were used for any purpose.
- 10.19 In general, for the period 1995 to 2008, the Commission is satisfied, having heard the evidence of Garda technicians from all relevant Divisional Garda Stations, that there was no policy of deliberately recording solicitor/client calls, which would have been an extremely serious matter. Nor was there any policy of listening to or using the contents of any solicitor/client calls which had, in fact, come to be recorded on the systems.

### **2008-2013 (The NICE period)**

#### **Request for solicitor telephone numbers**

- 10.20 The NICE system being used by An Garda Síochána during this period was capable of being searched by reference to the telephone number used to make or receive the call. The Commission, therefore, sought to obtain the telephone numbers of all solicitors practising criminal law in the relevant Divisional areas. As the Law Society does not keep a database of solicitors who practise criminal law, a series of notices were published in the Law Society Gazette, the Law Society e-Bulletin and national newspapers inviting solicitors to contact the Commission with telephone numbers they would have used in contacting Garda stations. A total of 43 firms that practised criminal law contacted the Commission but, as 25 of these were Dublin-based, only 18 firms that were potentially relevant to the work of the Commission were identified through this public engagement process.

10.21 This low level of response calls for comment. With the cooperation of the Law Society, which the Commission greatly appreciates, the Commission was enabled to address directly the entire body of the solicitors' profession in Ireland. If there had been any significant suspicion among practising solicitors that their telephone calls with clients at Garda stations were being recorded, it would be expected that the profession would have communicated with the Commission to a greater extent than it did.

Garda 'helpdesk' for solicitors' enquiries

10.22 Some solicitors did contact An Garda Síochána directly and these queries were referred to a 'helpdesk', established by An Garda Síochána, to handle any queries that came in following the revelations of telephone recording in March 2014.

10.23 The Garda Helpdesk received a total of 105 queries, from solicitors, members of the public and persons who had been detained in Garda stations. Of these, 65 were made by solicitors regarding telephone calls made involving their clients while they were in custody. On review, it was found that 49 of the 65 solicitor queries related to stations where no telephone recording of any kind took place.

10.24 The remaining 16 queries (8 from the DAT period and 8 from the NICE period) were investigated by the Garda Helpdesk. No recordings of solicitor/client calls were found.

Further requests for solicitors' telephone numbers

10.25 Following the limited response to its advertised requests for assistance, the Commission engaged in a process of contacting solicitors practising in each county, using the Law Society Directory for 2014 as a guide. The Commission succeeded in registering 2,033 telephone numbers from 576 relevant solicitors' firms, inclusive of those received in response to its advertising efforts. The Commission is satisfied that this constituted a significant and representative number of solicitors' telephone numbers for its purposes.

Searching the NICE system

10.26 Twenty relevant Divisional Stations had to be investigated by the Commission. Any search for recordings had to be conducted on a Divisional basis.

10.27 It must be emphasised that the search initially was for recordings of calls made by solicitors to and from Garda stations. The fact that a call made from the office of a solicitor was identified did not necessarily mean that the solicitor was speaking to a client on that particular call. Solicitors make many calls to Garda stations, only a small number of which involve direct communication with clients.

- 10.28 Searches conducted on the NICE system by the Commission, using the telephone numbers collected from solicitors, identified a total of 17,254 recordings involving those numbers. It was anticipated that the vast majority of them would be calls from solicitors to the main station number, and this proved to be the case.
- 10.29 For the reasons outlined above in relation to the DAT period, the likelihood of a solicitor/client conversation taking place on the main station line of a Divisional Station was extremely small. It is also important to note that calls to the main station number ceased to be recorded when transferred to another extension, unless that extension was itself connected separately to the recorder.
- 10.30 The Commission then carried out further searches using the audit trails generated by the NICE Inform software application to establish whether any calls involving the solicitors' telephone numbers in the possession of the Commission were accessed by anyone.
- 10.31 A total of 107 such calls were identified as having been accessed. Combining this information with relevant custody records, 8 instances were identified where a prisoner was in custody and where a telephone call to his or her solicitor was made at a time that matched the results of the Commission's accessed telephone-call recordings. These instances came from three stations where lines other than the main station number were recorded: Bandon, Waterford and Wexford.
- 10.32 Each of these instances was examined, in detail, by the Commission and the technician who accessed the recording was contacted. In all but one case, the access was not the result of a deliberate search for that recording but was done incidentally, in the course of a search for another, unrelated call. In respect of that one remaining case, a technician was instructed to locate a call on the NICE database at the request of a solicitor in relation to a particular client. In order to confirm that he had located the correct call, the technician had no option but to access and listen to it. The purpose of the access in this case was not to listen to or use the content of the call, but simply to be able to confirm whether or not the call had been recorded.
- 10.33 The 7 instances of inadvertent access resulted from the fact that technicians who were engaged in downloading calls requested by members of the force were usually given no more than an estimated time at which the call took place. For this reason, they often had to widen the parameters of their search to include all calls within a given timeframe. In each instance, the call involving a solicitor's number was one of a number of other calls accessed inadvertently as part of a search for a 999 or other emergency call. Most importantly, none of these 7 potential solicitor/client recordings were downloaded or copied from the system.

### The NICE system and ‘Toolbar’

- 10.34 The ‘Toolbar’ software application, as discussed in Chapter 6 of this Report, was an alternative means of searching for calls on the NICE recorders. Unlike the ‘Inform’ application, it could not access the centralised archive of recordings. It could, however, be used to search for recordings on the local NICE recorder in the relevant Divisional Station. A generic login and password was used to access the application. It was intended as a backup, in the event of problems arising with Inform or with the central archive.
- 10.35 No audit trails were created by Toolbar, so that it is not possible to determine whether it was used to access the small number of solicitor/client recordings that have been identified. The Commission has not seen any significant evidence that technicians, in fact, availed of the Toolbar facility, but the possibility cannot be excluded. However, the Commission is satisfied, from its broader investigations, that the likelihood of solicitor/client recordings being accessed deliberately using Toolbar is remote.

### **Conclusions**

- 10.36 The Commission emphasises that solicitor/client confidentiality is a constitutional right and a fundamental requirement of fair procedures, and any possibility that this was breached by An Garda Síochána must be regarded as a matter of grave concern.
- 10.37 The Commission notes that, notwithstanding the concern expressed by the Law Society when the issue of the recording of telephone calls in Garda stations first came to public attention in March 2014, the profession itself did not appear to be apprehensive that their telephone calls with clients had, in fact, been recorded or listened to by An Garda Síochána. Though given the opportunity to do so, they did not offer evidence of such practices, or suggest instances in which they suspected that this had taken place. In the event, the profession was correct in this view.
- 10.38 The inquiries undertaken by the Commission, though necessarily incomplete, were comprehensive enough to allow the Commission to reach certain conclusions in relation to whether solicitor/client calls were recorded, accessed and/or used.
- 10.39 The Commission is satisfied that, for the entire period for which telephone recording systems have existed in Garda stations, there was no deliberate decision or intention on the part of An Garda Síochána to use those systems to record calls between solicitors and their clients.

- 10.40 The Commission identified three Garda stations at which solicitor/client calls either were or were likely to have been recorded between 1995 and 2013: Bandon, Waterford and Wexford. In each case, the evidence indicates that these recordings occurred inadvertently, as a result of recording certain specific non-999 lines, for reasons unrelated to the capturing of solicitor/client calls.
- 10.41 The Commission has found no evidence of any recorded solicitor/client call being accessed deliberately for its content. Nor is there any evidence of any such call being downloaded or copied for any purpose.
- 10.42 Where such access occurred, the Commission is satisfied that this was not done for the purpose of listening to the solicitor's call in question but rather, was carried out in the course of searching for other calls. The only known exception to this occurred in the course of a search authorised by the DPP, where a call was accessed and listened to by a Garda technician, not for its content, but simply in order to confirm the existence of the recording.
- 10.43 None of these conclusions should be taken as an exoneration of the existence of a system that allowed the possibility of recording and accessing solicitor/client calls without the knowledge of the parties concerned. Although it is possible to say that, in general, no abuse of this system occurred, it is not possible absolutely to rule out improper use in any specific case. No such case has been referred to the Commission.

## 11.Improper / Unlawful Use of Recorded Information

11.1. Paragraph 1(i) of the Terms of Reference requires the Commission:

“To establish whether any information obtained from the said telephone recording systems by An Garda Síochána was used by it either improperly or unlawfully and, in particular, whether any recordings as may have been made by An Garda Síochána of Solicitor/Client telephone conversations were used for any purpose whatsoever.”

The particular issue of solicitor/client recordings is dealt with in Chapter 10 of this Report. Chapter 11 is concerned with the more general question of whether the recordings were used improperly or unlawfully.

11.2. Whilst it is true that any instance of Garda members misusing recorded information would be of public concern, identifying and investigating every potential instance of misuse over a period of decades is simply not possible. The Commission has, therefore, exercised its discretion and focused on the following questions:

- i. Whether there is evidence to suggest widespread or systematic misuse of recorded information by An Garda Síochána at any given time period or location;
- ii. Whether there is evidence to suggest that such misuse did not or could not have taken place;
- iii. Whether any specific complaints have been made that involve suspected misuse of recorded information, and, if so, whether there is substance to those complaints.

11.3. In order for information obtained from the recording of non-999 calls to be used improperly or unlawfully, there are three obvious pre-conditions:

- i. The information must exist in a retrievable form;
- ii. The user must know the information exists; and
- iii. The user must have access to it.

11.4. For the period 1980-1995, the Commission finds it highly unlikely that information from non-999 recordings was available in any Divisional Station. A limited number of non-999 recordings would have been available at Command and Control, Dublin Castle (later Harcourt Square), but it appears likely that most members of An Garda Síochána were unaware of this.



- 11.5. For the period 1995-2008, it is clear that recorded information from certain non-999 lines at Harcourt Square, Anglesea Street and Divisional Stations outside the DMA was available, in theory, to members of An Garda Síochána, subject to (i) their knowledge of this fact, and (ii) the ability to gain access to the information.
- 11.6. For the period 2008-2013, all recordings on the NICE hard-disk system were uploaded to a central archive and retained indefinitely. Access to this material was limited to those technicians for whom accounts had been created on the system. As with the 1995-2008 period, recorded information from certain non-999 lines was available to members of An Garda Síochána on request, subject to the rules and restrictions in place regarding access.
- 11.7. The level of knowledge within An Garda Síochána as to the existence, operation and use of telephone recording systems is dealt with in Chapter 7 of this Report.
- 11.8. Although it has not been possible to give a definitive picture of the state of knowledge, at all levels of the organisation, concerning non-999 recording at Divisional Stations outside the DMA, it is likely that a significant proportion of the membership was unaware that any non-999 recording was taking place. This reduces the likelihood that members were accessing such calls for improper or unlawful purposes.
- 11.9. The findings of the Commission in relation to how and by whom recordings were accessed are set out in Chapters 4, 5 and 6. In general terms, the Commission has found that, over the entire period during which non-999 recording was taking place, no Directive or Circular issued from Garda HQ setting out the policy and rules of the organisation as regards the access and use of recorded calls.
- 11.10. However, the Commission has taken evidence from almost all the technicians who served at Divisional Stations and has found that, by and large, they exhibited a high sense of responsibility and a clear understanding that access to recordings should only be granted in response to genuine operational needs. Many insisted that access would only be granted with the approval, express or implied, of the District Superintendent. A similar approach appears to have been taken at Command and Control, Harcourt Square, where access was controlled by the officers in charge of the Control Room.
- 11.11. One significant difference in relation to the NICE recording system (2008-2013) is that the audit trails generated by the Inform software application allowed every

instance of access to be traced back to the technician responsible. This introduced a further element of security to the system and was a potential deterrent to any individual contemplating accessing a call for improper or unlawful reasons. However, for most of this period, technicians could also access recordings on their local NICE recorder by using the Toolbar application, which left no audit trail.

- 11.12. In October/November 2014, the Commission placed advertisements in national newspapers seeking information from members of the public, solicitors and current and former members of An Garda Síochána in relation to the recording of non-999 calls at Garda stations. A very small number of responses were received. Investigation of the matters raised in these responses did not reveal any instances of the improper or unlawful use of information obtained from non-999 telephone recording by An Garda Síochána.
- 11.13. The Commission also reviewed files kept by An Garda Síochána in relation to queries and complaints made about non-999 telephone recording in the months following March 2014, when the issue first came into the public domain. Again, no evidence of improper or unlawful use of such recordings was found.

### **Conclusions**

- 11.14. It is not possible for the Commission to say that information from Garda telephone recording systems was never used improperly or unlawfully. The mere existence of the recordings means that potential abuse could not be ruled out. The quality of notes kept regarding access to recordings varied significantly from station to station and a large number of occasions on which calls were accessed may have gone unrecorded. Of course, in the event that a Garda member was complicit in accessing a call for an improper or unlawful purpose, he or she would be unlikely to keep a record of that fact.
- 11.15. Nonetheless, the Commission finds it reasonable to conclude, based on the evidence before it, that no widespread or systematic, indeed probably no significant, misuse of information derived from non-999 telephone recordings took place. The principal reasons for this conclusion are as follows:
- 11.16. A significant proportion of the Garda membership, particularly in the higher ranks, appears to have been unaware that recordings of non-999 calls existed. The exact proportion is unknown, but the Commission is satisfied that many members of An Garda Síochána could not have misused the recorded information as they simply did not know it existed.

- 11.17. Access to recordings was controlled by members of the Telecommunications Section and, in many cases, required sanction from a District Superintendent. The Commission has heard evidence from most of the relevant Telecommunications technicians, in particular those who worked in Divisional Stations outside the DMA, and is satisfied that they were conscious of the potential for abuse and, to the best of their abilities, sought to confine access to recordings to cases of operational necessity.
- 11.18. Despite the publicity that was given to the existence of non-999 recording systems in 2014, and the subsequent advertisements by the Commission seeking information from members of An Garda Síochána, solicitors and the public, very few complaints were made to the Commission and no instances of the improper or unlawful use of telephone-call recordings have been found as a result of those complaints.

## 12. Investigation of the Death of Madame Sophie Toscan du Plantier – Telephone Recordings

### Background

- 12.1 Paragraph 1(m) of its Terms of Reference requires the Commission to investigate and report on tapes discovered in Bandon Garda Station as follows:-
- “In particular, to identify and review all recordings in the possession of An Garda Síochána emanating from the Garda telephone recording system at Bandon Garda station or otherwise, which relate to the Garda investigation of the death of Sophie Toscan du Plantier and to establish whether those recorded phone calls, and any other acts or events in the course of the said Garda investigation, disclose any evidence of unlawful or improper conduct by members of An Garda Síochána in connection with that investigation.”
- 12.2 The Commission, at paragraph 8(2) of its Third Interim Report of November 2015, gave formal notice of its interpretation of paragraph 1(m).
- 12.3 In order to carry out its investigation, for the purposes of paragraph 1(m), the Commission addressed the following tasks:
- a. Identifying and reviewing all surviving recorded telephone calls emanating from Bandon Garda Station or otherwise, which related to the Garda investigation into the death of Madame Sophie Toscan du Plantier;
  - b. Analysing the identified calls, in conjunction with related documentation held by the Commission, to establish whether they disclosed any evidence of unlawful or improper conduct by members of An Garda Síochána, in connection with that investigation.
- 12.4 The Commission has been given a very specific and focused task in its Terms of Reference, relating to a defined aspect of the investigation of the murder of Madame Toscan du Plantier. It is important to note that the Commission was not requested to carry out a full investigation into all potential incidents of unlawful or improper conduct during the investigation. The Commission’s investigation is limited by the contents of the recorded telephone calls which are in its possession.

- 12.5 It is also very important to note that the tapes that were provided to the Commission provided only a small and random snapshot of the telephone traffic around the time of their recording. They cannot be considered to be a full record of all relevant telephone calls made during the currency of the investigation.
- 12.6 With one or two minor exceptions, the recorded calls identified as relevant by the Commission came from 5 telephone lines at Bandon Garda Station. There were other telephone lines used by members of the investigation team that were not recorded.
- 12.7 Although the existing recordings from these lines do contain material of relevance to the investigation, it would be misleading to use them as a basis for any general conclusions regarding the Garda investigation of the murder of Madame Toscan du Plantier. Taken together, they constitute no more than a fractional, fragmented and essentially random assemblage of telephone conversations, often unclear or ambiguous in meaning, in contexts that are unstated. In addition, some involve persons now deceased, or persons whose memories of the matters discussed have been adversely affected by the passage of nearly 20 years and may also have been tainted by information or impressions acquired in the intervening period.
- 12.8 In total, the Commission identified 297 recorded calls as being relevant to the Toscan Du Plantier investigation. Of these, approximately 166 contained no information of substance in relation to the investigation. The remaining 131 calls were then reviewed by the Commission, to determine whether they disclosed evidence of unlawful or improper conduct in connection with the investigation.
- 12.9 Inevitably, the focus of the recorded calls is skewed by the fact that only certain lines were recorded and only for certain periods. As a result, some issues in relation to the investigation receive particular attention, whereas others that might potentially give cause for concern appear sporadically in the calls, or not at all.

#### **Identification of relevant recordings**

- 12.10 Virtually all of the relevant recordings identified by the Commission came from the DAT tapes found by the Telecommunications technician at Bandon Garda Station in June 2013.
- 12.11 Between January and April 2014, a hand-picked team of Garda officers reviewed every recorded call on the tapes to assess their relevance, firstly, to the Toscan du Plantier investigation and, secondly, to the categories of Discovery set out in an Order of the High Court in the case of *Bailey v The Commissioner of An Garda Síochána and Others*.

In total, the Garda team listened to more than 40,000 calls and assessed them for relevance to the investigation. From this exercise, a total of 282 relevant calls were identified by them.

- 12.12 The Commission conducted a detailed examination of the review process carried out by the Garda team in relation to the recordings. From this, the Commission was satisfied that the Garda review was conducted thoroughly and in good faith. Nonetheless, to ensure that no significant calls of relevance had inadvertently been missed, the Commission itself undertook a further review of all recorded calls from certain telephone lines in Bandon Garda Station. This process resulted in a further 15 relevant calls being identified, leading to a total of 297 calls.

### **Evidence of unlawful or improper conduct**

- 12.13 Paragraph 1(m) of the Terms of Reference is unusual, in fact probably unique, in requiring the Commission to reach a conclusion, not that any members of An Garda Síochána, in fact, behaved unlawfully or improperly, but that the “recorded phone calls..... disclose any evidence of unlawful or improper conduct”.
- 12.14 The test of whether evidence of unlawful or improper conduct is disclosed sets a very low threshold for the Commission’s investigation. It requires no more than a *prima facie* showing of misconduct on the face of the transcripts of the telephone calls, or when combined with other acts or events.
- 12.15 To put it another way, the task given to the Commission in paragraph 1(m) is a preliminary one. The Commission is asked only to report on the existence of evidence. In the event that such evidence is disclosed, it is not for the Commission to decide what further action, if any, should be taken.
- 12.16 However, the essentially preliminary nature of the Commission’s task does not mean that fair procedures and the constitutional rights of individuals can be ignored; even a mere finding that there is evidence of unlawful or improper conduct would potentially have devastating consequences for the standing and reputation of such a Garda member in the community.
- 12.17 For that reason, it was decided by the Commission that members of An Garda Síochána who could potentially be affected by a finding of the Commission under paragraph 1(m) should, where appropriate, be given the opportunity to attend and give evidence in relation to those telephone recordings in which possible evidence of improper or unlawful behaviour was identified by the Commission.

### **Categories of unlawful or improper conduct**

- 12.18 From the evidence before the Commission, the following categories of potentially unlawful or improper conduct were identified:
- i. Whether the recorded calls disclose evidence, in the case of certain Garda members, of a willingness to contemplate the possibility of falsifying, altering and / or suppressing evidence in connection with the investigation; and whether there is evidence of any such intention being carried out;
  - ii. Whether the recorded calls disclose evidence that investigating members of An Garda Síochána provided illegal drugs and sums of money to a potential witness, in order to secure his assistance in obtaining evidence against Mr Ian Bailey, the principal suspect for the murder of Madame Toscan du Plantier;
  - iii. The potentially improper disclosure of information to third parties, including members of the press, by certain members of An Garda Síochána in connection with the investigation;
  - iv. The actions and approach of certain members of An Garda Síochána in dealing with the victim of an assault perpetrated near Schull, Co. Cork, on 13 June 1997, and a possible connection between those actions and the investigation of the death of Madame Toscan du Plantier.

### **Willingness to contemplate modification of evidence**

- 12.19 The Commission has examined a number of instances in the recorded calls of, what appear to be, suggestions that items of evidence be modified to coincide with the Garda view of the case.
- 12.20 It should be stated, at the outset, that the Commission has found no evidence that any of these suggestions were followed by any actual interference or modification. The sole issue, therefore, is whether the calls disclose evidence of a willingness to contemplate engaging in such behaviour.
- 12.21 The instances in which such willingness was disclosed are set out in Chapter 12. In summary, they are as follows:

- A number of telephone conversations between Detective Sergeant Alpha and other Garda members in which they discuss the possibility of removing certain observations from a written statement prepared by another Garda member in connection with the investigation; and
- A telephone conversation in which Detective Sergeant Alpha appears to express a desire to remove part of the content from another written statement.

### **Willingness to contemplate falsification of evidence**

- 12.22 In the recorded telephone calls available to the Commission, there are two instances where members of An Garda Síochána appeared willing to contemplate allowing or encouraging certain persons to make false allegations or to give false evidence. Both cases related to assaults alleged to have been carried out by the husband of Mrs A. Although the alleged assaults themselves were not related to the murder of Madame Toscan du Plantier, there was a potential connection with the murder investigation in that Mrs A’s status as an important witness for the investigation may have influenced the behaviour of Garda members in relation to the assault allegations.
- 12.23 The first instance of possible misconduct comes from a recorded telephone call on 18 April 1997 between a Detective Garda Delta and a Garda Epsilon. In the course of the conversation, reference was made to an assault alleged to have been carried out by a Mr A on a Mr C, on the night of 13 April 1997. The details of the incident and the Commission’s investigation of other instances of potential misconduct by members of An Garda Síochána in connection with it are set out in Chapter 12.
- 12.24 In the context of discussing the likelihood of Mr C making a formal complaint of assault against Mr A in a few days time, Detective Garda Delta raised the question of whether a statement should be obtained from Mr A, the alleged perpetrator of the assault, in advance of Mr C making his complaint. Garda Epsilon responded by saying: *“Sure we can always pre-date it if it comes to it”*. The Commission finds that this discloses evidence of improper conduct, in the form of an expressed willingness on the part of members of An Garda Síochána to have a witness statement pre-dated.
- 12.25 Towards the end of the same telephone conversation, in the course of discussing actions that were open to Mr and Mrs A in the event that Mr C were to make a complaint, Detective Garda Delta appears to suggest that Mr A could say in evidence that Mr C *“threw a punch”* at him first. Detective Garda Delta told the Commission in evidence that this was something Mr A had told him did happen; Garda Epsilon, who visited Mr



and Mrs A on the night of the assault, indicated that, to his knowledge, it did not happen that way. Nonetheless, in the recorded conversation, Garda Epsilon did not correct Detective Garda Delta but appeared to assent to the suggestion.

- 12.26 In the event, it was found to be unnecessary to take any statement from Mr A as Garda Epsilon was able to persuade Mr C not to pursue his assault complaint. Thus the question of pre-dating such a statement or inserting into it a possibly untrue allegation that Mr C threw the first punch never arose. What is disturbing, however, is that suggestions could be made between two members of An Garda Síochána, without objection, that evidence could be slanted or falsified in these ways.
- 12.27 The second instance of potential misconduct arises from a recorded conversation between Detective Garda Delta and Mrs A on 29 October 1997. During the course of the conversation, they discussed the possibility that a complaint of assault might be made against Mrs A's husband by a person who had, on occasion, acted as a babysitter for the children of Mr and Mrs A. Detective Garda Delta appeared to suggest that Mr and Mrs A could seek to dissuade the person concerned from making a complaint of assault against Mr A by threatening to make their own complaint, alleging that the person in question previously assaulted one of the children of Mr and Mrs A.
- 12.28 The Commission has been unable to establish whether the suggestion made by Detective Garda Delta had a basis in fact, or whether he was suggesting that Mr and Mrs A invent a spurious assault claim. In evidence to the Commission, Detective Garda Delta said that Mr and Mrs A had previously alleged to him that the babysitter "*was slapping the children*" but that they were reluctant to make any complaint "*because they were neighbours*". Detective Garda Delta went on to say that "*there is no way*" he would have made the suggestion to Mrs A "*unless I had some knowledge... that something did happen*".
- 12.29 In circumstances where it is not possible to establish whether or not Mrs A told Detective Garda Delta on a previous occasion about an alleged assault by the babysitter, the telephone call cannot be said to disclose evidence of improper or unlawful conduct on the part of Detective Garda Delta.
- 12.30 Nonetheless, there are aspects of concern here. In particular, the Commission notes the apparent similarities with the approach taken by Detective Garda Delta in relation to the other allegation of assault by Mr A – that involving Mr C in April 1997. As reported above, in that case, Detective Garda Delta appeared to encourage Garda Epsilon in his efforts to dissuade Mr C from making a complaint against Mr A. He also suggested, in that instance, that Mr A could counter any complaint of assault by stating that he was assaulted first –

something which appears to have no basis in fact, although Detective Garda Delta claimed to have been told by Mr and Mrs A that it was true.

**Alleged provision of drugs and money to a witness**

- 12.31 Among the calls recorded at Bandon Garda Station in early 1997 is a group of calls related to a Mr B, a British national who was residing in the West Cork area.
- 12.32 In February 1997, Mr B contacted a local Garda station and offered to assist the police with their investigation of Mr Ian Bailey as a suspect for the murder of Madame Toscan du Plantier.
- 12.33 Between February and June 1997, almost all of Mr B's contact with An Garda Síochána was through two particular members: Detective Garda Delta and Detective Garda Gamma.
- 12.34 Some of the recorded calls in which Mr B is mentioned or involved, appear to suggest that he asked members of An Garda Síochána to provide him with quantities of illegal drugs and / or large sums of money, in return for his cooperation with the investigation of the death of Madame Toscan du Plantier.
- 12.35 The recorded calls show attempts by the members of An Garda Síochána to obtain the cooperation of Mr B, in order to cause Mr Ian Bailey to make statements incriminating himself in relation to the murder of Madame Toscan du Plantier.
- 12.36 The telephone calls contain a number of references to the supply to Mr B of materials described sometimes as "*stuff*" and once, explicitly, as "*hash*", as well as the payment to him of money. The Commission is satisfied that Mr B expressly or impliedly made requests, recorded in telephone calls, to members of An Garda Síochána for the supply of drugs, either to facilitate or in consideration of his assistance in the Garda investigation. While the Garda members in those calls did not expressly reject such requests, there is no evidence that they agreed expressly or impliedly to supply drugs to Mr B.
- 12.37 The Commission is satisfied that members of An Garda Síochána, over a period of months in early 1997, supplied Mr B with modest sums of money and articles of clothing. Mr B was a person without regular employment and of extremely limited means. In light of the general objectives of the investigation of an extremely serious murder, and where the expenditure involved was reimbursed to the Garda members, the

Commission is satisfied that the references made to such payment and provision did not disclose evidence of improper or unlawful conduct.

12.38 Mr B also made it clear that he would require to be paid a large sum of money in consideration of his assistance to the Garda investigation. One member of An Garda Síochána indicated that he was aware that Mr B would require monetary compensation and did not explicitly reject the request. However, the Commission has found no evidence that any member of An Garda Síochána expressly or impliedly offered to pay substantial sums of money to Mr B, in return for his making a statement incriminating Mr Ian Bailey in the murder.

12.39 It is important to note, at this juncture, that almost all of the relevant telephone calls were recorded with the knowledge of the Garda officers concerned but not of Mr B. This feature would make it improbable that the members of An Garda Síochána would say anything likely to provide evidence of misconduct against themselves.

#### **Disclosure of confidential information**

12.40 Over the course of one week in June 1997, there are a number of telephone calls between Detective Sergeant Alpha and several people, all of them civilians, in which he discussed the Toscan du Plantier murder investigation in various degrees. They are as follows:

- 18 June 1997 – conversation with an unidentified female civilian. Detective Sergeant Alpha discussed the progress of the investigation and suggested that Mr Bailey was being shielded by the people he was living with.
- 19 June 1997 – conversation with a journalist working for a UK publication. Speaking “*off the record*”, Detective Sergeant Alpha alleged Mr Bailey was attempting to use the media to build an argument that, due to negative publicity, a fair trial would be impossible. He also disclosed that Mr Bailey was not under surveillance and discussed another former suspect in the case.
- 23 June 1997 – call with a family member. Detective Sergeant Alpha briefly discussed the progress of the investigation and referred to Mr Bailey as “*a cunning bastard.*”

- 24 June 1997 – conversation with an employee of the Office of the Revenue Commissioners. Detective Sergeant Alpha made allegations concerning Mr Bailey, including saying that he had beaten his partner “*to a pulp a few times*” and that An Garda Síochána also believed he had committed similar assaults in England.
- 24 June 1997 – call with a local TD in West Cork to discuss a letter of complaint from Mr Bailey and Ms Thomas. Detective Sergeant Alpha informed the TD that Mr Bailey’s re-arrest was imminent.
- 24 June 1997 – two calls with a family member. Detective Sergeant Alpha discussed the investigation and alleged that Mr Bailey was making “*all kinds of allegations*” against An Garda Síochána in relation to it.

12.41 As Detective Sergeant Alpha is deceased, it was not possible for the Commission to inquire further into these matters.

12.42 In addition to the above instances of apparently improper disclosures made by Detective Sergeant Alpha, the Commission has also considered apparent instances of improper disclosure by Detective Garda Delta in the course of a recorded conversation with Mrs A on 3 April 1997. As indicated previously, Mrs A had given what was considered by An Garda Síochána to be important evidence to the murder investigation and Detective Garda Delta told the Commission that he had been asked by his superiors to engage with Mrs A, in the hope that she might disclose further information of benefit to the investigation.

12.43 The origins of the call appear to lie in an encounter between Mrs A and a Mr C during which she informed the latter that her husband suspected him of “*prowling*” around their house late at night.<sup>12</sup> According to Mrs A, Mr C threatened to kill her in the course of that conversation. She phoned Bandon Garda Station, seeking to report the matter either to Detective Garda Delta or to another named Garda member.

12.44 In the course of this conversation, Detective Garda Delta disclosed personal and confidential information about Mr C to Mrs A. Most, if not all, of the information appears to have been obtained by Detective Garda Delta from other members of An

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<sup>12</sup> It should be noted that, 10 days after this telephone call, on the night of 13 April 1997, Mrs A’s husband is alleged to have assaulted Mr C near their house. The response of An Garda Síochána to that alleged assault is dealt with in Chapter 12.

Garda Síochána, although Detective Garda Delta claimed that he had received some of the information from Mrs A herself on a previous occasion.

- 12.45 It is a remarkable feature of this recorded telephone call that, from the outset, Detective Garda Delta repeatedly betrayed unremitting animus against Mr C and used various obscenities in referring to him. He made allegations concerning his character and behaviour. In the view of the Commission, Detective Garda Delta does not appear to have had any, or any sufficient, evidence justifying him in adopting such a uniformly hostile attitude to Mr C. He also disclosed confidential information about Mr C which related to Mr C's previous status as a suspect in the investigation of the death of Madame Toscan du Plantier.
- 12.46 Detective Garda Delta accepted that he had been "*a small bit more liberal than [he] should*" have been in the information he disclosed to Mrs A. He was more open with her than in his normal interactions with a witness because, at that time, his main function, according to him, was to try to find out the name of the man who had accompanied Mrs A in the early hours of 23 December 1996, when, as he claimed, she had made a sighting of importance to the murder investigation.

#### **Actions in relation to an assault near Schull, 13 June 1997**

- 12.47 Amongst the recorded calls reviewed by the Commission were three calls from April 1997 that mentioned an assault on a Mr C. The assault was alleged to have been perpetrated by the husband of Mrs A, who was considered by An Garda Síochána to be a significant witness in the investigation of the death of Madame Toscan du Plantier.
- 12.48 On first analysis, the recorded conversations appeared to disclose evidence that members of An Garda Síochána had put undue pressure on Mr C not to make a formal complaint in relation to the assault. Some of the recorded conversations appeared to suggest that this was done in order to ensure Mrs A's continued cooperation with An Garda Síochána as a witness in the murder investigation.
- 12.49 Certain basic background facts are clear:
- a. On the night of 13 April 1997, two telephone calls were made to Bantry Garda Station reporting an assault on Mr C. These were carefully recorded in the Occurrence Book<sup>13</sup>. It was noted that Mr C had been "*badly assaulted*" and that he had been brought to Bantry

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<sup>13</sup> Book that records activity in the station on a day to day basis.

Hospital by members of An Garda Síochána in the Bantry Station patrol car. These are the only available written records of the matter that were provided to the Commission, although the issue was subsequently investigated by members of An Garda Síochána and figured largely in the telephone conversations with which this section is concerned.

- b. Garda Epsilon was on duty in Ballydehob when the patrol car from Bantry passed through the village, *en route* to the scene of the alleged assault. On his own account, he travelled with them and took responsibility for the investigation of the assault.

12.50 Detective Garda Delta was stationed in Bandon and was involved in the investigation of the Toscan du Plantier murder. He was assigned, in particular, to obtain certain specific information from Mrs A. He had no legitimate function in relation to the investigation of the alleged assault on Mr C. Yet, at his own initiative, he took an active interest in Garda Epsilon's pursuit of the matter. He initiated all relevant telephone calls of which the Commission is aware.

12.51 Garda Epsilon took no statements from either Mr or Mrs A, from the neighbour who had also reported the assault, or from anyone else. Garda Epsilon took no notes of his investigation and made no report to the member in charge. He, by his own account, made no attempt to visit Mr C or to investigate his injuries, although the report to Bantry Garda Station had stated that Mr C had been badly assaulted and that he had been taken to Bantry Hospital by Garda Epsilon's colleagues in the Bantry patrol car.

12.52 Garda Epsilon received a telephone call from Mr C the following day, 14 April 1997. Mr C wished to make a statement about the alleged assault. Garda Epsilon said that he would not be available for a few days. Mr C telephoned Garda Epsilon again, who told him that he would not be available until the following Tuesday. From this and remarks made in the course of the telephone conversations, it is clear that Garda Epsilon was unwilling to facilitate Mr C in making a statement.

12.53 Detective Garda Delta telephoned Garda Epsilon on 18 April 1997 to inquire about Mr C's impending attendance at the Garda station. So far as the Commission is aware, they had not previously discussed Mr C. Yet, from the outset, the two members of An Garda Síochána concur in describing Mr C in derogatory terms.

12.54 Both members of An Garda Síochána agreed, more or less from the beginning, that Mr C was not to be treated as a normal *bona fide* complainant, even though they both know

that it was not contested that Mr A committed the alleged assault on Mr C. The recorded conversation discloses evidence of an intention on the part of Garda Epsilon not merely to discourage Mr C in making a complaint, but “*under no circumstances*” to facilitate him in that regard. It is also clear from the conversation (and from his evidence to the Commission) that Detective Garda Delta approved of this approach.

12.55 On 22 April 1997, Detective Garda Delta telephoned Garda Epsilon once more to find out about the outcome of his meeting with Mr C. Garda Epsilon gave an account of their meeting in which he said that, over the course of an hour, he had succeeded in persuading Mr C not to press charges in relation to the assault, by suggesting that Mr and Mrs A could also pursue various remedies against Mr C. Some of these arguments, in the Commission’s view, had no basis in fact and were purely speculative.

12.56 Immediately following this conversation, Detective Garda Delta rang Mrs A to inform her of the outcome of Garda Epsilon’s meeting with Mr C. In the course of this call, Detective Garda Delta claimed to have instructed Garda Epsilon in the approach he had taken towards Mr C – something that Garda Epsilon strenuously denies and that Detective Garda Delta himself now says was untrue.

### **Conclusions**

12.57 In relation to the categories of potential improper or unlawful conduct identified from the available telephone recordings and related documentation, the Commission draws the following conclusions.

#### **Willingness to modify / falsify evidence**

12.58 It is of serious concern that, in the small sample of recorded calls available to the Commission, evidence is disclosed that members of An Garda Síochána involved in the investigation, including the officer responsible for preparing the report for the Office of the Director of Public Prosecutions, were prepared to contemplate altering, modifying or suppressing evidence that did not assist them in furthering their belief that Mr Bailey murdered Madame Toscan du Plantier.

12.59 Following an investigation of the content of these telephone conversations, the Commission has found no evidence that any of the suggestions posited by Detective Sergeant Alpha and considered by other members of An Garda Síochána, in relation to the alteration, modification, destruction or suppression of evidence in connection with the murder investigation, were actually carried out.

- 12.60 Similarly, the Commission has found no evidence that the suggestions made by Detective Garda Delta in relation to assaults allegedly carried out by Mr A against Mr C and another person were pursued any further.
- 12.61 The Commission has found that the suggestion by Garda Epsilon, which was not contested by Detective Garda Delta, that a statement relating to a serious assault could be pre-dated, discloses evidence of improper conduct.
- 12.62 The Commission is also satisfied that any act by members of An Garda Síochána, in the course of their duty, which consisted of suggesting or discussing the suppression, modification or alteration of any evidence, could, in itself, amount to improper conduct.

Alleged provision of drugs and money to a witness

- 12.63 The Commission has examined the relationship between Mr B and the members of An Garda Síochána, as disclosed in a number of telephone calls recorded at Bandon Garda Station in 1997 and one closely connected, contemporaneous, tape recording.
- 12.64 The Commission is satisfied that Mr B expressly or impliedly made requests, recorded in telephone calls, to members of An Garda Síochána for the supply of drugs, either to facilitate or in consideration of his assistance in the Garda investigation. While the Garda members in those calls did not expressly reject such requests, there is no evidence that they agreed expressly or impliedly to supply drugs to Mr B.
- 12.65 Mr B also made it clear that he would require to be paid a large sum of money in consideration of his assistance to the Garda investigation. However, there is no evidence that any member of An Garda Síochána expressly or impliedly offered to pay substantial sums of money to Mr B in return for his making a statement incriminating Mr Ian Bailey in the murder.
- 12.66 Almost all of the relevant telephone calls were recorded with the knowledge of the Garda officers concerned but not of Mr B. This feature makes it improbable that the members of An Garda Síochána involved would say anything likely to provide evidence of misconduct against themselves.
- 12.67 The Commission concludes that the recorded telephone conversations with Mr B do not disclose any evidence of unlawful or improper conduct by members of An Garda Síochána.



### Disclosure of confidential information

- 12.68 The Commission found a number of telephone calls from June 1997 in which Detective Sergeant Alpha discussed confidential matters relating to the murder investigation with various civilians, including, on one occasion, a journalist. As Detective Sergeant Alpha is deceased, it is not possible to put forward any potential explanatory or extenuating circumstances or reason for his engaging in those telephone conversations. On a *prima facie* basis, these disclosures appear to be inappropriate.
- 12.69 The Commission also found, in a telephone call from April 1997, evidence of the inappropriate disclosure of confidential information by Detective Garda Delta to Mrs A, a witness in the murder investigation.

### Actions in relation to an assault near Schull, 13 June 1997

- 12.70 In the view of the Commission, the recorded telephone calls, combined with other available evidence in relation to this matter, disclose evidence of improper conduct by members of An Garda Síochána in the following respects:
- A failure to take notes, statements or otherwise investigate an alleged assault on a Mr C by a Mr A;
  - A stated intention, subsequently carried out, to dissuade Mr C from making a formal complaint in relation to the assault;
  - The employment of misleading and, in some cases, untrue information in order to persuade Mr C not to pursue his complaint; and
  - Adopting an attitude of hostility towards Mr C, the victim of the alleged assault.
- 12.71 There is also some evidence to suggest that these actions may have been motivated by a concern to protect and maintain good relations with Mrs A, who was considered to be an important witness in relation to the investigation of the death of Madame Toscan du Plantier. This is denied by the two Garda members involved, Garda Epsilon and Detective Garda Delta.

# 1. INTRODUCTION

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## 1.1. Establishment of the Commission

- 1.1.1. The Government, by Order dated 30 April 2014 (S.I. No. 192 of 2014) made pursuant to the provisions of the Commissions of Investigation Act 2004 (the “2004 Act”), appointed Mr Justice Nial Fennelly as the Sole Member of the Commission of Investigation regarding certain matters relative to An Garda Síochána and other persons.
- 1.1.2. The task of any Commission established under the 2004 Act is to investigate and report on specific matters considered by the Government to be of “significant public concern” (s. 3(1) (a) of the 2004 Act). The specified Minister, for the purposes of s. 3(3) (b) of the 2004 Act, in effect the Minister to whom the Commission is to report, is the Taoiseach (see paragraph 4 of the Order). The matters of significant public concern to be investigated in this instance are set out in the Terms of Reference of the Commission, which are contained in the Order of 30 April 2014 and reproduced at paragraph 1.3 below. All of these matters, to a greater or lesser degree, relate to the operation by An Garda Síochána of systems that recorded telephone conversations into and out of a number of Garda stations.
- 1.1.3. The Commission was directed by the Order to report on all aspects of its investigation by 31 December 2014. However, it was implicit almost from the outset that this deadline was not realistic, given the scale and scope of the matters to be investigated. On 14 November 2014, an Interim Report was submitted to the Taoiseach under section 6(6) of the 2004 Act, requesting that the timeframe for submission of the Commission’s Final Report be extended until 31 December 2015. This request was duly approved.
- 1.1.4. By letter dated 31 July 2014, the Commission wrote to the Taoiseach indicating that it believed it would be possible to submit an Interim Report on sub-paragraphs 1(n) and (o) in advance of, and separately from, the other matters set out in the Terms of Reference. By letter dated 7 October 2014, the Taoiseach stated that it would be welcome if such a report could be produced at an earlier date. He formally requested the Commission to submit an Interim Report in respect of sub-paragraphs 1(n) and (o) – “...if you believe that it is feasible and appropriate.” This Second Interim Report of the Commission was delivered to the Taoiseach on 31 August 2015.

- 1.1.5. The Commission made two further requests for revisions of its timeframe, the latest being made on 14 December 2016 for an extension to 31 March 2017, which was approved by the Taoiseach on 21 December 2016.
- 1.1.6. This is the Final Report of the Commission. It addresses all of the matters outlined in the Terms of Reference, with the exception of the issues raised in sub-paragraphs 1(n) and 1(o), which were reported on in the Second Interim Report of the Commission. The Commission is unable to report on paragraph 1(p) of its Terms of Reference, as Judge Michael Reilly died in November 2016 before he had completed his report.

## **1.2. Background to the Establishment of the Commission**

- 1.2.1. The circumstances surrounding the establishment of the Commission have been dealt with to some extent in the Second Interim Report which related to paragraphs 1(n) and (o) of the Terms of Reference, but it is useful to reiterate them here.
- 1.2.2. On 25 March 2014, the Garda Commissioner, Mr Martin Callinan, announced his retirement from the position of Commissioner of An Garda Síochána which he had held since December 2010. This followed a visit to his home by the then Secretary General of the Department of Justice, Mr Brian Purcell, late in the evening of 24 March 2014.
- 1.2.3. The circumstances surrounding this visit and the events that occurred around it are fully documented in the Second Interim Report, but a crucial element in these was a letter written by Mr Martin Callinan as Garda Commissioner to the Secretary General of the Department of Justice which was delivered on 10 March 2014 to the Department of Justice. Although this letter requested that the Minister for Justice, Mr Alan Shatter, should be informed of its contents, this was not done until 25 March 2014, some 15 days after it had been delivered to the Department. This delay was the subject matter of paragraph 1(n) of the Terms of Reference and was reported on in the Second Interim Report of the Commission.
- 1.2.4. This letter of 10 March 2014 was the first formal communication to the Department of Justice by the Garda Commissioner outlining the facts surrounding the practice of recording certain telephone lines into Garda stations throughout the country. It summarises the position with regard to telephone recording as far as the Garda Commissioner was aware at that time and it is reproduced in full hereunder.

Oifig an Choimisinéara  
An Garda Síochána  
Páirc an Fhionnuisce  
Baile Átha Cliath 8  
Éire

Tel/Fon: (01) 666 2015 / 2026  
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*Luaigh an nímír tharagtha seo a leanas le do  
thoil:*

*Please quote the following ref. number:*

## An Garda Síochána



Office of the Commissioner  
Garda Headquarters  
Phoenix Park  
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CMR\_22-37161/12

### **CONFIDENTIAL**

Secretary General  
Department of Justice and Equality  
94, St. Stephen's Green  
Dublin 2

**RE: Recording of Telephone Conversations made and retained in Garda Stations.  
Data Protection Acts – Retention of Data.**

Dear *Secretary General,*

I wish to bring the following to the Minister's attention in accordance with Section 41 (d) of the Garda Síochána Act 2005.

During the discovery process in the current civil proceedings being taken by Mr. Ian Bailey and his partner, Ms Catherine Jules Thomas, for wrongful arrest and under other headings, further material has come to light that is relevant to discovery in those proceedings. This material relates to tapes of telephone conversations which took place on various dates during 1997 between members of An Garda Síochána at Bandon Garda Station and other serving members of An Garda Síochána and also with Ms Marie Farrell and in other cases with journalists who were contacting An Garda Síochána seeking information. These tapes are currently being reviewed as part of the Discovery process and will be listed in an Affidavit of Discovery which must be sworn by An Garda Síochána before the 25<sup>th</sup> March 2014.

As you are aware, An Garda Síochána and your Department are currently dealing with an order for Discovery which was made by Mr. Justice Hedigan on 17 May 2013. In respect of three earlier recordings between members of An Garda Síochána and between a member of An Garda Síochána and Ms. Marie Farrell, I have received advices from Senior Counsel that these recordings are captured by that Discovery Order and are relevant to the proceedings. A copy of these transcripts has previously been forwarded to the Chief State Solicitor's Office for review by Senior Counsel and I understand, following receipt of advices from Counsel a copy of those transcripts has also been forwarded to the Attorney General's Office and to your Department.

The analysis of remaining recordings is continuing at present which includes inter alia recordings of telephone calls between members of An Garda Síochána at Bandon Garda Station and journalists contacting An Garda Síochána and telephone calls between members of An Garda Síochána and a Mr. Martin Graham who is ostensibly providing information to An Garda Síochána.

It has since transpired following enquiries that systems would appear to have been installed during the 1980's, in Garda Stations to allow for the recording of incoming and outgoing telephone calls from designated extensions. The rationale behind this was the recording of Garda radio traffic to and from control rooms, 999 calls and the gathering of evidence around calls made to Garda stations regarding bomb threats and other code word messages. This practice has continued in some stations over the years with the relevant recordings being retained within the station itself. The original recorders were replaced with Dictaphone recorders during the 1990's and further replaced by NICE recorders which were installed in 2008.

I have since directed that the routine recording of non 999 Emergency calls to Garda stations cease and confirm that all recordings save those made on dedicated 999 lines were fully stopped nationally on 27 November 2013.

The only calls currently being recorded are 999 calls to the ECAS service where, since the legislation underpinning it in 2007 was enacted, a member of the public gives up their right to privacy when they ring the 999 service. BT ECAS record these calls from start to finish and An Garda Síochána record them from the point where they are handed over to it.

I await written confirmation from each Divisional Officer that all audio recordings that were stored at each of the Divisional HQ's outside of the Dublin Metropolitan Region are collected and are now stored securely in Garda Headquarters pending finalisation of legal advice. The total amount of tapes collected to date is 2,485.

The issue now is what action I as Data Controller should take in relation to the tapes which have been collected. I am very conscious in my role as Data Controller under section 2(1) (c) the Data Protection Act 1988 and 2003 and of my responsibilities which are as follows:

- 2(1) *A data controller shall, as respects personal data kept by him or her, comply with the following provisions:*
- (c) *the data –*
    - (i) shall have been obtained only for one or more specified, explicit and legitimate purposes,*
    - (ii) shall not be further processed in a manner incompatible with that purpose or those purposes,*
    - (iii) shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are collected or are further processed,*  
*and*
    - (iv) shall not be kept for longer than is necessary for that purpose or those purposes.*

I consulted with the Attorney General's Office on this issue on 11 November 2013 and also established a Working Group who will be in a position to report to me once they have further liaised with the Attorney General's Office in respect of all recordings which have been collated to date. It is the case I expect that consultation with the Office of the Data Protection Commissioner will be necessary which I will consider following further advices from the Attorney General.

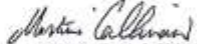
The Attorney General's Office advises at this time that all the outstanding recordings should be brought together and some inventory made of them, identifying them by station, date of recording and if they are in a condition which can be played or not. The recordings are being stored carefully and under secure conditions. An inventory of those recordings collated to date has now been compiled and has been furnished to the Attorney General's Office.

From a cursory examination of some of the tapes there is evidence of mould which would indicate decay of the magnetic tapes which may render the tapes unplayable. It is also the case that the only machines which are capable to playing these tapes are also quite fragile and dated.

I have no doubt that when the Discovery process is completed and if copies of the tape recordings are disclosed to the plaintiff in the Ian Bailey civil proceedings that this issue will very much come into the public domain and I am anxious to resolve any data protection issues as quickly as possible. You will note however that as soon as this issue came to my attention I took immediate steps to regularise the position and continue to do so.

A meeting has been arranged for Monday 10 March 2014 between Counsel, Attorney Generals Office and An Garda Síochána, which I understand Assistant Commissioner Michael Flahive will attend, where this matter and other pertinent issues will be discussed.

Yours sincerely

  
MARTIN CALLINAN  
COMMISSIONER OF  
AN GARDA SÍOCHÁNA

10<sup>th</sup> March 2014

- 1.2.5. This letter recites the circumstances under which the issue of telephone recording first came to light. Following the tragic murder of Madame Sophie Toscan du Plantier in West Cork in December 1996, investigating Gardaí regarded a local resident, Mr Ian Bailey, as a suspect. Mr Bailey and his partner, Ms Catherine Jules Thomas, were arrested on two occasions but neither was ever charged with murder or with any related offence.
- 1.2.6. As is explained in Chapter 12 of this Report, in 2007 Mr Bailey and Ms Thomas instituted proceedings against the Commissioner of An Garda Síochána, the Minister for Justice and Law Reform, Ireland and the Attorney General (Court Record Numbers 2007/3424P and 2007/3796P respectively). In the course of complying with an Order for Discovery of documents made by the High Court in that civil action taken by Mr Bailey, a number of old digital audio (DAT) tapes dating from 1997 and 1998 were found in Bandon Garda Station. These were listened to by Gardaí who were preparing the Discovery material and it emerged that a number of telephone conversations had been recorded which were relevant to the investigation of the murder. Three recordings in particular were identified at an early stage as being problematic for the Gardaí as they suggested improper behaviour on the part of some members. It was also apparent that these recordings were not part of any normal recording system in operation in An Garda Síochána as they involved conversations between members of the Gardaí who were unaware that their conversations were being recorded.
- 1.2.7. Deputy Commissioner Nóirín O’Sullivan (as she then was) became aware of the recordings that had been found in Bandon Garda Station on the evening of 17 October 2013, following a discussion with Chief Superintendent Tom Hayes who was in charge of collating documents for the Discovery of documents in the Bailey case. She directed that enquiries be made as to how these calls in Bandon came to be recorded and whether similar recordings, that is calls other than 999 calls, existed in other Garda stations. In her Statement to the Commission, Commissioner O’Sullivan stated:

*“On being informed in relation to the recordings discovered in Bandon I, in my capacity as Deputy Commissioner of Operations, caused enquiries to be made to the Executive Director of ICT as to whether this issue of the recording of telephone calls in and out of Garda stations was confined to Bandon Garda Station or was there a wider issue throughout the organisation. An email from the Superintendent of Telecommunications<sup>14</sup> on*

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<sup>14</sup> Superintendent Michael Flynn

*the 18<sup>th</sup> October 2013 made reference to the wider issue of extensions being recorded nationally in the Public Office, Communications Room and Incident Rooms as decided by the Divisional Officer. It is my understanding that the Executive Director of ICT caused further enquiries to be made identifying the nature and extent of the recording of non-999 calls.”*

- 1.2.8. In her evidence to the Commission, Commissioner O’Sullivan confirmed that, although transcripts of the calls from Bandon had not yet been prepared, she thought that *“there may have been some indication of the nature of the content of the calls at that stage.”*
- 1.2.9. The email referred to by Commissioner O’Sullivan was prepared by Superintendent Michael Flynn of Telecommunications Section within the Information and Communications Technology Unit (ICT) and was timed and dated 10.13am, 18 October 2013. It was produced within hours of the initial inquiry by then Deputy Commissioner O’Sullivan and it purported to give some information on how the telephone calls that had emerged in Bandon had come to be recorded. It stated:

*“The original installation of voice recording at Divisional HQs predates many currently serving in Telecommunications but it is my understanding that they were installed during the 1980s and the rationale behind this was the recording of 999 calls and the gathering of evidence around calls made to Garda stations regarding bomb threats and other code word messages.*

*The original recorders were replaced with Dictaphone recorders during the 1990s and further replaced by NICE recorders approximately five years ago. The NICE recorders allow for central recording and management of recordings. Since 2008, there are no recordings held locally, other than a thirty-day buffer and, after seven years, the central NICE recorder deletes the call. Therefore, today we have telephone recording systems installed in Command and Control and all Divisional HQs outside the DMR. [Dublin Metropolitan Region]*

*In Divisions, there is no national policy regarding what extensions were recorded but primarily the Public Office, Communications Room and Incident Rooms are included, as decided by the Divisional Officer. Initially, the recorder recorded all calls to or from the designated extension and the radio traffic to or from the Communications Room. Post the NDRS’ [National Digital Radio Service] deployment, the radio traffic is now recorded centrally.*



*The original retention period was set as six months plus one in case any complaints were made, and I understand this was the case up to 2008. Now I understand that this has been extended to seven years as part of the NICE recorder deployment five years ago, based on advice received regarding the Data Protection Act.....It would appear that, in this instance, no recordings were ever disposed of when the retention period expired.”*

Superintendent Flynn went on to say that, where a call was of evidential value to an investigation, then only that call should be disclosed. “*Otherwise*” he stated, “*we risk the right to privacy for the individuals who rang any of the recorded extensions during that period and could also put persons at risk who were assisting An Garda Síochána*”.

Superintendent Flynn recommended that any recordings not required for investigations should be disposed of securely. He also stated:

*“I would also recommend that we as, an organisation, define a national policy as to whether we can still continue to record these extensions and, if it is decided that we can, then we must also clearly define what extensions can be recorded and, if so, is the seven-year period suitable in this case”.*

Superintendent Flynn concluded his report by stating that:

*“The only calls I am sure we can record are 999 calls to the ECAS<sup>15</sup> service where, since the legislation underpinning it in 2007 was enacted, a member of the public gives up their right to privacy when they ring the 999 service. BT ECAS record these calls from start to finish and An Garda Síochána record them from the point where they are handed over to us”.*

Superintendent Flynn attached circulars to his email, which had been sent out by Headquarters following a case involving Gardaí in Waterford Garda Station in 2011.<sup>16</sup> These circulars related to ensuring that all telephones that were recording calls in Divisional Garda Stations were appropriately labelled indicating that they were recording.

- 1.2.10. Deputy Commissioner O’Sullivan, the Chief Administrative Officer, Mr Cyril Dunne, and the Executive Director of ICT, Mr Liam Kidd, have all given evidence that, prior to receiving this email from Superintendent Flynn on 18 October 2013, they were not

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<sup>15</sup> Emergency Call Answering Service.

<sup>16</sup> This case which is known as “the Holness Case” is dealt with in detail at Chapter 7 of this Report.

aware of the existence of a general system for recording phone calls in Divisional Headquarters as described by Superintendent Flynn. Deputy Commissioner O’Sullivan and Mr Kidd were aware of the recording of emergency or 999 calls. In her evidence before the Commission, Commissioner O’Sullivan stated:

*“I certainly would have been aware that 999 calls were being recorded, maybe not the background as to the reasons that it had commenced, but certainly I would have been aware that there were recording of 999 calls, yes.”*

- 1.2.11. The extent of knowledge within An Garda Síochána is discussed in more detail in Chapter 7 of this Report. It is enough to note at this point that no senior member of Garda Management appeared to be aware of the practice of recording telephone calls, other than 999 calls, into or out of Divisional Headquarters.
- 1.2.12. Further enquiries by Superintendent Flynn revealed an inconsistent picture across the country.
- 1.2.13. When the Garda Commissioner, Mr Martin Callinan, was made aware of these developments, both in Bandon and nationally, he directed that all recording of non-999 calls should cease immediately. This direction was fully complied with on 27 November 2013. The circumstances of these events are dealt with in Chapter 6 of this Report.
- 1.2.14. By the end of February 2014, a clearer picture had been formed as to which Garda stations had been recording non-999 calls and all the Digital Audio Tapes (“DAT tapes”) that were still in existence had been collated and stored in Garda Headquarters (HQ). By this stage, of course, the DAT tapes were obsolete, the system having been upgraded to a digital recording system in 2008 whereby data was centrally stored at Garda HQ.
- 1.2.15. A report by Superintendent Flynn, dated 19 February 2014, to the head of ICT, Mr Kidd, outlined the position as it was then understood. There were two appendices to that report. Appendix I was entitled “The Inventory of Dictaphone Tapes Returned.” It listed numbers of tapes retained in fourteen Divisional Garda Stations in respect of different years from 1995 to 2008. The total number of tapes was 2,485. Appendix II was an “Inventory of Dictaphone Solid State Recordings.” This covered the period 2008 to 2013, listing the lines that had been connected for recording during that time on a station-by-station basis. Mr Kidd transmitted Superintendent Flynn’s report the following day to Mr Ken Ruane, the Head of Legal Affairs of An Garda Síochána. Mr

Ruane forwarded the report and appendices to Ms Ruth FitzGerald, Advisory Counsel at the Attorney General's Office on 28 February 2014.

1.2.16. It was this report which formed the basis for the Garda Commissioner's letter of 10 March 2014 which is reproduced above. This letter was issued in compliance with reporting responsibilities imposed on the Garda Commissioner by section 41 of the Garda Síochána Act 2005 in order to keep the Department of Justice and the Minister for Justice informed of important developments. This letter was dealt with in detail in the Second Interim Report of the Commission.

1.2.17. For the purposes of the present Report, the crucial paragraph of this letter is that which states:

*"It has since transpired following enquiries that systems would appear to have been installed during the 1980s in Garda stations to allow for the recording of incoming and outgoing telephone calls from designated extensions. The rationale behind this was the recording of Garda radio traffic to and from Control Rooms, 999 calls and the gathering of evidence around calls made to Garda stations regarding bomb threats and other code word messages."*

The letter adds that the practice of recording and retaining such calls *"has continued in some stations over the years"* and that the original recording equipment was replaced during the 1990s and again in 2008.

1.2.18. The letter does not express a view on the legality of the recording systems as described. The Commissioner states, however, that he directed *"that the routine recording of non-999 emergency calls to Garda stations should cease"* and that this had been implemented on 27 November 2013.

1.2.19. Mr Callinan also stated that he had directed that all DAT tapes that were stored in Garda stations around the country should be collected and securely stored in Garda Headquarters pending legal advice. At the time of writing the letter, some 2,485 DAT tapes had been identified. The final tally was 3,027 tapes which could, at an extremely rough estimate, amount to more than 7,000,000 hours of recording. The actual number of hours is nowhere near that number, however, as not all tapes collated were full and not all eight channels would have been recording at the same time. Nevertheless, it was, by any standards, an extremely large quantity of recordings.

- 1.2.20. Apart from informing the Department and the Minister of the position in relation to the Bailey case, the main purpose of the letter of 10 March was to advise the Secretary General and the Minister that he, the Garda Commissioner, was seeking advice on the data retention issue that had now emerged. He stated that he had asked the Attorney General's Office to advise him and that he might have to seek the advice of the Data Protection Commissioner.
- 1.2.21. The Commissioner had consulted with Ms Ruth FitzGerald of the Office of the Attorney General in November 2013, once the fact of the voice recordings had been communicated to him.<sup>17</sup> In a subsequent briefing note to the Attorney General seeking nomination of Counsel to advise on the matter, Ms FitzGerald summarised what she had been told as follows:

*“It appears that systems were put in place in Garda stations – possibly in the 1970s – to allow for the recording of incoming and outgoing telephone calls. The reasons for the installation of the system are not known at this remove. However, in many stations the system has continued in place and recordings of telephone conversations have been made and stored. Some of the recordings are on tapes... which are effectively obsolete.”*

She stated that the issue had come to light as a result of the Discovery process in the Bailey case. She continued:

*“As regards 999 telephone calls, these are recorded and that is both permissible and necessary. What is at issue here is calls other than 999 calls.”*

Ms FitzGerald stated:

*“...the Garda Commissioner himself is simply not in a position to say what the purpose may have been or [to] find any documentation relevant to this recording...”*

As to the question of whether the existing recordings should be retained or destroyed, Ms FitzGerald wrote to the Attorney General:

*“As it is not possible at this remove to say what the purpose for the recording was... it would appear that the recording of telephone conversations since the introduction of the Data Protection Act is unlawful*

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<sup>17</sup> Ch. 8 Second Interim Report (p 44 *et seq*).

*insofar as there was no purpose for the recording or the retention of the recording (Section 2(1)(c)).*

*The Garda Commissioner indicated at our meeting that he does not think there is any reason for retaining the recordings and he does not wish to do so. His concern was whether there is anything which would stop him directing the destruction of the recordings.*

*It seems to me that this is a difficult issue upon which to advise. At one level, the recordings are illegal and illegally obtained evidence should not be used in support of a prosecution or proceedings. Yet it may be that a party who communicated with a Garda station may have some reason to wish to obtain the recording e.g. may claim it contains exculpatory evidence.”*

- 1.2.22. Ms FitzGerald emailed a letter to Mr Ruane on 14 November 2013 setting out the facts and issues in similar terms to those employed in her memo to the Attorney General. Having noted again that “*this [was] a difficult issue on which to advise*”, she reiterated:

*“The recordings are illegal and illegally obtained evidence could not be used in support of a prosecution or proceedings. Yet it may be that a party who has communicated with the Garda station may have some reason to obtain the recording. I am not saying that they would be entitled to do so but, rather, that once it becomes known that there are such recordings, that the issue would become a live one. Further, if the recordings are to be discovered in the Bailey proceedings, then it may be necessary to see whether there are any recordings relevant to other cases in which Discovery is outstanding... or indeed, cases in which Discovery has already been made but the case not yet heard.*

*The issues are complex. Further, because the issue will be a controversial one once the information comes to light in the Bailey case that the recordings were made I think it is important to ensure that we can demonstrate that the question of what to do about these recordings was considered carefully and thoroughly. As part of that process I am seeking the advice of Counsel.”*

Ms FitzGerald went on to advise that any outstanding recordings should be collected, placed in secure storage “*and some inventory made of them, perhaps identifying the station and dates to which the recordings relate, so far as this is possible.*”

1.2.23. The process of collating and annotating the DAT tapes continued until the end of February 2014. On 13 March 2014, Ms FitzGerald wrote to Mr Ruane and advised that the views of the Data Protection Commissioner should be sought.

1.2.24. On 19 March 2014, the Garda Commissioner did in fact write to the Data Protection Commissioner, Mr Billy Hawkes, outlining the same facts as were outlined in his letter to the Secretary General of 10 March 2014. At the conclusion of this letter, he summarised the issues as he saw them, which included:

- (i) That he, as Data Protection Controller under the Data Protection Act 1988, did not appear to have any lawful basis for retaining the recordings under the Data Protection Act 1988;
- (ii) That the material on the tapes would appear to be personal data for the purposes of the Act and accordingly could only be retained:
  - For one or more specified, explicit and legitimate purpose or purposes;
  - If not excessive in relation to the purpose or purposes for which it is collected; and for no longer than necessary for that purpose or those purposes.
- (iii) That it would appear that section 2 of the Act in this instance might not have been complied with here since, as the purpose, at least in recent years, had not been explicit, the retention may have been excessive.

The Garda Commissioner concluded the letter:

*“On this basis, as the recordings do not comply with section 2, I seek a direction as to whether they should, in principle, be destroyed.”*

1.2.25. The Data Protection Commissioner replied to this letter by telephone. A note of the advice given was taken by the Head of Legal Affairs in An Garda Síochána, Mr Ruane. In summary, Mr Hawkes’ advice was that, subject to the consent of the National Archives, the tapes that were not subject to the Discovery Order in the Bailey case ought to be destroyed. The Garda Commissioner gave instructions that this advice be communicated to Ms FitzGerald for further advice. Ms FitzGerald, however, said that

she could not recommend such a course and that she found the advice of the Data Protection Commissioner “*quite startling*”.

1.2.26. Although the Minister for Justice and the Government were not aware of the content of either the letter of 10 March or the letter to the Data Protection Commissioner, until after Mr Callinan’s retirement on 25 March 2014, the issue was raised during a review of the Bailey case which was conducted in the course of a Legal Management Advisory Committee (known as Legal MAC), attended by the Attorney General on 20 March 2014. This meeting and the events that followed are covered in detail in Chapter 22 of the Second Interim Report.

1.2.27. As outlined in Chapter 22 of the Second Interim Report, the Attorney General became alarmed at what she heard in relation to the taping of telephone calls in Garda stations:

“She concluded that there had, for decades, been wholesale extensive recording of telephone calls the length and breadth of the country in Garda stations, without any apparent authorisation under any of the legislation.”<sup>18</sup>

1.2.28. Although the Attorney General did not have the letter of 10 March available to her, she did have a copy of the letter of 19 March that had been written by the Garda Commissioner to the Data Protection Commissioner. That letter offered the same rationale for the recording systems as the letter of 10 March cited above:

*“It has since transpired following enquiries that systems would appear to have been installed during the 1980s, in Garda stations to allow for the recording of incoming and outgoing telephone calls from designated extensions. The rationale behind this was the recording of Garda radio traffic to and from Control Rooms, 999 calls and the gathering of evidence around calls made to Garda stations regarding bomb threats and other code word messages. It would now appear that this practice has continued over the years with the relevant recordings being retained within the station itself.”*

1.2.29. The Attorney General thought that this suggested rationale was hypothetical and she felt that her office was not in possession of sufficient facts to enable it to advise on the legal questions in issue.<sup>19</sup>

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<sup>18</sup> Para 24.3 Second Interim Report.

<sup>19</sup> Para 24.7 Second Interim Report.

1.2.30. As detailed in the Second Interim Report, the Attorney General briefed the Taoiseach and the Secretary General to the Government, Mr Martin Fraser, on the evening of Sunday 23 March 2014. The Second Interim Report outlines in detail the evidence of the Attorney General, Mr Martin Fraser and the Taoiseach about what was conveyed by the Attorney General to the meeting in relation to the recording of telephone calls in Garda stations. As the Report states:

“It is inescapable that the Attorney General presented an alarming picture to the meeting, to such an extent that the Taoiseach was, as he says himself, shocked.”<sup>20</sup>

1.2.31. The Taoiseach directed the Attorney General to verify the facts of what she had told him, and a meeting was scheduled for the following day, Monday 24 March 2014, at 6pm. This meeting was attended by the Taoiseach, the Attorney General and Mr Martin Fraser. Shortly after the meeting commenced, the Minister for Justice, Mr Alan Shatter, was asked to join it and subsequently Mr Purcell, the Secretary General to the Department of Justice, was also asked to attend. Mr Shatter, at the time of being summoned to the meeting, was hearing for the first time from his Secretary General, Mr Purcell, and an Assistant Secretary in the Department of Justice, Mr Michael Flahive, about the developments in the Bailey case and the issue of telephone recording that had come to light in the course of complying with the Discovery Order in that case.

1.2.32. According to the Taoiseach, the idea of establishing a Commission of Investigation to look into the telephone recording issue that had now arisen was first mooted at the meeting of 24 March. In his Statement to the Commission, Mr Martin Fraser said: “*It was agreed that the matter was of sufficient gravity as to merit the establishment of a Commission of Investigation.*” The Second Interim Report discusses in some detail the meeting of 24 March and the level of concern that was felt by all who attended it at the information that was imparted by the Attorney General. In his evidence before the Commission, the Taoiseach stated:

*“First of all, the concerns from my point of view were that members of the public, who would have been making contact with Garda stations, an unknown list of Garda stations over very many years, were in a position where their messages or their calls were recorded illegally. That this would give rise to great public controversy; give rise to a lack of integrity and credibility in the force; would cause public outrage. I was glad to see that the Commissioner had put an end to the practice in November 2013.*”

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<sup>20</sup> Para 25.29 Second Interim Report.



*Clearly, given that period of time, there were many instances around the country, both in terms of the Troubles in the late '70s and other issues that may have been the subject of messages or calls to Garda stations at various locations around the country.”*

- 1.2.33. In her Statement to the Commission, with which the Taoiseach agreed in the course of his testimony before the Commission, the Attorney General noted that:

*“... the Taoiseach was very seriously concerned and immediately indicated that, in his view, given the gravity of the matter... and the public importance of trust being restored and maintained in the Gardaí, a Commission of Investigation was warranted and that nothing less would be acceptable to allaying every public disquiet and anxiety.”*

- 1.2.34. As described in the Second Interim Report, the Secretary General to the Department of Justice, Mr Purcell, was instructed to attend at the home of the Garda Commissioner and to outline to the Commissioner the seriousness with which the Taoiseach viewed the developments both in the Bailey case and regarding the general telephone recording issue. Mr Purcell also told Mr Callinan that the Taoiseach would be recommending that a Commission of Investigation be established to look into both issues.

- 1.2.35. The following morning, the Garda Commissioner announced his retirement. The Taoiseach accepted the retirement of the Garda Commissioner and announced the establishment of a Commission of Investigation to look into the matters raised by the Attorney General in the preceding 48 hours.

- 1.2.36. Over the following three weeks, the Terms of Reference for the Commission were drafted. Mr Justice Nial Fennelly was appointed as Sole Member on 30 April 2014. The Terms of Reference reflect the serious view that was taken in Government circles regarding the widespread recording of telephone calls into Garda stations and the possible implications these recordings had for Gardaí involved in the investigation of the death of Madame Sophie Toscan du Plantier in Cork in 1996.

### **1.3. Terms of Reference**

- 1.3.1. The full text of the Order establishing the Commission can be found at Appendix 1 of this Report. Contained within the Order are the Terms of Reference for the Commission, which outline the scope of the investigations required. Paragraph 1 of the Terms of Reference states:

“The Commission is directed to investigate and to make a report to the Taoiseach in accordance with the provisions of section 32 of the Commissions of Investigation Act 2004 (No. 23 of 2004) on the operation of Garda Síochána telephone recording systems and on the following matters in particular...”

1.3.2. A series of sub-paragraphs then set out the “matters in particular” to be considered in the overall context of investigating Garda Síochána telephone recording systems. The sub-paragraphs with which this Final Report is concerned are as follows:

- (a) To identify all Garda stations in which telephone recording systems to record calls, other than 999 calls to the Emergency Call Answering Service, were installed and / or operated by An Garda Síochána between 1 January 1980 and 27 November 2013 and to establish an inventory of those Garda stations so identified to include:
  - (i) The date of initial installation, where such installation occurred on a date between 1 January 1980 and 27 November 2013;
  - (ii) To report on whether any such installations were already in existence on the 1 January 1980;
  - (iii) The duration for which telephone recording systems continued in operation in each such Garda station;
  - (iv) The date on which telephone recording systems were terminated or removed from each such Garda station.
- (b) To establish the immediate circumstances surrounding the installation of telephone recording systems operated by An Garda Síochána at the said Garda stations referred to at (a) above and to establish what authorisation was sought or obtained by An Garda Síochána for such installation and, including the funding, installation, maintenance and/or upgrading of those telephone recording systems, to include the public procurement procedure followed in 1996 and further in relation to the installation of the NICE recorder system in 2008.
- (c) To establish how the said telephone recording systems operated by An Garda Síochána were managed and to establish what use (if any) was

made by An Garda Síochána of any information collated by the said telephone recording systems.

- (d) To identify the organisation and structures in place for the installation, operation and management of the said telephone recording systems and in the storage, access, analysis and use of any information obtained from them.
- (e) To investigate and report on the level of knowledge of the existence, operation and use of the said telephone recording systems within An Garda Síochána.
- (f) To investigate and report on the level of knowledge of the existence, operation and use of the said telephone recording systems within the Office of the Minister for Justice and Equality, the Department of Justice and Equality, the Office of the Attorney General, the Chief State Solicitor's Office, the Office of the Director of Public Prosecutions, the Office of the Data Protection Commissioner and the Garda Síochána Ombudsman Commission.
- (g) To establish whether the installation, operation and use of the said telephone recording systems was authorised by law.
- (h) To establish whether any telephone conversations between solicitors and their clients were recorded by the said telephone recording systems.
- (i) To establish whether any information obtained from the said telephone recording systems by An Garda Síochána was used by it either improperly or unlawfully and, in particular, whether any recordings as may have been made by An Garda Síochána of solicitor/client telephone conversations were used for any purpose whatsoever.
- (j) To establish where the recorded information obtained from the telephone recording systems operated by An Garda Síochána was stored since the creation of same and to establish how such information was accessed and analysed by An Garda Síochána.

- (k) To establish whether any of the recorded information has been destroyed.
- (l) To establish any instances during the relevant period where the Office of the Director of Public Prosecutions made use of the data and information produced by the said telephone recording systems for any purpose.
- (m) In particular, to identify and review all recordings in the possession of An Garda Síochána emanating from the Garda telephone recording system at Bandon Garda Station or otherwise, which relate to the Garda investigation into the death of Sophie Toscan du Plantier and to establish whether those recorded phone calls, and any other acts or events in the course of the said Garda investigation, disclose any evidence of unlawful or improper conduct by members of An Garda Síochána in connection with that investigation.
- (q) To report on any other matters of concern arising from its investigation of recordings to and from Garda stations and to make any further recommendations as it sees fit.

## **1.4. What the Commission was Required to Investigate**

- 1.4.1. At the time of the establishment of the Commission, a number of facts were known to the Garda authorities and the Government. These, in turn, helped identify the issues that needed to be addressed by the Commission. These were outlined in two reports prepared by An Garda Síochána and signed by the newly appointed Interim Commissioner, Ms Nóirín O’Sullivan. The first of these reports was dated 31 March 2014. It was described as “...the chronology of events surrounding the utilisation by the Garda Síochána of a voice recording system as have been established to date”. It stated that “Voice recording systems [had] been in use in An Garda Síochána since at least the late 1970s. The policing objective in using such systems is to record incoming emergency calls”.
- 1.4.2. The report goes on to identify the original installation of voice-recording equipment in the 1970s and 1980s. The early history of voice recording in An Garda Síochána is explored fully in Chapter 3 of this Report. The significant point is that neither An Garda Síochána nor the Department of Justice was able to produce any documentation recording the decision to start recording these emergency calls. The Commission has

seen no policy document exploring the policy or legal implications of recording telephone calls.

- 1.4.3. The 31 March report notes the upgrading and replacement of voice-logging equipment that took place in 1995 / 1996 but states that “a specific policy document has not been identified covering this period”. The report cites a communication from Inspector Michael Bouchier to Superintendent Noel Geary in Garda Telecommunications Section, which gives a list of telephone lines that were to be recorded on the new Digital Audio Tape system. The Commission explores this communication in depth in Chapter 5 of this Report. It has had the benefit of direct evidence from both these former members and other Garda personnel who were involved in the Telecommunications Section during that time. This was the period when Digital Audio Tapes came into use. It was also the period during which the recordings, which later came to light in the course of the Bailey Discovery, were made in Bandon.
- 1.4.4. The third period covered by the report is from 2008 to the present. This period saw the installation of a new NICE system in which recordings were stored on hard drives locally at Divisional Stations and archived centrally in Garda Headquarters. There is more documentation available from this period but, once again, no documents identifying any legal authority for the continued recording of calls. Nor did it identify by whom the decision to do this was made or why it was made.
- 1.4.5. A further Garda report dated 14 April 2014 gave the final figures for DAT tapes that had been collated from Divisional Stations around the country. It also gave a station-by-station breakdown of the lines that were recording in each of the 17 Divisional Stations. On 9 April 2014, 3017 DAT tapes had been collated at Garda Headquarters (this figure excluded the 9 tapes found in Bandon which had been stored in Ballincollig as part of the Discovery process in the Bailey case). The report gave a breakdown of how many tapes each Divisional Station had furnished and itemised the quantity of tapes found for each year between 1995 and 2008. Louth located the highest number of tapes at 465.
- 1.4.6. The same report confirmed that no further documentation had been found in An Garda Síochána regarding the initial installation of voice-recording equipment in the mid-1970s and no further information was available relating to the upgrade in the mid-1990s.
- 1.4.7. The 14 April report identified the number of telephone lines that were recording throughout the country as 298. It stated that, when only 999 lines were left recording after November 2013, a total of 77 lines remained. In total 221 lines were recording non-999 calls during the relevant period throughout the country and these all ceased recording in November 2013.

1.4.8. The issues that needed to be examined began to crystallise as these facts started to emerge:

- A system for recording 999 calls was introduced into the Garda Radio Control Centre at Dublin Castle in the 1970s. What was not known was who had authorised this, why it was authorised, what lines were recorded and what legal basis there was for recording calls, including 999 calls. It was also not clear what use, if any, was made of these recordings. In 1989, the functions of the Radio Control Centre were transferred to Command and Control, Harcourt Square, where a similar recording system was installed.
- During the 1980s, communications consoles with limited facilities for recording telephone or radio traffic were installed in Divisional Stations throughout the country. It was not clear whether and to what extent this equipment was used to record non-999 calls. The S.E.L cassette recorders inserted into these consoles were intended to record one 999 line. The Commission has seen no evidence that they were ever used for any other purpose.
- The recording systems in Divisional Stations outside the Dublin Metropolitan Area (DMA) were upgraded in 1995 / 1996. DAT recorders were installed which allowed simultaneous recording of up to 8 lines. It was not known who decided to extend the recording capacity of the systems at Divisional Stations or why. It was not known what, if any, legal considerations, including Data Protection issues, were taken into account. It was not known what, if any, policies or guidelines were in place for accessing or retaining this data. It was also not known whether any guidance was issued to Divisional Stations as to how the new DAT system was to operate.
- In 2008, the systems at Harcourt Square and Divisional Stations outside the DMA were upgraded once more with the installation of the NICE system. It was not clear what legal considerations applied or were taken into account when this centrally retained database of telephone recordings was introduced. Neither was it known what national policy there was as to how these recordings were to be accessed or what use was to be made of these recordings.

- Senior Management within An Garda Síochána, including the Garda Commissioner and the Deputy Commissioner, all testified to the fact that they had no idea that calls other than 999 calls were being recorded in Divisional Garda Stations. This raised the question of how a system that recorded non-999 calls from the public could exist in up to 22 Divisional Stations<sup>21</sup> around the country for nearly twenty years without anyone in Senior Management in An Garda Síochána knowing about it.
- No-one appeared to be able to offer any assurances that solicitor / client calls were not recorded. What consequences would flow in the event that such calls were recorded and / or accessed by An Garda Síochána?
- The transcripts of calls that were discovered in the Bailey case raised some concerns. To what extent did these transcripts reveal inappropriate behaviour on the part of individual members of An Garda Síochána? What would be the consequences of such material coming to light?
- What legal basis was there for An Garda Síochána to record telephone calls even in situations where one party to the conversation was aware of the fact of recording?

1.4.9. The Commission's first task was to analyse and interpret the Terms of Reference and to identify a methodology whereby these Terms of Reference could be addressed in the most thorough and efficient way possible within the parameters of the Act.

1.4.10. As previously indicated, the tasks given to the Commission under sub-paragraphs 1(n) and 1(o) were completed and the Commission reported on them in its Second Interim Report. The remaining matters on which the Commission has now to report can be grouped under the following headings:

1) History of Garda telephone recording systems, 1980-2013

This includes an account of the installation, operation and termination of systems for recording telephone calls to and from Garda stations. In

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<sup>21</sup> In 1995, 18 Divisional Stations outside the DMA had recording equipment installed. By 2013, this number had increased to 22 as new Divisional Stations were established.

particular, the Commission must investigate systems which recorded “calls other than 999 calls to the Emergency Call Answering Service’.

2) Level of knowledge

The Commission must report on the extent to which the existence, operation and use of such telephone recording systems was known within An Garda Síochána, the Department of Justice and a number of other named State bodies.

3) Authorisation by law

The Commission must report on whether the installation, operation and use of those telephone recording systems was authorised by law.

4) Recording of solicitor/client conversations

The Commission must establish whether any conversations between solicitors and their clients were recorded on the Garda telephone recording systems and, if recorded, whether the recordings were used for any purpose.

5) Improper / unlawful use of recordings

The Commission has been asked to establish whether any of the information obtained from the telephone recording systems was used improperly or unlawfully by An Garda Síochána.

6) Investigation of the death of Madame Sophie Toscan du Plantier

The Commission must investigate whether any recorded telephone calls relating to the Garda investigation of the death of Madame Sophie Toscan du Plantier, when considered in conjunction with other acts or events in the course of that investigation, disclose any evidence of unlawful or improper conduct by members of An Garda Síochána in connection with that investigation.

7) Recommendations



Sub-paragraph 1(q) allows the Commission to report on any other matters of concern arising from its investigation of Garda telephone recording and to make any further recommendations as it sees fit.

Each of these seven headings is reported on in the following chapters.

## 1.5. Methodology

- 1.5.1. The Interim Report of November 2014,<sup>22</sup> which was published by the Department of the Taoiseach on 16 January 2015, outlined the steps that the Commission had taken at that point to ensure a timely and thorough investigation. That Report described the database that had been established and the protocols that had been put in place, including the Rules and Procedures for the proper conduct of the investigation. The Commission had procured the appointment of liaison persons from bodies from whom it expected to require assistance and it had put in place the legal and administrative support necessary for the investigation.
- 1.5.2. The Interim Report of August 2015 dealt exclusively with sub-paragraphs 1(n) and 1(o) of the Terms of Reference of the Commission and requires no further elucidation here.
- 1.5.3. The Third Interim Report of the Commission was presented in November 2015. It outlined the reasons for requesting an extension of time, under section 6(6) of the Commissions of Investigation Act 2004, to 31 December 2016. That report identified the wide extent of the Commission's remit and the extensive nature of the investigation required of it:

“As outlined in the November 2014 Interim Report, sub-paragraphs 1 (a) to (l) of its Terms of Reference require the Commission to investigate the installation, authorisation, legality, operation, maintenance, repair, removal and replacement of telephone systems at an unspecified number of Garda stations over a period of more than 30 years. The Commission must also investigate the use, reporting, retention and destruction of telephone recordings and information obtained from telephone recordings, as well as reporting on the level of knowledge of the existence, operation and use of

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<sup>22</sup> This Interim Report may be accessed at: [www.taoiseach.gov.ie/Fennelly Commission Interim Report November 2014](http://www.taoiseach.gov.ie/Fennelly%20Commission%20Interim%20Report%20November%202014).

the said telephone recording systems within An Garda Síochána and in a number of State institutions.”<sup>23</sup>

1.5.4. In addition, the Commission was required:

“To investigate and report on the level of knowledge of the existence, operation and use of the said telephone recording systems within the Office of the Minister for Justice and Equality, the Department of Justice and Equality, the Office of the Attorney General, the Chief State Solicitor’s Office, the Office of the Director of Public Prosecutions, the Office of the Data Protection Commissioner and the Garda Síochána Ombudsman Commission.”<sup>24</sup>”

1.5.5. The final significant element of the investigations required in relation to the telephone recording issue is contained in sub-paragraphs 1(h) and 1(i) of the Terms of Reference, which require the Commission to establish whether any telephone conversations between solicitors and their clients were recorded by the telephone recording systems and whether any information from these recordings was used for any purpose whatsoever.

1.5.6. As stated in the Third Interim Report, the Commission considers this to be one of the most important elements of its work. Solicitor/client confidentiality is a cornerstone of our legal and judicial system. It is an important constitutional principle. Any taint of impropriety on the part of An Garda Síochána would be extremely serious. Chapter 10 of this Report deals with this issue.

1.5.7. Paragraph 1(m) of the Terms of Reference required the Commission to investigate telephone recordings made in Bandon Garda Station that had come to light in the course of compliance with the Discovery Order made in the civil action taken by Mr Ian Bailey against the Garda Commissioner and others<sup>25</sup>. In many respects, the extent and nature of the investigations required for this tranche of work were unknown until a full analysis of the recordings had been done.

1.5.8. It is an unusual aspect of the Terms of Reference of the Commission established by the Government Order of 30 April 2014 that it is expressly required to report on whether “the installation, operation and use of the said telephone recording systems was authorised by law.” Section 32(1) of the Commissions of Investigation Act 2004 provides:

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<sup>23</sup> Para 4.2 Interim Report November 2015.

<sup>24</sup> Para 1(f) Terms of Reference of the Commission.

<sup>25</sup> Case ref no: 2007/3424P.

“On the conclusion of its investigation, a commission shall prepare a written report, based on the evidence received by it, setting out the facts it established in relation to the matters referred to it for investigation.”  
[emphasis added]

- 1.5.9. That provision might appear to imply that a Commission of Investigation may only be asked to report on matters of fact. However, s. 3(1)(a) of the Act empowers the Government by Order to “establish a commission to investigate any matter considered by the Government to be of significant public concern.” The power of the Government is not, therefore, limited to establishing Commissions to investigate matters of fact. It is clear in principle that the lawfulness of any activity which is made the subject of investigation by a Commission is likely, in many cases, to be of paramount concern.
- 1.5.10. Consequently, the Commission sees no obstacle to its reporting, as best it may, on whether the installation and operation by An Garda Síochána of telephone recording systems in Garda stations was authorised by law. This does not, of course, imply that the Commission possesses any special authority to make declarations as to the lawfulness or otherwise of such activities. That is necessarily reserved to the courts. The Commission can do no more than report on its own view of the matter with the benefit of such legal expertise as is available to it.
- 1.5.11. The Commission reports on these aspects of its Terms of Reference in Chapter 9 of this Report. In the course of its examination of the matter of whether the Garda telephone recording systems were authorised by law, the Commission has considered the following areas of law in particular:
- a. The Common Law. The Commission reports on whether An Garda Síochána had the right at common law to operate such systems for recording the telephone conversations of those communicating with it on the telephone lines operated by it.
  - b. Statutory Power. The Commission reports on whether An Garda Síochána, being a body created by statute and exercising statutory power, had power conferred upon it by statute to operate such systems. As a corollary, the Commission has examined the question of whether members of An Garda Síochána, in operating such recording systems, committed the statutory offence of interception of

telecommunication messages created by s. 98 of the Postal and Telecommunications Services Act 1983 as amended by s. 13 of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993. To assist it in this task, the Commission has obtained the opinion of a distinguished lawyer practising at the English Bar on similar provisions in the law of England and Wales.

- c. The Constitution. The Commission reports on whether the operation by An Garda Síochána of the telephone recording systems infringed the constitutionally protected right to privacy of communications.
- d. European Convention on Human Rights. The Commission has considered in detail and reports on whether An Garda Síochána, as an “organ of the State,” by recording telephone calls of individuals violated their rights to “private and family life, ...home and... correspondence,” protected by the European Convention on Human Rights and Fundamental Freedoms through the portal of s. 3 of the European Convention on Human Rights Act 2003.
- e. Confidentiality of Communications: EU Law. Finally, the Commission reports on whether the operation of the Garda telephone recording systems was contrary to the principle of confidentiality of communications laid down by certain Directives of the European Community (now European Union), both by virtue of the principle of direct effect and as transposed into Irish law, or the provisions of Articles 7 or 8 of the Charter of Fundamental Rights of the European Union.

1.5.12. The Commission has engaged with legal experts both in this country and abroad to assist it in this work. This aspect of the investigation is dealt with in Chapter 9 of this Report.

## **1.6. Documentation**

1.6.1. As indicated at paragraph 1.2.13 above, the initial reaction of the Garda Commissioner when he was informed that recording of non-999 calls had occurred in Bandon and other Divisional Headquarters around the country was immediately to order that all such recordings cease. He expressed concern that such activity was occurring and stated that he had had no knowledge that such recording was taking place. The first intimation he had that An Garda Síochána was recording non-999 calls came on 8 November 2013

when he was briefed on the matter by the Head of Legal Affairs within An Garda Síochána, Mr Ruane.

1.6.2. As will be further outlined in Chapter 7 of this Report, the Garda Commissioner, the Deputy Commissioner, the Chief Administrative Officer and the Head of ICT in An Garda Síochána were each wholly unaware that this recording was happening.

1.6.3. The Commission requested all documentation relevant to its Terms of Reference from An Garda Síochána. The report of the then Interim Garda Commissioner, Ms Noirin O’Sullivan, which had been delivered to the Secretary General of the Department of Justice on 31 March 2014, and the further report dated 14 April 2014 were made available to the Commission. Both these reports contained appendices, which indicated the extent of the documentary evidence that was available. It was clear from these reports that An Garda Síochána themselves had relied on oral evidence from retired Gardaí in order to form a picture as to how recording had been introduced into Garda stations and why. It was significant that, although the recording systems were stated to have been in place from the mid-1970s, only two documents relating to this issue dated from before 1994.

1.6.4. In her report, Commissioner O’Sullivan stated:

*“In the 1980s, An Garda Síochána began to implement a system of recording ‘999’ emergency calls into Garda Divisional Headquarters Stations outside of the Dublin Metropolitan Area, to be in a position to adequately assess and deal with incidents such as 999 calls and bomb threats, which were occurring on a frequent basis at that time. Although currently there are no discovered documents to support this, this is understood to be the case because these views have been articulated by retired members of the Garda Telecommunications Section who have been contacted and spoken to.”*

1.6.5. From the perspective of the Commission’s work, this was a significant factor. It was apparent from an initial reading of the material provided by An Garda Síochána that recording of telephone calls had commenced sometime before 1980. However, it appeared predominantly to relate to 999 or emergency calls. In 1995, as a result of an upgrade of the recording system, greater capacity was added and recording on non-999 lines appeared to have become part of the system. However, the 1995 upgrade appears to have been regarded as a continuation of the system already in place, notwithstanding the significant policy shift in terms of recording calls other than 999 calls which was now established. There was no indication from the available documentation that the original

policy decision was revisited at this time. In reality, these early reports were based on limited material and their value was similarly limited.

- 1.6.6. Another important feature of the initial reports by An Garda Síochána was that the appendices that set out the DAT tapes that had been recovered and the telephone lines that appeared to be recorded were different for each Divisional Headquarters. There was no consistency nationally. This meant that the Commission had to examine each Division separately.
- 1.6.7. As the Commission pursued its investigations, it addressed a number of focused information requests to An Garda Síochána seeking information and documentation that might shed light on how the organisation had come to record calls in the first place. It needed, firstly, to establish the decision-making process within An Garda Síochána. It then sought to trace the actual decision-making which had led to the installation of voice-recording equipment in Garda stations. A series of Information Requests were sent to the liaison person appointed to the Commission, Assistant Commissioner Jack Nolan. The Commission wishes to record its gratitude to Assistant Commissioner Nolan for the efficiency, courtesy and timeliness of his responses to the more than sixty requests for information that were sent by the Commission. Many of these requests listed multiple documents that were required by the Commission. They ranged from requests for organisational charts, extensive Minutes and Agendas of Committees to procurement and specification documentation relating to telephone recording systems as well as contact details of members and former members of the force who might be in a position to assist the Commission in its investigations. Assistant Commissioner Nolan and his colleagues Inspector Majella Armstrong and Superintendent Michael Flynn were tireless in ensuring that the requests of the Commission were dealt with as a priority, which has allowed the work of the Commission to proceed with efficiency.
- 1.6.8. The Commission divided its work into four distinct tranches<sup>26</sup> and sent a series of letters to An Garda Síochána requiring documentation as it arose in the course of its investigations. Throughout 2014, and into 2015, many of these requests related to the letter of 10 March 2014 and the retirement of the Garda Commissioner in March 2014. At the same time, however, work was proceeding in relation to the general recording and solicitor/client issues.
- 1.6.9. Paragraph 1(m) of the Terms of Reference, which involved an investigation of the calls recorded in Bandon that had been discovered in the civil action brought by Mr Ian

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<sup>26</sup> (i) Terms of Reference 1(n) and 1(o); (ii) General Garda Recording; (iii) Solicitor/Client Calls, and (iv) Term of Reference 1(m)

Bailey against the Garda Commissioner and others, was necessarily deferred until after the verdict of the jury was returned in that case on the 30 March 2015.

1.6.10. The first Information Request to An Garda Síochána was sent on 10 June 2014. It is an illustration of the type of information request that was issued by the Commission. It requested a comprehensive range of information including:

- Names of all senior Garda members during the relevant period.
- Lists of all Garda Divisions from 1978 to November 2013.
- Data Protection documentation.
- A copy of all documents relating to the procurement, installation, operation, supervision, maintenance, removal and replacement of telephone recording systems at Garda stations during the relevant period. In particular, the Commission requested documents relating to: Policy; Operation and Staff Training; Finance; Supervision and Audit; Repair and Replacement; and, finally, Information Storage, Dissemination and Destruction.

1.6.11. This Information Request was responded to by An Garda Síochána in a series of 11 letters, which dated from 19 June 2014 to 20 July 2015. This correspondence provided far more documentation than had been originally available. It was a valuable resource for the Commission but necessarily led to other lines of inquiry and further requests. This material is referred to throughout this Report as appropriate. A total of 69 specific Requests have been sent to An Garda Síochána seeking additional information and these have all been responded to.

1.6.12. In her second report to the Department of Justice dated 14 April 2014, Commissioner O’Sullivan outlined the Governance structures that were in place during the relevant period. She said that a Radio Advisory Committee had been in place in the 1970s, 1980s and into the early 1990s and that this had been replaced by an Information Technology and Telecommunications Committee in 1994. Significantly, the terms of reference of this Committee were related to the directing, monitoring and controlling of Information Technology and Telecommunications policy, strategy and implementation for the Garda Síochána, subject to the direction of the Commissioner and the approval and sanction, as required, of the Minister for Justice.

1.6.13. Given the paucity of documentation available from An Garda Síochána from the 1970s and 1980s, the Commission, by letter dated 23 October 2014, asked the Department of Justice to search its archives for material that might help identify how, and by whom, the decision to record at Garda stations was made. In particular, the Commission sought

copies of documents relating to the operation of telephone recording systems in Garda stations for the period 1 January 1980 to 27 November 2013. The Commission also requested documents relating to the approval of expenditure on any equipment intended to provide such recording. Mr Shane O'Connor of the Department of Justice sent a comprehensive response to this Request on 3 December 2014 enclosing some 350 documents which contained much valuable information. These documents are referred to throughout this Report as appropriate.

- 1.6.14. In addition to ascertaining the policy decisions that gave rise to the implementation of phone recording, the Commission was also concerned to clarify how the recordings operated in practice. It had already been established from the initial Garda reports that there was no single operational template that applied across the country. Each Divisional Station appeared to have developed its own practices with regard to recording and accessing telephone calls. It was also apparent that there was almost no documentary evidence of any significance available to the Commission. It was, therefore, necessary to interview personnel from each Divisional Station and, through this process, develop an overview of what had occurred over the three decades of the Commission's designated timeline.
- 1.6.15. A total of 134 hearings of witnesses were conducted by the Commission at its offices from June 2014 to January 2017, in accordance with the provisions of the Commissions of Investigation Act 2004. Witnesses were invited to attend to give evidence. The Commission did not need to exercise its powers of compellability under Section 16(1)(a). Generally, it was able to conduct its investigations "as expeditiously as a proper consideration of the matter ... permits".<sup>27</sup> Of the total of 134 hearings, 40 were held in relation to sub-paragraphs 1(n) and (o) of the Terms of Reference, 75 in relation to the general Garda recording issue, and 19 regarding the Bandon investigation. Some witness interviews were relevant to all three issues.
- 1.6.16. Witnesses were heard in private and were asked to take an oath or affirm. A full transcript of the hearing was taken for the purposes of the investigation. Prior to every hearing, witnesses were furnished with a copy of the Rules and Procedures that had been adopted by the Commission. Where possible, witnesses were given advance notice of the matters about which they were to be questioned. Furthermore, any evidence or material that the Commission believed should be disclosed to them in accordance with Section 12 of the 2004 Act was provided. With very few exceptions, witnesses did not exercise their right to be represented at hearings. In no instance, did any person seek to be permitted to cross-examine a witness.

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<sup>27</sup> Commissions of Investigation Act section 10(4).



- 1.6.17. Prior to 1978, appointments to the Telecommunications Section within An Garda Síochána were made from the general force and members were trained into the area. From the 1980s onwards, however, individuals were recruited into the force as qualified technicians and were provided with some police training.<sup>28</sup> This was in response to the growing reliance by the organisation on technology and based on an appreciation that this reliance would grow into the future. A total of 28 such technicians were recruited at this time. After initial training in Templemore Garda College, they were distributed across the 23 Divisional Stations that were in existence at that time. These local technicians were responsible for the maintenance and operation of the recording systems. It is significant that, over 35 years later, many of these technicians were still working in An Garda Síochána and many of them had been in the same Division for most of that time. This gave the Commission access to a very valuable source of institutional memory and allowed it to form a comprehensive picture of how the system had developed in each Division. It also allowed the Commission to identify Divisions where problems were likely to have occurred. The Commission contacted a total of 42 technicians. Their evidence is drawn on throughout this Report but is particularly pertinent to Chapters 3, 4, 5 and 6.
- 1.6.18. In addition, the Commission contacted a total of 89 Garda witnesses. These were members whose names had appeared in documentation or who had been identified to the Commission as having insight into the recording issue. The evidence from these witnesses is relied on throughout this Report where appropriate.
- 1.6.19. Apart from these specific targeted witnesses, the Commission used questionnaires and surveys to inform itself as to the general level of knowledge within An Garda Síochána. These surveys are covered in detail in Chapter 7 of this Report.
- 1.6.20. The issue of solicitor/client calls was investigated very thoroughly by the Commission. This necessitated spending significant time periods checking telephone numbers against the NICE database in Garda HQ. The Commission wishes to acknowledge the co-operation, courtesy and assistance provided by Superintendent Michael Flynn, Inspector Thomas O’Dea, Mr Derek Melia, Garda Ian Hutchinson and Mr John McMullen of Sigma Ltd., the private contractors who installed and maintain the NICE system on behalf of An Garda Síochána.

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<sup>28</sup> The mechanism to do this was Regulation 7 of the Garda Appointments Regulations and then since 1990 Regulation 14 of the Garda Appointments Regulations was used.

- 1.6.21. Much of the material being investigated by the Commission is historical. Consequently, it has been necessary to contact retired members of the force to procure a considerable proportion of the information relied on in this report. It was a matter of concern to the Commission that the body that represents retired members of the force felt unable to co-operate with the work of the Commission when it sought to invite retired members to participate in a survey on the level of knowledge of these former officers. Commissions of Investigation such as this one, established under the Commissions of Investigation Act 2004 require assistance and co-operation from all interested parties if they are to perform the public duty they are charged with. This matter is dealt with in Chapter 7.
- 1.6.22. Through this process of collating evidence and documents, the Commission is satisfied that it has succeeded in providing a reasonably comprehensive and quite detailed account of the general recording issue. Despite this, there are, inevitably, serious gaps. After such a long interval since the commencement of recording, many of those responsible have retired or are deceased. In addition, many have had difficulty recollecting events and many documents have been unavailable. Nonetheless, the most significant lacunae do not derive principally from these causes. It is a very striking fact that the Commission has been unable to uncover any evidence at all concerning the central questions related to the initiation of the recording of telephone calls at Garda stations. It has seen no evidence of consideration of relevant policy, none at all regarding the lawfulness of what was being done and no internal administrative documents concerning the rules to be applied in operating the systems. These matters are explained in the relevant chapters of the Report.
- 1.6.23. The Commission has set out its findings in some detail, firstly, as a historical record but, more importantly, in order to shed light on management and organisational practices within An Garda Síochána.

## 2. An Garda Síochána: History and Structure

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### 2.1. History of An Garda Síochána

- 2.1.1. The Garda Síochána was established by the Irish Free State pursuant to the *Gárda Síochána Act of 1924*<sup>29</sup> (“the 1924 Act”), as a force to replace the Royal Irish Constabulary (RIC). Section 19 of the Act states that all references to the Royal Irish Constabulary in any statute, order or regulation should be construed as a reference to the Garda Síochána. The Act established the structure of the force, which has continued, with some modifications, to today. Schedule 1 of the Act sets down the order of hierarchy for officers and ‘rank and file’ members. Officers included all ranks of Commissioner, Surgeon and Superintendents. Non-commissioned ranks consisted of Sergeants and Guards.
- 2.1.2. In his book, ‘Guardians of the Peace’,<sup>30</sup> Conor Brady describes as “*really significant*” the decision of the Provisional Government at the time that the Garda Commissioner should be directly responsible to the Government rather than to a police authority, as was the case with British Police forces. In this regard, the Garda Síochána mirrored the structure of the Royal Irish Constabulary, which had, since the passing of the Constabulary (Ireland) Act 1836, been controlled by an Inspector General who was directly responsible to the Lord Lieutenant and the Chief Secretary.<sup>31</sup> In 1839, it established a central depot in the Phoenix Park which was then outside Dublin. According to Brady, the City of Dublin developed its own police force in “*quite a different idiom*”. It was an unarmed civil force dedicated to the preservation of life and property and to the prevention and detection of crime. Unlike areas outside Dublin policed by the RIC, the Dublin Metropolitan Police (DMP) force was not primarily concerned with political unrest or intrigue.
- 2.1.3. Section 6 of the 1924 Act dealt with the geographical distribution of the force. Subsection (1) stated: *The Gárda Síochána shall be distributed and stationed throughout Saorstát Eireann in such manner as the Minister shall from time to time direct.*”

Section 2 vested the general direction and control of the Garda Síochána in the Garda Commissioner, subject to regulations made by the Minister under the Act:

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<sup>29</sup> At some point the fada on the ‘a’ in Garda was dropped in official documents but it was used in this early legislation.

<sup>30</sup> Guardians of the Peace, Conor Brady Gill and MacMillan Ltd. 1974, p.,44.

<sup>31</sup> Ibid p.9.

*“The general direction and control of the Garda Síochána shall...., be vested in the Commissioner of the Garda Síochána, who shall, from time to time be appointed, and may at any time be removed, by the Executive Council”<sup>32</sup>*

The Executive Council was empowered under Section 3 to appoint a Deputy Commissioner and Assistant Commissioners:

*“to assist the Commissioner in the direction and control of the Garda Síochána and to exercise such functions in that behalf as the Commissioner shall, subject to regulations made by the Minister under this Act, assign to them respectively.”*

All of these were office holders<sup>33</sup> who could be removed by the Executive Council at any time.

- 2.1.4. The Act proceeds to distinguish between members who were to be appointed by, and could be dismissed by, the Executive Council and those who were to be enrolled and dismissed by the Garda Commissioner.<sup>34</sup>
- 2.1.5. The First Schedule to the Act lists the ranks of Commissioner, Deputy Commissioner, Assistant Commissioners, Surgeon, Chief Superintendents, Superintendents and Inspectors as Officers. The non-commissioned ranks are listed as Sergeants and Guards.

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<sup>32</sup> S. 2 The Garda Síochána Act 1924

<sup>33</sup> Section 3. (2) also provided for the position of Surgeon of the Garda Síochána who was to be appointed by the Executive Council.

<sup>34</sup> Section 4.(1) stated:

“The officers of the Garda Síochána shall be divided into the several ranks specified in the First Schedule to this Act, and all such officers below the rank of Surgeon shall be appointed and may at any time be dismissed, or reduced to the rank of sergeant or guard, by the Executive Council, and may be from time to time promoted, degraded or suspended by the Commissioner in accordance with regulations made under this Act but it shall not be lawful for the Commissioner to degrade any officer to the rank of sergeant or guard.

(2) The men of the Garda shall be divided into the several ranks specified in the First Schedule to this Act, and shall be enrolled and appointed and may be from time to time promoted, degraded, suspended or dismissed by the Commissioner in accordance with regulations made under this Act.”

- 2.1.6. In 1925, the DMP and the Garda Síochána were amalgamated under the name An Garda Síochána by the Police Forces Amalgamation Act, 1925. This introduced the rank of Station Sergeant in addition to the other ranks identified in the 1924 Act.
- 2.1.7. The amalgamation of the two forces gave the then Minister for Justice, Kevin O’Higgins, an opportunity to address the growing problem of armed crime in rural areas. Although he was determined to maintain an unarmed police force in the country, an armed detective branch was formed. This branch was divided into two sections: Crime Ordinary, for non-political crime, and Crime Special, for political offences. This latter section became known as the Special Branch, or S Branch. Members of this armed branch of An Garda Síochána were known as Detective Officers.<sup>35</sup> In 1958, the Garda Síochána Act admitted women into the force for the first time.
- 2.1.8. For the first fifty years of its existence, almost all roles within An Garda Síochána were filled by members of the force. However, from the 1980s onwards, increasing civilian recruitment occurred and this was especially the case in the area of Information and Communications Technology (ICT).

## **2.2. Structure within An Garda Síochána**

- 2.2.1. An Garda Síochána publishes a Garda Code, which outlines the organisational structures and procedures to be applied to all aspects of policing in the State. The Garda Code is a confidential document and is not available to the public. The Commission was furnished with a copy of the Code, which had been published in November 1995. This was the Code’s fourth edition and it replaced the previous edition, published in December 1984. The most recent edition was published in 2005.
- 2.2.2. The 1995 version of the Garda Code, which was the relevant version during the establishment of the Digital Audio Tape (DAT) system and the investigation of the death of Madame Sophie Toscan du Plantier, was published in two very large volumes. Volume 1 consists of 40 chapters and “relates to managing a modern police service”. Chapter 2 outlines the organisational structure of An Garda Síochána as of 1995. The basic Garda ranks are the same as were established in 1925, comprising Commissioner, Deputy Commissioner, Assistant Commissioner, Surgeon, Chief Superintendent, Superintendent, Inspector, Sergeant and Garda. The organisation is divided into Branches with specific roles and responsibilities. This is best illustrated by a chart of the Branch structures and their functions:

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<sup>35</sup> Guardians of the Peace. Conor Brady. Gill and MacMillan. At page 132 *et seq.*

<b>Commissioner</b>			
Private Secretary		Personal Assistant	
<b>Deputy Commissioner</b>		<b>Deputy Commissioner</b>	
“A” Branch	“B” Branch	“C” Branch	Regional
<b>Assistant Commissioner</b>	<b>Assistant Commissioner</b>	<b>Assistant Commissioner</b>	<b>Assistant Commissioner</b>
Finance and Services	Personnel Training and Research	Crime and Security	Operations

Chart of Branch Structures and their functions

- 2.2.3. The division of An Garda Síochána into Branches provided a clear demarcation of function and responsibility within the organisation. The division of function that is introduced at Deputy Commissioner level is between matters that are described as Administrative and matters that are deemed operational, each of which is supervised by a Deputy Commissioner. According to the Garda Code<sup>36</sup>, both Deputy Commissioners advise the Commissioner on policy matters but, after that, their functions are clearly distinct.
- 2.2.4. The Deputy Commissioner in charge of Administration has responsibility for Administrative policy and planning, Budgetary determination, and Inspectorate and Organisational development. Reporting to the Deputy Commissioner Administration is the Assistant Commissioner with responsibility for Finance and Services. According to the Garda Code, Information Technology and Telecommunications are designated as “Services” and, accordingly, are the responsibility of the Assistant Commissioner, “A” Branch.
- 2.2.5. The Deputy Commissioner for Operations has responsibility for Community Policing, Cross Border and Anglo Irish Affairs, and Operational Policy Matters and Tactical Planning. Reporting to the Deputy Commissioner Operations is the Assistant Commissioner Crime and Security, “C” Branch. In 1995, this Branch was divided into 6 sections led by a Chief Superintendent. These were: Crime, Security International Liaison Office (ILO), Community Relations, National Drugs Unit and Garda Bureau of Fraud Investigation.
- 2.2.6. This was the structure of the organisation that was in place when the systematic recording of non-999 calls commenced in Divisional Stations outside the Dublin Metropolitan Area. The Commission believes that this structure was a significant factor in how that recording practice continued in An Garda Síochána for over 30 years without senior members of the force being aware of the practice.
- 2.2.7. Although the provision and supply of Information Technology (IT) and Telecommunications services was the responsibility of A Branch, the actual use of the facility in day-to-day policing was the responsibility of C Branch. In the course of its investigations, the Commission spoke with numerous Gardaí, both retired and still serving, who had been involved in the acquisition and installation of the DAT system in 1995. A question consistently asked by the Commission was who authorised the extension of telephone recording to lines other than 999 lines.

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<sup>36</sup> Garda Code, 1995, para 2.2.

Whilst the majority of witnesses were clear that the instruction to install the lines was an administrative decision, when it came to identifying where responsibility lay for developing an appropriate policy, there was no clear view. Some said that policy was an operational matter, whilst others said that policy in Telecommunications was developed within the ICT section which fell under the Administration Branch. Chapters 4, 5 and 6 of this Report look at this issue in detail.

- 2.2.8. Over the years, the basic division of Administration and Operations has remained, although the management structure within that framework has become significantly more diversified and specific. In her evidence before the Commission, Garda Commissioner Nóirín O’Sullivan described the new structures that had been put in place under her stewardship. She opened to the Commission a document entitled “An Garda Síochána Modernisation and Renewal Programme 2016-2021”. This document sets out a comprehensive five-year programme for An Garda Síochána. The first area for reform is identified as “Organisational Structure and Design”. The expected outcome from this initiative is “an effective and efficient organisation structure, and clarity of associated resource requirements to deliver policing and security services...”<sup>37</sup>. It is proposed to achieve this by providing greater oversight and governance and by devolving more responsibility and accountability to the 6 regions.

### **Geographical Organisation of An Garda Síochána**

- 2.2.9. In 1996, a reorganisation of Garda structures occurred with the establishment of 6 regions: the Dublin Region, Eastern, Northern, Southern, South Eastern, and Western regions. Each region was to be commanded by a regional Assistant Commissioner. According to the Garda Code, the duties of the regional Assistant Commissioners are purely operational: “They will be responsible for ensuring the operational efficiency of their respective regions and in particular for the quality of operational management exercised by their respective District and Divisional Officers.”<sup>38</sup>
- 2.2.10. Each of the regions is divided into Divisions commanded by a Chief Superintendent (Divisional Officer).

In turn, the Divisions are divided into Districts commanded by a Superintendent (District Officer). The Districts are divided into Sub-Districts, which are each the

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<sup>37</sup> An Garda Síochána Modernisation and Renewal Programme 2016-2021, p.13.

<sup>38</sup> Garda Code, 1995, para 2.2.



responsibility of a Sergeant. Each Sub-District usually has one Garda station. The number of Officers attached to each station may vary from 3 to 100.

- 2.2.11. This organisational structure is important because outside the Dublin Metropolitan Area, it was only Divisional Stations that had 999 answering services installed and it was only in these stations (along with Command and Control, Harcourt Square) that voice recording occurred.

There were 23 Divisional Headquarters identified in the 1995 Garda Code and these Divisions have remained broadly the same over the following 20 years.

	Garda Divisions	Divisional Headquarter Stations
1)	Carlow/Kildare	Naas
2)	Cavan/Monaghan	Monaghan
3)	Clare	Ennis
4)	Cork East	Anglesea Street
5)	Cork West	Bandon
6)	Donegal	Letterkenny
7)	Dublin Metropolitan (North Central)	Fitzgibbon Street
8)	Dublin Metropolitan (North)	Santry
9)	Dublin Metropolitan (South Central)	Harcourt Square
10)	Dublin Metropolitan (South)	Crumlin
11)	Dublin Metropolitan (East)	Dun Laoghaire
12)	Galway West	Mill Street
13)	Kerry	Tralee
14)	Laois/Offaly	Portlaoise
15)	Limerick	Henry Street
16)	Longford/Westmeath	Mullingar
17)	Louth/Meath	Drogheda
18)	Mayo	Castlebar
19)	Roscommon/Galway East	Roscommon
20)	Sligo/Leitrim	Sligo
21)	Tipperary	Thurles
22)	Waterford/Kilkenny	Ballybricken
23)	Wexford	Wexford

Of these 23 Divisional Headquarters, 17 – i.e. all those outside the Dublin region, numbered 7 to 11, – had voice-recording equipment installed.

Over the course of the relevant period for this Commission, the designations of Divisional Stations varied somewhat. For example, up to 1989, Drogheda had been the Divisional Headquarters for the Louth / Meath region. This was changed to Dundalk in 1989 and was returned to Drogheda in 1996. Fermoy became a Divisional Headquarters for the Cork North Division in 1998. Bray and Navan were added as Divisional Headquarters in 2008 following the formation of the new Wicklow and Meath Divisions. The Division of Carlow / Kildare was changed in 2009 to become the Kildare Division and the Carlow / Kilkenny Division.

- 2.2.12. Each of these Divisional Headquarters developed its own practices around telephone recording. These appeared to grow organically in many Divisions and do not appear to have been directed by Garda Headquarters in any meaningful way. Chapters 4, 5 and 6 explore this in greater detail by examining each Division in turn.
- 2.2.13. Commissioner O’Sullivan outlined the dual governance that operated in a Divisional Station. She distinguished between the “*policing operations*” of the Division, which involved the day-to-day management of all aspects of work carried out and in which the Divisional Chief Superintendent was largely autonomous, and the “*administrative*” function, which related to infrastructure and estate management. She said that technology fell into the latter category. She said that it had come as a surprise to discover that there was no record, even in the Telecommunications Section, of changes being introduced by Chief Superintendents. She said that she would have expected that, if lines were being moved or added on, even if it was just that the Control Room was moving to a different room, there would be some record of this at Headquarters.
- 2.2.14. Information and Communications Technology (ICT), which includes the Telecommunications Section, still comes under the “Administration” side of An Garda Síochána. However, as will be seen in Chapter 7, which examines the extent of knowledge in An Garda Síochána of telephone recording, the distinction between what is administrative and what is operational is not always clear-cut and there can be a lack of communication between the two sides of the organisation. This was a crucial factor in the failure to follow up on the ruling of the Circuit Criminal Court in the Holness case in 2011, as is outlined in that chapter.
- 2.2.15. ICT, including Telecommunications, is under the control of Assistant Commissioner A Branch, Finance and Services. In 2009, a lay person, Mr Liam Kidd, was appointed Head of ICT. Prior to his appointment, ICT had been directed by an Assistant

Commissioner with day-to-day responsibility under the control of a Chief Superintendent.

- 2.2.16. One of the issues that the Commission is required to report on is whether the recording systems in use were “authorised by law”. This is fully considered in Chapter 9 of this Report. In that context, the Commission has not seen any evidence that the lawfulness of the proposed systems was ever considered. Two questions arise from this: (i) Should these systems have been considered from the perspective of lawfulness? And, (ii) who should have considered this question?
- 2.2.17. Commissioner O’Sullivan referred to the Committees that had oversight of ICT planning – the Radio Advisory Committee and its successor, the IT and Telecommunications Committee. She said that she would have expected that these Committees, which were made up of various individuals from the Departments of Justice and Finance, as well as senior Gardaí, were probably where such issues would have been discussed. The Committee should have seen the wider implications of the expanded system that was being proposed and should have exercised oversight and governance and brought the matter to the attention of the Commissioner.
- 2.2.18. The Commission spoke with five former Commissioners and none of them was in a position to outline clearly how the policy and legal considerations arising from the new enhanced system installed in 1995 should have been dealt with. Commissioner O’Sullivan addressed this. She said in the course of her evidence:

*“ I think what is very clear to me from an organisational perspective, ... it is the issue of, I will call it, the lack of cohesion of the governance between the various sections. So, therefore, that something could actually be created and generated from one section, so in this case Telecommunications, and I would think for all of the right reasons, so there needed to be an upgrade of the systems. But then that without having the oversight and the governance to actually say what are the broader implications here from a legal perspective, from a policy perspective, from a corporate perspective, where are the codes of practice and where are the standard operating procedures that need to be around these? Then the oversight of the implementation of those down nationally and right across the divisions in this case and the districts. So where is the codified governance around that? I have to apologise on behalf of the Organisation to the Commission because that isn't obviously available, but I think by today's standards we would be approaching it in a very different way, that actually it would go up to one of our governance boards so they would actually be looking at the various elements of the operating model, what*

*needs to be there, the legal, the policy, the whole code of practice around it and then the oversight and governance arrangements, who has the responsibility and the accountability.*

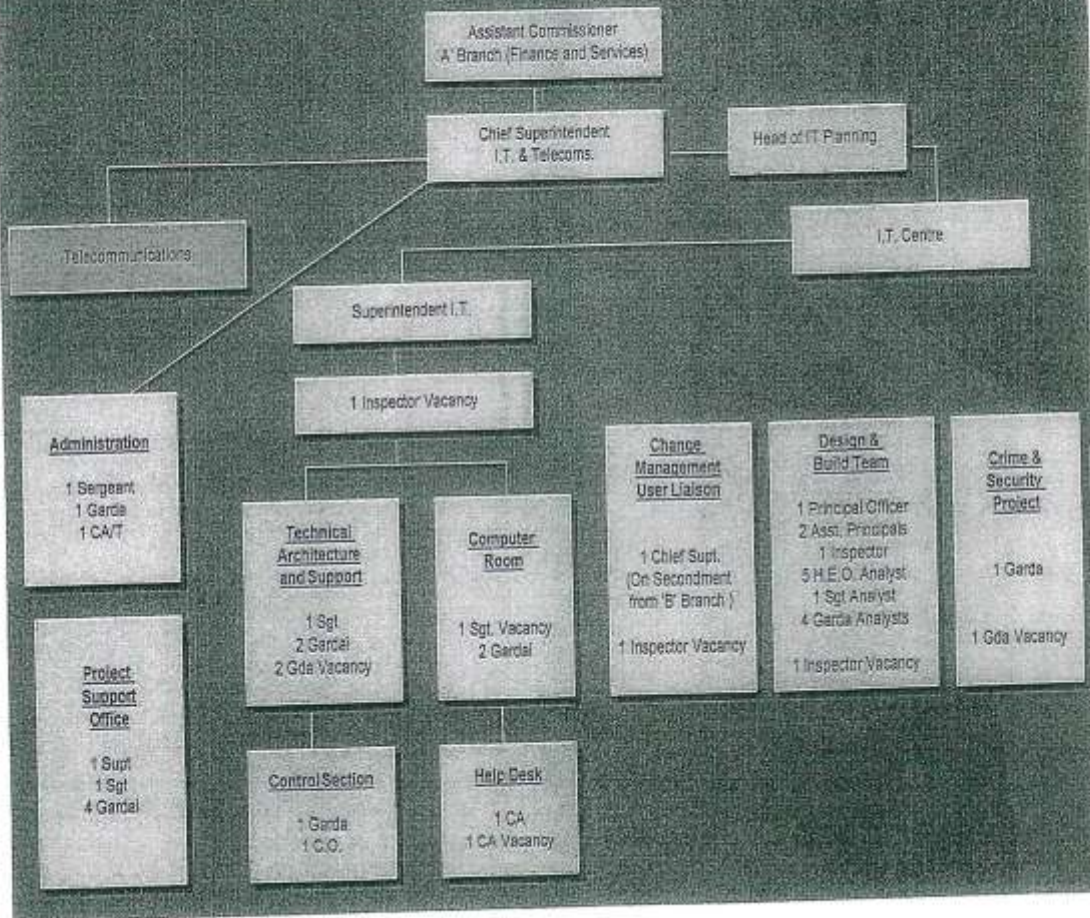
- 2.2.19. In conclusion, Commissioner O’Sullivan expressed the view that the development of the DAT system was dealt with as a Telecommunications issue as opposed to an issue for the organisation as a whole.

**Information and Communications Technology (ICT)**

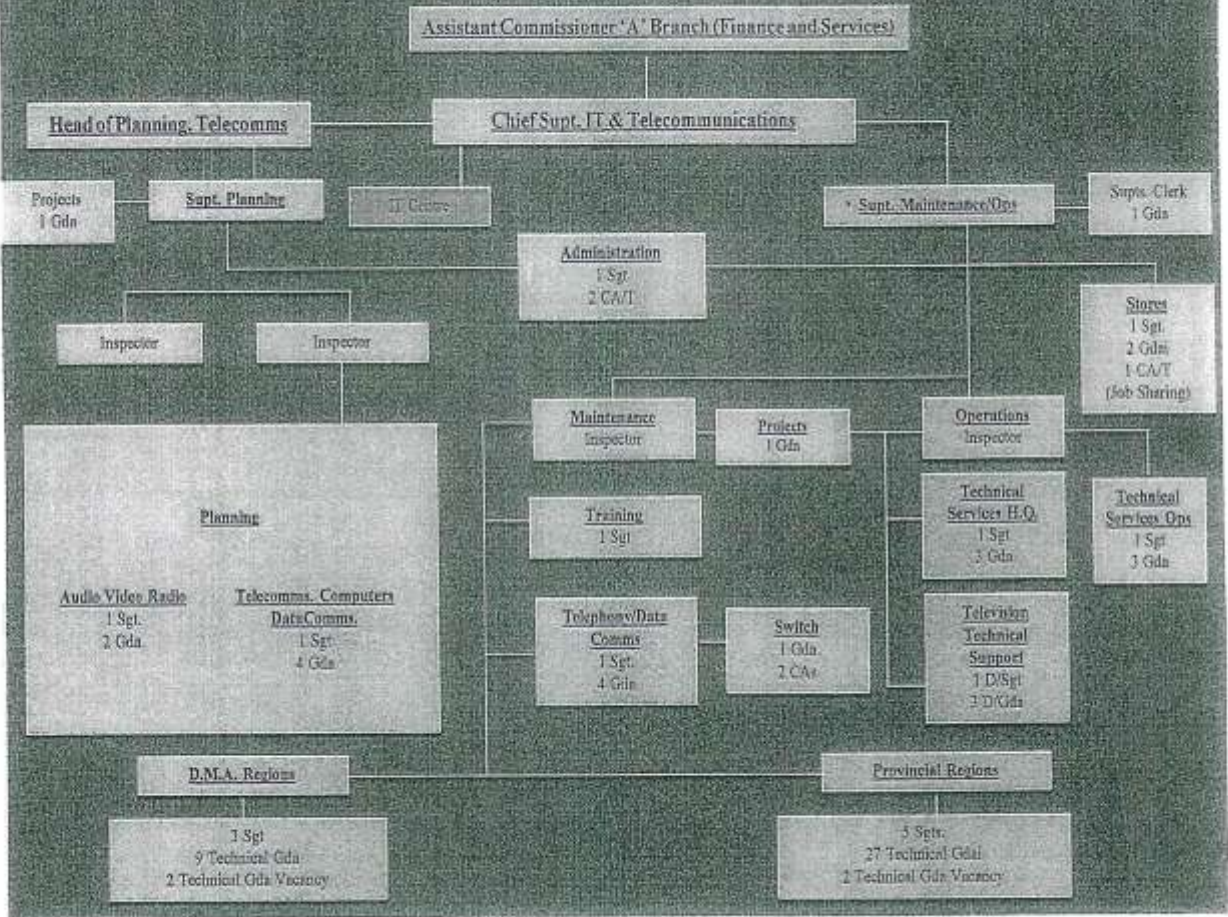
- 2.2.20. All matters relating to Telecommunications come under the control of the ICT Unit in An Garda Síochána. In 1995, when non-999 recording appears to have been first introduced into Divisional Stations, the Telecommunications Section within An Garda Síochána was the responsibility of the Assistant Commissioner, “A” Branch (Finance and Services). This, in turn, was divided between Planning and Maintenance. The IT Unit came within the Planning section.

A staff chart of the Garda I.T. Centre and a staff chart of the Telecommunications Section, both dating from 1995, are useful guides to the personnel involved in both sections at that time.

# STAFF CHART GARDA I.T. CENTRE.



# STAFF CHART TELECOMMUNICATIONS SECTION



2.2.21. The Telecommunications Section was positioned under the Administration Division, with the Chief Superintendent IT & Telecommunications reporting to the Assistant Commissioner “A” Branch (Finance and Services). Decisions on what equipment to buy were made by this section. Once the equipment was installed, it became the responsibility of local management to use it appropriately. This raises four questions:

- (i) To what extent did senior Garda management within Administration and, ultimately, the Garda Commissioner have competence to make decisions regarding expenditure on equipment and to what extent did the Department of Justice and the Department of Finance influence or direct that expenditure?
- (ii) Whose responsibility was it to develop policy around Garda equipment? Was it the Department of Justice or Senior Management in An Garda Síochána; or, a combination of both?
- (iii) Whose responsibility was it to ensure that activity engaged in by An Garda Síochána was lawful?
- (iv) Once equipment was provided to operational Gardaí, what responsibility did they have for ensuring that appropriate policies were in place and that the activity they were engaged in was lawful?

All of these issues are addressed in the chapters that follow but a preliminary question that is now addressed is the role of the Department of Justice in decision-making within An Garda Síochána and the extent to which policy and legality are issues that come within its remit.

## **2.3. The Department of Justice**

2.3.1. Section 2 of the 1924 Act states that “The general direction and control of the Garda Síochána shall, subject to regulations made under this Act, be vested in the Commissioner of the Garda Síochána, who shall from time to time be appointed, and may be removed, by the Executive Council”.

2.3.2. Section 16 sets out the power of the Minister:

“The Minister may from time to time, subject to the approval of the Executive Council, make regulations in relation to all or any of the matters following, that is to say:-

- a) The admission, appointment, and enrolment, of members of the Garda Síochána;
- b) The promotion, retirement, degradation, dismissal and punishment of members of the Garda Síochána;
- c) The duties of the several ranks of the Garda Síochána;
- d) The maintenance, training, discipline and efficiency of the Garda Síochána; the formation of representative bodies of members of the Garda Síochána;
- e) Any other matters or thing relating to the internal management of the Garda Síochána.

2.3.3. These provisions are replicated in sections 8 and 14, respectively, of the 1925 Act which amalgamated the Dublin Metropolitan Police with the Garda Síochána.

2.3.4. The 1925 Act was effectively the governing legislation that established the respective roles of the Garda Commissioner and the Minister for Justice until the enactment of the Garda Síochána Act 2005 (“the 2005 Act”). Chapter 3 of the 2005 Act outlines in greater detail the roles of the Minister for Justice and the Garda Commissioner.

2.3.5. Section 20 of the 2005 Act describes the role of the Minister and provides that he or she may, following consultation with the Garda Commissioner, determine priorities for the Garda Síochána.

2.3.6. Section 26(1) confers the following functions on the Garda Commissioner:

- a) “To direct and control the Garda Síochána;
- b) To carry on and manage and control generally the administration and business of the Garda Síochána, including by arranging for the recruitment, training, and appointment of its members and civilian staff;
- c) To advise the Minister on policing and security matters;
- d) To perform any other functions that are assigned to him or her by this Act or that may, by regulation, be assigned to him or her.”

2.3.7. As part of its inquiries into the role of the Department of Justice and Equality in decision making within An Garda Síochána and the extent to which policy and legality are issues that come within its remit, the Commission heard evidence from Deputy Secretary General of the Department of Justice and Equality, Mr Ken O’Leary, and from Mr Shane O’Connor, an Assistant Principal in the Garda Division



of the Department of Justice and Equality, with particular responsibility for Finance and Information and Communications Technology (ICT) related resources.

- 2.3.8. The representatives of the Department of Justice learnt about what equipment An Garda Síochána intended to purchase through their business cases to the Department seeking funding. Mr O'Connor told the Commission that the Department representatives did not always feel comfortable second-guessing An Garda Síochána, when it came to operational matters.
- 2.3.9. Mr O'Leary told the Commission that the Department of Justice did not have a role in the monitoring of the operation of a system to ensure that it was being operated lawfully by An Garda Síochána. No consideration would be given to the lawfulness of an operation unless, on the face of it, it raised substantial legal issues. If An Garda Síochána submitted applications to the Department of Justice for the purchase of equipment, the Department would operate on a presumption of legality and that whatever equipment was provided would be operated lawfully. As the Department does not have its own legal section, it relies on the services of the Attorney General for interpretations of the law. Reliance was placed by the Department of Justice officials on the fact that An Garda Síochána had its own legal section, which could provide guidance on the legalities of recording phone calls. The staff of the Department of Justice considered that these legalities would have been considered before any proposal was made to the Project Board. Mr O'Connor regarded his competencies within the Project Board as being focused on the scrutiny of documents from a value for money and due diligence perspective.
- 2.3.10. Chapter 8 of this Final Report deals with the extent to which the Department of Justice had, or should have had knowledge of the voice recording systems installed in Divisional Stations. It is clear from the governing legislation that whilst the Minister has a role in relation to certain administrative matters, the day to day policing requirements of the force are not areas that the Minister would be expected to be involved in.

### 3. TELEPHONE RECORDING SYSTEMS IN AN GARDA SÍOCHÁNA

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#### 3.1 INTRODUCTION

3.1.1. Paragraph 1 of the Commission’s Terms of Reference commences:

“The Commission is directed to investigate and to make a report to the Taoiseach ... on the operation of Garda Síochána telephone recording systems and on the following matters in particular...” [emphasis added]

This opening paragraph, which in effect defines the matter “considered to be of significant public concern” by the Government, refers simply to Garda telephone recording systems; it makes no distinction as to the kind of telephone calls being recorded on those systems.

3.1.2. There then follows a series of sub-paragraphs, the first of which (paragraph 1(a)) introduces a more particular focus, requiring the Commission to identify:

“...all Garda stations in which telephone recording systems, to record calls other than 999 calls to the Emergency Call Answering Service, were installed and / or operated by An Garda Síochána between 1<sup>st</sup> January 1980 and 27<sup>th</sup> November 2013...” [emphasis added]

Sub-paragraph 1(b) asks the Commission to carry out further tasks in relation to the “telephone recording systems... referred to at (a) above...” It is clear that references to “the said telephone recording systems” in the remaining sub-paragraphs are also intended to mean systems installed and operated with the intention of recording calls that were not 999 calls.

3.1.3. For the purposes of clarity, it should be stated that the “telephone recording systems” being investigated by the Commission are limited to those installed by An Garda Síochána in Garda stations. The Commission has interpreted this to include systems installed in buildings used by An Garda Síochána that were not Garda stations in the ordinary sense of the term, such as Dublin Castle and Harcourt Square, Dublin. To do otherwise would result in the entire Dublin Metropolitan Area (DMA) being effectively excluded from this Report. In light of the fact that “the operation of Garda telephone recording systems” has been designated a matter of significant public concern by the

Government, the Commission is satisfied that it cannot exclude those systems from its investigation. The Commission also considers that the history and development of Garda telephone recording systems cannot be properly understood without reference to the systems operated in Dublin Castle and Harcourt Square.

- 3.1.4. The Commission’s investigation does not extend to the use of temporary recording for specific purposes of surveillance or interception, pursuant, for example, to authorisations given under s.2 of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993.
- 3.1.5. As a matter of fact, the Commission has found no evidence of any systems having been set up by An Garda Síochána to record non-999 calls exclusively. Insofar as the recording of non-999 calls has taken place, it has occurred in the context of systems that also recorded 999 calls and / or Garda radio traffic. Accordingly, the bulk of this Report is concerned with systems in which 999 calls, radio traffic and non-999 calls were recorded by An Garda Síochána, within the timeframe set out in sub-paragraph (a) – that is, 1 January 1980 to 27 November 2013.
- 3.1.6. Before proceeding to consider the history of Garda telephone recording systems during the relevant period, it is necessary to define what is meant by “a 999 call” in the context of the Terms of Reference. In this Report, when the Commission uses the phrase, “999 call”, it is referring to a call received on lines that are dedicated solely to receiving 999 / 112<sup>39</sup> calls. The phrase, “emergency call”, on the other hand, is used in a broader sense, to include calls of an emergency nature that may or may not come in on dedicated 999 lines.
- 3.1.7. During the period with which the Commission is concerned, all calls to 999 or 112 were answered in the first instance by operators working for the telephone company responsible for the network. These operators would then transfer the call to whatever emergency service was required – fire, ambulance, police or coast guard.<sup>40</sup>
- 3.1.8. The distinction between a 999 call and an emergency call is significant for two reasons. Firstly, not all 999 calls are, in fact, of an emergency nature; some callers have used 999 as a means of contacting An Garda Síochána about non-emergency matters. Secondly, and perhaps more importantly, not all emergency calls to An Garda Síochána are made

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<sup>39</sup> 112 is the standard emergency number for the European Union, first introduced in 1991 (91/396/EEC).

<sup>40</sup> Sub-paragraph 1(a) of the Terms of Reference specifically refers to “999 calls to the Emergency Call Answering Service”, also known as ECAS. This service was introduced by the Communications Regulation (Amendment) Act 2007, which empowered the Minister for Communications, Marine and Natural Resources to enter into a contract with a supplier to provide an emergency call answering service for the State. Although ECAS is a new service, the manner in which 999 / 112 calls are dealt with remains essentially the same, in that the calls are answered initially by the ECAS provider, who then transfers the call to the appropriate emergency service.

via 999 lines; there is evidence to suggest that, particularly in areas outside the DMA, some people will call their local Garda station directly in an emergency situation, rather than dialling 999 / 112. Emergency calls to local stations are also a common feature of major incidents, where several emergency calls may be made at or around the same time. Finally, for much of the period with which the Commission is concerned, there is evidence that the telephone companies operating the 999 service used the main phone number for certain Divisional Stations as a backup, in circumstances where the dedicated 999 lines in the relevant Garda station were either busy or not functioning.

- 3.1.9. The Commission also restates that, although its Terms of Reference appear to imply that the recording of 999 calls is authorised by law, it has been unable to identify any legislative authority to that effect.<sup>41</sup>
- 3.1.10. There follows an outline of the various telephone recording systems that operated in Garda stations during the period January 1980-November 2013.

## 3.2 HISTORY OF GARDA TELEPHONE RECORDING SYSTEMS

- 3.2.1. From the investigations carried out by the Commission, the history of Garda telephone recording systems can be divided broadly into three periods:

- (i) 1980 - 1995
- (ii) 1995 - 2008
- (iii) 2008 - 2013

Within these periods, there are significant distinctions to be made between systems employed in the Dublin Metropolitan Area (DMA) and those employed in stations outside of it. These distinctions will be discussed as they arise throughout the Report.

### **1980 - 1995**

- 3.2.2. During this period, recording systems for radio and / or telephone calls were operated by An Garda Síochána at the following locations:

- The Communications Centre for the DMA, based initially at Dublin Castle, later moving to Harcourt Square.

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<sup>41</sup> See Interim Report of the Commission on paragraphs 1 (n) and 1(o) of its Terms of Reference at para. 6.9, footnote 14.

- The stations designated as Divisional Headquarters for each Garda Division outside the DMA. The number of Divisional Stations grew from 16 to 23 over the relevant period, reflecting changes in the structure of Garda Divisions.
- Divisional and District Stations within the DMA.

In all cases, the equipment was installed primarily to record 999 calls and / or Garda radio traffic. However, it is possible that other telephone calls may have been recorded on each of these systems during this period. No recordings from this period have survived.

### **1995 - 2008**

3.2.3. Beginning in December 1995, new recording equipment using the Digital Audio Tape (DAT) format was installed at each Divisional Station outside the DMA. A policy devised within the Telecommunications Section and adopted by Garda management, indicated that these recorders should be used to record 999 lines, Garda radio traffic and certain non-999 lines, as specified in the policy. The evidence obtained by the Commission shows that not all stations adhered strictly to this policy in determining what telephone lines should be recorded.

3.2.4. At around the same time, equipment of a similar kind was purchased to replace the recorders being used in the Communications Centre at Harcourt Square, Dublin and to establish a new Communications Centre for the Southern Region at Anglesea Street, Cork.

### **2008 - 2013**

3.2.5. In 2008, the existing Garda telephone recording systems at Harcourt Square and at Divisional Stations outside the DMA were replaced by a modern, computer-based system. This comprised locally installed hard-disk recorders with a limited storage capacity, combined with a central archive facility for storing and accessing all recorded data on the system.

3.2.6. Although the system appears to have been envisaged as a mere replacement of existing recording equipment, in fact it provided a greatly expanded capacity, both in terms of the number of lines and the volume of calls that could be recorded at any given station. Once again, it appears that, in a small number of Divisional Stations, this expanded capacity was employed to record some lines that had not been recorded previously in those stations. The precise nature of those lines, the reasons for recording them and the use, if any, made of those recordings is discussed in Chapter 6 of this Report.

- 3.2.7. Also during this period, two other significant developments took place that involved the recording of Garda-related communications.
- 3.2.8. In May 2008, following a tender process initiated in 2006, the Department of Finance signed a contract with TETRA Ireland Communications Ltd, under which that company undertook to build, own and operate a National Digital Radio Services Network (NDRS) on behalf of the emergency services and certain other non-commercial bodies. Construction of this service began in September 2008 and a full, nationwide rollout was completed in October 2010. As part of the service, Garda radio traffic was, and is, recorded by TETRA Ireland; however, this recording system is entirely separate from the recording systems operated by An Garda Síochána.
- 3.2.9. The other development followed the enactment of the Communications Regulation (Amendment) Act 2007, which empowered the Minister for Communications, Marine and Natural Resources to enter into a contract with a supplier to provide an emergency-call answering service for the State. In February 2009, following an open tender process, BT Ireland was awarded a contract to operate the service for 5 years. ECAS commenced operations in 2010. Under the system, all calls to 999 / 112 are answered initially by the ECAS provider, who then transfers the call to the appropriate emergency service. The ECAS provider also records the call up until the point of transfer.
- 3.2.10. Although the NDRS and ECAS systems do not fall to be investigated by the Commission under its Terms of Reference, aspects of their development and operation are relevant to matters being considered by the Commission, and will be referred to as they arise.

## 4. GARDA TELEPHONE RECORDING SYSTEMS, 1980-1995

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### 4.1 INTRODUCTION

- 4.1.1. This chapter addresses the matters raised in sub-paragraphs 1(a) - (d), (j) and (k) of the Terms of Reference, insofar as they apply to the period 1980 to 1995. This includes the planning, procurement, installation, operation, management, alteration and termination of Garda telephone recording systems during this period; as well as the storage and destruction of recorded information and the use, if any, to which such information was put by An Garda Síochána.
- 4.1.2. Under sub-paragraph 1(a), the Commission must report, not only on telephone recording systems to record calls other than 999 calls that were installed after 1 January 1980, but also on whether any such systems were already in existence on that date. One such system existed in the Garda Communications Centre, Dublin Castle. On the evidence before the Commission, it continued to operate until such time as the Communications Centre – also known as Command and Control – was relocated from Dublin Castle to Harcourt Square in or around 1989.

#### **Background**

- 4.1.3. In 1971, an interdepartmental Planning Group was set up to formulate proposals for a new, nationwide Garda radio network. The aim was to provide reliable two-way communication between mobile handsets, District stations and Divisional Headquarters. The Group included representatives from the Departments of Justice, Finance and Posts and Telegraphs, as well as from An Garda Síochána. The report of the Group was completed in 1973. The Commission has not seen a copy of this report, but related documents obtained from the Department of Justice indicate that the provision of tape-recording facilities at Divisional Stations was considered by the Planning Group. A memo from April 1973, addressed to the Secretary of the Department of Finance, states:

“An additional estimated expenditure of £224,400 would be required to equip all Garda Divisional Headquarters stations with control consoles and tape recording facilities but as these items appear to be optional and as they have not been included by An Garda Síochána as part of their requirements... it is not proposed to undertake the provision of them, at this stage at any rate.” [emphasis added]

No follow-up documentation to this has been located, but the Commission has not seen any evidence to suggest that tape recorders were purchased or installed in Divisional Stations at this time.

- 4.1.4. In or around 1973, a new Garda Communications Centre for the Dublin Metropolitan Area (DMA) was constructed at Dublin Castle. Tape-recording equipment was installed as part of this development.
- 4.1.5. In 1975, sanction was given by the Department of Justice for the purchase of two tape recorders as part of a plan to develop a similar Communications Centre for Cork City. However, the evidence before the Commission suggests that the recorders, if purchased, were not installed.



## 4.2 COMMUNICATIONS CENTRE, DUBLIN CASTLE

### Planning, procurement and installation

- 4.2.1. During the 1960s and early 1970s, there was a room at Dublin Castle used by Garda telephone operators who dealt with 999 calls for the DMA. Here, four Garda operators would answer 999 calls, write down the key information received and transmit that information to operational Gardaí *via* radio messages, as required.
- 4.2.2. Documentation for this period is scarce, but such documents as have been found contain no references to the existence of any telephone recording systems in Dublin Castle during this period.
- 4.2.3. In or around 1973, a new, purpose-built Radio Control Room was constructed at Dublin Castle, with new equipment for use by the operators answering 999 calls. The evidence heard by the Commission indicates that the primary purpose of the Control Room was to centralise the handling of emergency calls and alarm calls for the entire DMA. As part of this project, two 24-track, reel-to-reel tape recorders were installed. The evidence suggests that this was the first telephone recording system installed by An Garda Síochána anywhere in the country. Searches of the archives of An Garda Síochána and of relevant Government departments have not found any documentation in relation to the purchase and installation of these recorders.
- 4.2.4. Approximately five years later, in September 1978, the Department of Posts and Telegraphs entered into a contract with Dictaphone Company Ltd to purchase 12 pieces of equipment described as “Local Recording Systems (for use by operators dealing with emergency 999 calls)”. A specification document attached to the contract states that the equipment shall consist of:

*“...a record / replay system – cassette or similar to be installed in radio consoles for automatic recording and subsequent replaying [of] emergency telephone-radio messages received by operators at Communications Centres.”*

The required recording capacity was “*up to 60 minutes*”.

- 4.2.5. No other documentation in relation to this equipment has been found, but it appears that it was bought with a view to being installed in the Radio Control Room in Dublin Castle, and possibly also at the proposed Radio Control Room in Union Quay, Cork. It

was intended to assist the operators dealing with emergency calls by providing them with a short-term playback facility, allowing instant replay of recent calls without having to engage a technician in the cumbersome task of locating and replaying the calls on the main 24-track recorder.

4.2.6. Two of the technicians who worked at Dublin Castle during the 1970s gave evidence that a “*loop recording unit*” of this kind was installed in each console in the Radio Control Room. According to one of the technicians, the recorder did not use standard audio cassettes but rather an endless loop of tape, built in to the console. This allowed either 15 or 30 minutes of calls to be recorded, depending on length of loop. The same witness thought that the equipment purchased in 1978 may have been intended to replace similar equipment that had been installed previously.

4.2.7. The most detailed account of the Radio Control Room at Dublin Castle is set out in a report prepared in August 1982 as part of a review of Garda radio requirements in the DMA. At that time, the report indicates, there were 7 consoles in the Control Room, one of which was used only to communicate on District radio channels. The other 6 were connected to a number of radio channels and to the following telephone lines:

- Six 999 lines;
- Two extensions from the main switchboard used for alarm calls received on direct lines from alarm companies;
- Five extensions from the main switchboard “used for other incoming calls chiefly from DMA stations”; and
- One direct line from the Dublin Fire Brigade Control Room.

Each console also had two lines on which outgoing calls could be made. They were described as:

- (i) “*Omnibus line to all DMA. stations used for all station messages*”, and
- (ii) “*Exchange lines used chiefly for calling stations.*”

4.2.8. In relation to tape-recording facilities, the report notes:

*“The consoles are also equipped with individual tape recorders which record telephone conversation on the emergency lines on a continuously reused tape which holds a recording of the latest 60 minutes’ conversation. Playback facilities are provided on the recorders.”*

In addition, the Control Room was said to contain “*tape-recording equipment for recording all radio or telephone conversations at each console...*” This is presumably a reference to the 24-track recorders that had been in use since the mid-1970s.

### **Operation and management**

- 4.2.9. At that time, 999 calls did not come into Dublin Castle *via* the main telephone switchboard; they were received on dedicated ‘private-wire’ lines installed by the Department of Posts and Telegraphs. All 999 calls in the Dublin area came initially to a telephone exchange in Temple Bar. Any caller who requested the services of An Garda Síochána was then transferred *via* the private-wire lines to the Radio Control Room at Dublin Castle, where the call would be answered and dealt with.
- 4.2.10. Each of the operators working in the Radio Control Room sat at a console which had two elements:
- (i) a radio transmitter for making and receiving calls on the Garda radio network; and
  - (ii) a ‘key and lamp’ telephone unit<sup>42</sup>, which was connected to the 999 lines and also to some internal telephone lines.

These internal lines connected the radio operators with the main telephone switchboard for Dublin Castle, allowing the main switchboard operators to ‘patch’ calls through to the Radio Control Room, if necessary. Thus, for example, if a member of the public rang the main phone number for Dublin Castle regarding what was deemed to be an emergency matter, the main switchboard operator could transfer the call through to the Radio Control Room, where it could be dealt with in the same manner as a 999 call.

- 4.2.11. Two former members of the Garda Telecommunications Section, who worked on the installation of the new Radio Control Room, gave evidence that one of the 24-track recorders was used to record the 999 lines coming into the Control Room, and also to record any radio communications coming into or going out of the Control Room. The second machine was used to play back recordings, thus ensuring that incoming calls would continue to be recorded, even while other recordings were being played back. The recording machine did not stop in-between calls but ran continuously; one reel of tape

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<sup>42</sup> ‘Key and lamp’ units were simple switching devices, allowing the operator to choose between any of the telephone lines connected to the unit. A row of buttons enabled the operator to select a particular telephone line, and a corresponding light would flash to indicate when a given line was in use.

could record up to 24 separate telephone lines simultaneously for a period of 24 hours. When the first machine reached the end of its tape, the second machine would automatically begin recording. Technicians would then change the tape in the first machine. Two technicians who worked in Dublin Castle during this period recalled there being enough reels to last a month, at which point the oldest reel would then be re-used. Searches carried out by An Garda Síochána have not located any of these reels.

- 4.2.12. Aside from the dedicated 999 lines, there is some uncertainty as to whether the system recorded any other lines on which calls involving members of the public could be made or received. A technician who was based at Dublin Castle between 1983 and 1989 told the Commission that, in his recollection, only 999 lines and radio communications were recorded. However, evidence given by other technicians who worked in the Radio Control Room during the mid-to-late 1970s suggests that some, if not all, of the non-999 lines connected to the operator consoles in the Radio Control Room were recorded. One of the technicians told the Commission that this was done in order to ensure that calls of an emergency nature that came in to the main switchboard (rather than *via* 999) could still be recorded if the main operator transferred the call through to a recorded line on the radio operator's console. However, this technician also stated that, in his view, at least one of the lines coming into the console would not have been connected to the recorder. This was so that any non-emergency call for a radio operator – such as a personal call or an operational call from a colleague – could be sent to him without that call being recorded. It would also allow the radio operators themselves to make phone calls without being recorded.
- 4.2.13. The evidence before the Commission suggests that no more than 10 telephone lines could be connected to the 'key and lamp' unit used by the radio operators. One technician recalled that, in Dublin Castle, there were 6 dedicated 999 lines, which would have left a maximum of 4 non-999 lines on each console that could have been connected to the tape recorder.
- 4.2.14. The Commission heard evidence from a Garda technician who worked in Dublin Castle for approximately 12 months between 1976 and 1978. He was one of two technicians and a Sergeant from the Telecommunications Section who were based in Dublin Castle at that time. Requests to play back recordings usually came to him through the Sergeant. Copies of a recording, if required, were made by recording the call as it played back "*through the air*", using a handheld recorder such as those commonly employed for dictation. In most cases, however, the call was simply played back from the original machine in the presence of the Garda member who had asked to hear it. The technician did not keep any paper records of such requests, although he thought his Sergeant may

have done. No such records have been found in the material provided to the Commission by An Garda Síochána.

- 4.2.15. This technician's recollection was that most of the playback requests received were for 999 calls in circumstances where there was some question or issue in relation to how a specific call was handled by the operator. This accords with the recollection of another Garda technician, based in Dublin Castle from 1973 until 1976, who told the Commission that the 24-track recording equipment was installed in order to have a record of each 999 call and of the response to that call by the operator – including any radio messages sent as a result of the call – so that any subsequent complaints from members of the public that their call had not been dealt with appropriately could be investigated. He went on to state:

*“And although there was apprehension on behalf of the Gardaí about the equipment going in, they were delighted that in fact it was, because it vindicated them.”*

- 4.2.16. One instance of a 999 recording from Dublin Castle being used is documented in the Report of the Tribunal of Inquiry on the Fire at The Stardust, Artane, Dublin (“The Stardust Tribunal”, published in 1982). The report concerned a fire at The Stardust Nightclub in the early hours of the morning on Saturday, 14 February 1981, in which 48 people lost their lives. At paragraph 2.55 of the report, reference is made to a 999 call made to An Garda Síochána from a telephone in the foyer of the Stardust building:

*“The call made ... was, in common with all 999 calls to the Gardaí, automatically tape-recorded in the Garda Communications Centre at Dublin Castle, the time being recorded as 01.42. The Tribunal heard the tape recording of this call, the transcript of which reads as follows...”*

The Tribunal was established on 20 February 1981 and reported on 30 June 1982. It is not clear when the Tribunal listened to the tape recording of the 999 call, but it seems likely that the tape recording would have been found and set aside at an early stage by An Garda Síochána, as part of the police investigation of the fire and its causes. One technician who worked in Dublin Castle during this period told the Commission that he recalled “*a couple of tapes*” being retained and calls from them being played back for the Tribunal to hear.

### **Termination**

- 4.2.17. Although there is evidence that a decision had been made as early as 1982 to move the Dublin Metropolitan Area (DMA) Communications Centre out of Dublin Castle, documentation disclosed to the Commission suggests that this did not take place until 1989. In or around that time, the function of answering and responding to 999 calls in the DMA was transferred to a newly constructed Control Room at Harcourt Square, Dublin. It is presumed that the recording of telephone calls at Dublin Castle was terminated on or before the date of this transfer.
- 4.2.18. One technician, who worked at Dublin Castle from 1983 until the transfer of the Control Room functions to Harcourt Square in 1989, recalled that the 24-track recorder in Dublin Castle developed a fault towards the end of that period and was not repaired. He was unable to remember the precise date on which recording at Dublin Castle was terminated.

## 4.3 COMMUNICATIONS CENTRE, UNION QUAY, CORK

### Planning, procurement and installation

- 4.3.1 In or around 1973, as part of a broader review of Garda radio facilities, consideration was given to developing a Garda Communications Centre for Cork City, similar to that being developed at Dublin Castle. With this in mind, the then Garda Commissioner wrote to the Department of Justice in July 1973 seeking permission to purchase two radio consoles and two tape recorders for installation in the Radio Control Room at Union Quay Station, Cork.
- 4.3.2 Of the few documents from this period that have been found, none give details of the kind of tape recorders that were planned for Union Quay, or indeed the purpose for which they were sought. However, it seems reasonable to assume that the equipment being sought was similar to that being installed in Dublin Castle, and was intended for a similar purpose – that is, the recording of emergency-related communications to and from the Radio Control Room.
- 4.3.3 On 18 November 1974, the Department of Justice gave sanction for the purchase of *“two radio consoles and... two special tape recorders for use in the Radio Control Room at Union Quay Station, Cork”*. The machines were not purchased at that time. In August 1975, An Garda Síochána wrote to the Department to inform them that the cost of the equipment had now increased and to seek *“early sanction”* for this higher expenditure. Sanction was received by letter dated 3 October 1975.
- 4.3.4 No further documentation in relation to this proposed purchase has been provided to the Commission, but it appears that the tape recorders may never have been bought or, if they were bought, were not installed. The Commission heard evidence from a former member of the Garda Telecommunications Section who, in January 1979, was transferred to Cork as the Sergeant for Telecommunications in the Southern Region. In a written statement to the Commission he recorded his duties as including *“... the development of a Communications Control Centre at Union Quay Garda Station...”*, which suggests that the development first envisaged in 1973 had yet to take place.
- 4.3.5 As previously mentioned, documents disclosed to the Commission indicate that, in September 1978, 12 recording machines with a short-term recording capacity were purchased for installation in Garda “Communications Centres”. At the time, the description “Communications Centre” was used only for the Radio Control Rooms at Dublin Castle and Union Quay, Cork. It, therefore, seems likely that these were the intended destinations for this equipment. However, the then Telecommunications

Sergeant for the Southern Region has told the Commission that there was no telephone recording equipment in place anywhere in Cork City when he took up his duties in January 1979, and that no such equipment was installed in Cork until the 1990s.



## 4.4 COMMAND AND CONTROL, HARCOURT SQUARE, DUBLIN

### Planning and procurement

- 4.4.1 Towards the end of the 1970s, responsibility for assessing the communications requirements of An Garda Síochána passed from an inter-departmental committee to a broader-based group that included outside expertise. This group, known as the Radio Advisory Committee, was chaired by Professor Sean Scanlan, Professor of Electronic Engineering at University College Dublin. Deputy Commissioner Eamon Doherty (since deceased) represented An Garda Síochána. There were also representatives from the Department of Justice, the Department of Public Service, the Department of Posts and Telegraphs and Raidió Teilifís Éireann.
- 4.4.2 According to Professor Scanlan, the principal task of the Committee was to address deficits in the Garda communications network and, in particular, to facilitate better communication between Garda stations and members on patrol. He told the Commission:
- “So what we essentially decided was that we would attempt to identify the requirements of the Gardaí in terms of mobile communications; try to design a system that would meet (in certain respects) those requirements; find somebody from whom to purchase this stuff, and oversee its installation.”*
- 4.4.3 The Committee divided its work on Garda communications into three separate but inter-dependent blocks:
1. A communications network for the DMA;
  2. A communications network for Divisions outside the DMA; and
  3. A system for State-wide communications.
- 4.4.4 The Committee retained the services of Mr Alf Deeney (since deceased), formerly of the Electricity Supply Board, as a consultant on technical issues. Mr Deeney liaised with An Garda Síochána to determine their requirements, and also undertook research on communications equipment and potential suppliers.
- 4.4.5 During this time, the Radio Advisory Committee also oversaw a significant increase in the number of technically trained staff in An Garda Síochána. In 1982, a total of 24 new members were recruited specifically to work as Garda Technicians.

4.4.6 From as early as July 1982, proposals were being considered to move the Communications Centre for the DMA out of Dublin Castle. Following meetings between An Garda Síochána and Radio Advisory Committee representatives in August 1982, it was agreed that a new Control Centre for the DMA would be developed at Garda offices in Harcourt Square. This Control Centre would contain dedicated operator consoles for each Division of the DMA, along with consoles dedicated to specific sections at Harcourt Square, such as the Central Detective Unit (CDU) and Special Branch.

4.4.7 A report presented to the Radio Advisory Committee in October 1982 noted that *“telephone traffic, including the handling of 999 calls, is still to be examined and proposals agreed.”* However, it was agreed that *“all radio conversations are to be taped so that there is full accountability.”*

4.4.8 A follow-up report in November 1982 noted the complexities involved in upgrading Garda communications in the DMA, stating:

*“The communications network for the DMA is so tied up with the operational functions which take place at Garda Headquarters that both these operational centres have to be considered together. The aspects of communications involved are Telephony, Radio, Telegraphy, Computers and associated terminals. While each of these are separate branches of communication engineering the resultant DMA network is a system combining all of these aspects...”*

4.4.9 Following further research and discussion, it was agreed that the new Control Room should have a number of consoles dedicated to answering 999 calls. Details of any call requiring an emergency response would be taken and then transmitted to other operators, also based in the Control Room but working at separate Dispatchers’ Consoles, one for each Division in the DMA.

4.4.10 In May 1983, a report from Mr Deeney to the Radio Advisory Committee listed the facilities that were to be provided on the proposed Call Answering consoles. They included:

- “(a) Incoming 999 calls.*
- (b) Incoming exchange lines.*
- (c) Outgoing exchange lines (ex directory).*
- (d) ...*
- (e) ...*
- (f) ...*

- (g) *Tape-recording apparatus (a) operator-controlled (b) master-controlled from multi-track system.*
- (h) *PABX telephone system.*”

4.4.11 In October 1983, a specification document was prepared in relation to radio / telecommunications equipment required for the DMA. Suppliers were invited to tender for various items of equipment including:

*“Divisional Radio Dispatcher console for each DMA Division”  
And Call Answering console units to answer and distribute incoming police telephone traffic e.g. emergency 999 calls etc.”*

4.4.12 The Call Answering consoles, in addition to 999 lines, were to have 2 PABX<sup>43</sup> extension positions and facilities for answering calls on up to 20 exchange lines. A facility for transferring incoming telephone calls – whether 999 or otherwise – to any of the Dispatcher consoles or the Control Room Supervisor’s console was also required.

4.4.13 In terms of recording equipment, the specification document asked for:

*“Multi-track tape recording apparatus, with a time record, to record communications traffic on Radio Dispatcher and Call Answering console units.”*

The stated intention of the multi-track recorder was *“to enable the automatic tape-recording... of all communications traffic to and from all consoles”*. In addition, the specification document required *“that each desk be provided with cassette-type recording facilities to enable operators to re-listen to recently received messages.”*

4.4.14 Aside from the specification document, no other documentation in relation to the tendering process has been seen by the Commission. However, various invoices from 1985 and 1986 make it clear that the contract for the required equipment was awarded to Standard Elektrik Lorenz (S.E.L.), a German company. In particular, one invoice dated 11 December 1986 refers to the provision of Call Answering and Dispatch consoles, both with built-in tape recording facilities, and a multi-track recorder capable of recording up to 40 tracks simultaneously for up to 25.6 hours. A separate machine for playing back multi-track recordings was also included.

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<sup>43</sup> Private Automated Branch Exchange. These networks can switch calls between internal extensions, while allowing all users to share one or more external lines.

4.4.15 Following the award of the contract, further discussions took place between S.E.L. and representatives from An Garda Síochána and the Radio Advisory Committee in March, October and December 1987, and March 1988. These meetings do not appear to have resulted in any changes to the recording equipment ordered from S.E.L. for the DMA. Final acceptance tests for the purchased equipment were conducted from 23 to 27 May 1988.

4.4.16 A report from January 1989 provided to the Commission by the Department of Justice, entitled *'The New System'*, gives an overview of the new Garda radio and telecommunications facilities in the DMA and elsewhere around the country. The author of the report is unknown. In relation to the new Control Centre at Harcourt Square, the report states:

*"All voice traffic, radio and telephone, will be recorded."*

That statement is immediately qualified as follows:

*"(It should be noted that traffic that is 'patched through' control will not be recorded)."*

It is not clear to the Commission what is meant by this. None of the witnesses who gave evidence in relation to the system at Harcourt Square during this period were able to offer an explanation.

### **Installation**

4.4.17 Testing of the new DMA radio system was carried out in March 1989. Installation of radio equipment was still taking place in stations throughout the DMA up to and including August 1990. The date on which the Command and Control system at Harcourt Square finally went live is not known to the Commission.

4.4.18 In April 1989, the Garda Commissioner applied for registration as a Data Controller under the recently enacted Data Protection Act, 1988. Under the heading, *'Description of all Personal Data so kept or used'*, the application included:

*"Command & Control logging system for recording and logging the handling of 999 calls from the general public to the Communications Centre at Dublin Metropolitan Area Hqrs., Harcourt Square, Dublin 2."*

Although copies of the Data Protection Register entries between 1990 and 1995 are not available, it appears from internal Garda correspondence in March 1996 that the entry regarding Command & Control remained in place during this period.

### **Operation and management**

- 4.4.19 As one would expect, the cassette recorders built into the operator consoles were used by the operators to play back recent calls in order to clarify or confirm details. The console tapes, which could hold either 30 or 60 minutes of audio, were re-used on a continuous basis. There was no need to retain them as anything recorded on those tapes was also recorded on the multi-track reel-to-reel recorder in the Control Room.
- 4.4.20 The Commission heard evidence from a retired member of An Garda Síochána who, as the operational Superintendent in charge of Command & Control from 1987-1991, oversaw the opening of the Control Room at Harcourt Square and supervised its operation during that time. He told the Commission that the policy regarding the retention of tapes from the multi-track recorder remained the same as it was in Dublin Castle: the tape reels were changed on a daily basis and retained for approximately 30 days before being reused.
- 4.4.21 Requests from Garda officers investigating incidents, to listen to or take a copy of a call could be sanctioned by the Superintendent in charge of the Control Room, but were normally dealt with by an Inspector or Acting Inspector on his behalf. Requests were made verbally for the most part, either by phone or in person. Copies of calls were made onto ordinary cassette tapes and given to the requesting officer.
- 4.4.22 Any tape reel that contained a call which might be required for court proceedings would be held aside, with a note on it to say who had requested it and in relation to what incident. These reels were kept under the control of the technicians, in a separate room on another floor of the building.

### **Termination**

- 4.4.23 In the documents disclosed to the Commission, the earliest definite indication of an intention to replace the recording equipment at Harcourt Square is a quotation, received by An Garda Síochána from an unknown company in December 1994, for a 64-channel Digital Audio Tape (DAT) recorder under the heading “*System ‘A’ – Harcourt Square, Dublin 2*”.
- 4.4.24 Six months later, a letter, dated 3 May 1995, from An Garda Síochána to the Secretary of the Department of Justice stated:

*“The existing voice recording equipment at Garda Control Centre, Harcourt Square is fully utilised and has insufficient capacity to record necessary voice traffic.”*

The letter went on to request sanction from the Department to purchase new equipment from Dictaphone, one of four companies that had been invited to tender for the contract to supply recording equipment to both Harcourt Square and a new Garda Control Centre at Anglesea Street, Cork.

- 4.4.25 An entry in the Garda Telecommunications Store ledger indicates that an order was placed with Dictaphone on 18 October 1995 for *“supply and installation of voice logging equipment at Harcourt Square, Dublin and Anglesea Control Centre, Cork...”* Further details regarding the purchase, installation and operation of this new equipment are contained in Chapter 5 of this Report.
- 4.4.26 In the absence of any evidence to the contrary, it is presumed that the existing recording equipment at Harcourt Square continued to function until the new equipment arrived, sometime between October 1995 and March 1996.

## 4.5 DIVISIONAL STATIONS (OUTSIDE DUBLIN METROPOLITAN AREA)

### Planning and procurement

4.5.1 In April 1981, a specification document “*for the supply of VHF / UHF radio and associated equipment*” was prepared under the auspices of the Radio Advisory Committee. It referred to the proposed introduction of a new radio system for An Garda Síochána, based around communications control centres to be located at each Divisional Headquarters outside the Dublin Metropolitan Area (DMA).<sup>44</sup>

4.5.2 For each Divisional Station outside the DMA, the specification document proposed the installation of “*a communications console unit... to cater for both the present and future telecommunication requirements*”. A list of technical requirements for the proposed consoles included:

- Call / answer facilities for external and internal telephone circuits;
- Facilities for monitoring all radio traffic passing through the control unit;
- Display and answering facilities “*for emergency calls such as classified by 999 calls*”; and
- “*Arrangements whereby any circuit can be connected to voice recording apparatus (e.g. tape recorder unit).*”

It should be noted that this specification document did not ask for a recorder to be included in the console, but merely required the provision of an interface to allow recording devices to be connected, if needed.

4.5.3 The primary purpose of the new console was to facilitate radio communications – giving Divisional Stations immediate access, not only to members on patrol, but also to resources in other Divisions. To that end, the console was intended to allow two-way radio communication on a number of different channels – from local to divisional to national level. The reason for connecting 999 lines to the console was to streamline the emergency response process at Divisional level. In this way, the operator who answered a 999 call could also initiate a response by sending radio messages to members in the area and / or to other Garda stations, from sub-district up to national level.

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<sup>44</sup> Radio and communications requirements within the DMA were noted as being different from the rest of the country, and were to be the subject of a separate report.

4.5.4 The Chairperson of the Radio Advisory Committee, Professor Scanlan, has no memory of the recording of telephone calls being discussed at Committee meetings. He said that the Committee was aware of the recording system then in use at Dublin Castle. While he found it difficult, at this remove, to remember exactly what was known about the Dublin Castle system, Professor Scanlan stated:

*“... I don’t recall the Committee finding any huge surprises as it went about its business... Now if the Gardaí had never recorded anything that came into them we would have had a big surprise.”*

4.5.5 From a technical perspective, the question of audio recording was, in his view, “a rather routine thing” and, therefore, not something with which the Committee would have been greatly concerned.

4.5.6 According to Professor Scanlan, questions of policy relating to telephone recording were not matters for the Committee. He considered that the job of the Committee was to source communications equipment to meet the operational needs of An Garda Síochána and any issue as to what those needs were was not for the Committee to decide:

*“... the Committee was concerned to provide a system to the Gardaí and the Gardaí had to decide what to do with it when they got it. The Committee was always very careful that we didn’t cross into operational areas.”*

4.5.7 Similarly, questions about the legality of recording telephone calls were not regarded by Professor Scanlan as being within the Committee’s purview:

*“We would have assumed that was a Garda function or Department of Justice function. It certainly was not the Committee’s function, nor did we ever... get involved in these matters in such a way that we needed legal advice...”*

In the event that any legal issue had arisen, Professor Scanlan stated that he assumed that the Committee would have referred the matter to the Department of Justice for consideration.

4.5.8 Tenders from five companies were short-listed for consideration by the Radio Advisory Committee. In March 1982, the contract for supplying the required consoles to Divisional Stations outside the DMA was awarded to Standard Elektrik Lorenz (S.E.L.). Further discussions then took place between S.E.L. and Mr Deeney, technical consultant



to the Radio Advisory Committee, as to the precise details of the equipment to be purchased.

- 4.5.9 As indicated above, the initial tender specification did not ask for tape-recording equipment to be included in the console, but it appears that this changed some time after S.E.L. had been awarded the contract. On 17 June 1982, a letter to S.E.L., signed by a member of the Radio Advisory Committee, sought “*broad technical proposals*” in relation to a number of required facilities, including tape recording of 999 calls:

*“The Department of Posts and Telegraphs will provide 3 private circuits for incoming 999 calls (simultaneously). Automatic tape recording of these calls and acoustic and visual alarm is required...”*

The letter asked for proposals on supplying a tape recorder “*which has priority facilities for 999 calls*” and also requested “*a possibility of inserting, at a later stage, full tape recording on all radio / telephone circuits...*”

- 4.5.10 On 28 June 1982, S.E.L. responded with details of the equipment they proposed to provide, including:

*“Item 3... telephone switching device for call handling of 4 telephone lines. The proposed equipment is ready to handle up to 8 telephone circuits...*

...

*Item 5... telephone equipment for handling 3 simultaneous incoming emergency calls (‘999’)...*

...

*Item 7... tape recorder for use by the operator. The tape recorder can be linked to any one of the 8 radio circuits or to any of the 3 (4) emergency calling circuits; one at a time with priority facilities on ‘999’ calls.”*

- 4.5.11 From the limited documentary evidence available, it is not clear who first suggested that a tape recorder should be included as part of the new communications console for Divisional Stations. According to Professor Scanlan, once the Committee had decided to award the contract to S.E.L., the precise technical details of what equipment should be supplied was a matter for Mr Deeney, in consultation with An Garda Síochána and S.E.L. themselves. Mr Des Matthews, the senior representative from the Department of Justice on the Committee, stated to the Commission that he recalled seeing an emergency-call recording facility on a visit to a police control room abroad with other members of the Committee. He stated:

*“Its value was immediately appreciated and it was subsequently agreed by the Committee that it should be included in the Control Room equipment specification. The rationale was that 999 messages from an over-excited or panicky caller could be garbled and difficult to follow – it was obvious that a playback facility would be invaluable in many cases.”*

- 4.5.12 A written ‘Summary of Work’, prepared by Mr Deeney for the Committee in or around July 1982, indicates that the letter sent to S.E.L. on 17 June 1982 was written following a meeting at Garda Headquarters “... to define the operational requirements of Divisional and District Headquarters from a communications point of view.” It seems reasonable to conclude that the decision to request tape-recording facilities emerged from that meeting.
- 4.5.13 At a meeting on 20 July 1982, the Radio Advisory Committee approved the addition of a number of “extra features” to the proposed consoles for Divisional Stations, including a tape recorder that could be switched for use on either the incoming 999 lines or the Garda radio channels.
- 4.5.14 In September 1982, the Department of Posts and Telegraphs placed an order with S.E.L. for the *supply* of the consoles and related equipment, as approved by the Committee. Delivery was scheduled to commence in October / November 1982 and to be completed by June 1983. In the event, it appears that most of the consoles were delivered between May and September 1983.
- 4.5.15 As indicated above, the console, as well as handling 999 calls, was also to include a facility for *four* telephone lines linked to the general station exchange to be answered at the desk. In the correspondence from S.E.L., this is described as being separate from the 999 answering facility. Although the available evidence suggests that the primary purpose of the tape recorder on the console was for 999 and radio recording, there is some evidence that it was technically feasible to record any line that was connected to the console, including the non-999 lines linked to the general exchange.
- 4.5.16 Early in 1983, Mr Deeney and a colleague visited S.E.L. to carry out acceptance testing of the *first* Divisional console. Mr Deeney reported that, in addition to the unit for answering 999 calls, the console contained a “*telephone panel*”, which allowed access to incoming and outgoing calls:

*“The telephone unit provided has a maximum capacity of 8 lines. These lines may be either Direct-Exchange lines or PABX extensions or a combination of both.”*

4.5.17 As to the recording facility on the console, Mr Deeney reported:

*“The answering of a 999 call automatically starts a tape recorder which records the emergency call. This facility allows the operator to replay the telephone call at his / her convenience. The tape recorder may also be switched to radio circuits or general telephone circuits as desired...”*

4.5.18 Mr Matthews, who represented the Department of Justice on the Committee, stated to the Commission that part of the reason for purchasing the recording facility was to give Control Room operators the capability of recording significant calls that came in on non-999 lines:

*“My understanding then, and now, is that the only phone calls being considered for recording were those that might be giving information to the Gardaí about security or other criminal issues and that might come in on a direct line to the Garda station. The idea was that if and when such a call came in, the console operator could press a button on his control desk and record it. There was no question of recording any other telephone... or calls to or from any other office in the station.”*

4.5.19 He explained the rationale for this as follows:

*“The context of the time must be kept in mind. There was a constant security alert stemming from the Northern ‘Troubles’. There was constant concern about the location of arms dumps and the involvement of illegal arms; there were kidnapping, bomb threats, bomb scares etc etc and the Gardaí were much reliant on information coming confidentially from members of the public. The public was also being exhorted to advise the Gardaí of any suspicions or knowledge of crime in general. Such information was more likely to be provided to the Gardaí by direct phone contact rather than by 999 calls, which were for emergency use only and had to be routed through an additional operator. In essence, there was no distinction to be made between such phone calls and 999 calls and they appeared to be equally appropriate for recording.” [emphasis added]*

### **Installation**

4.5.20 As previously indicated, the installation of the S.E.L. consoles was part of a much broader process of creating up-to-date “communications centres” in all Divisional Headquarters. This process also involved installing and upgrading radio equipment in

Sub-District, District and Divisional Stations, putting up additional aerial masts, and installing new PABX internal telephone networks in Garda stations across the country.

4.5.21 At a meeting in November 1982, the Radio Advisory Committee were told:

*“Necessary briefing had been provided for the Sergeants who will be responsible for installing radio equipment in the various Divisions – the planned network was fully explained to them and installation procedures had been agreed.”*

4.5.22 Evidence from members of the Garda Telecommunications Section suggests that the S.E.L. consoles were installed in every Divisional Station outside the DMA, with the exception of Cork East.<sup>45</sup> It seems that the installations took place on varying dates between 1983 and 1985, although the Commission has not seen any documentation to confirm this. As a rule, they were installed by the technicians who had been assigned to work in that particular Division.

4.5.23 The Commission was able to hear evidence from Garda technicians who worked in each Divisional Station for the relevant period, with the exception of Castlebar and Naas. The technicians’ evidence varies on the question of what telephone lines were connected to the S.E.L. console: some remembered only 999 lines being connected, while some others mentioned other lines as having been connected, but said that these lines were not recorded. This may reflect differences between stations as to what lines were connected to the console. The console was modular in construction; in effect, it consisted of a large wooden desk with slots into which various pieces of equipment could be placed as required. The evidence before the Commission suggests that one of the purchased pieces of equipment allowed the console to be connected to four lines from the main station exchange,<sup>46</sup> but it may be that, in some stations, a decision was made to have those extensions connected to other phones in the Control Room, rather than running them through the console.

4.5.24 In any event, there seems to have been a general understanding amongst technicians that the tape recorder in the console was intended to assist the operators by allowing short-term playback of 999 calls. This view is supported by the available documentation in relation to the purchase of the equipment, which consistently links the tape recorder to the recording of 999 calls.

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<sup>45</sup> At that time the Southern Region was divided into 3 Divisions: Cork East (Divisional HQ: Union Quay), Cork West (Divisional HQ: Bandon) and Kerry (Divisional HQ: Tralee). M Bouchier (p. 62-3, 79) says there were no S.E.L. consoles installed in Union Quay, or anywhere else in Cork City.

<sup>46</sup> See para. 4.5.15 above.

- 4.5.25 One technician, who had experience with S.E.L. desks in a number of Divisional Stations during the 1980s and early 1990s, told the Commission in evidence that, from the point of view of telephone connections, the S.E.L. recorder was a dead end. In other words, calls could be received on a line that was connected to the recorder but they could not then be transferred to any other extension in the Garda station; nor could any outgoing calls be made on such a line. This was not an issue for 999 lines, which had always been separate from the main station exchange and were intended only for incoming calls.
- 4.5.26 This evidence appears to contradict the report of Mr Deeney quoted above, which clearly states that the tape recorder could be switched to record any radio and telephone line connected to the console. It may be that in some stations the manner in which the console and the recorder were set up resulted in the situation described by the technician. In any event, the evidence before the Commission strongly suggests that, insofar as the recorders were used at all, they were used to capture 999 calls only.

#### **Operation and management**

- 4.5.27 Although no policy documents or written instructions concerning the use of the S.E.L. console have been found, the configuration of the console and the limited nature of the recording facility make it clear that the purpose of the recorder was to assist the Control Room operators who dealt with 999 calls by providing a short-term playback facility, allowing them to check the details of calls where they were unsure of what had been said.
- 4.5.28 Only one line at a time could be recorded. As indicated above, depending on how the recorder and the console were set up, it may have been possible for the operator to switch recording manually from the 999 line to a radio channel or to another non-999 line. However, there is no evidence to suggest that this was done in practice.
- 4.5.29 Extensive searches carried out by An Garda Síochána have not located any of the cassette tapes that were used in the console recorders; nor is there documentary evidence of any systematic effort made by An Garda Síochána to retain such recordings. The Commission considers that this lends support to the view that the recordings were intended as a short-term memory aid for radio operators and were not retained for long periods.
- 4.5.30 There is no evidence of any written policy concerning access to, copying, retention or destruction of recordings made on the S.E.L. console.

- 4.5.31 In any event, it appears from the evidence given by a number of Garda technicians that the consoles exhibited technical problems almost from the outset, in relation to both the call answering and call-recording functionalities. Several technicians gave evidence that the tape recorder in the console frequently broke down, or, in some instances, never worked at all. The audio quality of calls coming into the console was also said to be very poor.
- 4.5.32 In some stations, the consoles ceased to be used altogether within a few years of their installation. Local radio communications were made using a different radio controller.<sup>47</sup> The dedicated 999 lines were connected to stand-alone telephones that were not recorded. One technician who was assigned to Limerick station in 1984 described the S.E.L. console there as *“a piece of furniture rather than a piece of electronic equipment. It was a lovely designed desk, ergonomically suited to a Control Room but had no electronic functionality.”* Some technicians in other stations recalled the tape deck in the console being used primarily to play music cassettes.

### **Termination**

- 4.5.33 The installation in 1995/96 of new Digital Audio Tape (DAT) recorders in Divisional Stations<sup>48</sup> meant that the tape-recording function of the S.E.L. console was no longer required. However, it appears that, in many stations, the S.E.L. consoles – and the console recorders in particular – had ceased to function some years before this.
- 4.5.34 In Galway, for example, a written report from the local technician indicates that he had removed the S.E.L. tape recorder on 22 July 1991, following a report that it was faulty. The machine was sent to the Telecommunications Section at Garda HQ, who forwarded it on to S.E.L. for repair or replacement. Some 7 months later, S.E.L. confirmed that neither parts nor replacement units could be obtained for the faulty recorder. It was decided that a modified version of the recorder used in the DMA consoles should be installed instead.

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<sup>47</sup> District stations used a four-channel radio controller supplied by PYE Telecommunications. As each Divisional station was also a District station, it had one of these controllers available for use alongside, or instead of, the S.E.L. console. Inter-divisional and national radio functionality was unique to the S.E.L. console; but it seems that inter-divisional radio communication was rarely used by Gardaí at that time, and plans for a national radio channel were not, in fact, implemented.

<sup>48</sup> See Chapter 5.2 below.

## 4.6 DUBLIN METROPOLITAN AREA (DMA)

### **Planning and procurement**

- 4.6.1 The former chairperson of the Radio Advisory Committee, Professor Scanlan, told the Commission that the communications requirements of An Garda Síochána in the DMA differed from the rest of the country in certain important respects.
- 4.6.2 From the point of the view of the Commission, the most significant difference was that the process of answering 999 calls was centralised: instead of 999 calls being directed to the nearest District or Divisional Station, all such calls, made anywhere within the five Divisions of the DMA, were sent directly to the Communications Centre at Dublin Castle (later moved to Harcourt Square), where they were answered and dealt with.
- 4.6.3 Because of these and other differences, the provision of a radio and telecommunications network for the DMA was treated as a separate project by the Committee. In October 1983, a specification document was prepared “*for the supply of radio and associated equipment*” to be used in the DMA.
- 4.6.4 It was agreed that communications consoles with radio and some telephone functionality would be installed in the 16 District stations within the DMA. Sub-District stations would each have a console with radio facilities, but no telephone connections.
- 4.6.5 Although 999 calls were not answered in Sub-District or District stations, a decision was made to have a tape recorder installed in the consoles for those stations. The specification document indicates that the recorders were intended to record “*all transmissions to and from the console*”. The Commission notes that, in addition to radio channels, the District station consoles were to have connections for “*two telephone exchange lines and a PABX connection*”, along with a facility to connect one of the exchange lines to the District and Divisional radio channels. The specification document does not state expressly whether the recording facility should extend to these telephone lines, but the use of the word “*transmissions*” above suggests that the purpose of the recorder was to capture radio traffic rather than telephone calls.
- 4.6.6 No further documentation in relation to this tendering process has been seen by the Commission, but copies of invoices indicate that S.E.L. – the company that had supplied consoles for Divisional Stations around the country – was awarded the contract to supply consoles for the District stations within the DMA. The first of these consoles was delivered in October 1985. Further deliveries took place on dates between December 1985 and August 1986. The invoices make it clear that the supplied consoles were equipped with a tape recorder, as requested in the specification document.

### **Installation**

- 4.6.7 The Commission has heard evidence from a former Inspector in the Telecommunications Section who oversaw the installation of these S.E.L. consoles in the DMA. He recalled that there was a tape recorder on the consoles. When asked what it would have recorded, he said that, as far as he could remember, anything that came in to the console, whether by radio or telephone, could have been recorded.
- 4.6.8 Another technician, who was attached to Garda Headquarters at the time, recalled installing the first of these S.E.L. consoles in Ballymun Garda Station. He did not remember connecting any particular telephone lines to the recorder, and said he had “grave doubts” as to whether the recorders in the DMA District stations were ever used.

### **Operation, management and termination**

- 4.6.9 As with the consoles installed in Divisional Stations outside Dublin, there is no evidence of any written policy or instructions having been issued with regard to use of the recording facility on the consoles installed within the DMA. Anecdotal evidence suggests that the recorder was of a similar type, in that it used ordinary cassette tapes of 60 or 90 minute duration. Searches by An Garda Síochána have not located any tapes used in these recorders.
- 4.6.10 It is not clear from the available evidence whether the tape recorders in the DMA District stations were used at all. The principal intention seems to have been to provide radio operators in those stations with a means of replaying recent radio messages.
- 4.6.11 In any event, the evidence before the Commission suggests that, over time, the consoles developed similar problems to those installed in Divisional Stations outside the DMA. There were problems with the power supplies which caused the consoles to cease operating. Complaints were also made about the audio quality of calls received on these consoles.
- 4.6.12 In or around October 1989, the warranty provided by S.E.L. in relation to the DMA equipment expired. From that point on, any repairs of faulty equipment by S.E.L. were subject to prior cost approval by the Garda Telecommunications Section. An undated report from 1989 states:

*“This will enable us to decide whether to proceed with repair or perhaps purchase a new unit... whichever is the more economical. Technicians at Harcourt Square have been trained to carry out maintenance down to board level.”*



- 4.6.13 One technician who worked in the DMA North Division between 1991 and 1993 was aware that the S.E.L. consoles at stations in that Division had recording devices in them. He thought that they had been used, but never saw them in use himself. He added that, by the time he came into the job in 1991, the consoles were “*pretty much obsolete*”, though they were still being used as items of furniture.
- 4.6.14 Another technician who was based in Garda Headquarters during that period recalled being sent out to a number of stations in the DMA to dismantle and dispose of consoles that were no longer functional. He was not asked to certify in writing that the consoles had been disposed of – “*they were treated really as a disposable item that depreciated over time*” – and searches by An Garda Síochána have not found any documentation in relation to this process.

## **Conclusions**

- 4.1 Between 1980 and 1995, the installation of telephone recording systems by An Garda Síochána was authorised by the Government on the advice of the Radio Advisory Committee, an interdepartmental group with Garda representation and independent technical expertise.
- 4.2 The Radio Advisory Committee was fully aware of the capacity of the recording equipment installed and its intended purpose, which was to record emergency-related communications to and from Garda Control Rooms.
- 4.3 The only systems on which non-999 calls may have been recorded during this period were those operated at the Communications Centre, Dublin Castle and later at Command and Control, Harcourt Square.
- 4.4 The recording of non-999 calls at these locations was limited to certain lines, used mostly by Control Room operators to contact members in Garda stations throughout the DMA. These lines were recorded in pursuance of the overall goal of recording all emergency-related communications.
- 4.5 Recordings at Dublin Castle / Harcourt Square were retained for no longer than a month, unless required for a particular investigation or court proceedings. This was a matter of practice rather than policy.
- 4.6 Short-term cassette recorders were installed in Divisional Stations throughout the country in the mid-1980s. Insofar as they were used at all, the Commission is satisfied that they were used only to record 999 calls. These recordings were not retained.
- 4.7 No written policy was formulated by An Garda Síochána in relation to the recording, retention, access and use of telephone calls during this period, whether 999 or otherwise. In the absence of any such policy, the technicians and officers working in the relevant Control Rooms devised their own practices and procedures.

4.8 No tapes or access records from any of the telephone recording systems in place during this period have been located.

## 5. Garda Telephone Recording Systems, 1995-2008

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### 5.1 Introduction

- 5.1.1 This chapter addresses the matters raised in sub-paragraphs 1(a) - (d) and (j) and (k) of the Terms of Reference, insofar as they apply to the period 1995 to 2008. These include the planning, procurement, installation, operation, management, alteration and termination of Garda telephone recording systems during this period, as well as the storage and destruction of recorded information and the use, if any, to which such information was put by An Garda Síochána.

### 5.2 Telecommunications in An Garda Síochána

- 5.2.1 In the early 1990s, there was a structural change to the Telecommunications Section of An Garda Síochána. The focus of the Telecommunications Section up to this time was the maintenance of equipment. The Section also had a technical role, overseeing the installation of new equipment and providing technical support to Gardaí in operational matters. There was no planning role associated with the Section; decisions on the procurement of new or replacement equipment were the function of the Radio Advisory Committee.<sup>49</sup>
- 5.2.2 Between 1992 and 1994, this changed with the establishment of a Planning Section within the Telecommunications Section. The focus at that time was on replacing the national radio network, the estimated budget for which was £97 million. The Planning Section was set up primarily to formalise and streamline the process of identifying and procuring new telecommunications equipment. Issues of policy and strategy remained with the Radio Advisory Committee, which was replaced by the Information Technology (IT) and Telecommunications Executive Committee in 1994. The Terms of Reference of the new Committee were laid out in its Annual Report of 1995 as follows:

*“Directing, monitoring and controlling IT (in accordance with the Garda IT Plan) and Telecommunications policy, strategy and implementation for the Garda Síochána, subject to the direction of the Commissioner and the approval and sanction as required by the Minister for Justice.”*

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<sup>49</sup> See Chapter 4 above.

- 5.2.3 The Committee was also responsible for “*defining the scope of the individual IT and Telecommunications projects*”, as well as “*setting up Project Boards to oversee these projects*”.
- 5.2.4 The Committee consisted of members from An Garda Síochána, the Department of Justice, the Department of Finance, University College Dublin (UCD), CRH and Allied Irish Banks (AIB).
- 5.2.5 Within An Garda Síochána, the key personnel in relation to Telecommunications at this time were as follows:

Assistant Commissioner T O’Leary

Assistant Commissioner O’Leary was Assistant Commissioner, “D” Branch, at this time. Amongst other responsibilities, he had oversight of the IT and Telecommunications Section.

Liam Hamilton – Civilian Engineer, Head of Telecommunications Planning

Mr Hamilton joined An Garda Síochána in October 1992 as a Principal Officer to the Department of Justice. Mr Hamilton was the first person of a senior civilian rank to be appointed to the Gardaí. He acted as an advisor to Garda Management and helped give strategic direction to the development of telecommunications services. He sat on the IT and Telecommunications Executive Committee as Head of Telecommunications Planning.

EJ Cussen – Chief Superintendent, IT and Telecommunications

Chief Superintendent Cussen was promoted to this position in July 1992. He reported to the Assistant Commissioner, “D” Branch, and worked alongside Mr Hamilton, the Head of Telecommunications Planning. He also sat on the IT and Telecommunications Executive Committee.

Although his position as Chief Superintendent gave him responsibility for both Information Technology (IT) and Telecommunications matters, Chief Superintendent Cussen’s principal focus was on IT. He had no experience in the technical aspects of telephone or radio systems and, therefore, he limited his role in Telecommunications to one of administration – processing paperwork, signing invoices, organising conferences and dealing with disciplinary matters. Although his approval was generally required for decisions in relation to the maintenance, replacement or expansion of telecommunications equipment, in such matters he thought it prudent to defer to the views of those with more relevant expertise, such as Mr Hamilton or the Superintendents in the Telecommunications Section. In 1998, the IT and Telecommunications Section

was restructured. Telecommunications was taken out of his portfolio and allocated to a newly appointed Chief Superintendent.

Noel Geary – Superintendent, Telecommunications Planning

Superintendent Geary's duties included liaising with the Head of Planning in relation to the provision of new telecommunications systems for An Garda Síochána, including radio communications, data network systems, telephone systems and Closed Circuit Television (CCTV) schemes. In operational terms, he reported directly to Chief Superintendent Cussen but, in relation to specific telecommunications projects and budget matters, he liaised with Mr Hamilton. Mr Hamilton, as a consultant and advisor, was not a line manager from the perspective of An Garda Síochána at this time.

Michael Bouchier – Inspector, Telecommunications Planning (Cork)

Although based in Anglesea Street, Cork, Inspector Bouchier had a national role as part of the Telecommunications Planning and Projects Unit. He had a project role in Cork at the time overseeing the Motorola trunk radio network, which was then being installed. He spent two or three days each week in Dublin working with the Planning Unit.

James Jeffers – Inspector, Telecommunications Planning

Inspector Jeffers was promoted to Inspector in February 1995 and was given responsibility for Telecommunications Operations located in Garda Headquarters (HQ). As Inspector, he was responsible for, amongst other things, the administration and management of projects relating to the Telecommunications Planning Section and he reported to Superintendent Geary.

William F. Nolan – Superintendent, Telecommunications Maintenance

During the early 1990s, Superintendent Nolan's duties covered all areas of the Telecommunications Section. However, when Superintendent Geary was appointed Superintendent, Planning, in 1995, Superintendent Nolan took charge of the Maintenance side of the Section. His job was to manage the technicians and ensure they received training, and to ensure that the equipment was installed correctly, that warranties were in order and that spare parts were available.

John Power – Inspector, Telecommunications Maintenance

Prior to the change in the organisation of the Telecommunications Section in the early 1990s, there was one Inspector of Maintenance with responsibility for the Dublin Metropolitan Area (DMA) and another Inspector with responsibility for maintenance of equipment for the rest of the country. When the changes occurred, Inspector Power was designated Inspector of Maintenance with responsibility for the whole country.

Paul James Sharpe – Inspector, Telecommunications Maintenance

Inspector Sharpe was responsible for, amongst other things, technical services in support of Garda operations in the DMA and the provincial Divisions. As Inspector, he was also responsible for liaising with the Planning Section to ensure the smooth coordination of operational maintenance and planning matters.

### **5.3 Command and Control Centre, Harcourt Square**

- 5.3.1 As indicated previously,<sup>50</sup> in 1989, Harcourt Square became the Command and Control Centre for the DMA, coordinating the Garda response to all emergency calls in that area. Although not a Garda station *per se*, it was the operational Headquarters for the DMA. The Command and Control Centre is also important in that it influenced the development of other Control Rooms that were created subsequently by An Garda Síochána – firstly, in Anglesea Street, Cork, and then at the other Divisional Headquarters outside the DMA. For that reason, it is important to include information pertaining to telephone recording at Harcourt Square in this Report.
- 5.3.2 In 1995, Harcourt Square did not have any public access areas and did not house any persons in detention. It did not act as a regular Garda station and members of the public did not attend it to report a crime or to be interviewed for any reason. A number of specialised units were based in Harcourt Square, including the Special Detective Unit and the Central Detective Unit. Calls to these units were answered, in the first instance, by telephone operators working in a part of the building separate from the Command and Control Centre.
- 5.3.3 The purpose of the Command and Control Centre was to centralise and control the response to all emergency calls for the DMA. All 999 calls for the DMA were answered in Harcourt Square at this time. As will be outlined below, certain non-999 telephone lines into and out of Command and Control were also recorded. Although these lines could, in theory, be dialled directly, they were not numbers that would have been known or used by the public at large.
- 5.3.4 The Command and Control Centre in Harcourt Square had a number of consoles dedicated to answering emergency calls. Details of any call requiring an emergency response would be taken and then transmitted to other operators, also based in the Control Room but working at separate Radio Dispatcher consoles, who, in turn, would transmit the information to patrol cars in the relevant areas. In the event that no response

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<sup>50</sup> See Chapter 4 above.

was forthcoming from a mobile unit, the dispatchers could also ring the local Garda station, from where Gardaí on foot patrol were managed.

### **Planning and procurement**

- 5.3.5 When the Command and Control Centre at Harcourt Square became operational in 1989, it was equipped with a 40-track reel-to-reel analogue tape machine that was used to record all communications traffic to and from the Call Answer and Dispatch consoles in the Control Room. It appears that, at some point between 1992 and 1995, the possibility of replacing this recorder with more up-to-date equipment began to be considered. On the information before the Commission, it is not possible to say who initiated this process.
- 5.3.6 The IT and Telecommunications Executive Committee was established in early 1994 and, as noted at paragraph 5.2.3 above, was responsible for “*defining the scope of the individual IT and Telecommunications projects*”, as well as “*setting up Project Boards to oversee these projects*”. No documentation for the Committee is available for this period. No agendas for meetings, minutes of meetings or annual report were made available to the Commission for 1994 despite a request being made that all of the aforementioned be furnished. The Commission heard oral evidence from the Secretary to the Committee. She confirmed that minutes were taken of every meeting and that agendas were also drafted. She was surprised that the documents were unavailable as she recalled leaving all of the material behind in the IT Section when she was promoted in 2001. This is a significant gap in the information available to the Commission.
- 5.3.7 In evidence to the Commission, the Head of the Telecommunications Planning Section, Mr Hamilton, stated that, during 1992-93, he and Inspector Geary had met with each Regional Telecommunications Sergeant and discussed with them the various issues existing for the technicians. Mr Hamilton also recalled visiting Harcourt Square where, amongst other matters, he noted that storage of the large reel-to-reel tapes then in use was “*something of a headache*”.
- 5.3.8 There is limited documentation available to the Commission for this period. However, it appears from the documentation provided that Inspector Geary was carrying out research into telephone recording equipment from May 1994 onwards, and was receiving information from commercial companies about digital voice recorders.
- 5.3.9 On 1 December 1994, a tender document was prepared and sent to a number of companies, inviting them to quote for the supply and installation of Communications Logging Systems at Command and Control, Harcourt Square, Dublin, and the



Communications Centre, Anglesea Street, Cork. The Commission has been unable to identify who requested the preparation of the tender document.

- 5.3.10 Quotations were to reach Inspector Geary by close of business on 7 December 1994. Any queries in respect of the tender process were also to be addressed to him. In all, five companies were invited to respond to the tender.
- 5.3.11 The specification document sent to the five companies required two separate recording systems, a different one for each location. The first system, System (A) for Harcourt Square, required a minimum recording capability of 60 channels with expansion up to 80 channels. This marked an increase in capacity of some 20 to 40 channels over the existing reel-to-reel system. A cartridge or cassette-based tape medium was the preferred choice. A tape transcription facility was required. Twenty-four hour logging was also required.
- 5.3.12 The second system, System (B) for Anglesea Street, Cork, was to be identical to the first system except that only 20 channels were required to record, with possible expansion up to 30 channels. Until this point, no multi-track recording facility had ever been installed in Anglesea Street. The purchase of this system formed part of a new initiative to create a Communications Centre for Cork City at Anglesea Street influenced by the Command and Control Centre in Harcourt Square.
- 5.3.13 The Commission has seen documentation for other, unrelated, projects – such as the purchase of computer equipment, or of a fingerprint identification and retrieval system - where an executive summary of the proposal for the purchase of equipment was presented to the Committee for consideration. Whether this was done in the case of the telephone recording systems for Harcourt Square and Anglesea Street cannot be confirmed.
- 5.3.14 The company that ultimately won the tender – Dictaphone Ltd – submitted a quotation on 5 December 1994 for both systems and submitted an updated quotation on 3 March 1995. The recorder model to which the quote related was the same in both quotations.
- 5.3.15 Following the receipt of the updated quotation, a meeting of the IT and Telecommunications Committee took place on 13 March 1995. The Agenda for this meeting was made available to the Commission. At point number 7 on the Agenda the following is listed: “*purchase of equipment (voice recording equipment)*”. The minutes of this meeting were not produced to the Commission despite repeated requests for same. The minutes of 12 other meetings between 1995 and 1996 were made available to the Commission. Some of these minutes relate to meetings that took place before 13

March 1995 and some relate to meetings after that date. It is highly regrettable that these crucial minutes have not been made available. The Commission is certain that the meeting took place. It is recorded in the minutes of a meeting of the Committee on 11 October 1995 that the minutes from the meeting on 13 March 1995 “*were adopted and agreed*”.

- 5.3.16 It is likely that the purchase of recording equipment for Harcourt Square and Anglesea Street was raised at the IT and Telecommunications Committee meeting on 13 March, though the extent to which it was considered cannot be known. Members of the Committee who gave evidence to the Commission in person were unable to recall any discussion of the telephone recording systems at this or any other meeting. This suggests that if the matter was considered, it did not generate controversy or significant debate. In one sense, this was not surprising. As far as Harcourt Square was concerned, the proposal was framed as an upgrade of existing equipment, presumably intended to fulfil the same task of recording emergency-related communications traffic. In the case of Anglesea Street the proposed equipment, although new, was intended to fulfil a similar function to that in place in Harcourt Square, as part of centralising the emergency call response.
- 5.3.17 The quotation provided by Dictaphone Ltd in relation to Harcourt Square was for a Digital Audio Tape (DAT) recorder machine, described as follows:
- “Model 9902-4-2/032 Prolog Dual Drive 64 Channels Modular Digital Logger recording up to 64 Lines/Extensions with 4 Channels to spare, giving 100% backup, simultaneous record/reply, using DAT cartridge, each cartridge giving 320 hours recording capacity and including model 9905/4S Workstation complete with speaker and software and two 30 hour instant playback modules.”*
- 5.3.18 On 3 May 1995, An Garda Síochána sought sanction from the Department of Justice to purchase the Dictaphone machine for Harcourt Square at a cost of IR£34,550.35. On 24 May 1995, sanction was granted by the Garda Planning Unit in the Department of Justice.
- 5.3.19 On 30 September 1995, an invoice issued from Dictaphone Ltd to An Garda Síochána for the supply of the equipment.
- 5.3.20 On 18 October 1995, an order was placed with Dictaphone for the supply and installation of the voice-logging equipment at Harcourt Square and Anglesea Street Communications Centre, Cork, “*as per the quotation of the 5<sup>th</sup> April 1995*”. The quotation of 5 April 1995 was not provided to the Commission and it is unclear whether

this date is simply a clerical error. In any event, it does not appear to the Commission that any material change occurred. The equipment supplied was the same as that quoted for in December 1994 and March 1995.

### **Installation**

5.3.21 The DAT system was described by one technician, who was present for the installation of the recorder in Harcourt Square, as a “*direct replacement for the old reel-to-reel recorder*”. He recalled transferring the same channels that were recorded on the reel-to-reel system onto the new DAT system. The old system was a 40-channel system. The channels recorded were as follows:

- Call Answering consoles<sup>51</sup> 1 - 7, where all 999 calls for the DMA were answered;
- Two telephone extensions from the PABX<sup>52</sup> system, situated on the Call Answering desks;
- Divisional Dispatch consoles from which radio calls were sent to and received from mobile patrol units in the DMA;
- Two telephone extensions from the PABX system, situated on the Divisional Dispatch consoles;
- The Special Detective Unit, Central Detective Unit and Traffic Dispatch desks which dealt with the deployment of resources from those units;
- Private-wire lines from alarm monitoring companies, which were also answered on the Call Answering desks at positions 1-7.

5.3.22 No external telephone extensions were recorded other than those connected directly to the Call Answering and Dispatch consoles. All dedicated 999 lines connected to the Call Answering consoles were outgoing-call barred. The two extensions allowed the operators to make an outgoing telephone call if they needed to do so. The operator would push the telephone extension button and the extension would become live. The Dispatch console operators worked primarily by sending and receiving radio communications. If a problem arose with the radio system, the two PABX telephone extensions on the consoles could be used by the operators. In general, these telephone extensions were used to contact District Garda Stations within the DMA.

5.3.23 It was theoretically possible for the console operators in Command and Control to make and accept personal or other non-emergency calls on the recorded PABX lines connected to the console, whether by direct dial or *via* the main telephone exchange for

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<sup>51</sup> See para 4.4.14.

<sup>52</sup> Private Automated Branch Exchange. These networks can switch calls between internal extensions, while allowing all users to share one or more external lines.

the building. However, the telephone numbers for these extensions were not published and would not have been generally known to members of the public.

- 5.3.24 The new DAT recorder system had increased capacity to record up to 64 channels. However, on installation, the technician did not recall any other telephone lines being added for recording on the new system.
- 5.3.25 The main telephone line into Harcourt Square was a published telephone number and was accessible to members of the public. This telephone number was answered by the operator on the main switchboard. The main switchboard was answered in a different room from the Control Room. It was not recorded.

#### **Operation and management**

- 5.3.26 The Commission was unable to find any written policy regarding the operation and management of the new expanded telephone recording system installed in Command and Control in Harcourt Square. This is, perhaps, not surprising, as there is no evidence of any written policy for previous telephone recording systems at Dublin Castle or Harcourt Square.
- 5.3.27 Despite the existence of the IT and Telecommunications Executive Committee, whose role it was to direct, control and implement IT and Telecommunications policy, it appears that the purchase of this new equipment did not prompt any review of existing policy and practice.
- 5.3.28 Any instructions received by the technicians in relation to the DAT recorder system were given verbally by either the operational Superintendent in charge of Command and Control or the Telecommunications Sergeant assigned to Command and Control.
- 5.3.29 Given the volume of telephone and radio traffic received in Harcourt Square, the tapes were changed every 3 or 4 days. The technicians would make regular checks on the system and, when a tape was 90% full, they would replace it with a new one.
- 5.3.30 All recordings from the DAT recorder were retained for a minimum of 30 days. After that, the oldest DAT tape was then reused unless there was a new blank tape available. This continued the unwritten practice that had been in place since the 1970s for the analogue reel-to-reel recorders previously used at Harcourt Square and Dublin Castle.
- 5.3.31 In the event that a recording on a tape needed to be kept for an investigation or a court case, that tape would be removed and placed in a separate storage area.<sup>53</sup>

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<sup>53</sup> See para 5.3.35 below.

### **Training**

- 5.3.32 The technicians did not receive any official training on the DAT recorder. However, when the machine was installed, they would have received basic training on how to use the machine, including how to change the tapes and how to perform a search for recorded material on the tapes.

### **Maintenance**

- 5.3.33 The technician's role was in first-line maintenance. He was responsible for ensuring that the system was recording, the date and time were correct and that no fault existed in relation to the recorder. The technician completed checks on the system on a daily basis.
- 5.3.34 If a problem arose that the technician was unable to solve then Dictaphone Ltd provided second line maintenance. Support was also available from the Telecommunications staff in Garda HQ in Phoenix Park.

### **Storage**

- 5.3.35 Tapes from the DAT recorder were kept in two sealed, locked, fireproof safes in what is described as a "*playback room*" on the seventh floor in Harcourt Square. The operational tapes that were available to be reused if necessary were kept in one safe and any tapes that were being retained for an ongoing investigation were kept in the second safe. The Telecommunications staff and the Sergeant had access to the locked safes and the keys to same were stored in the technician's workshop.

### **Access**

- 5.3.36 A technician in Harcourt Square recalled receiving requests both verbally and in written form from the Management staff at Command and Control to replay recordings of 999 calls and radio dispatch communications. Technicians would also receive requests on occasion to retain a tape for a certain period in relation to an ongoing investigation.
- 5.3.37 One technician told the Commission in evidence that the majority of requests he received were from the Superintendent in Command and Control for recordings of calls in relation to which an internal Garda investigation was taking place. A member who worked for the Superintendent at this time also recalled receiving requests from operational Gardaí and from Superintendents' offices within the DMA looking for details of calls to verify the date and time of a given call in addition to the identity of the operator who took the call. The Garda member in the Superintendent's office would forward such requests on to the technician.

- 5.3.38 As noted earlier, Harcourt Square received all the 999 calls for the DMA at this time. If a Garda member from outside the Command and Control Centre in Harcourt Square wanted access to an audio recording, he or she would make a written application through the relevant District Superintendent who would forward the application to the Superintendent in charge of Command and Control who, in turn, would forward the application to the technician.

**Destruction of recorded information**

- 5.3.39 As stated earlier, DAT tapes were changed every 3 to 4 days. Once removed from the recorder, they were kept for a minimum of 30 days and then reused as necessary if no new blank tape was available.
- 5.3.40 When, on the instructions of Commissioner Callinan in November 2013, all extant DAT tapes were gathered together for secure storage at Garda HQ, a total of 82 tapes were found at Harcourt Square. It is not known how many of these tapes, if any, were retained in connection with a specific investigation or court case.

## **5.4 Communications Centre, Anglesea Street, Cork**

**Background**

- 5.4.1 As noted in Chapter 4, the Control Room for the Cork City Division was based in Union Quay Garda Station, Cork, during the 1970s and 1980s. The Telecommunications Section was situated in Bishopstown due to the lack of facilities at Union Quay Garda Station.
- 5.4.2 In or around November 1991, the Divisional Headquarters for the Cork City Division moved to Anglesea Street Garda Station. The Telecommunications Section transferred from Bishopstown to Anglesea Street some 16 months later in March 1993.
- 5.4.3 Although Anglesea Street was a fully functioning Garda station, with a Public Office and interview rooms, it was considered an administrative Garda station. Persons in detention were generally brought to the Bridewell, Togher or Mayfield Garda Stations. Members of the public could attend Anglesea Street by arrangement and could be interviewed regarding an investigation. If a person was arrested following an interview he or she would be taken to the Bridewell or another Garda station to be processed as a prisoner.

**Planning and procurement**

- 5.4.4 From the available information, it appears that the purchase of telephone recording equipment for Anglesea Street was part of a broader plan to develop the station as a

Communications Centre for Cork City in order to centralise the response to emergency calls across the city.

5.4.5 At or around the same time, a new radio system for An Garda Síochána was being installed throughout the Cork City Division. This “Smartnet Trunked Radio Network” was the first of its kind in Ireland.

5.4.6 As noted at paragraph 5.3.12 above, the specification document seeking a recording facility for Anglesea Street, Cork, requested that the recording facility be identical to the system sought for Harcourt Square, but with a lesser capacity of 20 channels and the capability of expanding to 30 channels if required.

5.4.7 As noted at paragraph 5.3.14 above, Dictaphone Ltd responded with a quotation on 5 December 1994 and with an updated quotation on 3 March 1995.

5.4.8 The quotation for Anglesea Street was for a DAT recorder as follows:

*“Model 9902-4-1/024 Prolog Dual Drive 24 Channels Modular Digital Logger recording up to 24 Lines/Extensions with 4 channels to spare giving 100% backup giving simultaneous record/replay, using DAT cartridge each Cartridge giving 320 hours (total 640 hours) recording capacity and including Model 9905/4S Workstation complete with Speaker and Software also one 30 hour instant playback module”.*

5.4.9 On 18 October 1995, an order was placed with Dictaphone for the supply and installation of the voice-logging equipment at Harcourt Square and Anglesea Street Communications Centre, Cork, as per the quotation of 5 April 1995. The quotation of 5 April 1995 was not provided to the Commission and, as noted previously, it is not known whether this is simply a clerical error or whether a new quotation was provided to An Garda Síochána.

5.4.10 Unfortunately, no Customer Engineering Work Docket has been made available to the Commission confirming the installation of this 24-channel DAT recorder.

5.4.11 On 2 November 1995, Inspector Michael Bouchier compiled a report in relation to the new Trunked Radio System, which had been installed in Anglesea Street at this time. In this report, Inspector Bouchier noted that *“all radio and telephone traffic to the Operator Consoles is being recorded on a digital recording system”*. Given that no other recording equipment had been installed in Anglesea Street prior to the DAT system, the Commission is satisfied that the *“digital recording system”* referred to by

Inspector Bouchier is the DAT recorder. Therefore, it is assumed that the DAT recorder was installed in Anglesea Street Garda Station between 18 October 1995 and 2 November 1995.

5.4.12 On 16 January 1996, a report concerning the operation of the new radio system, sent from Anglesea Street Garda Station states that *“all voice traffic on the radio system and the 999 system is recorded and can be accessed through the controller”*.

5.4.13 On 4 June 1998 a Customer Engineering Work Docket indicates that the Dictaphone system was upgraded by 8 channels, increasing the capacity of the system from 24 to 32 channels in total.

#### **Installation**

5.4.14 The Commission has been unable to establish the exact date the DAT recorder was installed in Anglesea Street Garda Station. It has also been unable to establish what channels were connected to the system when it was installed in 1995.

5.4.15 The Control Room at Anglesea Street was equipped with 3 Dispatcher Consoles used to answer 999 calls, alarm calls and dispatch radio messages. Calls could also be made to and from each of the Dispatcher Consoles *via* direct dial or through the internal Garda telephone exchange. This facilitated contact between the Dispatchers and local Garda Stations. All calls going through the Dispatcher Consoles were recorded.

5.4.16 Unlike Harcourt Square, calls to the main station number at Anglesea Street were also answered in the Control Room, on 2 ‘Attendant Consoles’ that were separate from the Dispatcher Consoles and were not connected to any 999 lines. It appears that the Attendant Consoles were also connected to the DAT recorder at or around the time of its installation. As a result, all calls to and from the main station number were recorded, though recording ceased if and when the call was transferred to another extension.

5.4.17 As indicated above, Inspector Bouchier reported on 1 November 1995 that all telephone traffic on the operators’ consoles was being recorded. In a statement to the Commission, he confirmed that this would have included calls to and from the main station number.

5.4.18 The Commission was also furnished with a copy of the *“Control Room Anglesea Street Operators Manual, CCTV, Telephony and Fax”*, which was compiled by one of the technicians stationed at Anglesea Street. Unfortunately, this manual is undated. However, the evidence before the Commission suggests that it was written during the Dictaphone period.



5.4.19 In relation to the telephone system, the manual indicates that calls on the following lines were recorded:

- 999 lines (6 in total);
- Direct line / extension numbers for the operators' consoles and the supervising Sergeant's console in the Control Room;
- All calls to the main station number;
- Garda station alarms;
- Calls from the Public Access Call Box (also known as 'Green Man') at Barrack Street and Blackrock Garda Stations;
- Private-wire lines to Fire Service and other State agencies;
- Private-wire lines to cash centres and private security companies;
- Direct line for use in the event of a 'tiger kidnapping'.

5.4.20 The manual makes it clear that, in addition to the 999 lines and radio traffic, certain non-999 extensions including the main station number were being recorded in Anglesea Street. As we have seen, it is not possible to confirm the date from which this was being done. However, there is reason to believe that the main station number was being recorded by the end of 1995, and possibly earlier. In February 1996, when DAT recorders were being installed in other Divisional Headquarters around the country, Inspector Bouchier was asked by the Telecommunications Section to give his recommendations as to what lines should be recorded as a matter of priority. In his response, he included the "*Telephone Attendant Offset Console*" – that is, the console where the main station number was answered – as one of his priority lines.<sup>54</sup> Mr Bouchier told the Commission in evidence that this was based on his experience of having that line recorded in Anglesea Street.

5.4.21 It is important to note that recording the main station number did not mean that all telephone lines in the station were being recorded; recording of any call on the main station line ceased if the call was transferred to another extension (unless that extension was connected separately to the recorder).

5.4.22 When a major event was taking place in the Cork Region, extra telephone lines were added to the system and enabled to record, for example, when the Tour de France took place in Ireland in 1998. When such an event was taking place, the staff numbers in the Control Room were increased. Extra operator consoles were made available. In effect, this was a duplication of telephone lines rather than the recording of any new material. These telephone lines were installed on a temporary basis. The request to install these

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<sup>54</sup> See para. 5.5.46 below.

telephone lines on the system would have been made verbally to the technician by the District or Divisional Officer.

### **Operation and management**

- 5.4.23 As with Command and Control, Harcourt Square, the Commission was unable to find any set policy regarding the operation and management of the new telephone recording system installed in the Communications Centre in Anglesea Street Garda Station.
- 5.4.24 Although the installation of multi-track recording equipment at Anglesea Street represented a new development, it does not seem to have prompted any statement or review of policy by the IT and Telecommunications Executive Committee. Inspector Bouchier told the Commission in evidence that he received no information or guidelines as to what lines should be recorded, what records should be kept and how playback requests should be managed.
- 5.4.25 Given the absence of any policy statement from Garda HQ, and as Anglesea Street Garda Station was the first Divisional Headquarters outside the DMA to have multi-track recording equipment installed, it is not surprising that the decisions made “*on the ground*” by Inspector Bouchier regarding policy would come to influence policy and practice at the other Divisional Headquarter stations outside the DMA.
- 5.4.26 A detailed analysis of the development of policy relating to the operation and management of the telephone recording systems in Divisional Stations is set out below starting at paragraph 5.5.187.

### **Training**

- 5.4.27 The technicians in Anglesea Street did not receive any formal training on the DAT recorder when it was installed.
- 5.4.28 On 24 February 2000, the Telecommunications Sergeant for the Cork Region wrote to the Telecommunications Section at Garda HQ asking for training for himself and 7 other members on the “*Dictaphone Operation and Set-up*”. There was no reply to this application that was made available to the Commission.
- 5.4.29 On 29 March 2000, an email was sent to all of the Regional Telecommunications Sergeants enquiring as to whether the technicians had received training following the installation of a workstation for the DAT recorders. 10% of the payment for the workstations was held back until the equipment had been installed and training of the

local technicians completed. The Regional Telecommunications Sergeants noted at this time that no training had been received on the use of the DAT recorders.

- 5.4.30 From 23 May to 25 May 2000, training in relation to the DAT recorders and playback workstations was provided for at Garda HQ. However, none of the technicians stationed in Anglesea Street from whom the Commission took oral evidence were provided with this training. The Commission is aware that one member who was stationed in Fermoy at the time was provided with training.

#### **Maintenance**

- 5.4.31 First-line maintenance on the DAT recorders was performed by the technicians. However, a service-level agreement was in place with Dictaphone Ltd to maintain the recording systems.
- 5.4.32 The maintenance of the DAT recorders is described in detail below, beginning at paragraph 5.5.229. The maintenance contracts covered Harcourt Square, Anglesea Street, Cork, and all of the Divisional Headquarter Garda stations.

#### **Access and use of recordings**

- 5.4.33 There was no written or formal policy communicated to the technicians from Garda HQ regarding who could have access to the DAT recorder. Likewise, there was no written or formal policy in place regarding who could request access to the audio recordings for use in an investigation. Without any direction or policy from Garda HQ, it fell to the local technicians to develop their own practices in relation to access.
- 5.4.34 The Commission has received detailed records from the technicians stationed in Anglesea Street and is satisfied that there was no systematic abuse of the audio recording system. There is no evidence before the Commission of a practice of downloading or checking recorded calls for any purpose other than to satisfy a request made to the technicians by a Garda member for the purpose of investigating a criminal matter or a complaint.
- 5.4.35 The Instant Playback Machine (IPM) was a computer workstation, initially installed in the Control Room that was accessible to all members. Those who worked in the Control Room on a regular basis would have been aware of it. It was not password protected. Any member of An Garda Síochána could enter the Control Room and use the IPM to listen back to a call. In or around 2000, the IPM was moved into the Equipment Room and, from then on, was accessible to the technicians only.

5.4.36 In general, requests were made to the technicians from members who were investigating a crime. Almost all requests at this time would have been verbal and made directly to the technicians. A cassette copy of the relevant recording would be provided in response to any request. In general, the technicians at Anglesea Street noted the work that they performed on the DAT recorder in their personal work diaries. Copies of some of the entries in the personal work diaries of the technicians were made available to the Commission.

5.4.37 From 1999 onwards, the Regional Telecommunications Sergeant, who was stationed in Anglesea Street, kept a Correspondence Register in which all written requests for copies of recordings were logged. From about 2005 onwards, all tasks were logged by the technicians in a “Telecoms Task Log”, which comprised an Excel spreadsheet designated for each Region. This was kept on a server in Garda HQ.

#### **Storage**

5.4.38 The DAT tapes at Anglesea Street were stored in a box in the same cabinet that housed the DAT recorder. This was located in the Equipment Room. The box was labelled “*keep re whatever investigation etc*”. There was no stipulation as to the rank within An Garda Síochána a member was required to hold in order to make the decision to retain a tape.

#### **Destruction of recorded information**

5.4.39 The technicians recalled the content of a letter dated 24 October 1996. The letter stated that “*the tapes used in conjunction with this equipment should be stored in a secure cabinet for one month unless subject to an investigation*”. The technicians followed this instruction. They generally kept a tape for 4 to 6 weeks, in case members had not realised that the recording was required within the 4-week period.

5.4.40 If no request was made to the technicians to listen to a tape, they would reformat it and reuse it. If a tape was reused on a number of occasions, it would become worn and fail to function correctly. If a tape was found to be unusable, the technicians would destroy it.

5.4.41 If a request was made to retain a tape subject to an investigation, the technicians would keep the tape. They noted that they kept those tapes in the box in the Equipment Room, as per paragraph 5.4.38 above. These tapes were kept indefinitely, as the technicians were never informed by members when the investigation was closed. 124 tapes were kept indefinitely and these were returned to Garda HQ in 2013.

## 5.5 Divisional Stations outside the Dublin Metropolitan Area (DMA)

5.5.1 In 1995, there were 18 Divisional Headquarter Garda stations outside the DMA<sup>55</sup>. They were as follows:

1. Anglesea Street, Cork East Division
2. Letterkenny, Donegal Division
3. Sligo, Sligo / Leitrim Division
4. Castlebar, Mayo Division
5. Roscommon, Roscommon / Galway East Division
6. Monaghan, Cavan / Monaghan Division
7. Drogheda, Louth / Meath Division
8. Mullingar, Longford / Westmeath Division
9. Mill Street, Galway West Division
10. Henry Street, Limerick Division
11. Ennis, Clare Division
12. Thurles, Tipperary Division
13. Tralee, Kerry Division
14. Bandon, Cork West Division
15. Portlaoise, Laois / Offaly Division
16. Wexford, Wexford Division
17. Waterford, Waterford / Kilkenny Division
18. Naas, Carlow / Kildare Division

5.5.2 Fermoy, Bray, Navan and Kilkenny became Divisional Headquarter Garda stations in subsequent years and this will be referenced as appropriate in this chapter. The Communications Centre in Anglesea Street Garda Station, Cork, and the Command and Control Centre in Harcourt Square, Dublin, have been dealt with separately above.

### **Planning and procurement**

#### **Background**

5.5.3 As was indicated in Chapter 4, since the mid-1980s, Divisional Stations throughout the country had a limited, one-track cassette recording facility built into the S.E.L consoles that were installed for use by the telephone operators in those stations. In most Divisional Stations, this recorder – and in many cases the entire console – had ceased to function by the early 1990s.<sup>56</sup>

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<sup>55</sup> Dublin Metropolitan Area hereinafter (DMA) which became known as the Dublin Metropolitan Region (DMR) in subsequent years.

<sup>56</sup> See Chapter 4, para 4.5.33.

- 5.5.4 On 19 July 1995, Inspector Power, who worked in the Maintenance Section of Telecommunications, wrote to each Regional Telecommunications Sergeant asking for reports on whether the S.E.L. consoles in their Region were being used and whether all features were functioning satisfactorily. His recollection, as he stated in his evidence to the Commission, is that this action was prompted by complaints received about the consoles. The Commission has not seen any written responses to Inspector Power's request. There is some later correspondence which suggests that Inspector Power produced a report on the issue, but a copy of this report has not been found.
- 5.5.5 On 30 August 1995, the Chief Superintendent, Galway, received correspondence from his Superintendent referring to problems with the PABX telephone exchange in Mill Street Garda Station, Galway and suggesting that it would have to be replaced. The Chief Superintendent forwarded the application to the Assistant Commissioner, "D" Branch, Garda HQ. He outlined that the existing telephone system was old and nearly obsolete. It regularly broke down and was only kept in service by using spare parts from similar systems. He also stated that "*the automatic recording of 999 calls can no longer be made and this is very unsatisfactory*".
- 5.5.6 The response of the Assistant Commissioner is not recorded, but it appears that the Galway application was sent to the Telecommunications Maintenance Section for further consideration. On 6 November 1995, a letter was written on behalf of the Superintendent, Maintenance, W.F. Nolan, to the Superintendent, Telecommunications Planning, Noel Geary. Having recommended replacement of the telephone exchange at Mill Street Garda Station, it goes on to consider the problem regarding 999 recording. The letter notes that the S.E.L. consoles were now over 10 years old and that spare parts would become unavailable shortly, as the consoles were now obsolete.
- 5.5.7 In particular, the letter states that the tape recorder unit for the console was no longer available. It also notes that problems with the 999 recording systems in other Divisional Stations had been brought to the notice of the Telecommunications Section. It makes a recommendation that the provision of call-recording equipment for all Divisional Stations be examined and that it would record "*all radio and telephone traffic.*" Mr Nolan told the Commission that this reflected his own view that all radio and telephone traffic going through Divisional Stations should be recorded, but he stated that such matters would have been for the IT & Telecommunications Executive Committee to decide. Mr Cussen, the then Chief Superintendent, stated in evidence to the Commission that he was unaware of the recommendation at this time.
- 5.5.8 Documentation provided to the Commission indicates that the Planning Section had already begun the process of tendering for replacement recording equipment some

weeks before Superintendent Nolan's letter of 6 November 1995. Nonetheless, the evidence of both Mr Geary and the then Head of Telecommunications Planning, Mr Hamilton, was that the impetus for the project derived from problems with maintaining the S.E.L. consoles, rather than resulting from a strategic decision to acquire better and more powerful equipment.

5.5.9 Mr Hamilton told the Commission that the project:

*"...was not really a strategic-level project, this was something done for maintenance reasons almost... to replace older systems which were inadequate and were causing maintenance problems..."*

5.5.10 Similarly, Mr Geary stated:

*"From what I can recall it wasn't intrinsically a planning thing in the sense that it was initiated in the Planning [Section]... all we were doing was replacing those S.E.L. recorders with new equipment and a request was made by the maintenance side to replace them and they had in mind particular types of equipment, some of which had already been put... into Harcourt Square..."*

5.5.11 As indicated at the outset of this chapter, during 1995 / 96 the overall responsibility for directing, monitoring and controlling Telecommunications policy and its implementation lay with the IT and Telecommunications Executive Committee – a high-level group chaired by a Deputy Commissioner and including representatives from the Departments of Justice and Finance.<sup>57</sup>

5.5.12 The Committee had meetings in June, October and December 1995. Attendees at those meetings included Deputy Commissioner Byrne, Operations, Assistant Commissioner O'Leary, "D" Branch, Chief Superintendent Cussen, Telecommunications, and the civilian Head of Telecommunications Planning, Mr Hamilton. Minutes of those meetings contain no mention of voice recording policy, or of the process then underway to replace the S.E.L. recorders with a new system. A meeting may also have taken place in July 1995, but no agenda or minutes for this meeting have been found.

5.5.13 The Committee met on a further 9 occasions in 1996; again, the minutes for each meeting indicate that no discussion of telephone recording systems took place. This accords with the evidence given to the Commission by former members of the Committee, who were unable to recall any discussion of the purchase of a new DAT system for Divisional Stations around this time.

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<sup>57</sup> See above para 5.3.6

5.5.14 From this, the Commission must conclude that the IT and Telecommunications Executive Committee did not at any point discuss the implications of replacing the limited S.E.L. recorders at Divisional Stations with new DAT machines capable of recording multiple lines at one time. This is quite simply because the matter was not put before them for discussion, although, as we will see, certain members of the Committee – notably the Chief Superintendent, Telecommunications, and the Assistant Commissioner, “D” Branch – were made aware of the proposed replacement process in or around November 1995 and in due course gave their approval to the purchase of new equipment.

**Tender specification**

5.5.15 On 18 September 1995, Superintendent Geary sent faxes to a small number of companies asking them to forward quotations for *“the supply, installation and commissioning of voice logging systems in the Major Control Centres as per the attached specification.”* The companies were asked to respond by 27 September 1995. It is not clear who drew up the specification document, but the evidence suggests it was done either by Superintendent Geary himself or under his oversight. Mr Geary has no recollection of drawing it up, though he is named in it as the person to whom all queries should be directed.

5.5.16 The specification document as provided to the Commission is undated and headed *“Communication Logging Systems”*. It begins by stating:

*“The Garda Síochána are considering the installation and commissioning of Communication Voice Logging Systems in its major Control Centres located at various parts of the country.”*

5.5.17 It then goes on to set out the requirements for the proposed systems. Of particular interest to the Commission are the following:

- Each recorder had to be capable of recording a minimum of 8 channels;
- The recording medium (DAT was the preferred choice) had to allow for 240 hours of recording time;
- The system had to be capable of expansion. Tendering companies were asked to *“specify the system’s expansion capability and indicate by what increments expansion is to be achieved”*;
- The system had to allow *“automatic search to any location by means of recorded time signal”*;



- For fail-safe purposes, each recorder was to have a second, standby tape deck that would commence recording automatically in the event of a fault in the first tape deck;
- In the event of a recording failure on a specific channel, the system should be able to switch recording from that channel to a spare, default channel.

- 5.5.18 The document does not specify what kinds of communications An Garda Síochána intended to record with the new system, although one reference to “*the interface of radio, telephone and audio circuits*” implies that both radio and telephone recording was envisaged as a possibility.
- 5.5.19 The Commission could not establish why a minimum of 8 recording channels was specified. As we have seen, the S.E.L. recorders previously installed in Divisional Stations could only record one channel at a time, on tapes that lasted no more than 60 minutes. In a subsequent report outlining the results of the tender process, Superintendent Geary identifies one reason for replacing the S.E.L. recorders as being that they were “*deficient in facilities*”<sup>58</sup>. This suggests that the decision to purchase a system with increased recording capacity was not merely an example of unintended “*technology creep*”, but arose from a concern within the Telecommunications Section that the existing recorders were not capable of fulfilling the task required of them.
- 5.5.20 Mr Geary was unable to recall precisely what he meant by the phrase “*deficient in facilities*”, but it is reasonable to suppose that it related to the in-built limitations of the S.E.L. recorders – specifically, the inability to record more than one channel at a time and the inability to record for more than 60 minutes without changing tapes or recording over earlier calls.
- 5.5.21 There are clear reasons why a multi-track recorder could have been deemed necessary, even if the only aim was to record 999 calls. In the first place, a number of Divisional Stations had more than one 999 line. In some stations, 999 calls could also be put through to other lines in the event that the dedicated 999 lines were busy or unanswered. Finally, having multiple recording channels meant that some spare channels were available for use as a backup, in the event that a recording channel ceased to function properly. As we have seen, the capacity to switch to a spare channel in the event of a recording failure was a requirement in the specification document. Mr Geary also referred to this potential benefit in his evidence to the Commission.

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<sup>58</sup> See para 5.5.26.

- 5.5.22 The decision to look for a multi-track recorder may also have been influenced by the fact that the Communications Rooms in Divisional Stations were thought of as Control Centres – that is, as discrete areas, modelled on Command and Control, Harcourt Square, from which emergency calls would be handled and any necessary response directed by means of radio messages. Since the mid-1970s, there had been a practice of recording both radio and telephone communications in and out of Command and Control (first at Dublin Castle, then at Harcourt Square). This practice was also adopted in Anglesea Street when a new Communications Centre for Cork City was constructed there. Even the S.E.L. consoles in Divisional Stations, though capable of recording only one channel at a time, were bought to allow for operators to switch between recording telephone and radio channels as required. Having multiple recording channels eliminated the need for switching, and thereby ensured that all 999 and radio traffic was recorded.
- 5.5.23 It remains unclear why the minimum number of recording channels was fixed at 8. Mr Geary and other members of the Telecommunications Section who gave evidence to the Commission could not provide an explanation. It is possible that 8 was the minimum number of channels on all the commercially available recorders at that time, but this has not been confirmed. The Commission notes that, for the recorders cited in the tenders received by An Garda Síochána, recording capacity could be increased only in increments of 4 or 8. It is clear that, for some stations at least, 4 channels would not have been sufficient to record all the 999 lines as well as the radio channels in addition to providing one or more spare channels as a fallback in the event of another channel developing a fault.
- 5.5.24 Three companies provided quotations to An Garda Síochána in response to the specification document. A fourth was also invited to tender for the system but did not do so. One of the 3 companies, Dictaphone Ltd, provided quotations for 3 different systems – two named ‘Guardian’ and one named ‘Sentinel’.
- 5.5.25 Each of the tenders received offered 8-channel digital recorders with dual DAT drives, allowing 300 to 350 hours of recording per tape and a capacity to expand the number of recording channels incrementally to 32, or in some cases 64. All except the ‘Sentinel’ model also included an internal hard drive for instant playback of recent recordings. The essential difference between the two ‘Guardian’ models offered by Dictaphone was the amount of memory the instant playback drive could hold – 30 hours in one case, 320 hours in the second.
- 5.5.26 On 10 November 1995, Sergeant John Doyle wrote to Superintendent Geary attaching a spreadsheet with the proposals from each company. He outlined that all suppliers had

quoted for the minimum requirement of 8 channels and had noted that if greater channel capacity was required further cost would be incurred. He also stated that the lowest quotation was from Dictaphone for the Sentinel unit but pointed out that it did not have a hard disc and, therefore, had no instant playback facility. It was also incapable of remote access.

5.5.27 It is not known who was involved in the evaluation of the responses to the tender but, on 15 November 1995, Superintendent Geary wrote to the Chief Superintendent, IT and Telecommunications, summarising the background to the tender process and its outcome. Under the heading, “*Replacement of Voice Logging Recording Equipment at Divisional Control Centres*”, he wrote:

*“With reference to the above and further to ... Superintendent Nolan’s Report (copy attached) of 6<sup>th</sup> November concerning same, a proposal has been made to replace the existing voice logging recorders installed in Divisional Communications Consoles due to the fact that same are:*

*(a) unserviceable*

*(b) obsolete*

*(c) deficient in facilities.*

*For these reasons a specification was drawn up and tenders invited from 5 firms for the supply and installation of 16 systems to meet immediate and urgent needs.*

*Following technical evaluation it is recommended that the unit offered by Dictaphone Ltd i.e. the Sentinel Model 51200-408 meets the specification and it is therefore recommended that an order for 16 units be placed with Dictaphone Ltd...”*

5.5.28 This letter appears to be the first occasion on which Chief Superintendent Cussen was informed in writing about the project of replacing the S.E.L. recorders. In his evidence to the Commission, Mr Cussen did not recall having any particular involvement with the replacement process. He indicated that projects involving the replacement of telecommunications equipment were usually dealt with by the Head of Telecommunications Planning, Mr Hamilton, and could bypass him entirely. Mr Cussen emphasised that his background was in IT rather than Telecommunications and that he, therefore, had no technical expertise in the area and did not believe he could bring “*much added value*” to the choices made by Mr Hamilton and the staff working in that area, such as Superintendent Geary.

5.5.29 Mr Cussen did not recall his response to the letter of 15 November 1995 but he said that he would have sent it on for approval, probably to the Assistant Commissioner, “D”

Branch, and, ultimately, to the Department of Justice. Although there is no written evidence of a file being sent to the Assistant Commissioner on the issue, it seems that sanction to proceed was sought and obtained from him, most likely verbally. A letter dated 21 November 1995, sent by Superintendent Nolan to Superintendent Geary on behalf of Chief Superintendent Cussen, states that the Assistant Commissioner, “D” Branch, had approved the purchase of the equipment. Superintendent Nolan then requested Superintendent Geary to make early arrangements for the purchase of the 16 systems.

- 5.5.30 The Assistant Commissioner, “D” Branch, at the time was a Mr T. O’Leary. It is not clear to what extent Assistant Commissioner O’Leary was made aware of the increased technical capabilities of the proposed new system – notably, the change from one-track to simultaneous 8-track recording and from 60 minutes to 320 hours of recording time per tape.
- 5.5.31 The Commission understands that, in 1995, sanction would have been required from the Department of Justice before the purchase of this new equipment could be completed. Documentary evidence confirms that this was given in relation to the earlier purchase of systems for Harcourt Square and Anglesea Street. However, searches by An Garda Síochána and the Department of Justice have not found any documentation to show that sanction was sought for the purchase of DAT systems for Divisional Stations.
- 5.5.32 On 23 November 1995, the Sergeant in charge of Stores was asked to place an order with Dictaphone Ltd for the 16 units. An order document was then forwarded to Dictaphone Ltd on 24 November 1995.
- 5.5.33 Between 24 November and 5 December 1995, Dictaphone Ltd corresponded with Superintendent Geary and it was decided that the Guardian Model 31210-408 would now be supplied instead of the Sentinel Model. It is unclear why this change occurred. It was agreed that the price would remain the same, although the Guardian model came with a 30-hour instant playback module (IPM) courtesy of an in-built hard drive, something the Sentinel model did not have.
- 5.5.34 The Commission has had sight of the Telecoms Store Ledger from December 1995 and, on 6 December 1995, an order was placed to “*supply and install in the following Garda Stations: Letterkenny, Sligo, Castlebar, Roscommon, Monaghan, Drogheda, Mullingar, Galway, Ennis, Thurles, Tralee, Bandon, Portlaoise, Wexford, Waterford, Naas :- Voice Logging Equipment type Guardian 31210-1408*”

5.5.35 This effectively completed the tender process and made way for the supply of the equipment for installation to begin.

### **Installation**

#### **Preparation for installation**

5.5.36 On 24 November 1995, Inspector Power wrote to each Regional Telecommunications Sergeant and to Inspector Bouchier in Cork to inform them that voice-recording systems would be installed in 16 Divisional stations by Dictaphone Ltd, who would also supply training.

5.5.37 Superintendent Geary devised a number of steps that he deemed necessary, on the basis of his experience, to have in place for the installation of the equipment. He set out the following steps in a letter to Inspector Bouchier dated 5 February 1996:

1. Full test and validation of unit in Headquarters – Planning Section.
2. Utilise Portlaoise Divisional Control Room for field trials.
3. Determine policy on which circuits are to be connected for logging purposes. (The units have been equipped with 8 channels initially).
4. Proceed with general installation to be carried out by supplier, pending the satisfactory outcome of the Portlaoise field trials.

5.5.38 Step 1, the full test and validation of the unit, was a technical check on the unit to ensure that it did what it was supposed to do before it was installed. This occurred in Garda HQ. On 7 March 1996, Superintendent Geary wrote to Chief Superintendent Cussen, stating “*tests have been carried out successfully in the Telecommunications Planning Unit*”.

5.5.39 In relation to Step 2 – field trials – DAT recorders were installed in Bandon (December 1995) and Portlaoise (February / March 1996) Garda Stations some months ahead of their installation in the rest of the country. The technicians in those stations do not recall being told that the installation was for trial purposes, but it is reasonable to conclude that this was the case. In April 1996, the technician in Bandon submitted a report on the installation and use of the system there. This was done at the request of an Inspector from Telecommunications Planning who would have reported to Superintendent Geary. In the case of Portlaoise, the letter of 7 March 1996, referred to above, includes confirmation by Superintendent Geary that “*a Unit has recently been installed in Portlaoise on a trial basis.*”

- 5.5.40 Step 3, regarding the determination of policy on which telephone / radio circuits were to be connected to the recording system, is the aspect of greatest importance and will be discussed in detail throughout this chapter. At this point, it suffices to observe that this perceived need to determine recording policy runs counter to any suggestion that the DAT recorders were seen merely as a ‘like-for-like’ replacement of existing equipment.
- 5.5.41 Step 4 was to proceed with general installation of the equipment by the supplier, Dictaphone Ltd, when the field trials in Portlaoise were completed. Details of the installation process for each station are set out further below.

**Determination of policy – recording lines**

- 5.5.42 Having outlined the steps to be taken prior to installation of the new DAT recorders, Superintendent Geary concluded his letter to Inspector Bouchier on 5 February 1996 by asking the Inspector to let him know what he would consider to be “*the most essential circuits (in order of priority) which should be connected to the unit*”.
- 5.5.43 Mr Geary told the Commission in evidence that he chose to contact Inspector Bouchier because of his experience. Inspector Bouchier was working full-time in the area of radio and telephone communications, as distinct from Superintendent Geary who, although a senior manager, considered himself to be working part-time in the area, given his other responsibilities in areas such as CCTV and IT.
- 5.5.44 Inspector Bouchier had overseen the installation of a similar recording system at Anglesea Street, Cork, in October 1995 as part of the new Communications Centre there. His responsibilities also included oversight of telecommunications at Bandon, where the first of the new 8-channel recorders had been installed in December 1995, apparently for trial purposes. He was thus well placed to advise on the installation from a practical point of view.
- 5.5.45 The determination of recording policy, however, was another matter. Inspector Bouchier himself believed that the decision regarding which lines should be recorded was a matter for the operational side of An Garda Síochána, not for the Telecommunications Section. In his view, equipment such as this was bought in response to operational needs and it was important to be sure of what the operational Garda Management wanted it to do, rather than making decisions on the basis of what he thought it should do.
- 5.5.46 For this reason, when a DAT recorder was installed in Anglesea Street Garda Station Inspector Bouchier had sought directions from the local operational Superintendent as to which circuits should be connected. He received no response and so, ultimately, was

compelled to make the decision himself. Inspector Bouchier may also have had a say in deciding which lines were to be connected to the recorder in Bandon in December 1995. No documentation exists in relation to this, but the technician in Bandon believes that he discussed the question of which lines should be recorded with Inspector Bouchier around the time of the installation.

5.5.47 On 13 February 1996, Inspector Bouchier responded to Superintendent Geary's request for advice with the following suggestion:

*"I consider that the following circuits should be connected to the Dictaphone Guardian Voice Logging Recorder in the order set out:*

1. *999' circuit (s).*
2. *Telephone Attendant Offset Console.*
3. *Private Wire (s) from Ambulance Control; Fire Station and Alarm Monitoring Stations*
4. *Audio output from positions 3 & 4 of the Philips M84 District Controller. Position 3 covers the Personal Radio channel which also covers M/Cycles and HB mobiles. Position 4 covers the sub-district station and LB district mobile channel.*
5. *Audio output from positions 1 & 2 of the Philips M84 District Controller. Position 1 covers the National Channel for LB mobiles from outside the district. Position 2 covers the Division to Division channel linking the Divisional Controller to the districts in the division."*

5.5.48 Inspector Bouchier added the following observations to his response:

*"With reference to No.1, there may be more than one '999' circuit or a reserve '999' circuit.*

*Regarding No.2, I feel that connecting the Telephone Offset Console to the recorder that the Operators conversation with the caller will be courteous and ensure a faster transfer of calls to the called party leaving the lines open for other callers.*

*Regarding No.3 the number of PW<sup>59</sup> circuits will vary from Division to Division. There may in fact be none in some divisions.*

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<sup>59</sup> Private Wire.

*With regards to 4 & 5 there is one audio output for each two channels and I feel that this is adequate. The channels will be recorded if they are being monitored.”*

- 5.5.49 In evidence to the Commission, Mr Bouchier was asked to explain the various circuits in more detail. The recording of the 999 circuits was self-explanatory given that these calls were of an emergency nature.
- 5.5.50 Mr Bouchier explained that the “*Telephone Attendant Offset Console*” was the console on which calls to the main number of the Garda station were answered. In Harcourt Square, all such calls were answered in another room, away from the Command and Control Centre. But in every Divisional Station outside the DMA, the main station number lines came into the Control Room and were answered there, as well as 999 calls.
- 5.5.51 Strictly speaking, this represented a departure from the acknowledged purpose of the Control Room, which was to have a dedicated area in which emergency calls – and only emergency calls – were received and responded to. However, there were understandable reasons for this departure in the case of the Divisional Stations.
- 5.5.52 Firstly, as Mr Bouchier explained to the Commission in evidence, some of the Divisions at the time did not have proper dedicated 999 emergency telephone lines or, if they had, there was only one. Telecom Éireann, who were, at that time, responsible for answering all 999 calls and forwarding them to the appropriate emergency service, would use the main station telephone line as a fallback if the 999 line was engaged or faulty. This did not change until 1997, when Inspector Bouchier engaged in a process with Telecom Éireann to install dedicated 999 emergency telephone lines in all Garda stations. Even after that, 999 calls continued to be put through to the main station line if the dedicated 999 lines were busy or not functioning.
- 5.5.53 The second reason for having the main station number answered in the Control Room was one of resources. Due to limitations in terms of space and staffing resources, it made sense in most Divisional Stations to have 999 and non-999 calls to the station answered by the same operator, working in one room. In most stations, there was generally only one telephone operator on duty, though during busy periods – such as after a major traffic accident or other incident – other members in the station might assist in answering calls. As we will see, in some stations the pressure on Control Room operators at times of high call volume resulted in decisions being made to allow Control Room calls to be answered on certain telephone lines outside the Control Room, in order to reduce the number of unanswered calls.<sup>60</sup>

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<sup>60</sup> See for example para. 5.5.166 below.



- 5.5.54 As outlined above, the reason offered by Inspector Bouchier for having the main station number recorded, set out in his response of 13 February 1996, was that, if Control Room operators knew the line was being recorded, this would encourage courtesy and efficiency in their manner of dealing with calls. In evidence to the Commission, Mr Bouchier said that this was not the only justification for recording this line. He referred to the fact that the main station number often functioned as a backup line for the 999 service, and that other calls of an emergency nature could also come in *via* the main station line – facts he assumed to be widely known in the Telecommunications Section and unnecessary to state in his response to Superintendent Geary.
- 5.5.55 It is also important to note that once the operator transferred a call from the main station line to another extension outside the Control Room, the recording ceased, unless that particular extension was itself connected to the DAT recorder. Of course, if the operator did not transfer the call but dealt with the particular matter him or herself, whether of an emergency nature or not, the entire content of that conversation would be recorded.
- 5.5.56 Another reason for recording the main station number offered by Inspector Bouchier related to the receipt of telephone calls detailing bomb threats. Such threats were received on 999 emergency lines but also on the main station telephone line. Sometimes threats were made to the offices of newspapers and the newspapers would relay the information to the Gardaí by ringing the station directly rather than calling the 999 emergency line.
- 5.5.57 The circuits described as “*private wires*” were direct telephone lines between the Garda station and Ambulance Control, the fire stations or alarm monitoring companies. It was a direct link to and from a stand-alone telephone at the Garda station, bypassing the normal telephone exchange in the station. There was no dial-up required; it was essentially a hotline between the Gardaí and other emergency services.
- 5.5.58 Circuits 4 and 5 were Garda radio channels. Circuit 4 covered positions 3 and 4 of the radio unit called the M84 controller. These channels were used for District-level communications – walkie-talkies, radios on motorcycles and a service known as the “*Green Man*”. The Green Man was a radio unit mounted on the front door of a Sub-District Garda Station for use by the public when the Garda station was unmanned. A member of the public could lift the receiver and connect with the Control Room in the nearest District Garda Station. If that station also happened to be the Divisional Station then the radio message would be recorded.

- 5.5.59 Circuit 5 covered positions 1 and 2 of the radio unit. Position 1 was for a national radio channel. It was a common channel so that Garda vehicles travelling from anywhere in the country could radio the nearest Divisional Stations if required. Position 2 provided for direct radio contact between the various District Garda Stations within a Division and the Divisional Stations.
- 5.5.60 Following receipt of the above suggestions from Inspector Bouchier, it does not appear that there was any further discussion with Inspector Bouchier regarding the various circuits he had proposed to be recorded. Mr Geary stated in evidence to the Commission that he had asked Inspector Bouchier for his opinion because he had more experience in the field. Having received the Inspector's suggestions, he passed them on to his Chief Superintendent for consideration. Mr Geary also confirmed that, to the best of his knowledge, Inspector Bouchier was the only person who gave any thought to the content of what should be recorded.
- 5.5.61 In considering the above, it is important to remember that the role of the Telecommunications Section, then as now, was to provide technical support to those carrying out the operational work of An Garda Síochána – that is, preventing and investigating crime, engaging with local communities and members of the public, and preserving national security. For that reason, one would expect that the task of deciding what telephone and radio circuits should be recorded would not have been completed without high-level input from the operational side of the force.
- 5.5.62 However, the Commission has found no evidence, in either the available documentation or the testimony of any of the witnesses it has heard, that any instructions or directions were given by senior levels of An Garda Síochána in relation to this issue. This is despite the fact that the IT and Telecommunications Executive Committee – a high-level group including representation from both the operational and technical sides of An Garda Síochána – was in operation at this time and that certain members of this Committee were aware that new recording equipment was being installed in Divisional Stations outside the DMA.
- 5.5.63 On 7 March 1996, Superintendent Geary wrote to Chief Superintendent Cussen in relation to the forthcoming installation of the new recorders in Divisional Stations, stating:

*“With reference to the above and following on directions from Assistant Commissioner D Branch Services in 1995 I wish to inform you that the voice logging equipments for Provincial Control Rooms has been delivered and will be installed over the next two months. The equipment is similar to*

*that used in Command and Control Harcourt Square and the Control Room at Anglesea Street, Cork.*

*Tests have been carried out successfully in the Telecommunications Planning Unit and a Unit has recently been installed in Portlaoise on a trial basis. Following successful field trials it is proposed to arrange for the recording of Voice Traffic on the following circuits subject to your approval:-*

- 1. 999*
- 2. Telephone Attendant Operators Set*
- 3. Ambulance*
- 4. Fire*
- 5. Alarm Monitoring*
- 6. Radio, Wts and Interdistrict*
- 7. Radio, mobile and National Emergency.”*

5.5.64 When asked in evidence about the various circuits listed in this letter, Mr Cussen told the Commission that he did not know what the “Telephone Attendant Operators Set” was. Despite receiving the letter and not fully understanding its contents, Chief Superintendent Cussen did not ask for clarification on the meaning of the term, Telephone Attendant Operators Set. He believed it was associated with the 999 system and he did not believe that there was any issue with the recording of the 999 system as it had been done for years. He also noted that the letter stated that this system was equivalent to that in Command and Control at Harcourt Square; his understanding was that only 999 calls were recorded at Harcourt Square and, therefore, this too was only recording 999 calls.

5.5.65 Despite the lack of a written policy regarding the recording of any calls including 999 calls, Mr Cussen stated that he would still have considered the recording of the main telephone line a change in policy. He was aware that recording of 999 calls and associated radio transmissions had been taking place in Dublin since the 1970s and he considered the recording of 999-related communications to be a long established Garda policy, albeit unwritten. Upon being informed by the Commission that recording the Telephone Attendant Operators Set meant recording the main station number for each Divisional Station, Mr Cussen expressed surprise. He said that, if general incoming calls to Garda stations were to be recorded, that, in his view, would represent “*a major change in policy that would be made by, I would imagine, the Commissioner.*”

5.5.66 In evidence, Mr Cussen also stated that, based on the letter of 7 March, he believed that the Assistant Commissioner had already approved the course of action. However, he accepted that the letter was still seeking his approval regarding the circuits to be connected to the recorder and acknowledged that the directions of the Assistant Commissioner related to the purchase of the equipment rather than what was to be recorded on the system.

5.5.67 Mr Cussen did not recall seeing the report from Inspector Bouchier outlining the reasons for recording the various circuits and he did not recall Superintendent Geary bringing this information to his attention.

**Determination of policy – data protection**

5.5.68 Although he did not understand that Superintendent Geary’s proposals included the recording of non-999 calls made to the main number of each Divisional Station, Chief Superintendent Cussen was alive to the possibility that the installation of this new equipment might give rise to data protection concerns. On 14 March 1996, he wrote to Superintendent T.J. Cahill, Operations and Security, attaching Superintendent Geary’s proposal and seeking observations “*on any implications under the Data Protection Act*”.

5.5.69 Superintendent Cahill was the Data Protection Manager for An Garda Síochána and the designated liaison person with the Office of the Data Protection Commissioner. By letter dated 15 April 1996, he confirmed that “*the voice logging system will attract Data Protection requirements including an amendment to the Data Protection Register*”. He quoted the existing Register entry as follows, “*Command and control logging system, and other incidents requiring a Garda response, for recording and logging the handling of 999 calls from the general public to the Communications Centre, Dublin Metropolitan Area HQ, Harcourt Square (and Communications Room, Cork City – proposed December 1995)*” and indicated that he would arrange for it to be updated “*...on receiving details of an adjusted entry to the register.*” In evidence to the Commission, Mr Cahill explained that, although he would be responsible for the final draft of any amendment, he was seeking clarification from those who were familiar with the new recording system as to what exactly the amendment should say. The letter continued:

*“For inquiry purposes it would also be helpful to have brief information on the processes involved e.g. the length of time the details of any particular call are stored and the security arrangements for protecting the data from unauthorised access.”*

- 5.5.70 In expressing the view that there were data protection implications arising from the new Divisional recording system, Superintendent Cahill was thinking only of the recording of 999 calls and associated radio communications. He did not understand what was meant by the Telephone Attendant Offset Console and remained unaware that calls to the main station number would be recorded on the new system.
- 5.5.71 In a handwritten note on the back of this letter, Superintendent Cahill wrote *“File will need to be passed to originator for purposes of ‘A’”* – implying that someone from the Telecommunications Section would need to provide the details of what the required amendment should contain, as well as providing him with the additional information requested so that he could answer any queries relating to the issue.
- 5.5.72 On 22 April 1996, Superintendent Geary forwarded Superintendent Cahill’s minute to Inspector Bouchier *“for attention on the points raised... in so far as they apply to Anglesea St.”* Inspector Bouchier responded by indicating the procedures that were being employed at Anglesea Street Station in relation to storage of the recorded DAT tapes. This is dealt with further below under the heading “Storage”.<sup>61</sup>
- 5.5.73 On 17 October 1996, Inspector Power wrote, on behalf of Superintendent Geary, to Chief Superintendent Cussen, stating that *“arrangements are now in hand to complete the installation of the Dictaphone Guardian Call Logging Units at the Divisional Control Room[s].”* On the issue of data protection, he stated:
- “As the systems will attract Data Protection requirements, the current entry in the Data Protection Register should be amended to include the following stations:- Tralee, Ennis, Galway, Thurles, Sligo, Castlebar, Letterkenny, Roscommon, Monaghan, Mullingar, Drogheda, Naas, Waterford, Wexford, Portlaoise and Bandon.”*
- 5.5.74 From a letter dated 24 October 1996, it appears that this report was passed on to Superintendent Cahill’s office, with a request to *“make arrangements in relation to Data Protection requirements.”* Unfortunately, the Commission could not establish whether this was in fact done, as neither An Garda Síochána nor the Office of the Data Protection Commissioner were able to provide copies of the Register entries for 1996-97 – or indeed for any year between 1990 and 2008, with the sole exception of 2002-03. Superintendent Cahill himself had retired from An Garda Síochána in September 1996.
- 5.5.75 The 2002-03 Register entry for An Garda Síochána contains no reference to voice recording systems of any kind; even the original entry regarding Command and Control,

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<sup>61</sup> See para 5.5.244 below.

Harcourt Square had been removed. There is some evidence to suggest that, early in 1997, the organisation may have arrived at a view that it was not necessary to include voice recording systems on the Register. This is considered further in the context of paragraph 1(f) of the Terms of Reference, which requires the Commission to report on the state of knowledge within the Office of the Data Protection Commissioner.<sup>62</sup>

5.5.76 This issue of data protection is the first time that any legal consideration arises in the documentation relating to the DAT recorders. In fact it is also the only time during the DAT recorder period that the impact of legislation of any kind is considered.

5.5.77 Outside that context, the Commission has seen no evidence that any consideration was given to the legal implications of recording telephone calls or to the encroachment on personal privacy that was necessarily involved. Nor was consideration given to any other potentially relevant legislation.<sup>63</sup>

#### **Approval of policy – recording lines**

5.5.78 On 18 April 1996, Chief Superintendent Cussen wrote to Superintendent Geary to inform him that “*the recording of voice traffic on the circuits outlined*” was approved. Mr Cussen does not recall discussing the matter with anyone else prior to giving this approval.

5.5.79 In terms, therefore, of an official policy decision on what should be recorded on the new DAT system, the Commission could not establish that any decision was received from any member of An Garda Síochána in a higher position than Chief Superintendent Cussen. As noted previously, Chief Superintendent Cussen, in his evidence to the Commission, stated that he did not understand that a change was being made which involved the recording of a non-999 line.

5.5.80 The Commission has heard evidence from a number of former Garda Commissioners, all of whom were in agreement that a decision by An Garda Síochána to commence recording non-999 calls from members of the public should not have been made without the knowledge and agreement of Senior Garda Management and / or the IT and Telecommunications Executive (IT and T) Committee. In principle, this seems entirely correct. The Commission notes that this view was shared by former Chief Superintendent Cussen, although, as we have seen, he did not in fact bring the proposal to begin recording the main number in Divisional Stations to the attention of Senior Management or the IT and T Committee. This was simply because he did not understand that non-999 recording of that kind was being proposed.

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<sup>62</sup> See Chapter 8 below.

<sup>63</sup> For a detailed consideration of whether the recording systems were authorised by law, see Chapter 9.

- 5.5.81 It is not unusual in An Garda Síochána for policy changes to begin with issues raised and suggestions made by members working at ground level. Former Commissioner Fachtna Murphy (November 2007 - December 2010), though not Commissioner at the time of the installation of the DAT recorders, described in his evidence to the Commission how policy was created during his tenure as Commissioner. He stated that any major change in policy in any area within the force had to be approved at a high level. It would often begin with ordinary members who worked in a particular Garda Section or at a mid-level with an Inspector or Superintendent identifying the issues. The initial work would be carried out by those members and the results of any research conveyed first to the Chief Superintendent and then the Assistant Commissioner with responsibility for that Section.
- 5.5.82 If the proposed policy change was deemed worthy of consideration, the Garda Commissioner would receive a file on the matter. He or she would then seek the views of one or both Deputy Commissioners, depending on the administrative and / or operational implications of the proposed change.
- 5.5.83 Ultimately, any change in policy would be disseminated to the force by way of a Headquarters' Circular or Directive informing members about the matter. It would normally be signed by the Commissioner and released for distribution by the relevant Assistant Commissioner.
- 5.5.84 Although, as will be seen, the documentation sent from the Telecommunications Section to the Divisional Stations in relation to the proposed new system did contain directions as to which lines should be recorded, how long recordings should be retained for and where tapes should be stored, it was not a policy statement in the proper sense of the term. As several former Commissioners and members of the Telecommunications Section have told the Commission, official Garda policy comes from Headquarters' Circulars or Directives. No such document was issued by Garda HQ with regard to the DAT recording systems, or indeed in relation to the general issue of recording in Garda stations.
- 5.5.85 The lack of an official written policy, sanctioned by the Garda Commissioner, in relation to voice recording at Garda stations is important in two respects. Firstly, the absence of a clearly defined organisational policy, setting out what could and could not be recorded and why, allowed Divisional officers and local technicians to make changes to the recording system based on differing interpretations of what Garda policy was or should be. Secondly, the lack of a policy document made oversight more difficult, as there was

no clear statement of what constituted acceptable use of the system and no clear assignment of responsibility for ensuring that the system was not used inappropriately.

### **Installation in Divisional Stations, 1996-1997**

- 5.5.86 Following Chief Superintendent Cussen's approval of the circuits to be recorded, a Project Task Initiation Document was prepared by the Telecommunications Planning Section. On approval, it was sent to the Maintenance Section, as they were responsible for the onsite installations in conjunction with the suppliers.
- 5.5.87 A Project Task Initiation Document was prepared for every project within An Garda Síochána at this time. The document would be sent down the line to those implementing it. This was primarily a project management process developed for the Planning Section by Inspector Jeffers. It identified the project, its current stage and its expected completion date. The document was kept together with the tender documentation and invoices relating to the project so that all stages could be reviewed effectively from an administrative point of view.
- 5.5.88 The Project Task Initiation Document for this project was entitled "*Installation of Dictaphone Guardian Call Logging Units in Div HQ Control Rooms*". The assignment was detailed as follows:

*"Assignment: To install Guardian Call Logging Units in the following Div. Control Rooms:- Naas, Monaghan, Ennis, Letterkenny, Mill St. Galway, Tralee, Mullingar, Drogheda, Castlebar, Roscommon, Sligo, Thurles, Waterford and Wexford.*

*The following circuits to be connected:- [1] '999' Line(s), [2] Telephone Attendant Offset Console. [3] Private Wire(s) Ambulance Control, Fire Station, Alarm Monitoring Stations. [4] Audio output from positions 3 & 4 of Philips M845 District Controller (Personal Radio & District Mobile). [5] Audio output from positions 1 & 2 of M84 Controller (Nat Channel & Dist/Division)*

*Installation will be carried out by Dictaphone Staff.*

*Circuits to be provided by local Telecommunications Staff.*

*Proposed completion date of assignment 29/11/96*

*A report should be forwarded to the Planning Section on the completion of the above assignment."*



- 5.5.89 The proposed completion date of the assignment was 29 November 1996. The document itself was completed and signed on 30 September 1996. It does not mention Bandon or Portlaoise Stations, as the equipment had already been installed there, apparently to facilitate field trials. In evidence to the Commission, Mr Jeffers said that this was not a concern, given that the document was seen as a purely administrative record. The document issued from the Telecommunications Section only and was signed by Superintendent Geary. Neither Inspector Jeffers nor Superintendent Geary considered their role or this document as creating policy.
- 5.5.90 The Commission heard evidence from at least one Garda technician in each Division, including a number of civilian technicians. In total, 38 technicians appeared before the Commission. The Commission has found the evidence of the technicians invaluable to its investigations.
- 5.5.91 The technicians were asked to provide any relevant documentation to the Commission. When the DAT recorders were installed, Dictaphone Ltd filled out a Customer Engineering Ticket. This was signed and dated by the member of staff from Dictaphone Ltd who installed the equipment. Given the passage of time, not all of the Divisions were able to provide a copy of this document.
- 5.5.92 It was not possible for the Commission to pinpoint the exact date of installation in each case. However, the following is a list of approximate dates for when the equipment was installed in each Division:
- 19 December 1995 – Bandon Garda Station, Cork West Division.
  - Unknown date between 5 February and 7 March 1996 – Portlaoise, Laois/Offaly Division.
  - (As stated previously, it appears that these first two installations served as field trials for the equipment prior to a full nationwide rollout of the recording systems.)
  - 24 November 1996 – Thurles, Tipperary Division.
  - 4 December 1996 – Monaghan, Cavan/Monaghan Division.
  - 18 December 1996 – Sligo, Sligo/Leitrim Division.
  - Date unknown but before 29 November 1996 - Wexford, Wexford Division.
  - Date unknown in or around November/December 1996 – Ennis, Clare Division.
  - Date unknown but before 27 December 1996 – Tralee, Kerry Division.
  - 10 January 1997– Drogheda, Louth/Meath Division.

- Date unknown but before 10 February 1997 – Naas, Carlow/Kildare Division.
- 19 February 1997 – Waterford, Waterford Division.
- 6 March 1997 – Letterkenny, Donegal Division.
- 10 March 1997 – Castlebar, Mayo Division.
- 13 March 1997 – Roscommon, Roscommon/Galway East Division.
- 21 April 1997 – Galway, Galway West Division.
- 6 May 1997 – Mullingar, Longford/Westmeath Division.

- 5.5.93 A DAT recorder was later installed in Henry Street Limerick, Limerick Division, on an unknown date in 1998. Fermoy became a Divisional Station in 1998 and the DAT system was installed there on 30 March 1999.
- 5.5.94 The Project Task Initiation Document outlined above was sent to each Regional Telecommunications Sergeant by Inspector Power on 16 October 1996. At this time, An Garda Síochána had divided the country into a number of Regions for operational purposes. Each Region had a Telecommunications Sergeant, also known as a Technical Sergeant. The Technical Sergeants were stationed in the Divisional Garda Stations in Cork City, Portlaoise, Monaghan, Sligo, Thurles and Limerick. The Commission heard oral evidence from all except one of the Regional Telecommunications Sergeants who held the position at the relevant time.
- 5.5.95 The role of Regional Telecommunications Sergeant was described in evidence as one of the most complicated roles in An Garda Síochána given that it is a technical post in a policing organisation. The post requires the Sergeant to take direction from local Garda Management on operational and administrative matters, but also from the IT and Telecommunications Section in Garda HQ on technical issues. The Regional Telecommunications Sergeant thus had two reporting lines of authority, with a potential for conflict where operational and technical requirements intersected.
- 5.5.96 The Regional Telecommunications Sergeants were instructed to make arrangements to complete the installation of the DAT recorders in the relevant Divisional Stations within their Region.
- 5.5.97 The instruction noted that *“while the appropriate circuits should be provided by the Divisional Technician, the installations will be carried out by Dictaphone staff”*.
- 5.5.98 The Divisional Garda technicians confirmed that that this instruction was followed and, while most of them provided the actual physical circuits to be connected to the system, the engineer from Dictaphone completed the installation.

- 5.5.99 The role of the technicians in providing the circuits was for ease of installation. They were familiar with the various circuits and could identify which circuit was required to be connected to the DAT system.
- 5.5.100 The technical process involved in the installation was explained by a number of the technicians. First, the relevant telephone lines and radio circuits were identified by the technician. A cable containing various differently coloured wires ran from the back of the DAT recorder. There was a pair of wires corresponding to each channel on the recorder. Krone connection strips – a series of numbered connectors which allowed cables to be joined together without soldering or screwing – were used to join the circuits from the phone or radio systems to the DAT recorder. This was done by the engineer from Dictaphone once the appropriate circuits had been provided by the technicians. From that point on, the connected lines would be recorded while the machine was in operation.
- 5.5.101 As noted above, the system was a dual-drive system. The two DAT drives were configured to record in parallel, allowing the second drive to be utilised to play back a recorded call while the primary drive continued to record uninterrupted.
- 5.5.102 The Project Task Initiation Document asked for a report confirming the installation of the equipment. The reports furnished to the Commission only confirmed the installation in general terms and did not state which circuits were connected to the DAT recorders in each Division. For this reason, the Commission, in trying to establish which telephone lines were recorded in each Garda station during the lifetime of the DAT system, is compelled to rely principally on oral evidence from the relevant technicians, supplemented in some cases with limited documentary evidence, including work diaries, maintenance logs and relevant correspondence.
- 5.5.103 The Commission is required by its Terms of Reference to “establish an inventory” of all Garda stations in which non-999 telephone recording systems were installed, and to “establish the immediate circumstances surrounding the installation of telephone recording systems... at the said Garda stations.” The following is a summary of what has been established concerning the installation of the DAT recording systems in those Divisional Garda Stations that did not follow the recommendations as suggested by Inspector Bouchier. A detailed list of the other Divisional Garda Stations and what was installed on the DAT recorder is attached at Appendix 5A of this chapter.

### **Cork West Division – Bandon**

- 5.5.104 As noted previously, Bandon Garda Station was the first Divisional Garda Station to receive the DAT system, some 9 months prior to the issuing of the Project Task Initiation Document.
- 5.5.105 On 8 April 1996, the Garda technician in Bandon responded to a request from Inspector Jeffers in Garda HQ to report on the installation of the DAT system in Bandon. This was the only Division requested to report to Garda HQ in this manner. Mr Jeffers, in evidence, did recall requesting the report and believes it might have been due to the fact that this was very early on in the installation process. On the evidence before the Commission, it is probable that the installation in Bandon was used as a field trial for the equipment, prior to a nationwide installation process.
- 5.5.106 In a statement to the Commission, this technician said that he could not recall any consideration being given to the question of which circuits should be connected to the recorder until the Dictaphone engineer arrived on site to install the equipment in December 1995. In oral evidence, he accepted that he may have discussed the DAT recorder with Inspector Bouchier, Anglesea Street prior to its installation in Bandon, but his recollection was that they did not discuss the question of which circuits should be recorded until some months later, when Inspector Bouchier was preparing his response to Superintendent Geary’s request for advice on the circuits to be connected.
- 5.5.107 The technician also recalled discussing the DAT system with members of the Control Room staff at the time:
- “Because it was new and it was going to involve recording of calls, both radio and telephone, which they as Divisional Control Room operators were a party to, there was a very negative reaction to its installation at that time. There was much discussion at a local level about what should be recorded and the consensus arrived at was that the lines to be connected for recording purposes were the Divisional 999 line (02344520), the Attendant Console taking all incoming calls to the station (02341145), and the radio channels. At the time, the main incoming line was the fallback for the Emergency Operator in the event that the 999 line was busy or not answered. I no longer have notes of any discussion that took place or with whom.”*
- 5.5.108 The technician thought that the Sergeant in charge may also have been involved in these discussions, but could not be certain of this.

- 5.5.109 The report of the technician from April 1996 confirms that the equipment was installed in Bandon on 19 December 1995. The recorder was installed in the Control Room for 24 hours to assess the effect of it on members working there. The level of noise from the fan was found by officers working in the room to be unacceptably high and, therefore, the equipment was relocated to the Equipment Room.
- 5.5.110 The channels being recorded at that time were outlined in the report as follows:
- The 999 emergency line (of which there was only one at the time).
  - The attendant console for EMS80C – that is to say, the main station number.
  - The radio channels.
- 5.5.111 The report did not specify which radio channels were connected but stated that “*all radio channels on the District recorder are recorded via two tape sockets...*” In evidence to the Commission, the technician said that this included channels 1, 2, 3 and 4. However, as will be seen below, it appears that radio channels 1 and 2 were not in fact recorded.
- 5.5.112 In a statement to the Commission, the technician recalled that although it had been agreed with Control Room staff that the Attendant Console – that is, the main station number – would be recorded, it was not possible to do so at first, as a digital-to-analog converter was required in order for the console to be connected successfully to the DAT machine. The technician said that this was done “*some time later*” on a date that he could no longer recall.
- 5.5.113 According to the technician, much of the contents of the filing cabinets in his office were destroyed in November 2009 when Bandon Garda Station was flooded. Almost all of the DAT tapes retained in Bandon were also destroyed and disposed of as a result of the flood. However, in June 2013, whilst searching for documentation within the parameters of a Discovery Order issued by the High Court in the case of *Ian Bailey v The Commissioner of An Garda Síochána and others*<sup>64</sup>, the technician discovered 6 tapes “*in a store, which had been put aside and forgotten about.*” A further 4 tapes were subsequently found and handed to the Garda team responsible for collating information relating to the Discovery Order.
- 5.5.114 The contents of the tapes were reviewed by a team of Gardaí in order to determine whether any of the recorded calls might come within the terms of the Discovery Order.

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<sup>64</sup> *Ian Bailey v The Commissioner of An Garda Síochána, The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General.* Court ref. 2007/3424P

In the course of this review, it became clear that, for certain periods covered by the tapes, certain telephone lines were being recorded in addition to those cited in the technician's report of 8 April 1996. These lines were not among those proposed by Inspector Bouchier and approved by Chief Superintendent Cussen on 18 April 1996.

- 5.5.115 Under paragraph 1(m) of the Terms of Reference, the Commission is required, amongst other matters, "to identify and review all recordings in the possession of An Garda Síochána emanating from the Garda telephone recording system at Bandon Garda Station..." In fulfilment of this task, the Commission carried out its own review of the DAT tapes from Bandon Station. Further details of this process are contained in Chapter 12 below. The following is an account of what the Commission has been able to establish concerning the lines being recorded at Bandon during the DAT period.
- 5.5.116 There are no available tapes for the first 15 months after the DAT recorder was installed in Bandon. Of the tapes that were found, the first in time covers the period 24 March to 25 April 1997. On this tape, 5 channels are recorded. Channel 1 is the main station telephone line; Channel 2 is the 999 line; and channel 3 recorded radio channels 3 and 4, the District / Mobile radio channels. Radio channels 1 and 2 – the Divisional / National channels – were not recorded.

Recorded lines – DAT channel 4

- 5.5.117 Channel 4 contained calls made from a phone that appeared to be located in a private room at the station rather than in the Control Room. The recordings are poor in quality, as they are heavily affected by interference and frequently intermittent in nature, with gaps every few seconds. On 24 April 1997 (the penultimate day recorded on this tape), a number of calls involving a Detective Sergeant were recorded. Further calls involving the Detective Sergeant were recorded on the same channel on several other tapes, covering dates between 12 May and 25 June 1997.
- 5.5.118 The Commission has been told that, in or around March / April 1997, the Detective Sergeant moved from Bantry Garda Station to Bandon Garda Station in order to complete his work on the investigation report into the murder of Madame Sophie Toscan du Plantier. According to the technician in Bandon, the Detective Sergeant was given the use of a small room upstairs that had previously been used as a 'rest room' for female officers. He described this space as follows:

*"It was a place that was little enough used. If one of our female colleagues was pregnant or anything like that and was working and wanted a place to go and sit down for a rest or whatever, that was the room to be used."*

With the Detective Sergeant's arrival, this office became the de facto Incident Room for the murder investigation, as, by that time, most of the investigative work had been completed and the primary task was to prepare a report and file for submission to the Director of Public Prosecutions (DPP). According to the technician, there was more than one phone in the office during that period, though it appears from the available tapes that only one line was recorded.

- 5.5.119 In an affidavit sworn on 2 June 2014, in relation to the case of *Ian Bailey v The Garda Commissioner and others*, the former Detective Sergeant confirmed he had not known that calls between himself and other persons had been recorded until notified of this on or around 11 April 2014. He stated:

*"I can confirm that I never consented to such recordings taking place and I was never informed that such recordings were taking place or that it was even a possibility."*

- 5.5.120 In a report that accompanied the handing over of the DAT tapes on 11 June 2013, the technician in Bandon stated:

*"They contain voice recordings of all calls into and out of Bandon Station made on specific phones in the Station and would have included the Main Switch in the Communications Room and the main phone in the Public Office as well as all 999 calls and radio traffic. As I recall there was also an Incident Room phone recording on the system." [emphasis added]*

- 5.5.121 The technician knew from the dates written on the DAT boxes that the tapes covered periods in 1997. It is reasonable to assume that, in his report, he was referring to lines that he believed were recording at that time.

- 5.5.122 As we have seen, the recording of an Incident Room line would have gone beyond the policy recommendations made by Inspector Bouchier and adopted by the Telecommunications Section in 1997. In the course of its investigations, the Commission has identified two other stations in which an Incident Room line was recorded. In both cases, the line seems to have been recorded in order to capture information provided by members of the public in response to appeals by An Garda Síochána for assistance with an investigation. This rationale does not seem to apply in the case of Bandon Garda Station, as the information-gathering phase of the investigation of the murder of Madame Sophie Toscan du Plantier was largely over. Although the Detective Sergeant's room may have been designated as an Incident Room, it was in reality no more than a base from which to write the investigation report.

There is nothing to suggest that the phone number for this recorded line was advertised to the public, and there are no recorded calls on this line from members of the public offering information in relation to the Toscan du Plantier murder.

- 5.5.123 In evidence to the Commission, the technician said that this report had been written “*off the cuff*” on the same day that he handed over the first 6 tapes to the Garda team working on the Discovery Order in the Bailey case. He was unable to explain why he had written that an Incident Room phone had been recorded. He did not believe that it was a reference to the phone in the Detective Sergeant’s office; he said he did not know that calls on that line had been recorded until informed of this by the Garda team to whom he had handed over the tapes in June 2013. He told the Commission:

*“I was completely shocked when I discovered what was on that channel... and I certainly never, with any kind of intent, went and picked that particular phone and decided deliberately to put it onto the machine... That definitely didn’t happen.”*

- 5.5.124 In a statement to the Commission, the technician suggested that the phone in the Detective Sergeant’s office may have been connected to the recorder by mistake when the recorder was relocated from the Control Room to the Equipment Room. This was done some time between 20 December 1995 and 8 April 1996. The technician stated that radio channels 1 and 2 – the national and inter-district channels – should have been connected to channel 4 of the DAT recorder, but he believed that “*an error was made in the identification of the correct pair of wires in the Equipment Room Krone box*”, which resulted in a telephone extension, in what would later become the Detective Sergeant’s office, being connected to the recorder instead of radio channels 1 and 2. He claimed that he never noticed the error as these radio channels were rarely used and he never received a request to play back anything from them.

- 5.5.125 As the technician himself pointed out, it is impossible to verify whether or not this explanation is correct, as, by the time the technician was made aware in 2013 that the Detective Sergeant’s telephone line had been recorded, the original wiring had been removed completely in the course of renovations to the station.

- 5.5.126 In evidence to the Commission, the technician said that, when the room was being used as a female rest room, there were one or more working telephone sockets in it but no actual telephones were installed until the room was made ready for the Detective Sergeant to use. This may not be correct, as, on the earliest available DAT tape, calls are recorded on channel 4 up to 30 days before the first recorded calls involving the Detective Sergeant.



5.5.127 To further the confusion, at least two of the calls recorded during this period appear to be calls to either the Public Office or the Control Room. This could be the result of a crossed line – something the technician said was not unusual at the time – or it could be that a different extension was being recorded on channel 4 prior to the phone in the Detective Sergeant’s office.

5.5.128 On 5 September 2013, the technician in Bandon met with a Sergeant, a member of the Garda team working on the Discovery Order in the Bailey case, in order to instruct her in how to play back calls on the DAT recorder. He put the tape for 24 March – 25 April 1997 into the machine in order to demonstrate how to select a channel for playback, but did not play any calls at that time. The technician also gave some advice as to the channels that could have audio on them and the kind of calls they might contain. The Sergeant took brief notes during the conversation. She recorded being told that channel 1 was the main station number, channel 2 was 999 and channel 3 was a radio channel. In relation to channel 4, she noted:

*“Channel 4 – Done – apparently spill over data from Channel 1”*

The technician did not say to the Sergeant that channel 4 would contain radio traffic – although, based on his evidence to the Commission, he believed at that time that radio channels 1 and 2 would have been recorded on channel 4. The Sergeant told the Commission that the technician did not explain what he meant by *“spill over data”*. Nor is it clear what was meant by *“Channel 4 - Done”*. The technician himself did not remember saying any of this to the Sergeant.

5.5.129 In two appearances before the Commission, the technician adhered to the explanation offered in his written statement as to how channel 4 may have come to be recorded. This evidence was reflected in the draft Final Report of the Commission, which was sent to the technician for comment. In a letter from his solicitors sent on 24 March 2017, one week before the final deadline for submission of the Commission’s Report to the Taoiseach, the technician stated that references in the draft to the existence of interference and gaps in the recorded audio now gave him “cause to doubt whether there was a direct connection to the recorder for this particular channel.” Instead, he suggested that the recordings from the Detective Sergeant’s Office might have been the result of “crosstalk on an adjacent pair of wires.”

5.5.130 Because of the lateness of this response, the Commission could not investigate the matter further. Nonetheless, the Commission notes that, although this new theory is

different from that given by the technician in his oral evidence, it is similarly speculative and can neither be proved nor disproved at this point.

5.5.131 Calls on DAT channel 4 involving the Detective Sergeant appear on four tapes covering the following periods:

- 24 March – 25 April 1997
- 12 – 18 May 1997
- 21 – 24 May 1997
- 24 May – 25 June 1997
- 22 September – 24 October 1997

The precise date on which the Detective Sergeant moved out of the office in Bandon Station is unknown. The investigation report prepared by him was submitted to the Office of the DPP on 29 September 1997 and the last two recorded telephone calls involving the Detective Sergeant are on the same date. In his affidavit of 2 June 2014, the former Detective Sergeant stated that his involvement in the murder investigation lasted until 1998. Other documentation seen by the Commission suggests that, by early October 1997, he had resumed work in Dublin, returning to West Cork only occasionally as required.

5.5.132 The next available tape covers the period 22 September – 24 October 1997. Between 12 and 20 October 1997, a change appears to have taken place in the telephone extension being recorded on channel 4. There are no calls at all recorded between 13 and 19 October, and the calls recorded from 20 October onwards appear to have been on an extension in the technician's own office. This implies that the technician himself must have removed the wires connecting the Detective Sergeant's office to the recorder and connected a phone in his own office instead – although he himself has no recollection of doing so. It is possible that he could have made this change without realising that the lines he was disconnecting were not radio channels 1 and 2 but were in fact connected to a phone in the Detective Sergeant's office. Alternatively, if the recordings were the result of "crosstalk" rather than a mistake in wiring, a change in the wiring would not have revealed their existence. On 14 November 1997, the phone in the Detective Sergeant's office was connected to the recorder again, this time on channel 5. The reasons why this was done are not known. As indicated above, it is likely that the Detective Sergeant was no longer based in Bandon Station by this time.

5.5.133 Calls to and from the technician's office were also recorded on channel 4 of the next two tapes, covering the periods 23 October – 24 November 1997 and 25 December 1997 – 1

January 1998. The next available tape starts on 10 April 1998 – some 3 months later. There are no recordings on channel 4 of that tape.

Recorded lines – DAT channel 5

- 5.5.134 In or around 2 May 1997, a Detective Garda, attached to Bandon Garda Station asked the technician there if it was possible to have calls between himself and a person referred to in this Report as Mr B recorded. The detective had been engaging with Mr B as someone who might be able to assist An Garda Síochána in acquiring information about the murder of Madame Sophie Toscan du Plantier, but he had become suspicious of Mr B's motives in this regard. For that reason, he wished to have his conversations with Mr B recorded.
- 5.5.135 The technician told the Commission that requests of this kind were rare but that he would not have considered them unusual. The detective in question told the Commission that he was not aware of other detectives having asked for a recording facility and that this was the only time in his own career that he had made such a request.
- 5.5.136 In response to this request, the technician gave the Detective Garda access to a telephone in the Telecommunications Equipment Room that was connected to channel 5 of the DAT recorder. The detective told the Commission that, from this point on, any calls he made to Mr B were made from this phone.
- 5.5.137 Both the Detective Garda and the technician believed that this arrangement was in place from 6 May 1997. However, the first recorded call involving Mr B occurred on 20 May 1997. The Detective Garda told the Commission that he had notes which indicate that he telephoned Mr B twice on 13 May 1997, but it appears that these calls were not recorded.
- 5.5.138 The last recorded conversation between the Detective Garda and Mr B took place on 4 June 1997. The technician could not recall if he had disconnected the line from the recorder after this. The evidence before the Commission suggests he was aware that the Detective Garda's interactions with Mr B had come to an end around this time. In a written statement from 2006, the technician stated that he had retained the DAT tapes for the period 12 May to 25 June 1997, specifically because they contained calls involving Mr B.
- 5.5.139 In a statement to the Commission, the technician said his recollection was that this Equipment Room line was already connected to the recorder prior to the Detective Garda's request. He said that he had been using it to re-record threatening or abusive voicemail messages received by other Garda members, in order to preserve a copy of

those messages for investigative purposes. However, the calls recorded on the tapes found at Bandon Garda Station suggest that a different line was connected to channel 5 of the recorder between 24 March and 18 May 1997.

- 5.5.140 When the tapes were first reviewed by the Sergeant in September 2013, she identified a number of calls that were relevant to the Toscan du Plantier murder investigation. They included calls between detectives working on the case and between a detective and a witness in the investigation. The subject matter of these calls is considered further in Chapter 12 of this Report, which deals with paragraph 1(m) of the Terms of Reference. The content of the conversations suggests that the persons involved did not know these calls were being recorded.
- 5.5.141 In addition to calls relating to the Toscan du Plantier murder investigation, the tape for 24 March – 25 April 1997 also includes a number of calls made to and from prisoners at the station, including calls with family members and, in one instance, a solicitor.
- 5.5.142 The technician in Bandon was not aware that any of the above calls had been recorded on channel 5 until informed of this by the Commission. In a written statement, he expressed shock and surprise at the level of recorded activity on this channel. From the nature of the recorded calls, both the technician and the Detective Garda were of the opinion that the line in question was located in a room near the Detective Branch office known as Interview Room No. 2. This room was used as a backup interview room if multiple prisoners were held in relation to an incident. Prisoners coming into the station were processed in the Public Office and would normally make telephone calls from a phone just outside that office. The main Interview Room was close to the Public Office but, according to the technician, it did not have a working phone due to an ongoing cable fault, which he had been unable to remedy.
- 5.5.143 As stated above, calls between the Detective and Mr B on the Equipment Room phone were recorded on channel 5 between 20 May and 6 June 1997. No other calls of relevance to the Toscan du Plantier investigation were recorded on channel 5 during this period, which suggests that the line being recorded during March / April 1997 was disconnected and replaced by the Equipment Room line. The technician has no recollection of doing this.
- 5.5.144 No DAT tape exists for the period 26 June – 21 September 1997. The next available tape, which begins on 22 September 1997, contains some calls made by the Detective Garda, as well as calls between a prisoner and members of his family. This suggests that, at some point between June and September 1997, the technician once again connected a phone line from Interview Room No. 2 to the recorder, for reasons now unknown.

- 5.5.145 There are no calls recorded on channel 5 from 13 October to 13 November 1997, suggesting that the Interview Room line was disconnected from the recorder at some point during that period. From 14 November 1997, the same line appears to be recording again – but this time on channel 6 of the recorder. On the same day, channel 5 began recording a line in the room used as an Incident Room for the Toscan du Plantier murder investigation while the Detective Sergeant was working in Bandon.
- 5.5.146 There are no tapes covering the period 2 January – 9 April 1998. The next available tape covers 10 April – 15 May 1998. The line being recorded on channel 5 during this time appears to be the same as that connected on 14 November 1997 – that is, the line in the room formerly used as the Detective Sergeant’s office.
- 5.5.147 According to the technician in Bandon, the entire telephone system for the station was upgraded in or around April 1998. All extension numbers were changed from 3 to 4 digits and every office was assigned its own direct-dial number. The next available tape covers the period 16 June – 21 July 1998. During that time, 18 instances of interference are recorded on channel 5, but no audible calls.
- 5.5.148 Only one other tape has been found relating to Bandon Station. It covers a period from December 2002 to January 2003. There are no calls on it that were recorded on channel 5.

Recorded lines – DAT channel 6

- 5.5.149 On 16 May 1997, it appears that an unknown telephone line was connected to the recorder and then disconnected shortly afterwards. Only 3 calls were recorded, 2 of which were clearly for testing purposes. They are followed by 4 instances of interference. No further calls were recorded on this channel between 16 May and 25 June 1997.
- 5.5.150 The next available tape begins on 22 September 1997. There are a number of calls recorded on the tape that suggest that, between that date and 13 October 1997<sup>65</sup>, channel 6 was connected to a line used frequently by the technician himself. The line was most likely to have been either in the technician’s own office or in the Telecommunications Equipment Room.
- 5.5.151 The technician has no recollection of making this connection to the recorder. In a written response to the Commission he stated:

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<sup>65</sup> The tape runs until 24/10/97 but the last call on ch6 is 13/10/97.

*“It may have been connected... for the purpose of accessing recordings of messages left on mobile and landline voicemail which were the subject of complaints made. I do recall being involved in a couple of investigations where many nuisance and threatening calls were being made to a few individuals but I cannot be specific about the period of time this started.”*

- 5.5.152 From 20 October 1997, it appears that this line was switched from channel 6 to channel 4 on the recorder, for reasons now unknown.
- 5.5.153 The next calls recorded on channel 6 begin on 14 November 1997. On the evidence before the Commission, it appears that the line being recorded was in an Interview Room – most likely the same line that had been recorded on channel 5 during March / April and September / October 1997. Amongst the calls recorded are calls made by prisoners, including one call between a prisoner and his solicitor.
- 5.5.154 No DAT tape survives for the period 2 January – 9 April 1998. The next available tape begins on 10 April 1998. It appears that, during this time, the Interview Room line continued to be recorded on channel 6. Once again, the recorded calls include calls made by prisoners. In another instance, the phone appears to have been left off the hook, with the result that parts of an interview taking place with a prisoner in the room were recorded. It is not possible to say whether this was done deliberately or by accident.
- 5.5.155 The last recorded call on channel 6 took place on 21 April 1998. There then follow recordings of noise and interference, ending on 7 May 1998. Similar interference patterns are recorded on the next available tape, covering 16 June – 21 July 2008. The explanation for the cessation in call recording and the subsequent noise and interference appears to be that the entire telephone system for the station was upgraded in or around April 1998.
- 5.5.156 One other DAT tape from Bandon Station has been found. It covers the period December 2002 – January 2003. Nothing was recorded on channel 6 during that time.

Report of Technician, July 1998

- 5.5.157 On 13 July 1998, the technician in Bandon Station prepared a report for the Sergeant in charge of the station on the lines then being recorded on the DAT machine. The report listed the main station number, the 999 line, radio channels 3 and 4 and a new, previously unrecorded, line that is described as follows:

“44301 Direct Telecomm Line working on Black Phone on Radio Console.  
Numbers that are required in the event of an emergency are programmed

into this phone. This line is independent of the telephone system in the station. If important information has to be passed on e.g. alarm calls etc. it may be useful to have a record later.”

- 5.5.158 This new line was connected to channel 3 of the DAT recorder. According to the report, radio channels 3 and 4 were moved to channel 4 of the recorder, although the available tapes seem to indicate that this was not done until after 21 July 1998.
- 5.5.159 The technician told the Commission in evidence that the main purpose of this report was to inform the Sergeant in charge of the recording of this new line. No mention was made in the report of the lines that had been recording on channels 4, 5 and 6 up until the upgrading of the station telephone system in or around April 1998.
- 5.5.160 It seems that, at some point between July 1998 and December 2002, this line was removed from the recorder, as, on the tape covering December 2002 – January 2003, channel 3 contains recordings from the Public Access Call Box (PACB – also known as the Blue Man or the Green Man)<sup>66</sup> attached to Kinsale Garda Station.

Report of Technician, March 2004

- 5.5.161 In February 2004, the Telecommunications Section, Garda HQ, emailed the Regional Telecommunications Sergeants asking for information as to the radio and telephone circuits then being recorded at Divisional Stations. Arising from this request, the technician in Bandon Station provided the following response by email:

*“Channels presently recorded at Bandon.*

- 1. Main Tel Switch*
- 2. 999 line*
- 3. Phone for receiving PACB calls from Kinsale*
- 4. Radio Channels 3 & 4*
- 5. Radio Channels 1 & 2*
- 6. Main tel in Public Office for incoming calls.”*

- 5.5.162 In evidence to the Commission, the technician said that the main Public Office line could not have been recorded at that time, as it was a digital line and required a digital-to-analogue converter to enable recording, which was not then installed. He considers it “*more than likely*” that, in listing “*Main tel in Public Office for incoming calls*” as a recording line, he was referring to another analogue extension in the Public Office to which unanswered calls in the Control Room would be diverted. The reference to

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<sup>66</sup> See para 5.5.57

*“incoming calls”* did not mean that only incoming calls were recorded; any outgoing calls on that line would also have been recorded.

5.5.163 Neither the Public Office line nor radio channels 1 and 2 were recorded on the last extant DAT tape (December 2002 – January 2003), so, if they were connected, this must have been done after 20 January 2003.

#### **Wexford Division – Wexford**

5.5.164 The Commission was unable to establish an exact date on which the DAT recorder was first installed in Wexford Garda Station. However, it has established, from diary entries provided by the technician who was stationed in Wexford in 1996, that on 29 November 1996 the DAT recorder was *“reinstalled”* in the Equipment Room there.

5.5.165 The technician recalled the following circuits as having been connected in Wexford:

- Two analogue 999 lines
- The telephone attendant offset console
- Associated overflow groups in the Control Room
- The Public Office telephone lines
- A direct (private wire) telephone line to the Bank
- Radio channels

5.5.166 The Public Office telephone lines were additional to those listed for connection in the Project Task Initiation Document circulated to all Regional Telecommunications Sergeants prior to installation.

5.5.167 At the time, the Public Office in Wexford Garda Station was in a very small room on the ground floor. The Control Room was on the first floor. A number of complaints were received that incoming telephone calls to the station were not being answered quickly enough. The technician stated in evidence that, in response to this problem, it was decided by the Superintendent in Wexford that calls to the main station number would automatically transfer to the Public Office phones if they were unanswered in the Control Room. For that reason, it was decided that the Public Office telephone lines should also be recorded. However, this meant that, in addition to recording calls transferred from the Control Room, any other calls made directly or transferred to the Public Office lines would also be recorded. Outgoing calls made on the Public Office phones were similarly recorded as a result.



5.5.168 The technician could not recall the name of the Superintendent to whom he spoke at the time. The Commission wrote to one of the Superintendents stationed in Wexford during this period. The former Superintendent denied any knowledge of the existence of a recording machine in Wexford Garda Station. He also denied having had any discussion with the technician, which is unsurprising given that he denied any knowledge of the recording system.

5.5.169 However, the Commission is satisfied, from the evidence of the technician, that he was instructed by one of his superiors to add the Public Office telephone lines to the DAT recorder and that this was done for the reasons set out above at paragraph 5.5.166.

5.5.170 In an entry in his diary on 31 May 2004, the technician noted that he had relocated the Dictaphone recorder.

#### **Waterford Division – Waterford**

5.5.171 The DAT recorder was installed in Waterford Garda Station on 19 February 1997.

5.5.172 The technician stationed in Waterford at that time recalled the installation and provided the Commission with a notebook entry confirming the date it occurred. The Regional Telecommunications Sergeant from Portlaoise attended Waterford Garda Station and completed the installation. The machine was installed in the Control Room. The Regional Telecommunications Sergeant informed the technician which circuits were being connected by him to the DAT recorder.

5.5.173 The following circuits were connected to the DAT recorder:

- 999 lines
- Main phone extension 5300
- Main Public Office phone extension

5.5.174 In evidence to the Commission, the technician recalled querying why the Public Office telephone line was being recorded. He recalled problems in relation to telephones not being answered in Waterford Garda Station. During this period, the Control Room in Waterford was located on the ground floor of the Garda Station, right beside the Public Office. Local Management considered the two rooms to be part of the one unit.

5.5.175 On 28 March 1997, the technician was asked to turn off the DAT recorder by the Sergeant in charge due to the noise generated by the machine in the Control Room. A copy of a diary entry from that date confirms that this was done. It remained turned off until the end of November 1998, at which point the Control Room was refurbished. For

the duration of this period, there was no recording of telephone calls in Waterford Garda Station. The machine was reinstalled in the Equipment Room rather than the Control Room in or around 24 November 1998. This was a locked room and access was restricted to the Telecommunications staff and the Sergeant in charge.

**Galway West Division – Mill Street, Galway City**

- 5.5.176 The DAT recorder was installed in Mill Street Garda Station on 21 April 1997. A Dictaphone Customer Engineering Work Ticket was provided to the Commission confirming its installation on this date. The Engineer’s Report states that 7 lines were connected and tested on this day.
- 5.5.177 The following circuits were connected to the DAT recorder:
- Channel 1 – 999
  - Channel 2 – 999
  - Channel 3 – Ambulance Control (private wire)
  - Channel 4 – Carnmore Airport (private wire)
  - Channel 5 – Radio Console LHS
  - Channel 6 – Radio Console RHS
  - Channel 7 – Attendant Offset Console
- 5.5.178 In written and oral evidence to the Commission, the technician confirmed that an eighth circuit was connected to the DAT recorder later on the same date. Channel 8 was labelled “Extension 8071 Incident Room”.
- 5.5.179 The eighth circuit connected was the Incident Room in Mill Street Garda Station and, in evidence to the Commission, the technician stated that this was connected on the direction of the District Superintendent in Galway at the time of installation. The technician accepted that this circuit was not included in the Project Task Initiation Document outlining what should be connected to the DAT recorder on installation. He recalled that the Superintendent felt it would be of value to have this Incident Room extension recorded but that no further reason or explanation was given for doing so.
- 5.5.180 The relevant District Superintendent did not recall any specific discussion with the technician on this matter when asked in writing by the Commission. However, the Commission has no reason to doubt the technician’s evidence that this line was recorded with the knowledge and approval of the District Superintendent. The rationale for recording this telephone line, however, remains unclear given that the District Superintendent stated that he could not recall the conversation. As in other stations, the

Incident Room phone number was publicised in the media from time to time during major investigations, as a contact point for members of the public with relevant information to share.

- 5.5.181 The DAT recorder was initially installed in the Control Room. However, the machine developed a fault in early May 1997. Following discussions with the Divisional Officer, it was decided that, when the staff member from Dictaphone Ltd attended the station to repair the fault, the machine would be relocated to the Equipment Room.

#### **Confirmation of installation**

- 5.5.182 On 24 March 1997, confirmation letters were sent to the Maintenance Section in Telecommunications confirming installation of the DAT recorder system in Bandon, Tralee, Sligo, Letterkenny, Roscommon and Castlebar Garda Stations.
- 5.5.183 On 14 May 1997, similar confirmation letters were sent confirming the installations in Naas, Wexford, Waterford, Monaghan, Drogheda and Mullingar. The installations at Thurles, Clare and Galway were confirmed by letter dated 21 May 1997.

#### **Installation in Limerick and Cork North Divisions, 1998-1999**

- 5.5.184 The installation in both of these Divisional Stations took place separately from the installation in the other Divisional Stations. The Commission was unable to identify why Henry Street, Limerick was not included in the original roll-out of the system. Fermoy was not designated a Divisional Station until 1998. As part of this new arrangement, from the beginning of 1999, all 999 calls for the Cork North Division were to be answered in Fermoy. An application was made on 11 November 1998 to the Telecommunications Section in Garda HQ for the installation of telephone recording equipment to record all 999 calls in Fermoy Garda Station.

#### **Installation of DAT-recorder workstations**

- 5.5.185 On 3 April 1998, Dictaphone Ltd responded to an enquiry from the Planning Section in Telecommunications for the supply of Prolog Management workstations. These workstations were to be connected to the DAT recorder system.
- 5.5.186 At this time, the workstation had already been installed in Henry Street Garda Station in Limerick. Workstations were not required for the DAT recorder in Sligo or Castlebar.
- 5.5.187 An order was placed with Dictaphone Ltd for the provision of 14 workstations. The workstation was a standard personal computer, which had an external audio speaker unit for better playback sound and was used to access recordings from the system. Recordings on the DAT tapes or on the Instant Playback Module could always be

accessed using the controls on the DAT recorder itself, but the workstation offered a more user-friendly interface.

### **Operation and management**

- 5.5.188 The Commission was unable to establish the existence of any uniform policy, either written or verbal, on the operation and management of the new DAT recording systems following their installation within An Garda Síochána. Despite the existence of the IT and Telecommunications Executive Committee, whose role it was to direct, control and implement IT and Telecommunications policy, the Commission was unable to establish that the Committee ever discussed the implementation of the DAT recording system in Divisional Stations. No policy document was, therefore, issued or approved by the Committee.
- 5.5.189 The absence of any high-level consideration of policy issues that could arise from the new recording system in Divisional Stations is in contrast with the attention given to other projects involving new technology during the same period. Ten separate Project Boards were created by the Committee to oversee various IT and Telecommunications projects. However, no Project Board was established to oversee the purchase, installation and implementation of the DAT recorder system.
- 5.5.190 The level of detail contained in the Annual Reports of the IT and Telecommunications Executive Committee in 1995, and in particular in 1996, is notable for the complete absence of any reference to the DAT recorder system. This, again, is in stark contrast to the detail provided in relation to all other projects under the remit of IT and Telecommunications at the time. For example, in relation to the new Cork Radio System, reference is made to: the tender process and to whom a tender was awarded; when installation commenced; the issues that arose as a result of testing a prototype of the system; when the installation was due for completion; as well as the benefit to An Garda Síochána of the project. A status update on all aspects of the project is included, with reference made to the preparation of user and technical documentation and to the provision of user training. A Project Board, composed of two Inspectors and a civilian from the IT Centre, was also established to oversee the project.
- 5.5.191 The projects undertaken by the Committee were stated to have been implemented using a Project Management methodology, which was subject to “*strict monitoring and control*”. This strict monitoring and control, however, was not applied to the installation

of DAT recorders in Divisional Stations, given that it appears that little or no reference was made to the project by the Committee at this time.

- 5.5.192 In a document produced by the Secretary to the Committee at the end of 1996, entitled “Technological Developments in An Garda Síochána 1992-1996”, reference is made on the final page to “Other Telecommunications Initiatives”. This is a brief summary of all of the Telecommunications projects and includes the following reference “Digital Voice Logging Equipment for DMA and Cork – also being installed in other Divisional Headquarters”. This project was listed under the heading, Radio, and not under the heading, Telephone, which may stem from the fact that consideration of digital voice-recording systems first arose in the context of establishing a new Garda radio communications system for Cork. Under the heading, “Audio Visual”, reference is also made to “Digital Recording of Audio”. It is clear, therefore, that the Secretary to the Committee, at least, had been provided with some information to the effect that these recording systems were being installed.
- 5.5.193 The fact that this project was considered in a summary context shows the lack of importance attributed to it by the Committee in comparison with other projects taking place at this time. This is despite the fact that the new recording system had increased capacity to record multiple telephone lines and retain many more hours of recordings relative to the S.E.L. system.
- 5.5.194 Not only did the Committee fail to address policy issues regarding the operation and use of the new DAT recorders in Divisional Stations but, in general, Senior Garda Management outside the Telecommunications Section, including 5 former Commissioners, stated that they were completely unaware of the purchase and installation of these new recorders at this time.
- 5.5.195 In general, the current and former high-level Garda officers interviewed by the Commission gave evidence that they were only aware of the recording of “999 calls” or “emergency calls” on a recording system of some form. They said that they were never made aware of the technical details of the system. Interestingly, the definition of “999” or emergency calls also varied greatly, in particular between Senior Management members serving within the Dublin Metropolitan Area (DMA) and operational members serving in the Divisional Stations outside the DMA. This is considered further in Chapter 7.
- 5.5.196 The lack of clarity as to what constituted an emergency call and the lack of guidance from Garda HQ regarding this basic definition is symptomatic of the lack of

communication and understanding throughout the Garda Síochána organisation in relation to the operation and use of the DAT recorders in Divisional Stations.

- 5.5.197 The Commission sent a questionnaire to each technician before inviting them to attend before it for oral hearing. Both in the questionnaire and at hearing, the technicians were asked about their awareness and understanding of policies within the organisation in relation to the operation and management of the system, with particular emphasis on access to the recording system, access requests from Garda members and the use of the recordings. Not one of the technicians was aware of any uniform policy developed during this period in relation to any of those areas.
- 5.5.198 A number of technicians expressed surprise at the time of installation that no policy was forthcoming and some members even wrote to their Regional Telecommunications Sergeants seeking direction following the installation of the DAT recorders. It is clear from this correspondence that the technicians had not received any instructions in relation to the operation or management of the system and, therefore, felt it necessary to make enquiries.
- 5.5.199 As noted above at paragraph 5.5.104, Inspector Jeffers requested a report from the technician in Bandon Station following the installation of the DAT recorder. In his report in response, the technician included his view on the need for training on the system. He noted that, at a minimum, those trained on the system should include the full-time radio operator and the duty Sergeant on each unit. Having regard to the “*sensitive nature*” of the material that could be recorded, he stated that full access to the unit should be given to an Inspector, who would need more advanced and detailed training. In oral evidence to the Commission, the technician confirmed his opinion that the responsibility for downloading and listening to calls should have been the job of an Inspector or a Sergeant at the very least, and not a job for the technicians.
- 5.5.200 In considering the operation and management of the DAT system, it is important to note that the systems were installed to benefit operational members of An Garda Síochána rather than the technicians themselves. The members who needed the system were either telephone operators needing to check details of a call received, or investigating officers seeking to play or acquire copies of a call in relation to a specific incident. Finding and playing back calls on the system was a relatively simple task, requiring no specialist technical knowledge. There was no reason to presume, therefore, that the technicians would be made responsible for dealing with all requests to access calls.
- 5.5.201 Indeed, as the technician in Bandon pointed out, there were good reasons why that job should have been given to an operational Sergeant or Inspector, rather than to the

technicians. In the first place, doing so would limit the technician's exposure to calls that were of no relevance to a technician's work and could be of a sensitive nature. It could also be argued that the technicians, by reason of the nature of their specialised background, were less well placed to judge whether a particular access request was being made for an operationally justifiable reason. Another practical reason was that, in almost all stations, the technicians worked daytime shifts and were not available if calls needed to be accessed urgently outside their shift time.

- 5.5.202 Notwithstanding these arguments, in the absence of any clear written policy on the issue, operation of the DAT recorder in almost every station was left to the judgment and decisions of the technicians.
- 5.5.203 One of the Donegal technicians wrote to his Regional Telecommunications Sergeant on 6 March 1997 seeking clarification / direction on whether technical or operational training would be provided to him and the communications staff operators. He queried whether more secure access levels were to be implemented (on installation, the security code for the machine was a simple default code, which gave any user access to all of the machine's functions) and what the maintenance procedures were in relation to the machine. He asked that the matter be treated urgently given that the machine was already installed. He received no reply to his queries. He told the Commission that he did not expect a reply from his Regional Telecommunications Sergeant but expected that his queries would be forwarded to Senior Management in Garda HQ, who would then reply with a policy statement on these issues.
- 5.5.204 Again on 14 November 1997, the same technician wrote to his Regional Telecommunications Sergeant stating that he had "*raised the matter of no training/direction*" with Inspector Power, Telecommunications, Garda Headquarters, during an inspection but had received no instruction to date. He also noted in his report that members of An Garda Síochána were now aware of the unit and demands were being made for information and copies of recordings were being sought. He asked for the report to be forwarded to the Chief Superintendent, Telecommunications, for direction and again he asked that the issue be treated as a matter of urgency. The Commission could not establish whether this report was forwarded to the Chief Superintendent, Telecommunications.
- 5.5.205 The technician did not receive any reply to his queries and no policy, oral or written, was forthcoming.
- 5.5.206 The technician with responsibility for the DAT recorder in Naas Garda Station was stationed in Portlaoise at the time. He wrote a report to the Sergeant in charge in

Telecommunications on 12 February 1997, outlining a problem that had arisen with the machine. He noted, *“there are no full guidelines as to its operation”*. Interestingly, he made a number of observations in relation to the DAT recorder including that he felt the *“operation of the machine should not be allowed to fall into our brief”*. In his opinion, the technicians should only have been involved at an advisory level.

5.5.207 The Telecommunications Sergeant with responsibility for the Eastern Region also wrote to the Maintenance Section in Garda HQ on 25 February 1997 and asked if it was possible to have *“clear guidelines issued as to whom is responsible for the operation of the voice logging recording equipment, the changing of the tapes and the storage of the tapes as it is being assumed by some that the Telecommunications Section is responsible?”*

5.5.208 No written response to this letter was found.

5.5.209 It is notable that, almost 11 years after the DAT recorder was installed, the Telecommunications Sergeant for the Southern Region wrote to Garda HQ on 25 September 2007 asking if there was *“a policy to record the main phone or [was] it just the 999’s?”* He also asked for clarification on the question of how long tapes needed to be kept. On 1 October 2007, a response was sent by Liam Moroney, an Inspector in Telecommunications, Garda HQ. He wrote:

*“I am not aware of any policy but I have no doubt that the purpose of those DAC’s<sup>67</sup> was to enable recording of the digital phones which were (and still are) used as operator consoles in divisional control rooms.....regarding the Dictaphone storage issues, see if you can get a quote and forward for the issue of a PO.... I will come back to you on the retention of tapes”*.

5.5.210 Without any official policy or direction coming from Garda HQ, the technicians and Regional Telecommunications Sergeants developed their own practices in operating and managing the recording systems. These practices varied from Division to Division, as one might expect. Practices in relation to access, use and storage of recordings are discussed below.

5.5.211 One further point should be made regarding the absence of a written policy from Garda HQ concerning the DAT systems in Divisional Stations. Although most of the technicians in the Divisions were made aware, *via* the Project Task Initiation

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<sup>67</sup> Digital-to-Analogue Converters



Document,<sup>68</sup> that certain specific lines were to be connected to the recorder on installation, at no stage was it made clear that these were the only lines that should be connected; nor was any process outlined for dealing with a request from an operational member of An Garda Síochána to have an additional line recorded.

- 5.5.212 In these circumstances, it is hardly surprising that technicians in some stations, acting on instructions from their operational Superintendents or Chief Superintendents, acceded to requests to have certain additional lines recorded.

### **Training**

- 5.5.213 As noted previously at paragraph 5.5.35, a letter was sent by Inspector Power to each Regional Telecommunications Sergeant and Inspector Bouchier on 24 November 1995, prior to the installation of the DAT recorders. The letter stated that *“the equipment will be supplied and installed by Dictaphone, who will also supply training”*. In evidence to the Commission, Superintendent Nolan stated that it was his responsibility to ensure that training took place.
- 5.5.214 However, having taken evidence from 38 technicians, the Commission is satisfied that there was no official training provided to any of the technicians on the DAT recorders at this time.
- 5.5.215 Most of the technicians recalled receiving a 10 or 15 minute demonstration from an employee of Dictaphone Ltd on how to use the system when it was installed. This involved learning how to play back calls and how to retrieve recorded calls from the system. Some of the technicians who joined Divisional Garda Stations after the installation of the DAT recorder were simply shown how to use the machine by the technician who was stationed there before them.
- 5.5.216 A conference for the technicians was organised by Chief Superintendent Cussen on 2 and 3 April 1996. This was not a conference specifically to deal with the DAT recording system but rather a general conference. According to Chief Superintendent Cussen, the seminar was *“intended to provide an opportunity for Mr Hamilton and the rest of the management team to clarify equipment policy, and for the technicians to ask questions and discuss any issues affecting them”*.
- 5.5.217 At this time, however, the DAT machines had been installed only in Bandon and Portlaoise. The installation of recorders in the other Divisional Stations did not begin until November 1996.

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<sup>68</sup> In the case of Bandon, where the system was installed some nine months before the Project Task Initiation Document was issued, it seems that the technician there was not made aware even of the existence of that document.

- 5.5.218 While most of the technicians attended the conference and could recall attending it, they did not recall any discussion arising in relation to the DAT recorders.
- 5.5.219 A number of the technicians recalled attending a basic operator's course in Garda HQ on 25 May 2000. This was the first time that an organised training course was provided to the technicians in relation to the DAT recorders. This is despite the fact that Superintendent Nolan was responsible for ensuring that relevant training was provided to the technicians.
- 5.5.220 Documentation provided to the Commission indicates that technician training was provided by Dictaphone at Garda HQ from 23 to 25 May 2000. It had been agreed with Dictaphone that 10% of the original contract price for the provision of the workstations accompanying the DAT recorders was to be retained until the installation was completed and training had been provided to the satisfaction of the Garda Telecommunications Section. It appears that these training days were organised in response to technicians expressing a need for more comprehensive training.
- 5.5.221 The training provided in May 2000 was purely of a technical nature regarding the operation of the system and was provided by Dictaphone Ltd. There was no discussion with the technicians regarding any legal or policy considerations. None of the technicians who were asked recalled any member of Garda Management being involved in the training.

**Access and use of recordings**

- 5.5.222 As noted above in the section "Operation and management", the Commission was unable to establish the existence of any uniform policy throughout the organisation in relation to any aspect of the recording system. Therefore, it is clear that there was no uniform policy on how the recordings could or should be accessed and who could or should access the recordings if they were required for an investigation.
- 5.5.223 Without any direction or clear policy from Garda HQ, it was left to the local Garda technicians to develop their own practices in relation to access. While it is wholly unsatisfactory that an important system with a potential for misuse should be implemented without a clear policy statement from Senior Garda Management, it must be noted that most of the technicians restricted access to the machine and the recorded telephone calls and took responsibility themselves for dealing with any access requests.
- 5.5.224 It is, therefore, necessary to identify the different practices that occurred in each individual Garda station. The Commission has received some written records from

nearly every Divisional Garda Station. These records vary widely in quality and quantity. Nonetheless, the Commission is satisfied that there was no systematic abuse of the recording system by the technicians. This conclusion is based on the documentation received, the evidence given by technicians themselves and the near total absence of complaints, from members of the force or the public, in which abuse of the recording system is alleged.<sup>69</sup> There is no evidence of a practice of downloading recorded calls for any purpose other than when a recording was requested by a member of An Garda Síochána for the purposes of a criminal investigation or the investigation of an internal disciplinary matter following receipt of a complaint.

- 5.5.225 In general, if a recorded call formed part of a Book of Evidence, a Statement of Evidence was provided by the technician who performed the download. Copies of these statements were also provided to the Commission by the technicians, although the majority of these relate to the period after 2008 when the DAT system was replaced by the hard-disk based NICE system<sup>70</sup>. A small number of the technicians gave evidence of appearing in Court to give oral evidence on the technical process involved in the downloading and copying of a recorded call. None of them recalled any challenge being made to the legality of the recordings in question. In fact, the Commission is aware of only one case prior to 2014 in which the legality of recording certain telephone calls became an issue. That case concerned a trial in Waterford Circuit Court and is considered in detail in Chapter 7 of this Report.
- 5.5.226 As indicated earlier, the amount of information recorded in connection with access requests varied from one Division to another, and sometimes from one technician to another within the same station. In particular, records do not always distinguish between the various telephone lines. Some technicians specifically noted whether the call in question was received on a dedicated 999 line or the main station line. Others did not. Equally, written requests for calls sent by members of An Garda Síochána and seen by the Commission do not generally state on which telephone line they believed the telephone call was received on. There are some exceptions, however, where members do include whether the call was received on the main station telephone line or the dedicated 999 line.
- 5.5.227 In general, the technicians were not given any information regarding the specifics of the investigation or case concerned. This is unsurprising given that they had no role to play in general policing matters. They were simply provided with a date and time when a call was received and asked to search for it.

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<sup>69</sup> See Chapter 11 below for further details.

<sup>70</sup> See Chapter 6

5.5.228 While the records and paper trails for the period 1996-2008 are not as comprehensive as the records kept from 2008 onwards the Commission does not apportion any blame to the technicians in this regard. While it would have been preferable for the technicians to keep records of the requests no instructions were given to them regarding the maintenance of records and no formal policy issued to them. Indeed, the responsibility for dealing with access requests in the first place was never formally assigned to them. They took on this job by default, in addition to the maintenance and support tasks they were already carrying out on a wide range of technical equipment in Divisional, District and Sub-District Stations.

5.5.229 Given that the records vary greatly from Division to Division, a summary of how requests for access were processed in each individual Divisional Station is provided at Appendix 5B to this chapter.

### **Maintenance**

5.5.230 The DAT recorders were under warranty with Dictaphone Ltd until 5 August 1997. In early 1998, a number of problems developed with some of the recorders. Particular problems arose with the machines in Wexford and Mullingar. Dictaphone carried out repairs and forwarded an invoice for payment. At this point, it was noted that there was no maintenance contract in place. A file on the issue of maintenance was forwarded to Inspector Power in the Telecommunications Section, Garda HQ.

5.5.231 Inspector Power noted that the situation regarding a contract for maintenance had been raised but had not yet been examined. The Commission received copies of written correspondence between Dictaphone Ltd, the Telecommunications Section and “A” Branch in Garda HQ between March and June 1998.

5.5.232 Dictaphone proposed a countrywide “full cover” Service Contract to include all service calls on the equipment, the supply and fitting of parts, travel time and call-out charges, as well as maintenance of the equipment software. If An Garda Síochána Technical Personnel were to carry out first-line maintenance, the cost of the Service Contract could be reduced by 20%.

5.5.233 As an alternative to this full-cover contract, Dictaphone also offered a “time and material basis” contract. However, Inspector Power was of the opinion that critical staff shortages in the Telecommunications Section at the time meant that this type of contract would not meet the requirements of An Garda Síochána. Higher costs would also be associated with repairs provided under the “time and material basis” contract.

- 5.5.234 At this time, Inspector Jeffers had been promoted to Superintendent, Telecommunications Operations. He agreed with Inspector Power that a yearly contract would be more efficient and cost effective. He completed a review of the cost of repairs to date and compared them with the yearly full-cover rate. He forwarded the proposal to the Chief Superintendent, Infrastructure, who requested further information on the function and cost of, and previous maintenance agreement that was in place for, the Dictaphone system.
- 5.5.235 Inspector Power responded to the request for further information by outlining that the DAT recorder was installed in Divisional Headquarter Stations for the voice recording of 999 emergency circuits, the Telephone Attendant Offset Console (i.e. the main station telephone line), private wires (i.e. direct lines to ambulance / fire / alarm services) and audio output from the M84 District Radio Controller. He also noted that a similar unit was purchased for Command and Control, Harcourt Square, which was maintained by Garda technicians who had undergone specialised training in Germany.
- 5.5.236 While he took into account the reports from both Inspector Power and Superintendent Jeffers, the Chief Superintendent, Infrastructure, wrote to the Assistant Commissioner, “A” Branch, recommending the “time and material basis” contract. This was due to the fact that the main objection to this contract from Inspector Power and Superintendent Jeffers related to provision of personnel. At the time, it was expected that extra staff would be recruited in the coming months.
- 5.5.237 The Assistant Commissioner, “A” Branch, however, was of the view that the position in relation to manpower was unlikely to improve in the short term. He accepted the recommendation of Inspector Power and Superintendent Jeffers that the yearly “*full cover*” contract was the preferred option. The position would be reviewed after a year.
- 5.5.238 The Commission did not receive copies of the Service Contract Agreement between An Garda Síochána and Dictaphone Ltd. It did, however, receive correspondence concerning subsequent contracts.
- 5.5.239 In 2002, the Department of Justice received a list of the service-level agreements that were in place within An Garda Síochána at that time. The Service Contract with Dictaphone was listed for one year with an end date of 31 October 2002.
- 5.5.240 In 2003, it was noted that the current Service Contract was due for renewal on 31 October 2003, which suggests that it had been in place for one year at this stage. The application was to renew for a further year.

- 5.5.241 On 8 November 2004, a quotation was received by An Garda Síochána from Dictaphone Ltd to renew the Service Level Agreement from 1 November 2004 to 31 October 2005. In a letter from An Garda Síochána to the Department of Justice dated 18 March 2005, a list of Service Contracts for the year ending 2004 was included. The Service Level Agreement for Dictaphone Voice Logging Equipment was listed at number 5, which confirms that the contract was renewed in accordance with the quotation.
- 5.5.242 Again in 2005, an application was made to renew the Service Contract that was already in place. At this stage, Dictaphone Ltd had been taken over by a new company called NICE. This did not affect the contract. The application was approved by the Assistant Commissioner, Strategy and Services.
- 5.5.243 Although the Commission is not in possession of the contract for each year, it is reasonable to assume that, from the period of 1998 up until the replacement of the equipment in 2008, a service-level agreement was in place on an annual basis with Dictaphone Ltd and thereafter with NICE.
- 5.5.244 In evidence to the Commission, the technicians confirmed that Dictaphone Ltd was responsible for maintenance of the system. However, in general, they themselves performed first-line maintenance on the machine. It was their responsibility to ensure that the machine was working correctly. For example, if a tape became stuck in the machine they would remove it. If a technical problem arose and they could not remedy, it they would log a call with Dictaphone Ltd.

#### **Storage**

- 5.5.245 Dictaphone Ltd produced a Prolog Digital Communications Recording System Handbook, which outlined guidelines for the proper storage of the DAT tapes. Only one technician provided a copy of this document to the Commission. It is unclear whether the other technicians were provided with a copy of the Handbook by Dictaphone at the time of installation.
- 5.5.246 The tapes used in the DAT recorders were 90-meter Digital Audio Tape cartridges with 4 millimetre tapes. The tapes could be write-protected by means of a physical switch on the tape itself: with the switch 'on', no recording was possible; with the switch in the 'off' position, a tape could hold up to 320 hours of audio. According to the Handbook, the tapes were to be stored in a protective plastic container at all times and in their "*operating environment*" out of direct sunlight. It was recommended that the tapes should not be exposed while they were stored and to avoid touching the tape surface.

- 5.5.247 As indicated earlier, questions about the storing of tapes arose when Chief Superintendent Cussen, Telecommunications, made contact with Superintendent T.J Cahill, the Data Protection Manager for An Garda Síochána, in March 1996.
- 5.5.248 Superintendent Cahill was asked for his observations on any implications under the Data Protection Act arising from the proposed installation of DAT recorders in Divisional Stations outside the DMA. In his response, he asked to be given further information about the recording system, including the length of time for which the details of any particular call were stored and the security arrangements in place for protecting the data from unauthorised access.
- 5.5.249 Superintendent Cahill's queries were passed on to Superintendent Geary and then to Inspector Bouchier, who had overseen the installation of similar equipment in Anglesea Street, Cork. On 8 May 1996, Inspector Bouchier reported to Superintendent Geary that tapes at Anglesea Street were stored for a period of one month, in a secure cabinet under the control of the District Superintendent, with no unauthorised access. He further reported that tapes that were "*the subject of an enquiry*" were stored until the enquiry was dealt with.
- 5.5.250 In evidence to the Commission, Inspector Bouchier stated that these procedures had been adopted on his own initiative, as he had not received any direction on what should be done with the tapes. The Commission notes that, in Command and Control, Harcourt Square, tapes were also retained for a minimum of one month. This does not seem to have been the result of any legal or policy consideration, but was simply the continuation of a practice from previous decades when an analogue reel-to-reel recorder was in use and only 30 days' length of tapes were available.<sup>71</sup>
- 5.5.251 Superintendent Geary forwarded the report from Inspector Bouchier to Chief Superintendent Cussen.
- 5.5.252 It was noted by Superintendent Geary that the procedure for storing the tapes as outlined by Inspector Bouchier was the same as that employed at Command and Control, Harcourt Square and in the "Interview Video of Suspects Pilot Scheme" then underway at various stations. Superintendent Geary sought approval for the ordering of suitable cabinets for all locations where the tapes would be held.
- 5.5.253 Superintendent Nolan responded to Superintendent Geary on behalf of Chief Superintendent Cussen and approved the purchase of the secure cabinets, noting that each Divisional Officer could purchase a cabinet under the Furniture Sub-Head.

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<sup>71</sup> See Chapter 4.

- 5.5.254 Inspector Jeffers wrote to Superintendent Geary asking that the procedures outlined in relation to the storage period, the control of the tapes and the retention of tapes relevant to an enquiry be brought to the notice of the Divisional Officers for their information and attention.
- 5.5.255 On 24 October 1996, Chief Superintendent Cussen wrote to each of the Chief Superintendents in charge of the Divisions where DAT recorders had been or were to be installed: Tralee, Ennis, Galway, Thurles, Sligo, Castlebar, Letterkenny, Roscommon, Monaghan, Mullingar, Drogheda, Naas, Waterford, Wexford, Portlaoise and Bandon. He noted in his minute that *“the tapes used in conjunction with the equipment should be stored in a secure cabinet for one month unless subject to an investigation, when tapes should be stored until completion of the investigation.”*
- 5.5.256 It is notable that these instructions regarding the storage and retention of tapes were addressed, not to the technicians, but to the Divisional Chief Superintendents. This suggests that the Telecommunications Section considered the storage and security of the tapes to be a matter for the operational side of An Garda Síochána rather than the technicians. Notwithstanding this view, as with other aspects of the DAT system, the task of arranging and managing the tapes in almost every Divisional Station was left for the technicians to deal with.
- 5.5.257 In evidence to the Commission, it was confirmed by all of the technicians that none of the Divisional Stations purchased a secure cabinet for this specific purpose.
- 5.5.258 Although these secure cabinets were not provided to the Divisional Stations, the general testimony of the technicians was that the tapes were stored in the Telecommunications Equipment Room of the station. Access to these rooms was restricted. Under the Garda Code, at paragraph 13.14(3), *“only telecommunications staff and member in charge are permitted to enter these rooms and the member in charge should ensure strict compliance with this practice for safety reasons”*. The evidence of the technicians is generally that this was adhered to.
- 5.5.259 Despite the clear instruction in the Garda Code, it is noted that, on 18 April 2006, the Assistant Commissioner, Strategy and Services issued a HQ Directive to each officer, inspector and station in response to a practice that had developed in Garda stations of using Telecommunications Equipment Rooms as general storage areas for items other than telecommunications equipment. The Directive refers to safety concerns about storage of these items (items which would not have been in the possession of or under the responsibility of the technicians) in the Telecommunications Equipment Rooms in



all Garda stations. There is nothing in the HQ Directive to indicate that this is a practice that was happening in any of the Divisional Garda Stations but it also does not refer specifically to which Garda stations had developed this practice.

5.5.260 The Directive restates paragraph 13.14(3) of the Garda Code regarding access to the Equipment Room. It does not state that the Code had been violated but simply reiterates the Code and states that the practice of storing other items in the Equipment Rooms would cease forthwith and that the rooms would be securely locked so as to prevent unauthorised entry. Appropriate signage was to be placed on the doors to restrict access to qualified personnel only.

5.5.261 A further HQ Directive was issued on 31 October 2006. The following was included in relation to the Equipment Rooms:

*“Special rooms are provided at most stations for communications equipment such as: radios, telephone, PABX, batteries and other related items. Only Telecommunications Staff and the Member-in-Charge are permitted to enter these rooms and the Member-in-Charge should ensure strict compliance with this practice for safety reasons.”*

5.5.262 The need to restate the fact that access to the Equipment Room was to be restricted suggests that this was being violated in some Garda stations. However, the Commission did not hear any oral evidence to this effect. The technicians generally confirmed that the Equipment Rooms in the Divisional Stations were locked at all times and that access was restricted.

#### **Destruction of recorded information**

5.5.263 As noted above, the total number of DAT tapes stored within the various Divisional Garda Stations from 1995 to 2008 was 2805, excluding Harcourt Square, Dublin, and Anglesea Street, Cork, which have been dealt with separately at paragraphs 5.3.41 and 5.4.40, respectively. A breakdown of the DAT tapes recovered in each Divisional Garda Station is provided below. While the tapes were collected in 2014, they are listed according to the Divisions as they existed during the DAT period, prior to subsequent re-arrangements.

<b>Number</b>	<b>Division</b>	<b>Garda Station</b>	<b>Quantity</b>
1	Louth / Meath	Drogheda	472
2	Sligo / Leitrim	Sligo	314

3	Longford / Westmeath	Mullingar	296
4	Cavan / Monaghan	Monaghan	227
5	Laois / Offaly	Portlaoise	216
6	Tipperary	Thurles	185
7	Clare	Ennis	165
8	Wexford	Wexford	142
9	Roscommon	Roscommon	135
10	Waterford	Waterford	134
11	Carlow/Kildare	Naas	120
12	Limerick	Henry Street	109
13	Mayo	Castlebar	97
14	Cork North	Fermoy	95
15	Galway	Mill Street	55
16	Donegal	Letterkenny	33
17	Cork West	Bandon	10
18	Kerry	Tralee	0

5.5.264 The instruction dated 24 October 1996, which was forwarded to the Chief Superintendents from Chief Superintendent Cussen referred only to the storage of the tapes. As noted previously, the instruction was to “store the tapes for one month unless subject to an investigation when tapes should be stored until completion of the investigation”. Although this seems to imply that tapes should not be retained beyond one month unless required for a specific purpose, the fact that no positive instruction was given to destroy or erase unwanted tapes after one month caused confusion and allowed for different practices to arise. It is notable also that no legal reason was given for the one-month retention period. In the apparent absence of any legal imperative to destroy the recorded data, local officers and technicians in many stations chose not to do so.

- 5.5.265 The evidence before the Commission regarding the destruction of the tapes varied from Division to Division. Some of the technicians noted that there was no instruction to destroy the tapes and, therefore, they retained them indefinitely. Others noted that, after the one month period had passed, they did not systematically wipe or destroy the tapes but they felt at liberty to reuse them in the event that no blank tapes were available. Some said this was necessary from an operational perspective, as the availability of tapes was limited. Although the tapes were not destroyed, the inevitable consequence of reusing the tapes was that recorded material was lost.
- 5.5.266 A certain percentage of tapes became unreadable owing to power outages while recording, or faults in the recorder or the tape itself. Due to the passage of time, it is impossible to state how many tapes were lost in this way.
- 5.5.267 Given the variation between Divisions it is necessary to deal with each Division separately in reporting on the extent to which recordings on the DAT system were destroyed. A brief summary on a station by station basis is provided at Appendix 5C to this chapter.

#### **Termination**

- 5.5.268 The process to replace the DAT recorders began as early as 2004. At this point, it was considered that the equipment was obsolete. A maintenance contract remained in place to keep the units functioning but, due to the age of the machines, they were not providing the “*necessary 24 hour recording of calls as required*”.
- 5.5.269 In August 2004, a report was submitted to Chief Superintendent Jeffers seeking approval to proceed with a tendering process to replace the DAT system.
- 5.5.270 Between 2004 and 2007, consideration was given to the tendering process and what was required in order to replace the DAT telephone recording systems. This is covered extensively in Chapter 6 of this Report.
- 5.5.271 Although the process began in 2004, the DAT recorders continued in service until mid-2008. In general, the systems were replaced with the new NICE telephone recording system in July 2008.

## Conclusions

- 5.5.272 The general picture that emerges is that a major change in policy took place, commencing in 1995 when An Garda Síochána began to record telephone lines other than 999 lines in Divisional Stations outside the Dublin Metropolitan Area (DMA).
- 5.5.273 Prior to and following the purchase of recording equipment for those stations in 1995, the Senior Management of An Garda Síochána failed to formulate or promulgate any policies or Directives regarding:
- What lines were to be recorded at Garda stations;
  - What lines were not to be recorded;
  - Who could authorise the addition or removal of lines from the recorders;
  - For how long tapes containing recordings were to be kept;
  - Whether and when recordings should be destroyed; and
  - The authorisation of, and conditions governing, access.
- 5.5.274 In the absence of any formal policy statement on these issues from Garda Management, the Telecommunications Section devised practices and procedures which became, by default, the policy of the organisation. These procedures were implemented to varying extents across the country, but did not carry the authority of a formal Circular or Directive from Garda HQ.
- 5.5.275 In the absence of any clear statement from Garda HQ as to what should and should not be recorded, decisions were taken at Anglesea Street and Bandon (the first Divisional Stations to receive the new recording equipment) to record the main station number, which was answered in the Control Room, as well as the 999 and radio circuits. This was done for the following reasons:
- To ensure that 999 calls diverted to the main station line by the 999 service provider would be recorded;
  - To ensure that calls made to the main station line that turned out to be of an emergency nature would be recorded;
  - To ensure that Control Room operators, conscious of being recorded, would be courteous and efficient in their handling of calls to the main station line.
- 5.5.276 From an operational perspective, the recording of the main station number had much to recommend it. It is also important to note that calls to the main station number ceased to

be recorded if and when the call was transferred to another extension. Nonetheless, the inevitable result was that a considerable number of non-emergency calls from members of the public to the station would be recorded, as well as calls of an emergency nature. There is no evidence that the decision to record this line gave rise to any consideration of the potential legal implications of doing so.

- 5.5.277 Because of a series of failures of communication, understanding and oversight, set out in detail in this and other chapters of the Commission's Report, the fact that Divisional Stations outside the DMA were recording and retaining non-999 calls was not understood by the Senior Management of An Garda Síochána until November 2013.
- 5.5.278 As no Directive or Circular concerning telephone recording was issued from Garda HQ, there was nothing, in principle, to stop Superintendents and Chief Superintendents in the Divisions from requesting additional lines to be connected to the recorder where they saw an operational need to do so. Although answerable to the Telecommunications Section, Garda HQ, in technical matters, Divisional technicians were under the operational control of their local Superintendents and felt obliged to carry out such requests when made.
- 5.5.279 The failure to draw up any formal set of rules or protocols governing the operation and management of the DAT recording system is surprising and unfortunate. At the time of installation, several technicians expressed surprise at the absence of any policy. Others were concerned at the lack of proper training. Some wrote seeking directions. Regrettably, such expressions of concern as made their way to the Telecommunications Section at Garda HQ do not seem to have resulted in the kind of comprehensive review of policy and practice that might have been expected. In some cases, they were not even answered.
- 5.5.280 For the most part, insofar as additional lines were connected in some stations, this was done in pursuit of the overall goal of the recording system – that is, the capturing of emergency calls. In some stations, for logistical and other reasons, 999 and other emergency calls could be diverted to lines in other parts of the station, such as the Public Office. For that reason, decisions were taken in a small number of stations to record those additional lines.
- 5.5.281 In making these decisions, it appears little or no consideration was given to the fact that recording such lines would also mean that more non-999 calls involving members of the public would be recorded, almost certainly without their knowledge. In a small number

of stations, the recording of such lines also resulted in the inadvertent recording of phone calls to and from prisoners at the station.

- 5.5.282 In two stations – Bandon and Galway – decisions were taken at local level to record certain telephone lines for reasons other than the capturing of emergency calls. In the case of Galway, a line in the Incident Room was set to record, apparently on the instructions of the District Superintendent, for reasons unknown. In Bandon, a number of additional non-999 lines were connected to the recorder for varying periods of time, for reasons that could not now be established. These lines included a telephone in a room that was used from time to time as an Interview Room, and was also used by some members to make telephone calls of a private and confidential nature. It is clear that the conversations of members were recorded without their knowledge. All records kept by the technician in relation to the operation and management of the system at Bandon Station, together with almost all of the DAT tapes then in existence, were destroyed when the station was flooded in 2009.
- 5.5.283 It emerges from a general view of all the evidence heard by the Commission that there was a great deal of confusion, amounting to ignorance, at the highest level in An Garda Síochána as to what lines were recorded in Divisional Stations outside the DMA. Most strikingly, some of the key witnesses believed that the Control Rooms at Divisional Garda Stations received only 999 calls. They failed to appreciate, as appropriate inquiries would have disclosed, that these Control Rooms also received all calls to the main station number. This may be explicable by reference to the fact that officers who spent most or all of their careers in Dublin could have mistakenly assumed that the Control Rooms in Divisional Stations outside the DMA were replicas of Command and Control at Harcourt Square, where only emergency calls were dealt with.
- 5.5.284 In default of any official rules or guidance emanating from Garda HQ, the technicians and their Regional Sergeants developed local practices in managing access to recordings. These practices varied from Division to Division. It is fair to say that, by and large, the technicians attached to the Divisional Stations exhibited a high sense of responsibility. To their credit, even in the absence of guidance, many of them were properly sensitive to the fact that telephone conversations were private and that access should not be granted except for valid operational reasons, and only then in response to a formal application supported by the District Officer, i.e., the Superintendent.
- 5.5.285 The Commission has found no evidence of widespread abuse of the system. Nonetheless, it is a fact that a large volume of private telephone calls were retained in

the possession of An Garda Síochána and the possibility of instances of abuse by members cannot be ruled out.

## 6. GARDA TELEPHONE RECORDING SYSTEMS, 2008-2013

### 6.1 INTRODUCTION

6.1.1 This chapter addresses the matters raised in sub-paragraphs 1(a) - (d), (j) and (k) of the Terms of Reference, insofar as they apply to the period 2008 to 2013. This includes the planning, procurement, installation, operation, management, alteration and termination of Garda telephone recording systems during this period, as well as the storage and destruction of recorded information and the use, if any, to which such information was put by An Garda Síochána.

#### **Background**

6.1.2 During 1997 / 98, the Telecommunications Section of An Garda Síochána carried out a review of Garda radio systems. The subsequent report identified a number of problems, including:

- (i) A lack of communication and control at Divisional and national levels;
- (ii) Security concerns concerning the interception of Garda radio messages;
- (iii) Difficulties in maintaining obsolete equipment.

6.1.3 In January 1999, the Government agreed that a new national radio system should be provided to support An Garda Síochána and to provide for the requirements of the other emergency services. A high-level Advisory Group and a Project Board, both chaired by An Garda Síochána with input from the Departments of Justice and Finance, were set up to oversee the development of this project.

6.1.4 At or around the same time, a review was initiated of the systems used by An Garda Síochána to deal with 999 emergency calls. As part of this review, independent consultants were brought in to conduct a study of Control Rooms in Garda stations nationwide.

6.1.5 The consultants' final report, issued in January 2002, notes that, outside the Dublin Metropolitan Area (DMA), the Control Room in each Divisional Station usually housed the main switchboard for the station as well as the radio console and dedicated 999 lines. It states that, as a result, *“all calls of a routine or emergency nature tend[ed] to be routed in the first instance to the station control room / point for action.”* The report also notes:



*“It is not uncommon for callers to use an inappropriate route for their calls to the Garda. In some cases routine calls should have been made using the 999 service while a number of 999 calls could easily have been made using the normal station telephone numbers.”*

6.1.6 The report does not discuss the recording of emergency calls, other than to note: *“Many control rooms are equipped with Dictaphone logger equipment that is used to record the audio of both radio and telephone traffic.”*

6.1.7 In December 2001, a TETRA<sup>72</sup> radio network was commissioned and installed in the North Central Division of the DMA as a pilot for a proposed national radio network.

## **6.2 PLANNING AND PROCUREMENT**

### **2004**

6.2.1 Although the Digital Audio Tape (DAT) recording systems installed in 1996 were not replaced until 2008, the process of planning their replacement began several years earlier. During 2004, the Telecommunications Section (ICT) at Garda Headquarters (HQ) began to receive an increasing number of calls from technicians highlighting problems with the existing telephone recording equipment. It became clear that simply repairing the equipment was not a viable long-term solution and the Project Management team within ICT began the process of researching replacements. In August 2004, a report was submitted to Chief Superintendent Jim Jeffers, Telecommunications, seeking approval to proceed with a tendering process for new recording equipment. The report, from Superintendent J. P. Sharpe, Project Management, states:

*“The existing Dictaphone call recording equipment... is fast approaching obsolescence and cannot be relied upon. Having recording equipment installed which cannot be trusted or guaranteed to operate at critical times can at least lead to criticism and extreme embarrassment should such recordings be called upon in the course of an investigation or enquiry.”*

6.2.2 The report continues:

*“It is proposed to install recorders in each Divisional H.Q. which would be stored on local hard drive but archived centrally.”*

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<sup>72</sup> Terrestrial Trunked RAdio (TETRA) refers to a standard digital mobile radio system approved for ‘professional’ users by the European Telecommunications Standards Institute (ETSI).

*If required and subject to policy decision it would also be possible to record all telephone traffic (i.e. non-emergency) in the relevant station.”*

6.2.3 It seems Superintendent Sharpe was not aware that certain non-emergency telephone traffic was already being recorded as a matter of course in Divisional Stations since the installation of the preceding DAT system in 1995 / 1996.

6.2.4 By letter dated 3 September 2004, Chief Superintendent Jeffers raised a query regarding the suitability of central archiving from an operational perspective. In response to this, Superintendent Sharpe wrote:

*“The central archive is a physical location for backing up the recordings. A copy of the recordings will also be stored on the local hard-drive at the Divisional location...*

*Archiving is presently being carried out by members of the Telecommunication section, both at Harcourt Square and in the Divisions. This is not a task for the Technicians who[se] only responsibility in the matter is to insure [sic] that the equipment is operational.”*

Superintendent Sharpe concluded by raising the question of what the proposed new system should record:

*“A policy regarding the recording of Radio & Telephony traffic is required, that outlines what should be recorded and for how long the recordings are kept. This is outside the scope of Telecommunications.”*

6.2.5 On 4 October, Chief Superintendent Jeffers responded, noting:

*“It is clear that there are two elements, i.e. technology and the operational management of the system to this project, that must be dealt with and I agree with your interpretation of both.”*

He went on to state:

*“I am now of the view, considering the sizable finance involved, that this should be treated as part of the ICT Strategy with a strong recommendation on how such systems should be interfaced with the present NRN<sup>73</sup> Control Rooms and future control room strategy.”*

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<sup>73</sup> National Radio Network.

## 2005

- 6.2.6 No further developments occurred in 2004. Documentation disclosed to the Commission indicates that the matter came before the IT and Telecommunications Executive Committee in April 2005. A list of “*Strategic and Operational Projects*” under the auspices of the Project Management Section, ICT, includes the following entry:

*“Replacement of telephony / radio call recording equipment...*

*File reactivated.*

*Tender to be drafted for recording of 999 calls and it is to include HQ and all the Divisions.”*

- 6.2.7 Inspector Thomas O’Dea, Project Management, ICT, was given the task of drafting the specification documents for the required equipment. To ensure that the technical specifications met the current and future operational requirements of An Garda Síochána, Inspector O’Dea sought information from technicians as to what was being recorded by the existing system and for how long those recordings were being retained. He also received suggestions from technicians as to what additional telephone lines might be recorded in the future.

- 6.2.8 As part of this process, Inspector O’Dea also looked for specification documents in relation to the existing DAT recorders. He was unable to locate any documents relating to the tender process for them, but did locate a copy of the Project Task Initiation Document prepared for the installation of those recorders in Divisional Stations. This served to confirm the minimum number of channels that would be needed in order for the new system to replace the DAT machines.

- 6.2.9 On 11 May 2005, Inspector O’Dea wrote to Chief Superintendent Jeffers under the heading “*Policy on the recording of Radio and Telephone calls at Divisional Headquarters & Harcourt Square.*” He stated:

*“There is currently call recording equipment installed in all Divisional Control Rooms and Harcourt Square. These devices are used to record incoming 999 / 112 calls and also record the radio traffic. This equipment is now obsolete and must be replaced as it can no longer be supported.*

*Currently the tapes containing the recorded calls are maintained by the local Telecommunication Technician, the backup period varies from location to location, from three months to a year, subject to local management instructions. What telephones and radio traffic is recorded is also subject to local management decisions.*

*We are currently planning to replace this equipment and to ensure that the replacement equipment meets the requirements of the organisation, it is necessary to agree:*

- *What items should be recorded?*
- *How long the recordings should be stored?*
- *Who is responsible for the data?"*

6.2.10 Inspector O’Dea concluded by recommending that “*the 999 / 112 telephones, the telephones associated with the Fines Office, Control room phones (phones that the public call in on) and incident room telephones*” should be recorded, as well as radio traffic. He suggested that recordings be kept locally at each station for a period of 60 days, before being archived for a set period of time (not specified in the report). At the end of this period, the recording would be erased.

6.2.11 In relation to his recommendation that Incident Room telephones be recorded, Inspector O’Dea told the Commission that this suggestion had come from some of the technicians he had spoken to. He was not aware of whether any Incident Room phones were in fact being recorded at that time.

6.2.12 Regarding the policy questions raised in his report, Inspector O’Dea told the Commission that, in talking to technicians about the system as it existed, he had become concerned at an apparent lack of consistency in how it was being operated – specifically, that there were variations in relation to which lines were being recorded, and where and for how long recordings were being retained. He stated:

*“So it didn’t sound right to me and going forward [with] the new system... one issue that I was going to highlight is there is going to be one solution right across the whole thing that we could control centrally.”*

6.2.13 Although his report included some policy recommendations, Inspector O’Dea made it clear in his evidence to the Commission that such matters were not for him to decide. He said he had raised these matters because, from his perspective, in order to prepare the technical details for the tender specification, he needed to know what the new equipment would be required to do.

6.2.14 In a response dated 19 May 2005, Chief Superintendent Jeffers stated:

*“...I am of the view that your replacement strategy should be on a one for one basis with the capability to scale up when the organisational requirements have been fully agreed.*

*To enter into this process now would have a serious impact on your ability to replace the system in a reasonable time frame.”*

- 6.2.15 This ‘one-for-one’ replacement strategy represented a narrower approach than that expressed by Chief Superintendent Jeffers in 2004, when he had recommended that replacement of the Dictaphone machines should take place alongside an operational review of recording policy, as part of the developing Control Room strategy. In adopting this narrower approach, Chief Superintendent Jeffers was motivated primarily by the fact that the existing recording equipment was now in urgent need of replacement.
- 6.2.16 In taking this approach, he assumed that no policy issues would arise if the new equipment was used solely to record lines that were already being recorded. As he told the Commission, *“the policy that was originally there was the policy that stood.”* He did not recall any further consideration being given to the questions of policy raised in Inspector O’Dea’s letter.
- 6.2.17 It is important to remember that the Telecommunications Section understood its role as being to provide technical support to meet the operational requirements of the organisation. Questions of policy, such as which telephone lines should be recorded in Garda stations, were essentially operational matters, properly to be determined by the Senior Management of An Garda Síochána. As an Inspector in 1996, Mr Jeffers had signed off on the Project Task Initiation Document which informed local technicians of the lines to be recorded on the DAT system. As a Chief Superintendent in 2005, he continued to believe that the 1996 document reflected a policy that had been understood and approved at Senior Management level. This is why he thought that no issue could arise if the new equipment to replace DAT was deployed in accordance with the 1996 policy as he understood it.
- 6.2.18 Chief Superintendent Jeffers maintained this belief notwithstanding the report from Inspector O’Dea, based on his own informal inquiries, that local Management decisions had created variations in the period for which recordings were being held, and that such decisions might also have affected the lines being recorded. It seems the information provided by Inspector O’Dea did not prompt any further inquiry into whether the policy outlined in 1996 was in fact being adhered to.
- 6.2.19 From this point on, the project of replacing the DAT recorders was considered by the Telecommunications Section as separate from the broader *“Control Room Strategy”*

project. The latter was an ongoing review process, involving Senior Management from the operational and technical sides of An Garda Síochána, which was examining future options for the handling of emergency and non-emergency calls, including the possibility of centralising call handling at national or regional level. Nonetheless, in drafting the specification documents for replacement recorders, Inspector O’Dea was alive to the fact that the equipment needed to be capable and flexible enough to continue to be of use in the event that emergency call handling was subsequently restructured on a regional or national basis.

- 6.2.20 On 24 May 2005, Inspector O’Dea forwarded a draft tender specification for approval. In the covering letter he wrote:

*“The replacement recorders will record both digital and analogue circuits. The recordings will be stored on hard drives locally and archived centrally. It will be possible to record both emergency calls and non-emergency calls on the recorders as well as the local radio traffic.*

*We propose to install a recorder in each Divisional HQ and at Harcourt Square... We propose to install an archive server to back up each recorder at a regional centre; there will be one backup server for each region.”*

- 6.2.21 The draft specification document was sent up to the Assistant Commissioner, Strategy and Services, Pat Crummey on 31 May 2005 but it seems that no decision was taken at that time. On 12 August 2005, Inspector O’Dea forwarded a Business Plan “*outlining the features of the proposed replacement equipment.*” This was passed on to Assistant Commissioner Crummey by Chief Superintendent Jeffers, who noted:

*“As this is an E.U. tender we will not be placing an order before the end of 2005. Consequently, sanction is now sought to tender for the supply of the equipment and [to] transfer this project to the 2006 financial year.”*

Assistant Commissioner Crummey gave his approval by letter dated 21 September 2005.

## **2006**

- 6.2.22 In July 2006, a Five-Year Strategic Information and Communications Technology Plan for An Garda Síochána was approved by the Garda Commissioner and submitted to the Department of Justice. In relation to voice-recording systems, the Plan states:

*“Voice recording systems are in use but currently operate as standalone systems. Telecommunications Section has identified the migration to a*

*central system as something that needs to be investigated. Suitable voice storage and / or archiving facilities and policies also need to be identified.”*

- 6.2.23 With regard to the future handling of emergency calls, the Plan envisages the creation of 6 regional Control rooms, equipped in the same way as Command and Control, Harcourt Square, and dedicated to handling all emergency calls within their region. Subsequently, in the final report of the Control Room Strategy project, the number of proposed control rooms is reduced to 3, including Harcourt Square.
- 6.2.24 Although approval had been given at Assistant Commissioner level to begin the process of tendering for new recording equipment in 2006, it seems that the project was not pursued during that year.

### **2007**

- 6.2.25 In January 2007, a Business Proposal for Radio and Telephone Call Recording at Divisional Stations, Harcourt Square and Anglesea Street was approved by the then Assistant Commissioner, Strategy and Services, Louis Harkin. The proposal contains increased cost figures but is otherwise identical to that approved by his predecessor in August 2005. In April 2007, a Request for Tender document was completed by Inspector O’Dea for onward transmission to the Director of Finance for An Garda Síochána.
- 6.2.26 In July 2007, the same document was resubmitted by Chief Superintendent Jeffers to Assistant Commissioner Harkin, in a letter indicating that Chief Superintendent Jeffers had “revisited the need for this” following recent discussions between them. Having referred to the fact that audio-recording facilities were also being considered as part of the National Digital Radio Project (NDRP)<sup>74</sup> then in development for An Garda Síochána, Chief Superintendent Jeffers concluded:

*“This application is urgently required to replace the audio recording systems already in use. These systems will be future proofed to satisfy our overall telephony needs.*

*The recording system for the NDRP will be an independent system and because of its size and complexity may have to be outsourced to the service provider. This is a matter yet to be decided, particularly on security grounds.”*

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<sup>74</sup> Also referred to as the National Digital Radio Service (NDRS).

6.2.27 On 30 August 2007, a meeting took place of a Project Board (known as the DigiCAD Project Board), established to oversee the development of the NDRP, Closed Circuit Television (CCTV), Computer Aided Dispatch (CAD) and the Garda Control Room Strategy. The meeting was chaired by Assistant Commissioner Harkin and attended by representatives from the Department of Justice as well as An Garda Síochána. A PowerPoint presentation prepared for the meeting listed a number of “*Key Business Decisions Required*”, including “*Voice Recording of Emergency & Non-emergency Telephony Calls / Legacy Radio Traffic at Control Rooms*”.

6.2.28 At or around this time, a document headed, “*Proposal on Voice Recording – National Digital Radio Service and Garda Control Rooms*”, was circulated to the members of the Project Board for their consideration. The document summarises the existing position as follows:

*“Currently radio & telephone traffic is recorded at Divisional control rooms, Anglesea Street, Cork and Command & Control at Harcourt Square. This includes the recording of emergency 999/112 calls at each centre.”*

6.2.29 The document goes on to propose:

*“...that non-emergency and emergency call traffic to the Control room is captured by deploying a call logger at the relevant station with a playback facility. This call logger will only record telephone traffic initiated or received at the Control room.” [emphasis added]*

6.2.30 Minutes of the 30 August 2007 DigiCAD Project Board meeting indicate that some discussion took place around the separate issue of voice recording under the NDRP system, but the proposal that both emergency and non-emergency telephone calls into and out of Divisional Control Rooms should be recorded does not seem to have attracted any attention or debate. One of the Department of Justice representatives who attended the meeting told the Commission in evidence that he had assumed the reference to non-emergency call recording meant only the recording of calls made to 999 or other emergency lines that turned out not to have been genuine emergencies. He did not take it to mean that any non-emergency lines were being or would be recorded. He assumed that every call to the Control Room of a Garda station was, by definition, a call made on an emergency line. He was unaware of the fact that Control Rooms in Divisional Stations outside the DMA routinely answered calls to the main station number, as well as the 999 lines.



- 6.2.31 At the same meeting, it was noted that a long-term strategy had been agreed of moving to 3 centralised Control Rooms for the entire country. In the short-term, however, the strategy of maintaining Control Rooms at Divisional level was to continue.
- 6.2.32 In September 2007, the Proposal on Voice Recording was split into two separate documents – one focused on the NDRP and the other focused on Garda Control Rooms. In the latter document (headed “*Proposal on Recording of Emergency and Non-Emergency calls at Regional Control Rooms and Divisional HQ Stations*”), it was again proposed that all telephone traffic into and out of Divisional Control Rooms be recorded, whether emergency or otherwise. It was suggested that the recordings should be available “*on-line*” for 30 days, and, thereafter, could be retrieved “*from the data archive*”. Suitably trained staff, authorised by Management, would replay and / or make copies of recordings on request.
- 6.2.33 The final, approved version of the Request for Tender document to replace the existing telephone recording system was advertised on the Government’s “eTenders” website on 26 October 2007 and published in the Official Journal of the European Union on 30 October 2007.
- 6.2.34 The Request for Tender document described the required system as follows:

*“This specification is for a Digital Logging Recorder System which interfaces to An Garda Síochána’s present analog and digital communications systems. The proposed solution shall automatically record and instantly playback telephone calls and radio traffic from An Garda Síochána’s communications systems at the sites outlined in the following table...”*

The sites listed for recording were:

- Garda Headquarters, Phoenix Park
  - DMA Headquarters, Harcourt Square
  - Anglesea Street, Cork
  - 18 Divisional Stations outside the DMA
- 6.2.35 No mention was made of the kinds of telephone calls that the proposed new system was intended to record, but a minimum number of potential connections was specified for each site. For the Divisional Stations outside the DMA, it was indicated that the new system must be capable of accommodating up to 12 analogue lines per station – 4 more than the maximum possible with the existing DAT recorders. The NICE system, which

was ultimately chosen as the most suitable from the tenders received, in fact allowed up to 24 channels (12 analogue, 12 digital) to be recorded at Divisional Stations, with a potential for further upgrades if required.

### **2008**

- 6.2.36 A total of 13 companies responded to the Request for Tender published in October 2007. Following an evaluation process carried out by members of the Garda Telecommunications Section, it was recommended that the tender be awarded to Sigma Wireless Ltd, an Irish company that had proposed installing a digital recording system made by NICE Ltd, a company from Israel. With sanction from the Director of Finance for An Garda Síochána, the tender was awarded to Sigma Wireless Ltd. A contract was signed by both parties on 17 July 2008. Installation of the system was scheduled to begin shortly thereafter.
- 6.2.37 Subsequent to the award of the contract, it was brought to the attention of the Telecommunications Section that an additional 3 recorders would be required. Two were for stations that had recently acquired Divisional Station status as the result of changes to the divisional boundaries within An Garda Síochána, namely, Bray and Navan. The third was intended to be kept as a spare unit in Garda HQ, where it could be used if required for important visitors, special events or other operational needs. On 15 July 2008, the Garda Director of Finance gave sanction to purchase the additional machines from Sigma Wireless Ltd, while indicating that any further purchases “in the near future” would require a fresh tendering process.

## **6.3 AUTHORISATION**

### **An Garda Síochána**

- 6.3.1 As outlined above, the move to replace the DAT recorders with a new system was initiated by the Telecommunications Section. Sanction to proceed with the tender process was given by the Assistant Commissioner, Strategy and Services, in January 2007 on the understanding that the purpose of the tender was to replace obsolete equipment.
- 6.3.2 It appears from the documentation disclosed to the Commission that the authority of the Assistant Commissioner was considered a sufficient basis on which to proceed. There is no indication of any further sanction being sought from the Garda Commissioner; nor is it clear when or indeed whether the Garda Commissioner was informed of the proposed replacement of the DAT recorders.

- 6.3.3 Once the tender evaluation process was complete, sanction was sought from the Director of Finance for An Garda Síochána to place an order with Sigma Wireless Ltd. This was granted by letter dated 17 April 2008.
- 6.3.4 Sanction was also required from the Department of Finance. This is described further at paragraphs 6.3.10 to 6.3.15 below.

**Department of Justice**

- 6.3.5 Section 43(1) of the Garda Síochána Act 2005, which came into force on 14 July 2006,<sup>75</sup> made the Garda Commissioner the Accounting Officer in relation to the appropriation accounts of An Garda Síochána. Notwithstanding this change, it seems that the Department of Finance continued to express a preference for dealing with expenditure applications *via* the Department of Justice rather than engaging directly with An Garda Síochána.
- 6.3.6 For this reason, although sanction from the Department of Justice was not a formal prerequisite for the purchase of new Garda telephone recording equipment, as a matter of practice, it was understood and expected by Department officials in the Garda Division that they would have an opportunity to review the terms of any such purchase prior to its being made.
- 6.3.7 It is not clear exactly how and when the Department of Justice was first informed of the proposal to tender for new equipment to replace the DAT recorders. Representatives from the Department were present at meetings of the DigiCAD Project Board during 2007 when voice recording under the National Digital Radio Project (NDRP) was discussed. The Department also received a copy of the September 2007 business proposal prepared by An Garda Síochána in relation to recording emergency and non-emergency calls at Regional Control Rooms and Divisional HQ stations, but this aspect of Garda voice recording does not seem to have been discussed at the Project Board meetings.
- 6.3.8 Correspondence between the Department and An Garda Síochána indicates that there were other, informal discussions between Departmental officials and members of the Garda Telecommunications Section at which the former were made aware of the decision to separate the replacement of the DAT recorders from the wider issues of Control Room Strategy and voice recording under the NDRP.
- 6.3.9 It appears from an email sent by one of the Department's representatives on the DigiCAD Project Board (dated 3 December 2007) that the Board were not given the

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<sup>75</sup>Garda Síochána Act 2005 (Commencement) (No.2) Order 2006 [S.I. 377/2006].

opportunity to review the tender document for the replacement of the DAT recorders prior to its publication on the Government “eTenders” website. In responding to that email, an Inspector from the Telecommunications Section wrote:

*“The current voice recording procurement process is outside the scope of the Control Room Strategy... The reason for the current e-tender procurement process is to replace existing recorders... which are time obsolete and in need of replacement.”*

### **Department of Finance**

- 6.3.10 In 2008, when An Garda Síochána sought to acquire the NICE system, there were in fact two mechanisms by which sanction could be given by the Department of Finance.
- 6.3.11 The first of these mechanisms simply involved An Garda Síochána writing to the Department of Finance directly, seeking sanction for expenditure in relation to a specific proposed project.
- 6.3.12 The second mechanism, created with Information Technology (IT) expenditure in mind, involved the awarding of an annual “Delegation Certificate”. The notion of a “Delegation Certificate” was introduced by Department of Finance Circular 16/1997. This established a practice whereby a certificate delegating expenditure within agreed spending limits to a department or agency (in this case An Garda Síochána) could be granted by the Department of Finance. In order to receive a Delegation Certificate, a department was required to supply an annual statement on IT-related expenditure and impacts, together with a statement of strategies for the management of information, computer applications and technical infrastructures.
- 6.3.13 The Commission has examined all the documentation supplied by An Garda Síochána, the Department of Justice and the Department of Public Expenditure and Reform (who now manage the archives of the Department of Finance in this respect). From this, the Commission has been unable to identify any document in which sanction was given to An Garda Síochána by the Department of Finance for the purchasing of the NICE system, whether by way of specific written sanction or under the auspices of a Delegation Certificate.
- 6.3.14 The Commission received evidence from an official in the Department of Public Expenditure and Reform indicating that the onus of ensuring that sanction has been obtained from the Department of Public Expenditure and Reform falls upon the Accounting Officer for An Garda Síochána who, he said, is also responsible for maintaining a central record of both delegated and specific sanctions.

- 6.3.15 Nonetheless, it is surprising, to say the least, that no document giving sanction to such a significant purchase could be found in the records of the Department of Public Expenditure and Reform.

## 6.4 INSTALLATION / ALTERATION

- 6.4.1 Unlike the situation pertaining to the installation of the DAT recorders in 1995 / 1996, there is no evidence of any formal written instruction from Garda HQ setting out the telephone lines that were to be connected to the NICE system. The Divisional technicians who assisted the Sigma Wireless engineers with the installation process understood that they were to transfer any lines previously recorded on the DAT system onto the NICE recorders.
- 6.4.2 This is apparent from an email sent to all Regional Telecommunications Sergeants on 4 July 2008 by a Sergeant in the Telecommunications Project Management Section. Regarding the installation process, he stated:

*“I suppose the main thing is to confirm that all traffic that was being recorded on Dictaphone is now being recorded on NICE system.”*

- 6.4.3 Inspector O’Dea (also from the Project Management Section), who had drawn up the original tender specification, told the Commission in evidence:

*“...it was to replace faulty equipment; the equipment out at the time was not reliable and so we were replacing like for like. The instruction was to take out the old unit, put in the new unit and wire it all the very same and if they want to make changes after that we will deal with it after that.”*

- 6.4.4 In a letter, dated 27 August 2008, to the Chief Superintendents of each Division regarding the NICE installation (by then completed in almost all stations), the Superintendent for Project Management, Telecommunications, stated:

*“These new NICE units replace the existing Dictaphone units which were at the end of their serviceable life, and are intended to record the 999 lines, radio traffic and specific Communications Room telephony traffic.”*

- 6.4.5 Installation was a two-part process. Firstly, each telephone or radio circuit that was to be recorded had to be physically connected to a NICE recorder located in the station. Once that was done, the relevant lines had to be enabled for recording on the NICE system.

This could only be done from the Telecommunications Section at Garda HQ, by someone with administrator privileges on the system. Dates were agreed with local technicians for the installation of each recorder, in order to minimise the downtime between the transfer of lines from the old system to the NICE recorder and the enabling of recording on those lines.

6.4.6 From the audit trails generated by the NICE system, together with the evidence of relevant Garda technicians, it is possible to identify the dates on which the recording system ‘went live’ in each relevant station. They are as follows:

Wexford	26 May 2008
Waterford	25 June 2008
Harcourt Square (Dublin)	28 June 2008
Portlaoise	1 July 2008
Monaghan	2 July 2008
Drogheda	3 July 2008
Bandon	4 July 2008
Fermoy	4 July 2008
Mullingar	7 July 2008
Ennis	8 July 2008
Thurles	8 July 2008
Tralee	8 July 2008
Roscommon	9 July 2008
Sligo	9 July 2008
Castlebar	10 July 2008
Letterkenny	11 July 2008
Anglesea Street (Cork)	30 July 2008
Naas	6 August 2008
Kilkenny	30 August 2008
Galway	3 September 2008
Navan	5 September 2008
Bray	3 October 2008
Limerick	[date unknown]

6.4.7 From the evidence provided to the Commission, it seems that, in almost every station, the telephone lines installed on the NICE system were the same as those connected to the DAT recorder immediately prior to the changeover. In some stations, this meant that certain non-999 lines, in addition to the main telephone number, continued to be recorded.<sup>76</sup> Those lines and stations are as follows:

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<sup>76</sup> For details of their original installation, see Chapter 5.

Bandon

A line in the Public Office, first connected sometime in 2003 / 2004.

Galway

A line in the Incident Room, first connected in 1997.

Waterford

A line in the Public Office, first connected in 1996.

Wexford

Two lines in the Public Office, first connected in 1996.

6.4.8 In a small number of stations, some new lines were added which went beyond those generally recorded during the DAT period. Details are set out below.

6.4.9 As indicated previously, a physical connection to the NICE recorder was not enough for recording to take place; it was also necessary for the lines to be configured for recording on the system at Garda HQ. This meant that, in every case where a line was added to the NICE system, one or more members of the Telecommunications Section at Garda HQ were aware that this was being done. For the most part, the task of configuring new lines for recording was undertaken by a civilian technician attached to the Telecommunications Section, Garda HQ, who was the principal administrator for the software aspects of the system.

6.4.10 In a written statement to the Commission, this civilian technician indicated that, in the absence of a clear written protocol to be followed regarding requests to add lines to the system, he adopted a practice of requesting an email from the Sergeant in charge of the relevant station outlining the reasons for the request. He stated:

*“The local technician made requests on what was to be recorded... Telecommunications Staff would have been technically supporting local staff in the discharge of their duties, but it was understood that only lines of importance to the discharge of Garda duties were to be recorded.”*

6.4.11 In the following stations, lines that were previously not recorded were connected to the NICE recorder, either at or after its installation:

**Bandon**

6.4.12 When the NICE recorder was installed in Bandon Garda Station, the Radio Equipment Room was relocated to a smaller room where the “patch panels” to facilitate connections to the NICE recorder were located. The technician was aware of the increased capability

of the new digital recorder and added a number of digital telephones that could not be recorded previously.

- 6.4.13 The technician also stated that the list of named channels on the recorder changed over time and that the arrangement in November 2013 when the recording ceased was different from when the recorder was installed in 2008. In addition, the Control Room was closed down and facilities were transferred to the Public Office from 5 March 2013.
- 6.4.14 The technician could not recall all of the changes that were made over that period. A review of the audit trails from 2009 to 2014 gives a clearer picture of what was connected to the recorder over this time period.
- 6.4.15 In 2009, channel 3 was listed as the “PUBLIC CALL BOX” and was re-labelled in 2010 as “Blue Man”. This line continued to be recorded until 2013. The Blue Man, or Public Access Call Box, was a digital telephone unit mounted on the door of a District or Sub-District Garda Station and available to members of the public when the station was closed. A person could use the unit to telephone Bandon Garda Station directly.
- 6.4.16 Also in 2009, channel 4 was listed as “EMERGENCY” and was a 999 line. In 2010, the channel was relabelled as “ECAS 999A Control Room” and remained a dedicated 999 line. However, in 2013, the line was renamed “Incident Room Main Line”. This is explained by the fact that, from 2013, direct 999 calls for the Bandon area were routed to Anglesea Street, Cork, and were no longer answered in Bandon. The dedicated 999 line was thus available for other uses. The technician left the line connected to the NICE recorder and re-labelled it. It is unclear whether the line was physically moved to another room or if it remained in the same location. Although it was available to be recorded, the audit trails indicate that no audio was in fact recorded between June 2013 and November 2013, when the instruction to cease all non-999 recording was issued.
- 6.4.17 In 2013, channel 5 was labelled “Sergeants Office Overflow Front Desk”. Prior to this, from 2010 to 2013, channel 5 was connected to a dedicated 999 line and was labelled “ECAS 999B Public Office”.
- 6.4.18 From the audit trails, it appears that a line was connected to channel 6 in 2009 and was labelled “Bandon NC” on the NICE system. The location of this phone and the reasons for connecting it to the recorder could not be established. On 1 January 2010, the phone recording on channel 6 was changed to “Bandon Free Phone Control Room”. Despite the reference to the Control Room, the phone was in fact located in the Public Office. The technician explained that a free phone number had been in use in the station for a number of years and that he connected it to the recorder in order “*to encourage more*



*prudent use of the facility*". This phone was largely used to contact members of An Garda Síochána who were on patrol and could not be contacted by radio.

- 6.4.19 From 2009, channel 7 was listed as "Incident Room" on the NICE system. All activity on this channel was undertaken by the system administrators and it appears that no audio was ever recorded on the line.
- 6.4.20 In 2011, channel 14 on the NICE recorder was labelled "Public Office Custody Suite". This label was changed in 2013 to "Doctor's Room Phone". The technician indicated to the Commission that the phone was not intended for use by doctors; the name related to its location only. He stated that he was asked to install a hands-free telephone in that room in order to facilitate translation services over the telephone if required. The phone was located in a room that was also used by doctors to take samples from persons in detention. Outgoing calls could not be made on it.
- 6.4.21 From 2012, channel 15 was connected to the NICE recorder. This channel was labelled "Alarms Control Room". Previous to this channel being recorded, calls from alarm monitoring companies rang through to Bandon Garda Station on the main station line. The technician had suggested that a dedicated line for such calls should be installed in the Control Room to ensure that they would be given priority by the Control Room operators. Calls of this nature were already being recorded prior to the installation of this new line, as were all calls on the main station line.
- 6.4.22 From 2010 onwards, channel 16 was connected to the NICE recorder and was labelled "D Branch". According to the technician, this was in order to record the Detective Branch Office extension if required. However, no physical phone was connected to this extension and the only audio recorded on this line was a small number of clicks and beeps.
- 6.4.23 From 2010, channel 17 was also connected to the NICE recorder. It was labelled "Incident Room ANALOG". This channel was available for recording if required but the technician stated that it was never put into use. Live monitoring for very brief periods was performed on this channel by the system administrators. The system administrators also appear to have attempted playback on this line from time to time, although no audio from the line was ever recorded.

#### **Bray**

- 6.4.24 Prior to 2008, Bray was a District Station in the Eastern Division of the DMA. In or around June 2008, it was designated as the Divisional Station for a new Wicklow

Division. As it had been part of the DMA prior to this, no 999 calls had ever been taken in Bray, and so there had been no need for a recording system.

- 6.4.25 In July 2008, sanction was sought from and granted by the Garda Director of Finance to purchase additional NICE recorders for Bray and Navan, another recently designated Divisional Station. The installation of the recorder in Bray was overseen by the Garda technician for DMA East, who had been responsible for the communications equipment in Bray when it was a District Station.
- 6.4.26 Because Bray Station had never previously dealt with 999 calls, there was no separate Control Room in the station. When the new 999 lines were installed, they were placed in the Public Office, which also served as the Communications Room. This meant that the officer on duty in the Public Office would be responsible not only for answering 999 calls, but also for answering any calls to the station on the main telephone number, as well as dealing with radio communications and attending to visitors at the Public Office counter.
- 6.4.27 In addition to the dedicated 999 lines and the main telephone lines for the station (63500 and 63501), an additional line was recorded in the Sergeant's Office. According to the technician, this was done at the request of the Sergeants and Inspectors working in the station. The Sergeant's Office had a window that looked out onto the Public Office area. If the member on duty in the Public Office was not in a position to answer a call on the main lines, that call could be picked up by the Sergeant on duty using the recorded extension in his office. At the same time, an additional phone, which was not recorded, was installed in the Sergeant's Office so that other calls could be made and received by the Sergeant on duty without being recorded.
- 6.4.28 The technician who oversaw the installation in Bray did not receive any written instruction or documentation concerning the lines that were to be recorded. However, from visiting and talking to technicians who worked in Divisional Stations outside the DMA, he understood that the recording of the main station number was in accord with standard policy. As the Sergeant's Office line was being recorded in order to capture calls hunting<sup>77</sup> from the main station number, he felt that this came within the same policy, even though it meant that other calls on that line would also be recorded.
- 6.4.29 At some point in 2009, the Public Office in Bray was partitioned in order to create a separate Communications Room. When this was done, the 999 lines and one of the main line extensions (63500) were moved into the Communications Room. The other main

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<sup>77</sup> Process of distributing calls from a single line to multiple other lines.

line extension (63501) was not moved but remained in the Public Office. It is not clear whether this was the result of oversight or a deliberate decision to continue recording this number. The Sergeant's Office line also continued to be recorded.

### **Kilkenny**

6.4.30 Kilkenny did not become a designated Divisional Station until 2008 / 2009 and so did not receive a DAT recorder when they were installed in 1996. No recording of phone calls took place in Kilkenny until the installation of the NICE system in 2008.

6.4.31 The installation of NICE in Kilkenny was overseen by the Telecommunications Sergeant for the South East Region, as a dedicated technician had not yet been assigned to the station. Sergeant Carley informed the Commission that he received no written instructions from Garda HQ as to which lines should be recorded – whether in Kilkenny or elsewhere. He stated:

*“It was obvious [that] expansion to the system was underway as the number of channels available to record was greatly increased. I determined that any expansion from what was recorded by the DAT should only be carried out on receipt of an authorisation file from appropriate management in conjunction with Telecoms HQ. The lines I was previously instructed to record went onto the system as this was a changeover.”*

6.4.32 In relation to the Kilkenny installation, Sergeant Carley told the Commission that all phones connected to the recorder were located in the Communications Room. At the time of the installation, the Public Office and Communications Room were in fact just one room, and it appears that one of the recorded extensions in this shared space – 5040 – was designated as the Public Office line. In 2009, the room was partitioned in order to create a separate Communications Room. Extension 5040 was not moved to the Communications Room at that time, but remained in the Public Office and continued to be recorded.

6.4.33 It is not clear whether the recording of this Public Office line in Kilkenny was the result of an intentional decision, or whether it was an accidental oversight arising from the fact that the Public Office and Communications Room were originally in one shared area. Searches of Kilkenny Garda Station have not found any documentation relating to the installation or operation of the NICE system. The Garda technician for Waterford station who assisted in the installation of the NICE system at Kilkenny station, told the Commission that “*whatever was done in Waterford was done in Kilkenny.*” In Waterford Station, certain lines in the Public Office had been recorded since 1997 and it

may be that, for this reason, it was deemed appropriate to record the Public Office phone in Kilkenny Station also.

### **Naas**

6.4.34 Although there is no documentary evidence to confirm what was recorded on the DAT system during the period 1997-2008, the Commission has been told, by members of the Telecommunications Section who worked at Naas Garda Station between 2000 and 2008, that only the dedicated 999 lines and two radio channels were recorded. According to a technician who worked there from 2000 to 2004, the absence of a digital-analogue converter meant that it was not possible to record the main station line during this period.

6.4.35 The NICE system was installed in Naas Station in August 2008. In addition to the 999 lines, two lines in the Communications Room – the main station line and a related overflow line – were connected to the recorder. Also connected were two lines in the Public Office – one on the main desk in the middle of the room, the other at the hatch where visitors to the station were dealt with.

6.4.36 The installation of the NICE system was carried out by personnel from Sigma Wireless Ltd, assisted by the technician for Naas, Garda Kieran Downey. Garda Downey told the Commission he had been aware of the new lines to be connected but could not now recall why or on whose instruction this was being done. The operational Sergeant in charge of the station at the time, Sergeant Gerry Goode, stated to the Commission that he was unaware of any decision having been made to record the Public Office lines until he saw that the phones were labelled as being recorded. He went on to state:

*“It is my understanding that the reason the extensions were set to record was due to the fact that if the Control Room was busy with only one operator and calls were coming through, the system transferred the calls to these extensions to ensure the incoming call was answered.”*

### **Sligo**

6.4.37 On 22 January 2008, a Garda member working at Sligo Garda Station issued a written request to have a recording facility put on the telephones in a room known as the Incident Room. He gave the following reason for his request:

*“Because of the nature of calls to the Incident Room, the identity of callers may be of evidential value to an investigation.”*

*On this date an anonymous call was received at the Incident Room and the identity of this caller is now urgently sought. If this call was recorded it may be possible to identify the caller on receipt of the call.”*

6.4.38 The Incident Room was a room used from time to time as an operations base for major investigations into serious incidents. While such an investigation was in progress, one or more of the Incident Room phone numbers could be publicised in conjunction with a request for people to phone in with any information relating to the incident in question. It was the potential value of calls like these that prompted the Garda member’s request for a recording facility to be installed.

6.4.39 This request was passed, *via* a Detective Sergeant and a Detective Inspector – both of whom expressed approval of the application – to the District Superintendent and ultimately to the Divisional Chief Superintendent, Kieran Kenny, on 29 January 2008. On 30 January, Chief Superintendent Kenny returned the file to the District Superintendent with a note stating:

*“I am in agreement with the proposal to have recording equipment placed on telephones in [the] Incident Room, Sligo. Sergeant M. Daly should now arrange same.”*

6.4.40 The file was duly passed on to Sergeant Martin Daly, who was the Telecommunications Sergeant for the Western region. On 5<sup>th</sup> February 2008, Sergeant Daly wrote to Inspector Liam Moroney at the Telecommunications Section, Garda HQ. He attached the application and noted that it had been sanctioned by the Chief Superintendent, Sligo, before asking:

*“With respect to the national policy for recording telephones at Garda stations, can I proceed with recording the telephones in the Incident Room?”*

He concluded by pointing out that the recording decks on the DAT equipment in Sligo were faulty and stating that he hoped to add the Incident Room phones to the new recorder (i.e. the NICE system) when it was received.

6.4.41 In evidence to the Commission, Sergeant Daly indicated that, although in operational terms he was obliged to carry out the direction given by the Sligo Chief Superintendent, he decided to contact Telecommunications at Garda HQ prior to carrying out the order, as he *“felt uncomfortable”* about the recording of Incident Room calls. He assumed that

a national policy existed as to what should be recorded and wished to be certain, in his own mind, that the proposed addition came within that policy.

6.4.42 According to Sergeant Daly, he received no response to his query. He did not pursue the matter further after that. The NICE system was installed in Sligo Station in July 2008 and Sergeant Daly arranged for the two telephone lines in the Incident Room to be added to the recorder, as per the sanction of the Chief Superintendent in Sligo.

6.4.43 On 11 August 2008, one month after the NICE system had been installed at Sligo, Inspector Moroney wrote to his immediate superior at Telecommunications HQ, Superintendent Flynn, enclosing Sergeant Daly's correspondence and stating:

*“With the recent replacement of the voice recording equipment in the Regional Divisional HQ stations and DMR HQ, there is a requirement to ensure a standard code of practice across all installations for the benefit of the divisional Garda technicians who will have responsibility for managing these systems.”*

6.4.44 Referring to Sergeant Daly's letter and also the Code of Practice on Data Protection adopted by An Garda Síochána in 2007, Inspector Moroney identified the following issues as arising:

*“What guidelines/criteria exist for the recording of emergency and non-emergency calls to Garda stations?  
How long can such data be stored (emergency and non-emergency calls)?  
Are there guidelines for the disposal of archived data and verification of same?”*

6.4.45 Superintendent Flynn in turn recommended that the issues raised by Sergeant Daly and Inspector Moroney be passed to the Crime Policy and Administration Section for their views. At that time, Crime Policy and Administration contained a small unit of four Gardaí who were also qualified barristers. Their function was to advise the organisation on policy issues arising from operational policing activities. The Commission has been unable to establish whether these issues were in fact raised with Crime Policy and Administration. In any event, it appears that Sergeant Daly's questions went unanswered, and the Incident Room lines in Sligo remained on the system.

6.4.46 The Commission notes that, on the NICE system, the two Incident Room telephone lines were labelled according to their extension numbers. There was nothing on the recording system itself to indicate that the lines were located in the Incident Room.

### **Thurles**

- 6.4.47 The NICE system was installed in Thurles in July 2008. At that time, the lines to be recorded were simply transferred from the DAT recorder. They included the main station line (5100), which at that time was answered in the Communications Room.
- 6.4.48 From September 2010, changes to the Emergency Call Answering Service operated by BT Ireland meant that 999 calls previously received in District Stations in the Tipperary Division were now all being sent to the Divisional Station, Thurles. Any radio messages in response to those calls would now also come from Thurles rather than the District Stations. This resulted in a significant increase in workload for the operator in the Communications Room. For that reason, a decision was taken to move the main station line (5100) out to the Public Office. The main Public Office line (5140) was then moved into the Communications Room. This was done, in part, so that it could function as an overflow line from the main number; in the event that no one in the Public Office answered a call to 5100, it would ring in the Communications Room on 5140.
- 6.4.49 Following this geographical change in location, the main 5100 line continued to be recorded on the NICE system but 5140 was not recorded, notwithstanding the fact that it was now functioning, in part, as an overflow line for the main station number.
- 6.4.50 In or about October 2011, as a result of a conversation with a technician in Garda HQ, the Garda technician for Thurles became aware that it was possible to have lines added to the NICE recorder. On 19 October 2011, he wrote to the Sergeant in Charge of Thurles Station, seeking approval to connect a further four extensions to the recording system. Two of those were located in the Communications Room: extension 5140 (referred to above) and extension 3212, which was connected to the Public Access Call Box facility, also known as the “Blue Man”. This facility consisted of a call box located outside Sub-District Stations, which allowed a caller to contact the Divisional Station if the Sub-District Station was closed.
- 6.4.51 The remaining two extensions were located in the Public Office. The reason given by the technician for recording them was that they both functioned as overflow extensions for calls coming into the Communications Room. The first of these (5121) was a designated overflow line for the ECAS 999 line; the other (5196) was located in a corner of the Public Office and could be used to answer incoming calls to the main station line (5100). In both instances, the purpose of recording these Public Office lines was to capture calls that the technician understood were supposed to be recorded as a matter of policy – that is, 999 calls and calls to the main switch. In the case of extension 5196,

however, any ordinary calls to and from that line would also have been recorded as a result.

- 6.4.52 The technician's application to have the above extensions recorded was forwarded with approval to the acting District Officer and on to the Divisional Chief Superintendent. On 3 November 2011, the Chief Superintendent wrote to the Chief Superintendent, Telecommunications, at Garda HQ, informing him of the extensions sought to be connected and stating: "*Application is forwarded and recommended.*" No written response to this letter was forthcoming. The Chief Superintendent in Thurles sought a response by letter dated 19 December 2011. Her successor took up the matter again on 3 May 2012 and 11 June 2012. From internal Telecommunications Section correspondence, it appears that the requested extensions were in fact connected and set to record from 15 November 2011. It is not clear at what point the Chief Superintendent in Thurles was made aware of this.

## 6.5 OPERATION AND MANAGEMENT

### Recording and storage

- 6.5.1 The NICE system, as purchased by An Garda Síochána in 2008, was composed of the following elements:

- Hard disk recorders, located in each station where recording was required.

The recorders installed in Divisional Stations outside Dublin could accommodate up to 12 analogue and 12 digital channels. In Anglesea Street, Cork, the maximum was 24 analogue and 48 digital. In Harcourt Square, up to 34 analogue and 64 digital channels could be recorded.

- A computer workstation, located in each relevant station, using proprietary software to facilitate search, playback and / or downloading of recorded calls.
- An archive storage facility, located in Garda HQ, which automatically stored backup copies of every recording made on the local hard disk recorders.



- 6.5.2 In addition to recording audio, the system also recorded certain metadata for each call, including date, time, call duration and, where available, caller-line identification. This information was searchable using the software installed in the computer workstations.
- 6.5.3 In the event that the available memory in the local hard disk recorder became full, the oldest message in the recorder would then be erased to make space for new messages. Copies of all erased messages would be retained in the central backup archive. The volume of available memory in each local recorder is extensive and, at the time of writing, none of the machines in use in Divisional Stations have reached the point where it is necessary to erase old messages.

### **Retention of recordings**

#### **Recordings on new system**

- 6.5.4 The tender specification document prepared by An Garda Síochána included the following requirement regarding the retention of recordings:

*“Archiving media must be future proof and calls must be capable of being played back for at least ten years after being archived.”*

- 6.5.5 When Inspector O’Dea, who drafted the specification document, first began examining the prospect of replacing the DAT recorders in 2005, he spoke to a number of technicians to determine what the existing practice was concerning the retention of recordings. In evidence to the Commission, he said that what he discovered gave him cause for alarm:

*“There was no consistency, they were all doing different things... and from a data retention point of view and things like that, I was nervous that it should be better regulated.”*

- 6.5.6 As noted previously, in a report of 11 May 2005 to his Chief Superintendent in Telecommunications, Inspector O’Dea pointed out this apparent lack of consistency and suggested that *“to ensure that the replacement equipment meets the requirements of the organisation, it is necessary to agree... how long the recordings should be stored.”* However, Chief Superintendent Jeffers responded by recommending replacement of the DAT equipment on a *“one for one”* basis, without any further consideration of policy issues but ensuring that any replacement equipment would have the capacity for expansion *“when the organisational requirements have been fully agreed.”*

- 6.5.7 This left Inspector O’Dea with the problem of determining an appropriate minimum period for which the new system should be capable of retaining recordings. As stated

above, in drafting the tender specification he set a minimum period of 10 years for retaining recordings. In evidence to the Commission, his recollection was that, in arriving at that figure, he had used as a baseline a 7-year retention period from, he thought, the National Archives Act 1986 – although in fact no such retention period is mentioned in the Act.<sup>78</sup> He told the Commission:

*“It was just a figure we picked out because it was longer than our 7 year [period] and it wasn’t totally outlandish...”*

6.5.8 As with the question of which telephone lines should be recorded on the new system, Inspector O’Dea believed that the issue of how long recordings should be retained was a policy decision that should be made outside the Telecommunications Section. Having been told by his Chief Superintendent in 2005 to concentrate on replacing the existing equipment without waiting for any new determinations on recording policy, he did not consider it part of his function to seek legal advice on what the appropriate retention period for recordings might be. As far as he was concerned, once the system was capable of retaining records beyond any maximum period that might be foreseeably required, the question of how long recordings would, in fact, be retained was to be determined by those deciding operational policy for the organisation.

#### Recordings on DAT system

6.5.9 In addition to the retention of recordings on the new system, reference was made in the tender specification to the archiving of calls from the Guardian DAT recorders then in use:

*“Due to the fact that currently archived calls may be required at a future date, tenderers shall also include a proposal for the playback of archived Guardian recordings.”*

6.5.10 In the event, none of the tenders received contained any proposal for archiving DAT calls, other than that An Garda Síochána should retain one or more DAT machines for playback purposes.

#### Access to recordings

##### Administrator privileges

6.5.11 Access to recordings on the NICE system is controlled, in the first instance, by the System Administrator, who can set up user accounts with varying levels of security and

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<sup>78</sup> The seven year figure may have come from a more general State practice of retaining records in light of the six-year limit on actions set out in the Statute of Limitations 1957.

permitted access. Initially, it was assumed that Sigma Wireless personnel would manage the system remotely, using the administrator account. However, for security reasons, it was decided by An Garda Síochána that the system should only be accessible from Garda premises – in other words, remote access to the system should not be allowed. As a result, the role of administrator was undertaken in the main by a civilian technician attached to the Project Management section of Telecommunications in An Garda Síochána. Through frequent telephone interactions with Sigma Wireless personnel during which problems and technical tasks were discussed, this technician gradually gained a hands-on expertise in the operation and management of the NICE system.

- 6.5.12 Using the System Administrator account, individual usernames and passwords were created for the Divisional technicians, allowing them to search the system, play back and download calls, and listen to calls in real time (known as “live monitoring”). All other tasks on the system – such as adding and removing lines or users, and naming or renaming recording lines – could only be done using the System Administrator account.

Software applications – Toolbar and Inform

- 6.5.13 The NICE system employed two software applications which could be used to find, play and download calls. The first, called “Toolbar”, was installed on each local replay machine and allowed the user to search the local recorder (and only that recorder) for calls. No audit trail was created when Toolbar was used. The same generic login and password were employed by all users of the application.
- 6.5.14 The second software application, called “Inform”, was a network-based programme. Technicians were given their own unique username and password. They could then search for calls in any station they were authorised to access by the System Administrator. Using the network server, Inform would first search the relevant local recorder. If the desired call was not found, it would then search the archived calls on the backup server in Garda HQ. All actions taken by users on Inform were recorded on the network, thus providing a permanent audit trail of activity for each user on the system.
- 6.5.15 From audit trails examined by the Commission it appears that use of the Inform application commenced on 24 October 2008 with actions taken by the Default Administrator. Prior to this, it must be assumed that Garda technicians were using Toolbar as the only possible means of accessing recordings on the NICE system.
- 6.5.16 One-day training sessions for technicians on the operation of the NICE system were held in September 2008, November 2008 and July 2010. At these sessions, the technicians were told to use Inform rather than Toolbar for all searches on the system. The reasons

given were (i) the existence of an audit trail and (ii) some issues regarding time and date accuracy on Toolbar.

- 6.5.17 Although the technicians were told clearly and unequivocally that Inform was the only application to be used, Toolbar remained available as a backup. If, for some reason, the network on which Inform relied was not functioning, technicians could still use Toolbar to search for calls on their local NICE recorder.

Audit trails generated by the Inform application show that most technicians began using Inform in or around November 2008. Some technicians who had been trained in September, when Inform was not yet available, changed over gradually between November 2008 and April 2009. Some others, however, continued to use Toolbar rather than Inform until sometime in 2010, either because they found it easier and quicker to use or because of problems experienced with Inform. One technician in particular, who had been one of the first to receive training in September 2008, did not use Inform at all until “*it became an issue*” in December 2013. He told the Commission in evidence that he was unaware of any instruction not to use Toolbar; nor was he aware that it left no audit trail. When asked why he used Toolbar rather than Inform, he told the Commission that it was easier to use and quicker, as it searched the local hard drive directly without first having to access the central server at Garda HQ.

#### Live monitoring

- 6.5.18 Technicians with access to the NICE system in Divisional Stations and at Garda HQ had a facility to listen to calls on a given channel as they were being recorded. The purpose of this ‘live monitoring’ facility was to allow technicians to conduct random spot checks in order to confirm that the system was recording. Audit trails from the NICE system examined by the Commission show that live monitoring was carried out infrequently and generally for no more than a few seconds at a time.
- 6.5.19 Technicians questioned by the Commission stated in evidence that they were never asked to conduct live monitoring for any operational or investigative purpose; nor did they do so.

## **6.6 ACCESS TO RECORDINGS – POLICY**

### **Telecommunications Section – policy document**

- 6.6.1 Prior to the installation of the NICE system, there was no consistent, countrywide policy as to how access requests should be handled and documented.<sup>79</sup> In January 2009, a draft

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<sup>79</sup> See Chapter 5.

policy document in relation to NICE was created for the technicians by members of the Telecommunications Section at Garda HQ. In relation to access requests, the document stated:

*“All requests for playback and copying of recordings should only be granted on receipt of official written application from local District Superintendent... An official record should be kept in local Telecommunications Office of all applications submitted and copies made on the basis of approved applications.”*

This document appears to have been created and disseminated solely within the Telecommunications Section. There is no evidence that it was submitted to the DigiCAD Project Board or to any other section of An Garda Síochána for consideration.

- 6.6.2 A copy of the Telecommunications draft policy from January 2009 was circulated to the technicians who attended training sessions for NICE in July 2010. But it seems that the majority of technicians – who attended the earlier training sessions in 2008 – were not made aware of the document or its contents at any stage. Most of the technicians interviewed by the Commission had no recollection of seeing it. One Regional Telecommunications Sergeant recalled that issues of policy were discussed at the training session he attended but he was not informed subsequently about the NICE Policy document. Another technician told the Commission that he received a copy of the document in August 2010 but noted that it was only in draft form:

*“It’s not signed by anybody, it’s just a draft policy... until Senior Management send you out a directive... to me it isn’t really policy.”*

- 6.6.3 In December 2010, a further version was sent from Sergeant Power, Telecommunications HQ, to Superintendent Flynn, Telecommunications HQ, with a request that it be forwarded to all Divisional technicians for their attention. It is not clear whether this was done. The document was re-submitted by Sergeant Power to Superintendent Flynn in April 2011 and, at some point after that, was made available to all technicians *via* the Garda Intranet Portal. Even at that stage, however, some technicians remained unaware of its existence.

- 6.6.4 From the evidence given by technicians to the Commission, it is clear that awareness and application of this policy varied from Division to Division around the country. Further information is set out below (see Chapter 6.7).

### **National Digital Radio System (NDRS) – policy document**

- 6.6.5 Around the same time that Telecommunications were developing their NICE policy document, in a seemingly unconnected process, a Policy and Procedures manual for the National Digital Radio System (NDRS) was being developed by the Change Management section of An Garda Síochána for final approval by the DigiCAD Project Board.
- 6.6.6 Chapter 7 of the manual addresses voice recording on NDRS. However, it also includes a section, headed “*Instant Replay Facilities*”, which concerns the separate recording of telephone calls at Harcourt Square and Divisional Stations. It is clear that this section was drafted before the acquisition of the NICE system, as NICE does not, in fact, facilitate the instant replay of calls.
- 6.6.7 The NDRS Policy and Procedures Manual describes the “*primary function*” of the recording systems in those Garda stations as being:

*“...to record and replay incoming emergency calls to assist call takers where they need to clarify or confirm details of a call...”*

It goes on to state that:

*“These recordings may however also assist in conducting criminal or disciplinary investigations.”*

No mention is made of the recording of any calls other than 999 or alarm notification calls. It appears that those responsible for drafting the manual were unaware of the fact that, since 1996, the main station number had been recorded as a matter of course in almost all Divisional Stations outside the DMA.

- 6.6.8 The manual envisages a system where accessing calls is the responsibility, not of the Divisional technician, but of the Garda member responding to emergency calls in the Control Room (‘the Dispatcher’). The Dispatcher must only access voice recordings “*where there is an operational requirement to do so*”, and then only on the authorisation of his or her supervisor or Sergeant in Charge. He or she may not play back recordings over the radio network to any Garda member. The Dispatcher is also required to maintain a register in the Control Room identifying:

- The name of the requesting authority / member;
- The date and time period of the replayed voice recording;
- The name of the Dispatcher who played the recording.

6.6.9 The manual goes on to stipulate that, in Divisions outside the DMA, a person not below the rank of Sergeant should be appointed Radio Records Manager. That person's task is to process requests for archived recordings, whether from the Garda Síochána Ombudsman Commission (GSOC) or from members conducting internal disciplinary inquiries.

6.6.10 In relation to the retention of recordings, the manual states that recordings made in Divisional Stations will be available for playback at those stations for up to 6 months, and thereafter can be accessed from the central archive *via* Harcourt Square and / or the Telecommunications Section. It is notable that no time limit is given for the retention of archived recordings. It appears that no consideration was given as to whether it was legal to retain them indefinitely or if they should be destroyed after a certain period.<sup>80</sup>

6.6.11 On 26 October 2009, a memo issued from the office of the Deputy Commissioner, Operations, to the Assistant Commissioner and Chief Superintendents for the DMA. Headed "Requests for audio playback and recording of radio and '999' calls received at the DMR Communications Centre, Harcourt Square", the document draws attention to the rules set out in chapter 7 of the NDRS Policy and Procedures Manual. With reference to 999 and alarm calls, it states:

*"... the Instant Replay Facilities as detailed at section 7.4 of the manual, formalise the manner of requests for recordings by officers conducting criminal or disciplinary investigations."*

6.6.12 The NDRS Policy and Procedures Manual deals with all aspects of the operation and use of the Garda radio system and it seems reasonable to assume that it must have been disseminated across the organisation as a whole. Nonetheless, as far as voice recording in Garda stations is concerned, there is no evidence that the practices outlined in the manual were adopted in any Division outside the DMA. One technician expressed the view to the Commission that it was a document drafted with the Harcourt Square system in mind, which, therefore, failed to recognise that Divisional Stations outside the DMA were not organised in the same way and did not have the same resources:

*"They have written a policy that is geared towards the Dublin system where you have Dispatchers. And in Divisions down the country there isn't Dispatchers and they also talk about Radio Records Managers and things like that but they haven't translated it into reality in the country. So these people weren't appointed and as a result, things came to us as default"*

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<sup>80</sup> Equally, no time limit is given for the retention of recordings made under the TETRA radio system.

*because we knew how to do it... So again this is where there is a breakdown in policy...”*

## **6.7 ACCESS TO RECORDINGS – PRACTICE**

6.7.1 As stated above, it is clear that the rules in relation to accessing telephone recordings as set out in the NDRS Policy and Procedure Manual were not applied in Divisional Stations outside the DMA. In every such Divisional Station, playback and downloading of calls remained the responsibility of the local Garda technician rather than the Control Room operator. In dealing with access requests, some technicians adopted the rule set out in the NICE policy document created by the Telecommunications Section in 2009, which required written authorisation from the District Superintendent. Others simply continued with whatever their practice had been before the installation of the NICE system.

6.7.2 Record keeping in relation to access requests continued to vary widely. Some technicians kept detailed records in a dedicated file; others made a note of requests in the same book used to record all of their daily activities. Still others kept no records at all, assuming that the audit trail on the NICE system would suffice as an indication of what had been done.

6.7.3 What follows is a summary of the procedures adopted in each Divisional Station, insofar as the Commission has been able to establish them.

### **Anglesea Street (Cork City)**

6.7.4 One of the technicians who worked at Anglesea Street told the Commission in evidence that, while he could not remember whether the NICE policy document was enforced from the outset, “*within a year or two*”, all requests were being processed through the local Superintendent.

### **Bandon (Cork West)**

6.7.5 The technician stationed at Bandon stated to the Commission that he never saw any official policy or guidelines in relation to recording on the DAT or the NICE systems. As a matter of practice, he did not ask members seeking recordings to obtain approval from the Superintendent.

### **Bray (Wicklow)**

6.7.6 The technician stationed at Bray told the Commission in evidence that, from the time he began using the NICE system in or around June 2009, he adopted a policy of requiring a



written direction from an Inspector before granting any access request. His recollection was that this policy had come from the Telecommunications Sergeant for his region.

6.7.7 In November 2009, he was asked by the Regional Telecommunications Sergeant to read and follow the procedures outlined in the NDRS Policy and Procedure Manual with regard to voice recording at Garda stations. However, he interpreted the relevant sections as referring to the TETRA radio system rather than NICE, and so continued with his previous practice.

6.7.8 In August 2010, a further email from the Regional Telecommunications Sergeant to all the technicians in the Eastern Region drew their attention to the draft policy devised by the Telecommunications Section for the NICE system and stated:

*“Please be advised that the following is to be followed at all times:*

- *No requests for playback or copying are to be granted without a written application regardless of the urgency that is expressed to you. If a request is urgent the minimum requirement is an email from the Supt...*
- *NICE Inform is the only tool to be used to retrieve all calls from the recorder (without exception)...”*

The email concluded:

*“The Draft Policy attached is to be updated and sent out but for the moment please ensure you follow the above request without exception...”*

6.7.9 The technician in Bray Station told the Commission that, from the time of receiving this email, he implemented the procedures as outlined in the draft policy document.

#### **Castlebar (Mayo)**

6.7.10 The technician at Castlebar Station told the Commission that he never saw any policy document in relation to accessing calls on the NICE system. He continued the practice adopted during the DAT period of requiring access requests to be made in writing to the Sergeant in Charge of the station.

#### **Drogheda (Louth)**

6.7.11 The technician stationed in Drogheda received an unsigned copy of the draft NICE policy document but, in the absence of a Directive from Senior Management, he did not consider it to be a binding statement of policy. He continued his own practice of

accepting access requests from any member within his Division. Requests could be made verbally, and he would note them himself in the “Faults Book” – normally used to note faults with the NICE system. Over time, the volume of calls made it difficult for him to remember to note every request. For that reason, he began to ask the requesting member for an email in order to have a record of the request.

**Ennis (Clare)**

6.7.12 The technician stationed at Ennis told the Commission that the practice during the NICE period was the same as that during the DAT period. Requests – verbal or written – would come to him ordinarily from a Sergeant, Inspector or Superintendent. If ordinary Garda members requested a copy of a recording, he would tell them to make the request “*through the channels*” – that is to say, *via* a superior officer. However, in a case where a Communications Room operator was simply seeking to play back a received call in order to check some details, he would not require higher authorisation.

6.7.13 The technician did recall that, “*some years ago*”, a memo had been sent from the Chief Superintendent to all Station members stating that any requests for recordings were required to go through the Superintendent, but this does not seem to have changed his practice of accepting requests from a Sergeant or Inspector in addition.

**Fermoy (Cork North)**

6.7.14 Initially, the technician stationed at Fermoy was not aware of any policy regarding access to recordings. He responded to written and verbal requests from ordinary members as well as superior officers. He was aware of the NDRS Policy and Procedures Manual, but did not consider that it was applicable to the NICE recorder, as it was not written with that machine specifically in mind.

6.7.15 In 2010, the Regional Telecommunications Sergeant made him aware that the sanction of a Superintendent was needed to download calls. Although conscious of this rule thereafter, however, he continued, on occasion, to respond to verbal requests from other officers, on the assumption that they would have discussed the matter with the Superintendent prior to approaching him.

**Galway (Galway)**

6.7.16 The technician at Galway Station told the Commission that he was not aware of any policy documents concerning voice recording until March 2014. Requests for recordings would usually come in the form of a “job sheet” from the Incident Room in relation to a particular investigation. The technician would make a copy of the recording and return it with the job sheet to the Exhibits Officer for the investigation. He did not keep any records himself in relation to access requests.

**Kilkenny (Carlow-Kilkenny)**

- 6.7.17 The technician for Kilkenny Station did not recall seeing any policy documents in relation to voice recording on the NICE system until recently. The Regional Telecommunications Sergeant provided him with a template form to be used by members looking for recordings but, according to the technician, the form was rarely used in practice. Requests for recordings were infrequent, and usually related to incidents of which he was already aware. Normally, the request would come from a Sergeant, Inspector or Superintendent.

**Letterkenny (Donegal)**

- 6.7.18 Both of the Donegal technicians who gave evidence to the Commission said that they were aware of the policy requirement for written approval by the Superintendent of any access request and that they adhered to this rule insofar as it was possible. In some cases, they were willing to accept written approval from an Inspector acting on behalf of the Superintendent.

- 6.7.19 A record of each request was kept by the technicians using a standard form of their own devising. The form contained various headings including the date of the request, the job number of the investigation to which the request related, the time and channel number of any recordings downloaded, the number of copies made and the member(s) to whom the recording was provided.

**Limerick (Limerick)**

- 6.7.20 The Commission heard evidence from two technicians stationed at Limerick, both of whom said they were aware of the NICE policy document developed by the Telecommunications Section and that they applied the rule requiring written authorisation from a Superintendent to any requests they received.

**Monaghan (Cavan / Monaghan)**

- 6.7.21 Neither of the two technicians based in Monaghan were aware of any policy document concerning access to recordings on the NICE system. One told the Commission that while, as a matter of preference, he would look for the Superintendent's approval before responding to a request for a recording, there would be occasions when he would act on a request from a Detective Sergeant or Inspector if the urgency of the situation demanded it. The second technician said that, in the absence of a defined policy, he facilitated any officer who made a request for a recording, without looking for higher authorisation.

**Mullingar (Westmeath)**

- 6.7.22 The technician stationed in Mullingar received a copy of the draft NICE policy document from his Regional Telecommunications Sergeant in August 2010. He told the Commission that, prior to this, if a member of any rank made what he considered “*a legitimate request*” for a recorded call he would facilitate them without requiring further approval. Almost all of the requests received were verbal.
- 6.7.23 This approach did not change immediately on receipt of the NICE policy document, as the technician considered it to be no more than a draft proposal for a policy, and not signed off or completed:

*“...as far as I was aware that was a draft, that is what was being proposed to the Superintendent. I wasn’t aware whether it had been sanctioned or agreed to.”*

From memory, he believed that the rule requiring authorisation by a Superintendent began to be implemented in Mullingar sometime in 2011. Records of requests began to be kept from 2010 onwards.

**Naas (Kildare)**

- 6.7.24 The technician stationed at Naas told the Commission that he was aware of the policy requiring written authorisation from a Superintendent for access requests. He indicated that he had tried to implement this policy insofar as it was possible. Verbal requests from the Sergeant in charge or the Superintendent would be complied with, while other members making verbal requests would be told to direct the request to the Superintendent in writing. The technician admitted that his own records in relation to requests dealt with were “*very poor*”.

**Navan (Meath)**

- 6.7.25 The technician at Navan Garda Station did receive the draft NICE policy document, although he was not sure when. He told the Commission that, as a rule, he insisted on obtaining written approval for all requests from a Superintendent. On some occasions, a Superintendent might send another officer on his behalf to tell him that a particular recording was required. The technician would comply with those requests, although some might be verbal rather than on paper.
- 6.7.26 For his own records, the technician would generally note the time and date of the call downloaded, but not the channel on which it was recorded (999 / main switch).

**Portlaoise (Laois / Offaly)**

- 6.7.27 The two technicians stationed at Portlaoise told the Commission that they were aware of a policy requiring authorisation from a Superintendent for all access requests. This rule was applied by them from an early stage following installation of the NICE system.
- 6.7.28 They indicated that written requests were the norm, but that there could be situations – such as urgent requests from an Incident Room – where a verbal request would suffice, with paperwork to follow at a later stage. Requests generally were made through the Regional Technical Sergeant who was also stationed in Portlaoise at this time. Copies of the majority of access requests were kept by him in his office.

**Roscommon (Longford / Roscommon)**

- 6.7.29 The technician in Roscommon told the Commission that she was aware of the rule requiring written authorisation from a Superintendent, but explained that it may not always have been followed:

*“Usually if someone in authority asks you to do something, you don’t normally turn around and say, well, can I have a written application from the District Superintendent – unless it is something that you really feel that you are not happy with... If there is some operational request that is urgent and somebody wants to listen to something... you may be seen as being a bit awkward if you say, ‘well, where is the written request from the District Superintendent’.”*

- 6.7.30 Written requests were kept by the technician “as a matter of form”, but verbal requests may not have been noted.

**Sligo (Sligo / Leitrim)**

- 6.7.31 According to the technicians stationed at Sligo, the practice, even before the NICE system was installed, was to require approval from the District Superintendent for any access request. This approval need not have been in writing – a phone call from the Superintendent was deemed sufficient. This practice was continued when the NICE system replaced the DAT recorder.

**Thurles (Tipperary)**

- 6.7.32 Of the two technicians working at Thurles Garda Station who gave evidence to the Commission, one said that he was aware of the NICE policy document emanating from the Telecommunications Section, the other said that that he was not. As a matter of practice, they responded to verbal and written requests for recordings without seeking authorisation from the Superintendent. In or around 2010, the Regional Telecommunications Sergeant provided a template form to be used by officers

requesting recordings, but it seems that they were not often used. Only 6 such forms were produced to the Commission in response to a request for records kept at the station.

**Tralee (Kerry)**

- 6.7.33 The technician at Tralee Garda Station said he was aware “*anecdotally*” of the rule requiring authorisation of an access request by a Superintendent, and would have followed that practice in dealing with such requests.

**Waterford (Waterford)**

- 6.7.34 The technicians stationed at Waterford told the Commission that, although they were not sure whether or not they had seen the NICE policy document requiring approval of requests by a Superintendent, they were already implementing such a policy before the document was promulgated. The Telecommunications Sergeant for the South-Eastern Region, who was based at Waterford Garda Station, devised a template form for use by Gardaí requesting recordings. The form was used, to some extent (though not always), in Waterford and the other Divisional Stations in that region.

**Wexford (Wexford)**

- 6.7.35 The technician stationed at Wexford told the Commission that he could not recall if he saw the NICE policy document. He said that, as a rule, requests for recordings coming from an Incident Room would be responded to, as it was assumed that the member making the request carried the authority of the Superintendent and was effectively acting on his behalf.

## **6.8 MAINTENANCE**

- 6.8.1 In the tender specification document prepared by An Garda Síochána, for the new recording system, it was stated that every tender must include a proposal for a maintenance schedule based on a 3-year contract, with the option to extend for a further two years. The schedule was to include two system checks per site per year, plus provision of a 24-hour, 7-day local telephone number for fault reporting and service requests. The successful contractor was obliged also to submit a report at the end of each scheduled maintenance period with details of maintenance carried out.
- 6.8.2 Since being awarded the contract to supply and install the NICE recording system, maintenance of that system has been carried out by Sigma Wireless Ltd, as per the terms of the contract.

## 6.9 TERMINATION

- 6.9.1 Certain facts concerning the termination of non-999 recording on the NICE system were the subject of the Commission’s Interim Report relating to sub-paragraphs 1(n) and (o) of the Terms of Reference, submitted to the Taoiseach on 31 August 2015.
- 6.9.2 Chapters 6 and 7 of that Report outlined the circumstances under which the then Garda Commissioner Martin Callinan came to be informed that recording of non-999 lines had taken place in Bandon Garda Station, and possibly in other Garda stations around the country. In response to that information, Commissioner Callinan issued a verbal instruction (sometime between 8 and 11 November 2013) to the effect that the recording of non-999 calls should be stopped immediately. Following some delays, that task was completed on or around 27 November 2013.
- 6.9.3 In its Interim Report, the Commission confined itself to reporting only those facts that were necessary in the context of sub-paragraphs 1(n) and (o), indicating that it would report more fully on this matter in its Final Report. There follows a more detailed account of the process by which the recording of non-999 telephone lines on the NICE system was terminated.

### **Instruction from Garda Commissioner**

- 6.9.4 As outlined in the Interim Report, there is no written record to indicate the exact terms of the instruction given by Commissioner Callinan; nor is it clear exactly when or to whom it was given.<sup>81</sup>
- 6.9.5 In his evidence to the Commission, Mr Callinan has made it clear that, on being informed of the existence of non-999 call recording in Bandon and other Garda stations, he immediately took the view that there could be no lawful justification for such recording practices.
- 6.9.6 Mr Callinan’s view was that only the recording of dedicated 999 lines and Garda radio channels was legally justifiable. He also told the Commission that, for the entirety of his career up until October / November 2013, his understanding had been that no other lines were being recorded by An Garda Síochána.
- 6.9.7 For almost all of his career, Mr Callinan was based in the DMA – though, as a member of the Central Detective Unit (and later the National Criminal Bureau of Investigation) during the 1980s and 1990s, he did work from time to time on specific investigations at various Divisional Stations around the country. Although he had understood for some

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<sup>81</sup> Interim Report on Terms of Reference (n) and (o), para 7.7.

years that calls coming into the Control Rooms of Divisional Stations outside the DMA were recorded, he was not aware that this could include calls to the main station number. He assumed, based on the model of Command and Control in Harcourt Square, that the Control Rooms dealt only with 999 calls and radio traffic, and that any non-999 calls to a Divisional Station would be answered in the Public Office. He was not aware that a practice had been in place since the mid-1990s of recording the main telephone line in Divisional Stations outside the DMA.

- 6.9.8 Although it is still not clear precisely when and to whom Commissioner Callinan issued his instruction to cease all non-999 recording, the evidence suggests that the Chief Administrative Officer, Mr Cyril Dunne was made aware of this decision in or around 8-11 November 2013 and undertook to set the process in motion.

#### **Implementation of Commissioner’s instruction**

- 6.9.9 Mr Liam Kidd, Executive Director of the Garda Information and Communications Technology Section (ICT), was made aware of the Commissioner’s instruction by Mr Dunne. He passed it on to the acting Chief Superintendent, ICT, Superintendent Michael Flynn on 11 November 2013.

- 6.9.10 In a statement to the Commission, Superintendent Flynn described the instruction received by him as being “... *to stop the recording on all extensions that could not be identified as being exclusive 999 extensions.*” He said he passed on this instruction verbally to Inspector O’Dea, ICT, for action to be taken. Inspector O’Dea confirms this. He recalls Superintendent Flynn telling him that it was his understanding that An Garda Síochána had no legislative authority to record any lines except 999 lines and that the Commissioner wanted all recording of non-999 lines stopped immediately.

- 6.9.11 On receiving this instruction from Superintendent Flynn, Inspector O’Dea sought clarification from him as to what exactly they were being asked to do:

*“Because I don’t want to go and start a process and [have] somebody come back tomorrow and say, well, that’s not what we meant you to do and we have to reverse the whole process... Am I to delete everything? Am I to disconnect? What am I to do?”*

- 6.9.12 Inspector O’Dea also sought clarification about what constituted a “*non-999 line*”. Specifically, he wished to know if the direct lines from alarm companies and the private-wire connections to the Fire and Ambulance Services were to be considered as 999 lines in this context.



- 6.9.13 Having received only a limited verbal instruction himself, Superintendent Flynn was unable to provide clarification on these matters. Having discussed it further between themselves, Superintendent Flynn and Inspector O’Dea decided to continue the recording of the Alarm, Fire and Ambulance lines at Command and Control, Harcourt Square, but not in Divisional Stations. In part, this was because of the complexity of isolating and disconnecting such lines from the Integrated Communication Control Systems (ICCS) computer consoles used in Command and Control.
- 6.9.14 Both Superintendent Flynn and Inspector O’Dea told the Commission that they assumed that the original instruction had been issued verbally because of the perceived urgency of the situation. Both men also assumed that a written instruction would follow in due course, to support and confirm the initial instruction. This did not happen.
- 6.9.15 Inspector O’Dea said that he then began to think about how to achieve the desired result in a way that would not create problems in the event that the decision was reversed at some stage. He sent an email to the technician responsible for administering the NICE system at Garda HQ, which stated:
- “Can you arrange for all recording of lines and radio traffic except 999/112 lines at District Headquarters to be stopped immediately. This does not apply to recording associated with the ICCS or National TETRA Recorder.”*
- 6.9.16 The technician was on leave that day and did not see the email until the morning of 12 November 2013. At around 9 a.m. that morning, Inspector O’Dea visited him and confirmed that he was to stop all non-999 recording. His initial reaction was one of incredulity; he found it difficult to understand why such a step would be taken and thought it inadvisable, as he saw a clear operational benefit to An Garda Síochána in the recording of certain non-999 lines. He told the Commission:
- “I distinctly remember pointing out to him that calls similar to what we were about to stop [recording] had been used in court cases... and that there was no issue with those calls. He said it didn’t matter, it was an instruction.”*
- 6.9.17 The technician then asked if there was a file “on the way” – in other words, whether written confirmation of the instruction would be forthcoming. Inspector O’Dea responded that he did not know, but indicated that the instruction had come from the Garda Commissioner.

6.9.18 According to Inspector O’Dea, they then discussed the means by which the non-999 lines could be stopped from recording. Although it was possible for to disable recording of those lines on the NICE system, there was a concern that there might be discrepancies between the names given to the lines on the system at Garda HQ and the reality of which lines were connected to which channel on the recorder at each Divisional Station. Such discrepancies could result in some 999 lines being disabled inadvertently. This civilian technician told the Commission that this problem could have been resolved by listening to calls on each channel. However, in the end, it was decided that the “*cleanest*” way to carry out the instruction would be to have the lines physically removed from the recorder at each station.

6.9.19 Immediately following this discussion, the civilian technician sent an email to each of the Divisional technicians and Regional Telecommunications Sergeants, copying the emailed instruction from Inspector O’Dea and adding:

*“Please see instruction from [Inspector O’Dea] below, can you remove all lines currently being recorded which are not 999/112 or ICCS. If you are unsure which channels these are please feel free to ring and I can tell you which ones to disconnect. From next Monday I can turn off the recording from HQ or at the time you remove the channels.”*

6.9.20 Following another conversation with Inspector O’Dea, the technician sent a further email some 10 minutes later, indicating that he had to cease recording all non-999 / 112 or ICCS calls that day.

6.9.21 The emails provoked a range of reactions amongst the technicians and Regional Sergeants. Some told the Commission that they were not surprised by the instruction, having heard rumours previously that there might be an issue with telephone recordings arising from the Bailey case. Others were surprised and expressed strong objections – both to the instruction itself and to the fact that it was being conveyed to them in an email from a technician at Garda HQ rather than from Senior Management *via* the Divisional Chief Superintendent. One technician told the Commission:

*“I couldn’t believe that it was being done and I didn’t do it immediately... because again I didn’t think that was a very good direction. It wasn’t worded very well. There was no reasoning behind it. I felt that that direction shouldn’t have come straight out to me... That should have gone to the local Chief Superintendent to inform him.”*

6.9.22 Over the course of the morning on 12 November 2013, a number of technicians and Regional Sergeants contacted ICT at Garda HQ to voice their concerns about the instruction and to raise queries as to what it meant. The Sergeant for the Eastern Region stated:

*“I am concerned by the way this direction is being sent out. This direction needs to come through the local Chief Superintendent so he has knowledge of same. Further to this can you please clarify what a 999 phone is or isn’t? By this I mean is the main phone and other phones in [the] communications room classed as 999?”*

6.9.23 An email from the Sergeant for the Southern Region to Inspector O’Dea raised similar concerns:

*“Hardly a week goes by that we don’t get a direction from a Superintendent to download a call from the Switchboard, Ambulance, Fire Service or Alarm Company in relation to an investigation....*

*Stopping the recording of these phones will impact on investigations so I suggest that each Chief Superintendent and Superintendent is advised of this action before it’s implemented by way of a direction from C/Supt Telecomms.”*

He also made the point that, at busy times when multiple calls to 999 lines are made, some of those calls could end up being diverted to non-999 ‘overflow’ or ‘backup’ lines. If those lines were now removed from the recorder, any such calls would be lost.

*“The overflow and backup for the 999s, Emergency Services and Alarm Companies is to DDI numbers on phones on each console and the 3<sup>rd</sup> option is the main Switchboard number.*

*The Control Room Operators will also make tele[phone] calls on those phones to all these services, and next of kin etc, and these calls also form part of the subsequent investigations. The recordings from these phones have been successfully used many times to defend all sorts of allegations against Gardaí about not responding to calls appropriately or within a reasonable timeframe.*

*A case in point here is a recent Fatal Hit and Run where one 999 call and three other Telephone calls were downloaded as part of the follow up investigation.”*

- 6.9.24 In evidence to the Commission, the Southern Regional Sergeant said that, in the case of the hit-and-run incident mentioned above, details that enabled Gardaí to identify the vehicle and apprehend the culprit had come, not from the 999 call, but from the 3 calls to the main station number.
- 6.9.25 The Sergeant told the Commission that, in writing the email, he *“wanted... to be sure they understood the implication of what they were doing.”* He also sent a similar email to each of the Divisional Chief Superintendents in the Southern Region, *“... just to be absolutely sure everyone understood where we were.”* He then rang ICT at Garda HQ to discuss the matter further. He spoke with Superintendent Flynn, who informed him that there was an issue over the legality of recording non-999 lines.
- 6.9.26 Approximately one hour after the initial emailed instruction to the technicians, the civilian technician sent an email to Superintendent Flynn and Inspector O’Dea, referring to the fact that he was *“getting a lot of grief”* in relation to the proposal. He requested that the instruction be sent to the local Chief Superintendents, *“...as there are operational consequences that will occur as a result of the blanket ceasing of the recording of lines (Public office / control rooms / fallback lines etc).”*
- 6.9.27 In evidence to the Commission, the civilian technician said that, having sent this email, he decided not to take any further action in relation to disabling recording lines until such time as he received a response to his request and / or a formal written instruction confirming that the proposed cessation of recording had the authority of the Garda Commissioner. He did not inform Inspector O’Dea or Superintendent Flynn of this and assumed, from the fact that they did not contact him again about the matter, that the proposal had been postponed or shelved. For his part, Inspector O’Dea was aware of the complaints and objections being raised by technicians and operational Gardaí, but remained unaware that the civilian technician in telecommunications section had decided not to carry out the instruction to cease recording, pending further clarification.
- 6.9.28 Although the instruction sent out by the technician in telecommunications section on behalf of Inspector O’Dea had been for the technicians to remove all non-999 lines from the recorder in their Division, not every Division complied with this request. Some were not prepared to do so without further confirmation (a) that this was indeed the instruction and (b) that it was being done with the knowledge and approval of the Garda Commissioner. Others were aware of the fact that objections had been raised and were

waiting to see if the decision would be reversed. Some of the newer technicians told the Commission that, as they had not been present when the recorder was installed, they were unwilling to risk making mistakes in disconnecting lines from the machine.

6.9.29 On varying dates after 12 November 2013, non-999 lines were physically removed from the recorders in the following 9 stations:

Drogheda  
Ennis  
Galway  
Kilkenny  
Letterkenny  
Monaghan  
Mullingar  
Sligo  
Waterford.

6.9.30 No lines were disconnected in the following 10 stations:

Bandon  
Bray  
Castlebar  
Cork  
Limerick  
Navan  
Portlaoise  
Roscommon  
Thurles  
Tralee

6.9.31 With regard to Command and Control in Harcourt Square, the Superintendent in Charge was alerted by the civilian technician in the telecommunications section, on 12 November 2013, that the proposed removal of non-999 lines from recording would include the “*Dispatcher Desk phones*” – that is, lines used by the Dispatchers to make and receive calls outside the ICCS console system. Superintendent Kettle responded by email that afternoon, stating:

*“It is critical that the dispatchers’ phones are recorded as they need to contact stations prior to transferring CAD incidents for local resourcing. The dispatchers’ ICCS radio traffic is recorded for operational*

*requirements and I need all phone voice conversations also to be recorded.”*

6.9.32 Whether as a result of Superintendent Kettle’s objection or otherwise, it seems that the Dispatcher Desk phones were not disconnected and continued to be recorded until the end of March 2014, when Inspector O’Dea became aware of this and instructed the technician to disable recording of those lines from Garda HQ.

6.9.33 On 21 November 2013, Inspector O’Dea sought email confirmation from the technician that all non-999 / 112 lines were no longer being recorded. He replied in the negative, stating:

*“...all backup lines and main office lines are still being recorded. Due to the harassment / vitriol I received after my last email after forwarding your request to the local Technicians [to] remove the lines, their local Chiefs instructed them not to stop the recordings, and I was informed ‘not to touch’ their lines.”*

6.9.34 On discovering this, Inspector O’Dea again sought to ensure that the instruction to cease recording was carried out. The technician in Telecommunications section renewed his request for written confirmation that this was being done on the instructions of the Garda Commissioner. He also pointed out that the original email of 12 November 2013 had referred erroneously to recording in District, rather than Divisional, Stations. On 25 November 2013, having received confirmation from his line manager that the instruction to cease recording had indeed come from the Commissioner, the technician began the process of disabling the recording of non-999 lines on the system at Garda HQ. He told the Commission that he stopped the recording function for all lines that were not labelled as 999 lines on the system. This task was completed on 26 November 2013. On the same day, an email was sent from the civilian technician’s line manager, Sergeant Walsh, to the Regional Telecommunications Sergeants informing them that this was being done.

## **6.10 USE OF RECORDINGS**

6.10.1 This section of the report examines what is known about the use made by An Garda Síochána of recordings on the NICE system.

6.10.2 The principal sources in this regard are the audit trails generated by Inform, the software used by technicians to access the NICE system in most (though not all) cases. The audit

trails are helpful insofar as they record every instance in which a recording on a given extension formed part of a search conducted by a technician.

- 6.10.3 However, the mere fact that a recording is identified on the audit trail as having been searched for is not, by itself, proof that the recording was being accessed and used intentionally. As the evidence from a large number of technicians makes clear, the details of time, date and telephone extension given by officers requesting recordings could often be vague or incorrect. In order to locate a particular call, the technician might have to begin with broad search terms covering more than one telephone extension over a period of several hours. He would then play small snippets of the calls returned in that search in order to identify the call that was requested. So, although the audit trail records each of those calls as having been retrieved and accessed, in reality, only one call – the one requested in the first place – was being used in any meaningful sense of the term.
- 6.10.4 The audit trail does record the fact that playback was initiated by a user on the system. Unfortunately, however, it does not indicate which calls within a given search period were played back and for how long. This makes it impossible in almost every case to establish if a particular call or portion of a call was listened to. Only those with administrator privileges on the NICE system could have been aware of this gap, as no one else had access to the audit trails. In evidence to the Commission, a number of technicians, and even the System Administrator for An Garda Síochána, expressed surprise at the fact that such details did not form part of the audit trail.
- 6.10.5 All downloads of calls are recorded on the audit trail. It is theoretically possible that, instead of downloading the audio for a call, a user might play the call on the speakers attached to the playback unit and record it ‘through the air’ using another recorder. There would be no reason to do this, unless one was seeking to avoid a record on the audit trail of accessing a particular call – in which case, the easiest means of doing so would be to access the call using the Toolbar application rather than Inform.<sup>82</sup>
- 6.10.6 In addition to the audit trails, the Commission has sought and received copies of any access records kept by the technicians themselves. As indicated elsewhere in this Report, such records vary widely from station to station. In some cases, no records were kept; in others, the records are incomplete, to varying degrees. In some cases, access requests are noted but the record does not note the extension on which that call was recorded, or the reason why the call was requested.

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<sup>82</sup> See above para 6.5.13 et seq

6.10.7 What follows is a summary of what has been established concerning the uses to which recordings were put by An Garda Síochána. Under paragraph 1(i) of the Terms of Reference, the Commission has also been asked, in particular, “to establish whether any of the recorded information obtained from the said telephone recording systems by An Garda Síochána was used by it either improperly or unlawfully...” Issues of improper or unlawful use are considered further in Chapter 11 of this Report.

#### **Divisional Stations outside DMA**

6.10.8 Audit trails from the Inform software application show that, in every Divisional Station, most of the calls accessed by technicians were on dedicated 999 lines. In many stations, calls were also downloaded from the main station line. In many of these instances, the available records do not indicate the reason why the recording was requested but the evidence given by Garda technicians from the Divisional Stations was that such calls were generally calls of an emergency nature.

6.10.9 As previously indicated, a small number of stations recorded other non-999 telephone lines in addition to the main station number. The Commission has examined the audit trails and available access records for those telephone lines and found as follows:

#### **Sligo – Incident Room**

6.10.10 Two telephones in the Incident Room at Sligo Garda Station were recorded on the NICE system. A review of the audit trails generated by the Inform software application shows that no calls from those lines were downloaded between 2008 and 2014.

6.10.11 The audit trail does show instances where calls on one or other of the Incident Room lines were played back. In some cases, the context in which these playbacks occurred suggests that this was done for one of two reasons:

- (i) Routine maintenance – that is, listening briefly to a randomly chosen call in order to check that the system was recording properly; or
- (ii) Playback in the course of trying to find another requested call – in other words, listening to a short segment of the call in the course of trying to identify another requested call for which inadequate information had been provided.



### **Galway – Incident Room**

- 6.10.12 One telephone extension in the Incident Room at Galway Station was recorded. As at Sligo Garda Station, there are no instances of calls having been downloaded using the Inform application.
- 6.10.13 Between 2008 and 2014, there were 9 instances of calls on the Incident Room line being played back. In 3 of these cases, playback of calls on other lines was carried out around the same time, suggesting that these instances were part of a broader search for a specific call, not necessarily on the Incident Room line. In relation to the other 6 Incident Room calls that were played back, the Commission has been unable to establish the reasons why they were accessed.
- 6.10.14 There are 5 instances of live monitoring occurring. Two of these were performed by Sigma Wireless in 2011. The duration of each suggests that this was done solely for the purpose of testing the system. The other 3 instances of live monitoring were performed in 2009 by the local technician. Again, a review of the audit trails suggests that this was done to check the system.

### **Wexford – Public Office**

- 6.10.15 Two Public Office telephones in Wexford Garda Station were recorded throughout the DAT and NICE periods (1996-2013). A review of the audit trails for the NICE period shows that no telephone calls to or from either of these Public Office telephone lines were downloaded in 2009, 2010 or 2011. In 2012, one call to Public Office line 5241 was downloaded and saved and one call to Public Office line 5244 was downloaded and saved. There were no further incidents of calls being downloaded from these lines in 2013 or 2014.
- 6.10.16 A total of 136 instances of access took place at Wexford Station from 2008 to 2014. The audit trail shows 83 instances of playback being initiated by the technician stationed in Wexford, as well as by four technicians in Dublin and one each in Waterford, Kilkenny and Galway. For quite a number of these entries, the technician involved appeared merely to be testing the system, as he would begin playback on a number of recorded channels at the same time.
- 6.10.17 Sigma Wireless also accessed these recorded telephone lines when performing ‘live monitoring’ on the system. This occurred on 3 occasions. Two other instances of live monitoring took place on the system, one by a technician in Waterford Station and another by a Dublin-based technician. It enabled users of the system to conduct random spot checks in order to confirm that the system was recording.

**Kilkenny – Public Office**

- 6.10.18 As noted at paragraph 6.4.32, the Public Office telephone line was recorded in Kilkenny from 2009 onwards. There are no instances of recorded calls on that line being downloaded in 2009, 2010 or 2013.
- 6.10.19 In 2011, a total of 12 recorded calls were downloaded from the NICE system by the technician stationed in Waterford. This technician was covering for the technician in Kilkenny who was on leave at that time. Seven of the calls relate to the same incident and occur within minutes of each other. A number of 999 calls and main station line calls are also downloaded regarding the same incident. Of the remaining 5 downloads, two relate to one incident, a further two relate to another incident and one relates to a third incident.
- 6.10.20 Written records corresponding to all 12 of the downloaded calls were provided to the Commission. The Commission is satisfied that the downloaded calls all related to policing matters and were not personal / private calls.
- 6.10.21 In 2012, one recorded call was downloaded from the Public Office telephone line by another technician from Waterford Garda Station. A written access request for this download was also provided to the Commission.
- 6.10.22 In 2014, two recorded calls were downloaded from the Public Office telephone line. These calls date from 2011 and had been previously downloaded at that time. They are accounted for above at paragraph 6.10.19.
- 6.10.23 The “Blue Man” line was also recorded in Kilkenny Station. The audit trails indicate no downloads of recorded calls from this line.

**Bray – Sergeant’s Office**

- 6.10.24 As noted at paragraph 6.4.27, the Sergeant’s office telephone was recorded from 2008 onwards. A review of the audit trails indicates that no recorded calls on this telephone line were downloaded from the system.
- 6.10.25 The telephone line was accessed on 40 occasions from 2008 to 2014. A breakdown of the access reveals that live monitoring was performed on 7 occasions. Training resulted in two instances of access. Resources were added, deleted or managed by the administrators on 24 occasions. Playback was initiated on the system on 7 occasions by technicians and the System Administrator. For each of the entries relating to playback, other channels were played back at the same time, which indicates that all 7 instances related to testing of the system by the technicians.

### **Naas – Public Office lines**

- 6.10.26 As noted at paragraph 6.4.35, two Public Office telephone lines were recorded in Naas following the installation of the NICE recording system. A review of the audit trails reveals that a total of 133 entries related to these two lines over the 6-year period. Sixty-two entries relate to Public Office extension 4341 and 71 to extension 4340. There are 77 instances where playback was initiated on recordings from these lines, as well as 15 instances of live monitoring and 37 occasions involving the updating of resources by administrators. .
- 6.10.27 A total of 4 recorded calls were downloaded from these telephone lines between 2008 and 2014. Three were downloaded in 2009, 2 of which relate to the same incident. Unfortunately, the technician in Naas did not keep written records of requests for access. There are no other identifying features in the audit trails in relation to the incident in 2009.
- 6.10.28 Of the two remaining downloaded calls, one was downloaded as a test when a new technician was added to the system and the other, downloaded in 2014, was a call made to Ambulance Control.

### **Thurles – ECAS overflow, Blue Man, Public Office**

- 6.10.29 As noted at paragraph 6.4.47, an application was made in October 2011 to record a number of extensions in Thurles Garda Station following a change in the geographical layout of the station. The new extensions set to record were an ECAS overflow line (5125), the “Blue Man” line (3212) and two Public Office lines (5140 and 5196).
- 6.10.30 The first instances of access on the audit trails occur in 2012, which is unsurprising given that the application to add the telephone to the systems was granted in late 2011. From 2012 to 2014, a total of 134 entries refer to the 4 extensions. There are 3 cases of calls being saved and downloaded in 2012. These all occurred on the ECAS overflow telephone line, the purpose of which was solely to capture 999 calls that were not answered in the Communications Room.
- 6.10.31 Eighty-three instances of playback occurred on the recorded telephone lines during this period. Playback was initiated by the two local technicians in Thurles Station, as well as a technician based in Dublin and a technician based in Cork. Sigma Wireless personnel, who were responsible for installing and maintaining the system, also initiated playback on these telephone lines on a number of occasions. Live monitoring was performed on 4 occasions by the System Administrators.

**Bandon – Public Office, Doctor’s Room, Sergeant’s Office**

6.10.32 In relation to Bandon Garda Station, the following telephone lines were recorded on the NICE system: the Public Office, the Doctor’s Room and the Sergeant’s Office. The labelling of the channels on the NICE recorder changed over time. Unfortunately, the label for each channel on the NICE system recorded the name given to the line but not the extension number. Consequently, the activity on every channel in Bandon Station, including 999 channels, had to be reviewed. The access records from 2009 to 2014 show 3534 instances of access on all channels. This is further distorted by the fact that, in 2014, the 10 “Bandon Tapes” were recorded onto the system to make them searchable. These recordings show as instances on the audit trail and account for the majority of the 1573 instances from 2014.

6.10.33 From examining the audit trails, the Commission established the following:

- The Public Office line was associated with channel 2.
- Channel 14 is listed as the Public Office Custody Suite. In 2013, the channel was renamed as the Doctor’s Room Phone.
- The Sergeant’s Office Overflow Front Desk was on channel 5 which, prior to 2013, was labelled ECAS 999B.

6.10.34 Despite the large number of instances of access recorded on the audit trails, only 6 recorded calls were downloaded from lines other than 999 lines for the entire period. Four of these were on the main station line; one was downloaded from the Alarms Control Room line. The final download was taken from the Public Office Custody Suite line in 2012. The reasons why these calls were downloaded could not be established.

## **Conclusions**

- 6.1 In essence, the changeover from the DAT to the NICE system was seen, by those responsible for the change, as a straightforward replacement of obsolete equipment, with no new policy implications.
- 6.2 A significant consequence of this limited view was that no consideration was given to the legal, constitutional or human rights implications of the recording of non-999 telephone calls by An Garda Síochána. The upper ranks of An Garda Síochána, who had been unaware of the existence of non-999 recording at Divisional Stations outside the DMA since 1995, remained unaware.
- 6.3 As a matter of fact, the new hard-drive system was significantly more than just a mere replacement of the former DAT system. It had a much greater capacity for recording, both in terms of the number of lines that could be connected and the volume of calls that could be retained. It was much easier to search for, play back and copy recordings. Also, for the first time, the centralised structure of the new system allowed Telecommunications personnel at Garda HQ to access and download recordings from any part of the country.
- 6.4 The new system had certain built-in safeguards that were not present in the old DAT system:
- No new recording lines could be added without the knowledge and approval of Telecommunications personnel at Garda HQ;
  - Access to recordings was limited to those persons for whom specific, password-protected accounts had been created on the system;
  - All activity on the system *via* the Inform software tool was audited and could be reviewed.
- 6.5 Nonetheless, the purchase of a system with such a significant increase in capacity and functionality should have prompted a review and restatement by An Garda Síochána of its policies and procedures in relation to telephone recording at Garda stations. This did not happen.
- 6.6 As a result, there was no regulatory control over a number of matters of crucial importance. They were, in particular:
- What lines were to be recorded;

- Whether, and in what circumstances, additional lines could be recorded,
- The conditions and period of storage of recordings;
- The rules regarding who could have, or could authorise, access to recordings.

6.7 The Commission believes it is important to record that, in spite of these very real, indeed fundamental, and regrettable defects in how the NICE recording system was managed, it has found no evidence of any general intention on the part of An Garda Síochána to invade the personal privacy of the persons whose calls were recorded. It has not come across any cases of abuse of such facilities as existed for access to recordings. On the whole, the technicians attached to the Divisional Stations approached their task responsibly and conscientiously. Given the almost total absence of any administrative structure or of appropriate guidance or instructions, they insisted, in many cases on their own initiative, on respect for proper safeguards and refused access to recordings other than for what they saw as proper operational reasons.

## 7. LEVEL OF KNOWLEDGE OF RECORDING SYSTEMS IN AN GARDA SÍOCHÁNA

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### 7.1. Introduction

7.1.1 Paragraph 1(e) of the Terms of Reference requires the Commission:

“To investigate and report on the level of knowledge of the existence, operation and use of the said telephone recording systems within An Garda Síochána.”

The “said telephone recording systems” are any systems operating in Garda stations to record calls other than 999 calls, between 1 January 1980 and 27 November 2013.

7.1.2 Reporting on this aspect of the Terms of Reference presents a number of challenges, which can be summarised as follows:

- The Commission is being asked, in effect, to report on the level of knowledge within every rank of An Garda Síochána, from ordinary members up to the Garda Commissioner, over a period of more than 30 years. This is a hugely wide-ranging inquiry.
- The category of “knowledge” is divided into 3 sub-categories. The Commission’s Report must take into account the level of knowledge, not only of the existence of non-999 telephone recording systems, but also of their operation and use.
- Assessment of knowledge is further complicated by the fact that An Garda Síochána has never installed systems to record non-999 calls exclusively: any non-999 recording that took place during the relevant period was on systems intended firstly to record 999 calls and other emergency-related communications.
- As was clear almost from the outset of the Commission’s work, the extent of non-999 recording that took place was not uniform across the country. It is important to consider, therefore, whether local Gardaí were aware of (i) the recording systems as they were generally intended to operate and (ii) such variations as applied in their local area. It is also important to establish whether and to what extent

Senior Management at Garda Headquarters (HQ) were, or should have been, aware of these local variations.

- Finally, insofar as certain sectors, especially the senior ranks, of An Garda Síochána appear to have had little or no knowledge of the non-999 recording that did take place, the Commission has sought to establish the reasons for this lack of knowledge.

7.1.3 Paragraph 2 of the Terms of Reference allows the Commission “to exercise discretion in relation to the scope and intensity of the investigation it considers necessary and appropriate, having regard to the general objective of the investigation.” With that in mind, the Commission’s conclusions in relation to this aspect of the Terms of Reference are based on the following sources:

- Review of all available documentation in relation to the installation, operation and use of Garda telephone recording systems between 1980 and 2013.
- Review of evidence in relation to certain matters which could, or should have, affected the knowledge of recording systems within An Garda Síochána, particularly at senior levels. This includes a 2011 case in relation to Waterford Garda Station in which the recording of non-999 phone calls was the subject of a court ruling.
- Statements and oral testimony from more than 100 serving and former members of An Garda Síochána, drawn from all ranks up to and including the Garda Commissioner.
- Responses to questionnaires devised by the Commission and sent to:
  - Serving and retired Chief Superintendents;
  - Serving Superintendents (outside the Dublin Metropolitan Area (DMA));
  - A sample of current and former Garda officers who had worked as telephone operators in Garda stations outside the DMA.
- Answers to a survey devised by the Commission and furnished to all serving Garda members via publication on the Garda Portal, an internal information network for the organisation.



- Responses to public advertisements placed by the Commission, seeking information from current and former members of An Garda Síochána, solicitors and members of the public in relation to telephone recording systems at Garda stations.

7.1.4 Chapters 4, 5 and 6 of this Report set out the facts established by the Commission in relation to the existence, operation, and use of Garda telephone recording systems during the relevant period. For ease of reference, these systems are summarised briefly below:

1980-1995

- Multi-track recording systems operated in the Radio Control Room, Dublin Castle (1980-89) and then in Command and Control, Harcourt Square (1989-1995). These rooms were dedicated Control Centres, created in order to allow a centralised response to emergency calls within the DMA. The recording systems were installed in order to capture an audio record of all emergency-related incoming and outgoing communications; these included 999 calls, radio communications and calls on certain non-999 lines into and out of the Control Centres.
- In the early to mid-1980s, limited one-track recorders were installed in consoles used by telephone operators at Divisional Stations outside the DMA. The recorders used ordinary 30-60 minute cassettes. There is some evidence to suggest they were purchased with the intention that telephone operators could switch between recording 999 lines, radio channels and other non-999 lines connected to the console.<sup>83</sup> However, as a matter of practice, there is no evidence that they were used for anything other than the short-term recording of 999 calls.

1995-2008

- In 1995, the multi-track recorder at Command and Control, Harcourt Square, was replaced by a new recording system using Digital Audio Tape (DAT). The evidence suggests that the same radio and telephone lines continued to be recorded as before.
- Also in 1995, a similar multi-track DAT system was installed in Anglesea Street Station, Cork, as part of a new Communications Centre for Cork City. For reasons set out in Chapter 5, a decision was made to record calls to the main station number at Anglesea Street

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<sup>83</sup> See Chapter 4, paragraphs 4.5.15 – 4.5.19.

which, though not an emergency number, was answered in the Control Room.

- Between 1995 and 2007, smaller DAT systems, allowing for recording on 8 tracks for up to 320 hours per tape, were installed in Divisional Stations outside the DMA. As with Anglesea Street, a decision was made to record the main station number alongside the dedicated 999 and radio channels. In a small number of stations, additional non-999 lines were recorded for various reasons, as set out in Chapter 5.

#### 2008-2013

- In 2008, the recording systems at Harcourt Square, Anglesea Street and Divisional Stations outside the DMA were replaced with a computer-based system known as NICE. This comprised locally-installed hard-disk recorders with limited storage capacity, combined with a central-archive facility for storing and accessing all recorded data on the system.
- For the most part, it appears that the lines already recording in each station were transferred over to the new system. In a small number of Divisional Stations, some additional non-999 lines were added, as set out in Chapter 6.

7.1.5 Whilst the Commission has found that a limited amount of non-999 recording took place at Dublin Castle and Harcourt Square, there is no doubt that the most significant recording of non-999 lines took place from 1995 onwards in Divisional Stations outside the DMA. This involved the recording of every call made to the main station number (until such time as the call was transferred to another, non-recorded extension). In a small number of stations, it also involved recording calls on lines in other locations, such as the Public Office, Incident Room and, in the case of Bandon Garda Station, two rooms used by Detective Branch members.

7.1.6 In light of this fact, the Commission has focused its inquiries in this chapter on the extent to which Garda members were aware of what was being recorded at Divisional Stations outside the DMA between 1995 and 2013.

## 7.2. Garda Recording Policy

7.2.1 The first and most significant fact established by the Commission in relation to knowledge of recording within An Garda Síochána is this:

- No formal statement setting out the policy of the organisation on the operation of telephone recording systems was issued by or on behalf of the Garda Commissioner at any time since the first recording system was installed at Dublin Castle in the 1970s.

7.2.2 This means that, although a certain proportion of the membership became aware of the existence and operation of these systems over time, the organisation as a whole was never formally put on notice as to:

- What lines were being recorded and why;
- What lines were not to be recorded;
- Rules governing the retention and destruction of recordings;
- How access to recordings should be managed;
- The purposes for which recorded information could and could not be used;
- Legal constraints on the operation and use of the systems, with particular reference to the fundamental rights of individuals as protected by the Constitution or international instruments.

7.2.3 In the absence of any written Directive or Circular from Garda HQ, knowledge of the recording systems was largely dependent on the extent to which members interacted with those systems in the course of their duties. Thus, the group that knew most about the systems comprised the technicians based at Harcourt Square and Divisional Stations outside the DMA. Other groups whose duties put them in contact with the recording systems to varying extents included:

- Telephone operators in Command and Control and Divisional Control Rooms;
- Sergeants and District Superintendents who supervised Control Room operations and, in some stations, signed off on requests to access recordings;
- Regional Telecommunications Sergeants who oversaw the technical work of Divisional technicians;

- Detective Branch members and other Garda officers who requested access to recordings in the course of carrying out investigations.

7.2.4 The Commission has found that, as a rule, the higher levels of Management in An Garda Síochána had much less knowledge of the operation and use of the recording systems than the groups referred to above. This is due, in part, to their lack of interaction with the systems, but is also the result of the difference between the DMA and the rest of the country in the handling of 999 calls.

7.2.5 Many, if not most, senior officers in the force appear to have served the majority of their careers in the DMA and their understanding of how 999 calls were handled was shaped by Command and Control, Harcourt Square, – that is, a Control Room dedicated specifically to emergency call response, while ordinary calls to the building were handled elsewhere. On the evidence before the Commission, even those Dublin-based officers who spent much of their career carrying out investigations in other parts of the country seemed to have no clear knowledge of how calls were handled in Divisional Stations outside the DMA. They were not familiar with the geography or configuration of Control Rooms in those stations and did not appreciate that ordinary calls to the main station number were answered in the Control Room alongside 999 calls.

### 7.3. Labels and Notices

7.3.1 One important factor in assessing the level of knowledge within An Garda Síochána is whether there were notices or labels in Divisional Stations to indicate that certain phone lines were being recorded.

7.3.2 The first evidence of any instruction from Garda HQ that recorded phones should be identified by means of labels or notices comes from an email, dated 22 July 2011, sent by Superintendent Flynn, Telecommunications Section, to the Regional Telecommunications Sergeants, with an instruction to ensure that *“all telephone instruments in your region that are connected to the NICE recorders are clearly labelled that they are being recorded.”* He added:

*“Also in conjunction with local management, discussions should be held regarding the addition of a poster, placed on the walls of control rooms or other offices where the extension is being recorded to inform members that the telephony is being recorded.”*

- 7.3.3 The email from Superintendent Flynn was prompted by a ruling of the Circuit Criminal Court in the course of the trial of four Gardaí for an alleged assault on Mr Anthony Holness. The details of the ruling in that case (referred to hereinafter as “the Holness case”) and the response of Senior Garda Management to the ruling are considered further below.
- 7.3.4 Prior to 2011, it seems that Divisional technicians were never asked to put up notices or labels to indicate which phones were being recorded. Some technicians told the Commission in evidence, however, that they did label phones on their own initiative prior to 2011.
- 7.3.5 Technicians based in Galway, Letterkenny, Roscommon, Tralee and Wexford Garda Stations all gave evidence that recording phones were labelled during the DAT and NICE periods. Contradictory evidence was offered in relation to Monaghan and Waterford Stations, with some witnesses stating that labels were present on the phones during the DAT and NICE periods, while others were unable to recall the existence of any labels prior to Superintendent Flynn’s email of July 2011.
- 7.3.6 Technicians who worked at Fermoy, Kilkenny, Mullingar and Naas Garda Stations told the Commission that the recording phones in those stations were labelled at some point after the installation of the NICE system in 2008, but prior to Superintendent Flynn’s email of July 2011.
- 7.3.7 The evidence indicates that, following the July 2011 email and further related correspondence – including a Garda HQ Directive dated 28 February 2012 and signed by the Executive Director, Information and Communications Technology, Mr Liam Kidd – labels were eventually attached to the recording phones in all Divisional Stations.
- 7.3.8 In summary, approximately half of the Divisional Stations in which calls were recorded had no signs or labels to indicate this fact until July 2011 at the earliest. The remaining stations may have had labels affixed to recording phones for varying lengths of time prior to 2011 but this cannot be confirmed and, in some instances, it is disputed.
- 7.3.9 The Commission now turns to examine what can be established concerning the levels of knowledge of telephone recording systems in various sections of An Garda Síochána.

## **7.4. Telecommunications Section**

- 7.4.1 As reported in Chapter 5, the decision to begin recording the main station number in Divisional Stations outside the DMA was recommended by members of the

Telecommunications Section and approved by the Chief Superintendent, Telecommunications, in April 1996 – although it appears he did not understand that this was what he had approved.

#### **Regional and Divisional technicians**

- 7.4.2 Regional Telecommunications Sergeants and local technicians in each Division were made aware of the decision by way of documentation emanating from the Telecommunications Section, Garda HQ, and were instructed to assist engineers from Dictaphone Ltd in connecting these lines to the DAT recorders.<sup>84</sup>
- 7.4.3 The Commission has heard evidence from almost all of the Divisional technicians and Regional Telecommunications Sergeants who served during the relevant period. From this evidence, it is clear that most Telecommunications technicians outside the DMA were aware of the lines that were being recorded in the areas for which they had responsibility – either because they assisted in connecting those lines or because they became aware of those connections in the course of operating and maintaining the system.

#### **Telecommunications Section, Garda Headquarters**

- 7.4.4 The IT and Telecommunications Section was overseen by a Chief Superintendent, with Superintendents, Inspectors and ordinary technicians reporting to him on Information Technology (IT) and telecommunications matters. The internal structure changed over time but the Telecommunications side was generally divided into sections associated with Planning and Maintenance.
- 7.4.5 As set out in Chapter 5, both the Planning and Maintenance Sections played a role in the procurement, installation and management of the DAT recording systems at Divisional Stations. As a result, members of each Section were aware of the fact that the main station number was being recorded in those stations.
- 7.4.6 Unfortunately, the Chief Superintendent who approved this practice in April 1996 did so under a misunderstanding, as he assumed that what was, in fact, the main station number was a number associated with the 999 system. As a result, he could not have informed his superiors that this number was now being recorded, as he did not know it himself.
- 7.4.7 Although most Telecommunications staff at Garda HQ were aware in 1996 / 97 that the main Divisional Station number was being recorded, the evidence before the Commission suggests a lack of awareness that, in some stations, additional non-999

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<sup>84</sup> One important exception to this is Bandon Garda Station, where a DAT recorder was installed in December 1995, apparently as a field trial in advance of a nationwide rollout of the system.

lines such as Public Office and Incident Room lines were subsequently recorded. The Commission notes, in particular, that, in 2005, when Inspector O’Dea was asked to draft a tender specification for equipment to replace the DAT recorders, he made enquiries of technicians in some Divisional Stations and was surprised by the apparent variation in what was being recorded.

- 7.4.8 At the time of writing, the Acting Chief Superintendent of the Telecommunications Section is Superintendent Michael Flynn. Superintendent Flynn has been the principal liaison for the Commission in terms of the historical and technical aspects of Garda telephone recording systems. As a Superintendent, he played an important role in the response of the Telecommunications Section to the issues raised by the Holness case in 2011 and the emergence of non-999 recording as an issue in October 2013. It is instructive, therefore, to examine his own knowledge of Garda telephone recording systems as he progressed through his career.
- 7.4.9 Superintendent Flynn was recruited into An Garda Síochána as a Telecommunications technician in 1991 and worked in the Telecommunications Section at Garda HQ. His duties initially involved the operation of technical equipment such as closed circuit television (CCTV) and radar speed cameras. He was appointed Sergeant in May 1999 and promoted to Inspector in July 2003. In this role, he had responsibility for managing the Sergeants in charge of the Technical Support Unit and the Headquarters Services Unit in Garda HQ. He also had responsibility for the Regional Telecommunications Sergeants attached to the DMA. He was involved in project managing the National Radio Digital Network (NDRN) in 2005 and 2006.
- 7.4.10 In 2006 he returned to the Operations side of the Telecommunications Section, where his responsibilities included management of the Regional Telecommunications Sergeants outside the DMA. In 2008, he was promoted to Superintendent, Telecommunications Operations. Since that time, his role has involved the planning, management and implementation of the communications system for An Garda Síochána.
- 7.4.11 Superintendent Flynn’s appointment in 2006 to manage the Regional Telecommunications Sergeants outside the DMA was significant. In his Statement of Evidence to the Commission, he said that it was when he was given responsibility for the Telecommunications Sergeants outside the DMA that he became aware that the main station number in each Divisional Station outside the DMA was being recorded. Prior to this, he was aware only that there were systems in place in Garda stations to record 999 calls. He said he recalled having to analyse and enhance a small number of 999 recordings in the early 1990s to improve their audio quality.

7.4.12 Superintendent Flynn said it was his understanding that the main numbers at Divisional Stations were recorded in order to capture emergency calls made directly to the station rather than through the 999 service. He became conscious of potential legal issues arising from the recording of non-999 calls in 2011, when he was contacted by Superintendent Chris Delaney, Waterford, in relation to the Holness case which is dealt with in detail below.

7.4.13 When the issue of non-999 recording arose again in 2013, as a result of the discovery of tapes at Bandon Garda Station, Superintendent Flynn was contacted by the Executive Director, Information and Communications Technology (ICT), Mr Liam Kidd, on 17 October 2013, and asked to gather information on Garda telephone recording systems. With the assistance of Inspector Tommy O’Dea, Telecommunications Section, he produced a brief report, on 18 October, which was forwarded by email to Deputy Commissioner O’Sullivan. This report was the first of a series of reports compiled by Superintendent Flynn over the coming weeks and months, as set out in the Second Interim Report of the Commission. The report of 18 October 2013 begins:

*“Deputy Commissioner Operations.*

*The original installation of voice recording at Divisional HQs predates many currently serving in telecommunications but it is my understanding that they were installed during the 1980s and the rationale behind this was the recording of 999 calls and the gathering of evidence around calls made to Garda stations regarding bomb threats and other code word messages.”*

7.4.14 Superintendent Flynn was asked by the Commission to explain the basis for the understanding he expressed in that passage. He said that he had spoken with a retired member, Mr Gerry McGowan, who had vast knowledge of telecommunications systems going back to the early 1970s. It is very significant that Superintendent Flynn had to compile his report from oral information, as there were no documents in existence from the relevant periods which could throw light on the issue. Nor did he feel that he had sufficient knowledge by himself to report accurately on the history and operation of the systems, despite his position as Superintendent, Telecommunications. This demonstrates that, over the period of time with which the Commission is concerned, a significant amount of knowledge was lost within the Telecommunications Section itself concerning the history of Garda telephone recording and, in particular, the recording of non-999 calls.



**Executive Director, Information and Communications Technology (ICT)**

7.4.15 In July 2008, Mr Liam Kidd, a civilian with a background in IT, was appointed to the newly created position of Executive Director, ICT, in An Garda Síochána. The position was created as part of a restructuring of IT and telecommunications management within the organisation. According to Mr Kidd, it was intended to bring together all IT and communications technology functions under one branch.

7.4.16 Mr Kidd was appointed at the equivalent grade of Assistant Commissioner. He reported, in general, to the Chief Administrative Officer, who, in turn, reported to the Commissioner.

7.4.17 Mr Kidd told the Commission in evidence that the first he heard about an issue with telephone recordings was when he received an email from the Chief Administrative Officer (CAO), Mr Dunne, on the 17 October 2013, asking him to report on a problem related to telephone recording that had emerged. He stated:

*“So that's when effectively I first became aware that there was an issue. Prior to that I was aware that we recorded telephone calls, but my understanding was that they were emergency calls...”*

7.4.18 Mr Kidd explained that, when he joined An Garda Síochána, the NICE system was in the process of being installed. In terms of his own knowledge of the installation process, he stated:

*“...as far as I was concerned, there were no budgetary issues, it was on time, and it didn't come up on my radar as something that needed to be managed. That was being done, it was being delivered, and it was replacing old equipment with new equipment, like for like.”*

7.4.19 In relation to his email of 17 October 2013, Mr Dunne told the Commission:

*“The first record I have was the e-mail here, which triggered me to go and find out what's the issue with recordings because up until that point I understood we recorded, we had policies and procedures in place which covered all of that and it was for emergency numbers.”*

7.4.20 On 18 October 2013, Mr Kidd received a further email from Superintendent Flynn outlining the position regarding recording in Divisional Stations as the Superintendent understood it at that time. In Mr Kidd's recollection, this was the first occasion on which

he received detailed information about the systematic recording of telephone calls in Garda stations.

- 7.4.21 The Commission has seen documentation from 2011 / 2012 relating to the Holness case which indicates that Mr Kidd did, in fact, have some knowledge of telephone recording in Garda stations arising out of that case. This is dealt with further in the section on the Holness case below.

## **7.5. Divisional Chief Superintendents**

- 7.5.1 Operational and administrative control of each Division is given to a Chief Superintendent. On 24 October 1996, the Chief Superintendent, Telecommunications, wrote to each Divisional Chief Superintendent informing him or her of the proposed installation of new voice recording equipment in Divisional Control Rooms. However, the letter did not indicate which telephone lines were to be recorded.
- 7.5.2 On the evidence before the Commission, Divisional Chief Superintendents were never formally notified of the decision taken within the Telecommunications Section to record the main station number, as well as radio and 999 lines. Accordingly, whether they came to know this fact depended on the extent to which they made enquiries or were informed by local officers or technicians.
- 7.5.3 For those Chief Superintendents who did know that the main station number was being recorded, it would have been reasonable to assume that this decision was made with the knowledge and approval of Senior Management at Garda HQ, although, as the Commission has reported in Chapter 5, this was not in fact the case.
- 7.5.4 The Commission devised and sent a questionnaire to 25 serving and 105 retired Chief Superintendents. The questionnaire sought to identify the level of knowledge of those officers about telephone recording systems, whilst also obtaining information about the duties undertaken and the locations they had worked in over the course of their careers. Responses were received from 20 serving officers, 18 of whom provided information relevant to the Commission's inquiries. 95 of the 105 retired Chief Superintendents provided replies, which was an extremely good response.
- 7.5.5 In summary, the responses encompass a range of opinions and states of knowledge on the following issues:
- The recording capacity of the DAT and NICE systems;

- The recording of the main station number at Divisional Stations;
- The recording of other non-999 lines on the DAT system;
- The replacement of the DAT system with the NICE system in 2008;
- The definition of what constitutes an emergency call;
- Whether emergency calls could and did come in on non-999 lines;
- The use of recorded calls in criminal prosecutions or internal disciplinary matters.

7.5.6 There were certain issues on which the responses received were unanimous. Perhaps most importantly, none of the respondents could recall having been made aware of any rules or policy concerning the operation of the system, including the retention, storage, access and use of recordings. Nor could they recall participating in any policy discussion regarding such matters.

7.5.7 Taken as a whole, the results tend to confirm the picture that emerges from other sources, namely that, while most Divisional Chief Superintendents were aware of the existence of telephone recording systems, they were never formally briefed as to what was being recorded and why. As a result, the level of knowledge of the operation and use of these systems varied from one Chief Superintendent to another.

## **7.6. District Superintendents**

7.6.1 In geographical terms, An Garda Síochána is divided firstly into Regions, then Divisions, Districts and Sub-Districts. Outside the DMA, each Divisional Station also functioned as the Headquarters for the particular District in which it was located. As a result, although the Divisional Chief Superintendent retained overall authority, the day-to-day operation of each Divisional Station was overseen by the District Superintendent. The District Superintendents also had operational authority over any technicians attached to that Division. The question of what those Superintendents knew about the recording systems is therefore of some importance.

7.6.2 As noted above, in October 1996, the Divisional Chief Superintendents were made aware of the forthcoming installation of DAT recording systems, though not of the lines to be recorded. It is reasonable to presume that the relevant District Superintendents would also have come to know of the installation through either the Chief Superintendents or the Divisional technicians, though there is little documentation available to confirm this.

- 7.6.3 The Commission devised and sent out a questionnaire to 76 serving Superintendents outside the DMA in relation to their knowledge of telephone recording systems. A total of 51 responses were received. As with the Chief Superintendents, knowledge of the operation and use of the DAT and NICE systems varied from one officer to the next. For instance, 8 respondents said they did not even know that 999 calls were recorded. By contrast, 18 said they were aware that all calls to and from the Control Room were recorded; and 6 said they knew of certain lines outside the Control Room that were being recorded, such as Public Office or Incident Room lines.
- 7.6.4 Chapters 5 and 6 set out the information obtained by the Commission in relation to how and by whom recordings were accessed. As with other aspects of the recording system, the absence of any clear policy Directive from Garda HQ resulted in a variety of locally devised approaches.
- 7.6.5 The value of access records as a means of assessing levels of knowledge of the recording systems is limited. In the first place, the quality and quantity of available records varies significantly from station to station. Secondly, such records as do exist do not, for the most part, indicate whether the person asking for a call was aware that it could be on a non-999 line. Finally, in many cases where a non-999 recording was supplied in response to a request, the records do not show whether the requesting member was made aware of the fact that it was a non-999 call.
- 7.6.6 Between 1995 and 2008, no Divisional Station required access requests to be authorised personally by the District Superintendent. At Sligo Garda Station, the technician would occasionally seek confirmation from the Superintendent in relation to oral requests received to access calls, but any written request from a Garda member was processed without recourse to the Superintendent. At Limerick Garda Station, the view was taken that requests coming from an Incident Room had the implicit authority of the District Superintendent.
- 7.6.7 Although most Superintendents were not involved in authorising access requests during the DAT period, there is some evidence of Superintendents making requests on their own account. Access records provided from Divisional Stations during this period are incomplete, but there is evidence of requests being made by Superintendents at 7 Divisional Stations during the DAT period. In Limerick, for example, the Commission was told that complaints from members of the public about the handling of calls were generally investigated by the District Superintendent.
- 7.6.8 The DAT system was replaced by the NICE system in 2008. Prompted in part by concerns about the lack of an official policy regarding access to recordings, the

Telecommunications Section developed a draft policy document which proposed that all requests for playback and copying of recordings should require an official written application from the District Superintendent.

- 7.6.9 From the evidence given to the Commission, it is clear that awareness and application of this policy varied from one Division to the next. However, over time, it seems that just over half the existing Divisional Stations adopted this practice.

## **7.7. Ranks Below Superintendent**

### **Survey of Garda members**

- 7.7.1 The access records provided to the Commission from Divisional Stations outside the DMA show examples of requests for recordings made by Gardaí of all ranks up to and including Superintendent. However, as pointed out previously, this evidence is of limited value in establishing whether or not those members knew that some of the calls requested were recorded on non-999 lines. In order to gain some sense of the general level of knowledge within An Garda Síochána, the Commission devised a simple survey which it hoped could be distributed to all serving and former members of the organisation.
- 7.7.2 An Garda Síochána have a private intranet known as the Garda Portal, through which the organisation can communicate with serving members. An Garda Síochána facilitated the Commission in placing a notice on this Portal inviting members to participate in an automated survey relating to their knowledge of telephone recording systems in Garda stations.
- 7.7.3 The notice, together with a link to the survey, was published on the Garda Portal on 27 November 2015 and remained active until the 22 January 2016. It was confirmed that all serving members of the organisation (12,816 as of 31 December 2015) have access to the Garda Portal. This includes all ranks from ‘rank and file’ members up to the Garda Commissioner. The survey was aimed at Garda members; civilian staff (2,100 as of 31 December 2015), who also have Portal access at an appropriate level, were not asked to participate.
- 7.7.4 The number of survey responses received was 1,143 – roughly 9% of the serving Garda membership.
- 7.7.5 The Notice read as follows:

“The Fennelly Commission is required to identify all Garda

stations in which telephone recording systems, to record calls other than 999 calls to the Emergency Call Answering Service, were installed and/or operated by An Garda Síochána between 1st January 1980 and 27th November 2013.

The Commission is specifically required, in accordance with Paragraph 1(e) of its terms of reference *“To investigate and report on the level of knowledge of the existence, operation and use of the said telephone recording systems within An Garda Síochána.”*

The Commission has contacted a large number of Gardaí individually where it believed that these members had particular knowledge of telephone recording systems. Paragraph 1(e) requires the Commission to ascertain the level of knowledge within the force generally.

The Commission has designed a simple survey which will give it a broad overview of the level of knowledge within the force. This survey is accessible through the link below.

All answers to this survey will be treated as strictly confidential and anonymous and will be viewed only by the legal team within the Commission.

Any member wishing to do so may contact the Commission at any time through the email, telephone number or postal address set out below but there will be no follow-up on any information disclosed in this survey.

The Commission would greatly appreciate the co-operation of the members of An Garda Síochána in order to allow it to complete its work.”

7.7.6 The questions posed in the survey were as follows:

1. Were you aware that dedicated 999 telephone lines were recorded in Command and Control Harcourt Square, Dublin and all Divisional

Headquarter Garda Stations outside of the Dublin Metropolitan Region? Yes  No

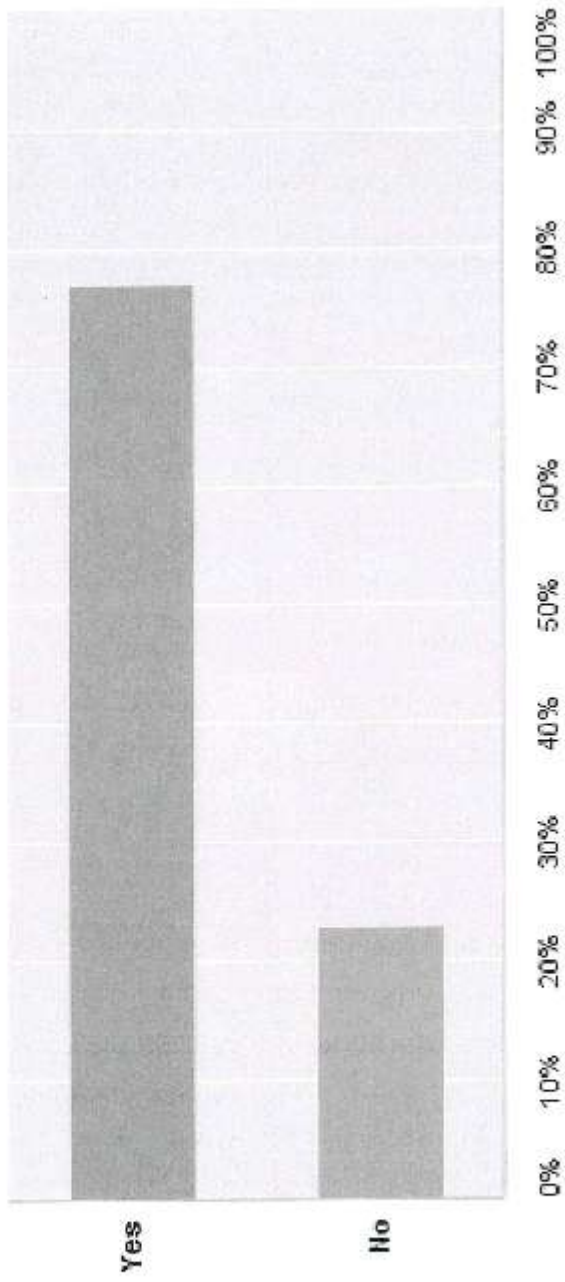
2. Do you consider that there was a justification for the recording of telephone calls received on such dedicated 999 lines? Yes  No
3. Were you aware that **all** calls answered by the telephone operator in the Control/Communications Rooms in all Divisional Headquarter Garda Stations outside of the Dublin Metropolitan Region were recorded? Yes  No
4. Do you consider that there was a justification for the recording of all such calls answered by the telephone operators given that some of those telephone calls could be of an emergency nature? Yes  No
5. Did you ever make a request for a copy of a recording of a telephone call for the purposes of an investigation? Yes  No
6. Did you ever make a request for a copy of a recording of a telephone call for the purpose of use in criminal proceedings? Yes  No
7. Did you ever make a request for a copy of a recording of a telephone call for the purpose of use in internal disciplinary proceedings? Yes  No

7.7.7 The survey employed a simple yes / no format for ease of use, in the hope that as many members as possible might take the time to respond. To facilitate anyone who might wish to impart further details or make any observations, a “Comment Box” facility was provided at the end of the survey.

7.7.8 A breakdown of results from this survey is set out below. Questions 1-7 involved a simple “yes” or “no” answer and the answers received are collated into a simple graph.

**Q1 Were you aware that dedicated 999 telephone lines were recorded in Command and Control Harcourt Square, Dublin and all Divisional Headquarter Garda Stations outside of the Dublin Metropolitan Region?**

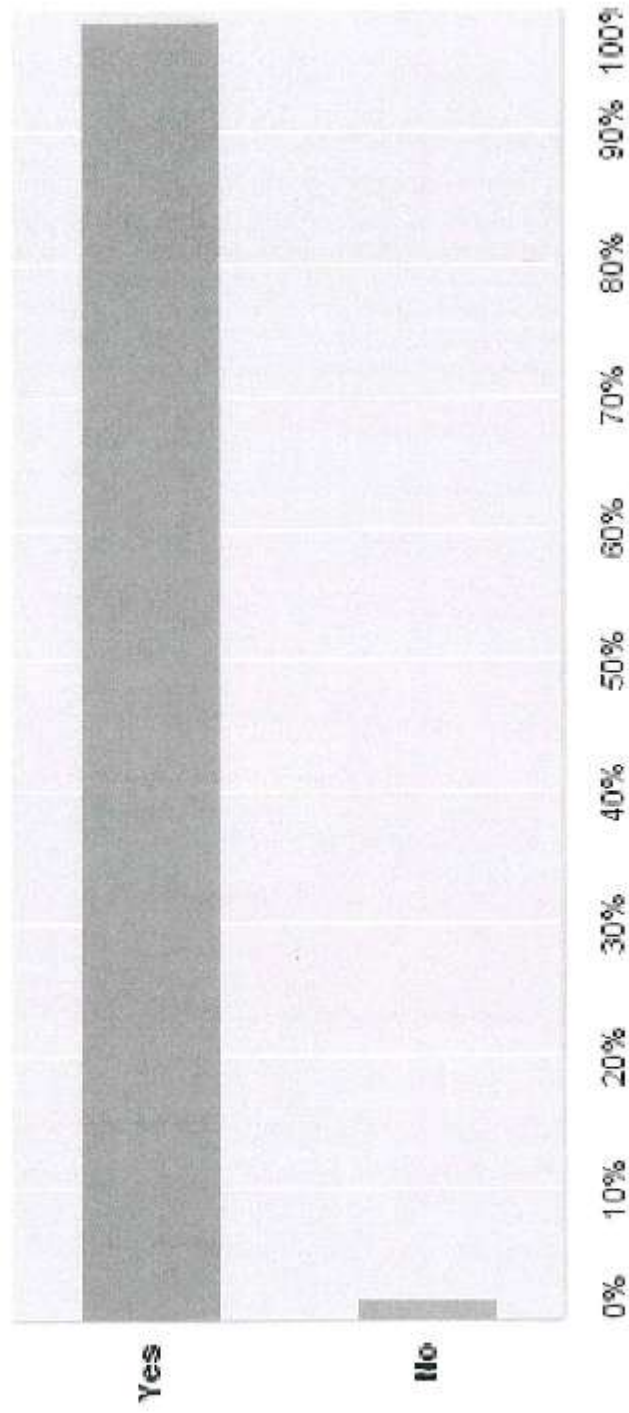
Answered: 1,143 Skipped: 0





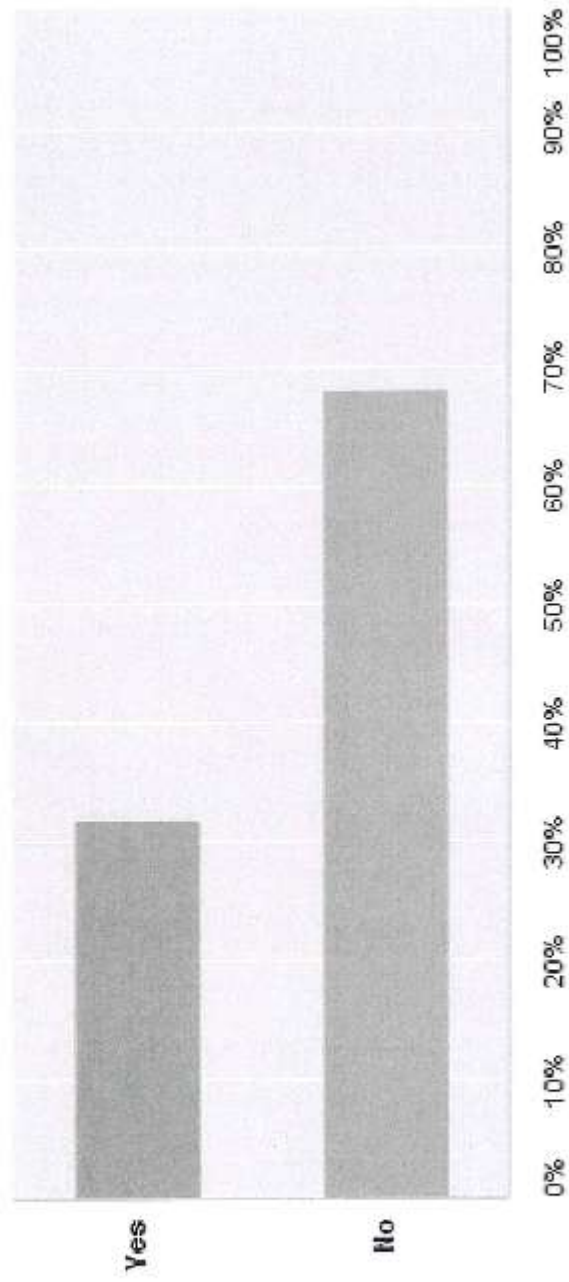
**Q2 Do you consider that there was a justification for the recording of telephone calls received on such dedicated 999 lines?**

Answered: 1,143 Skipped: 0



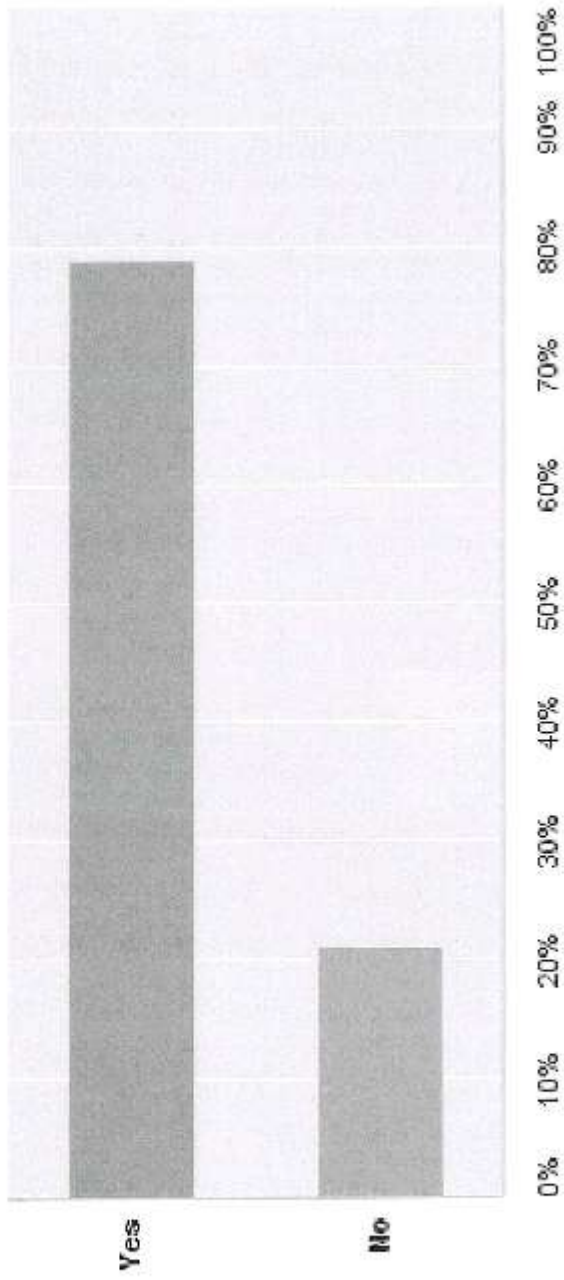
**Q3 Were you aware that all calls answered by the telephone operator in the Control/Communications Rooms in all Divisional Headquarter Garda Stations outside of the Dublin Metropolitan Region were recorded?**

Answered: 1,143 Skipped: 0



**Q4 Do you consider that there was a justification for the recording of all such calls answered by the telephone operators given that some of those telephone calls could be of an emergency nature?**

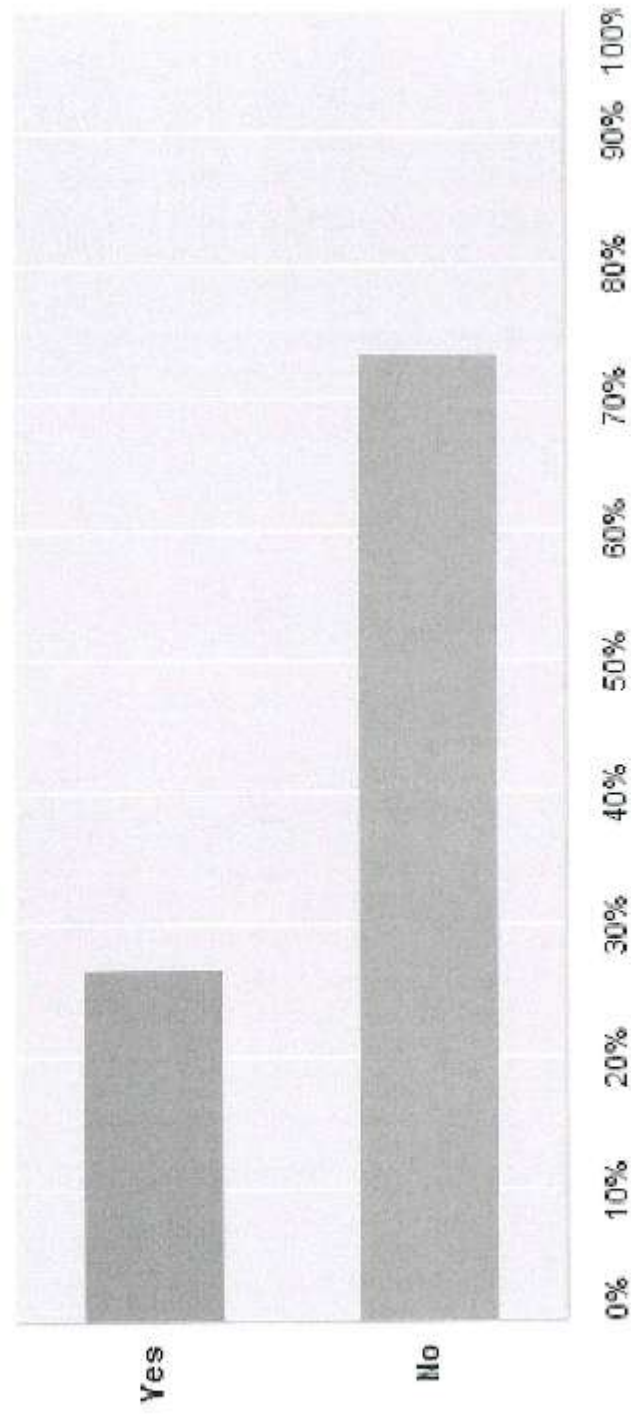
Answered: 1,143 Skipped: 0





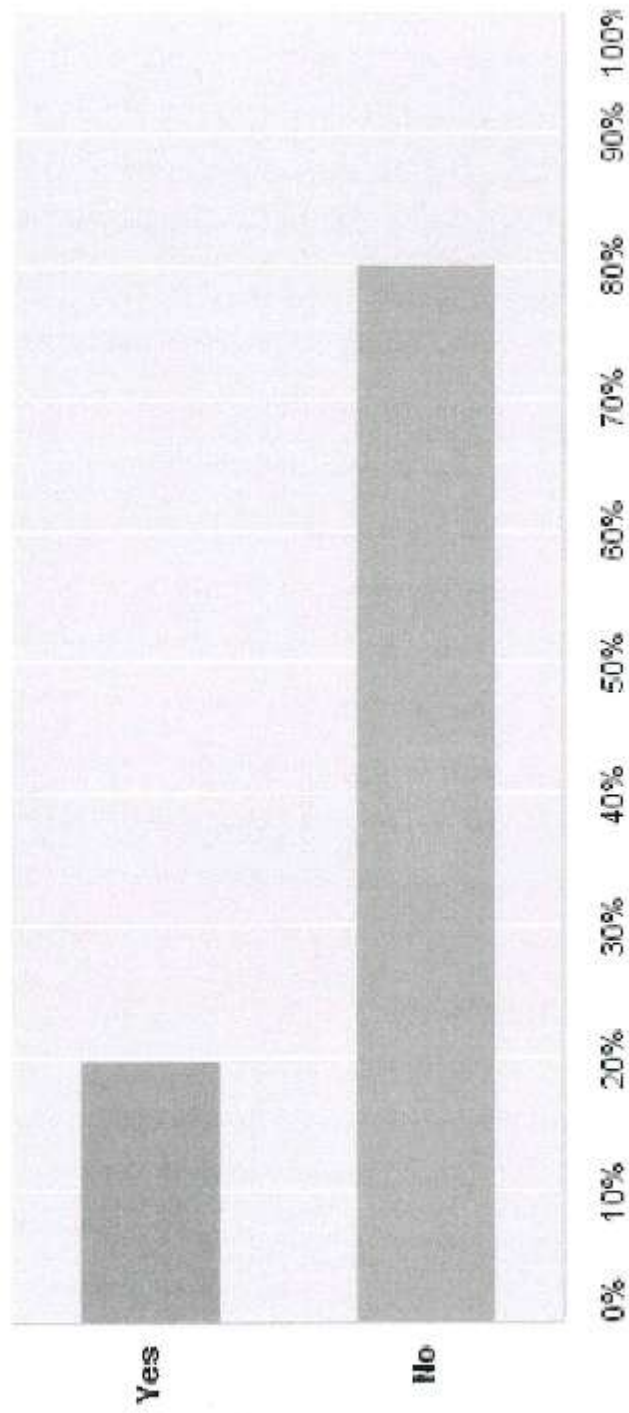
**Q5 Did you ever make a request for a copy of a recording of a telephone call for the purposes of an investigation?**

Answered: 1,143 Skipped: 0



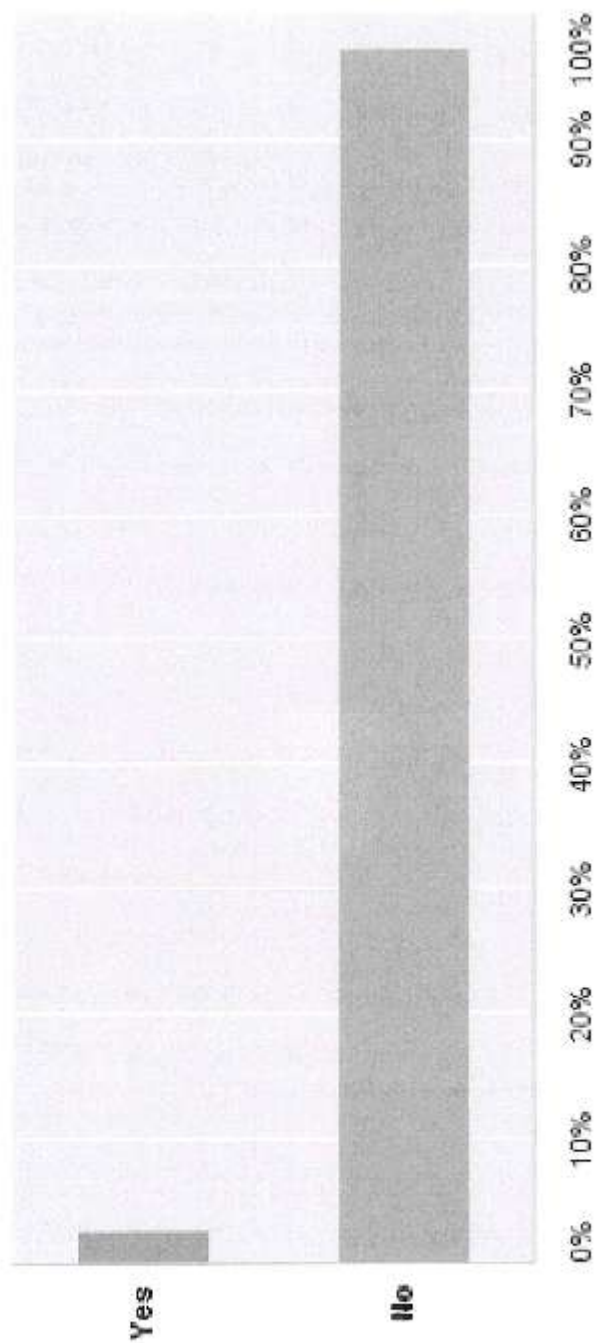
**Q6 Did you ever make a request for a copy of a recording of a telephone call for the purpose of use in criminal proceedings?**

Answered: 1,143 Skipped: 0



**Q7 Did you ever make a request for a copy of a recording of a telephone call for the purpose of use in internal disciplinary proceedings?**

Answered: 1,143 Skipped: 0



7.7.9 In terms of knowledge within the organisation of the existence, operation and use of telephone recording systems, the following results are of particular interest:

- Just over 77% of respondents said that they were aware that 999 calls were recorded in Divisional Headquarters, referred to as Divisional Stations in this Report, and at Command and Control in Harcourt Square, Dublin. Almost 23% did not know this. 98.25% considered that recording 999 calls on dedicated 999 lines was justifiable.
- Over 68% of respondents did not know that all calls answered by the telephone operator in the Control Room in all Divisional Stations outside the DMA were recorded. Almost 32% did know this. Almost 79% considered that recording such calls was justifiable given that some of those calls could be of an emergency nature. Just over 21% did not believe such recording was justifiable.
- The vast majority of those surveyed said that they never requested a copy of a recorded call for either an investigation or for criminal proceedings. 97.38% said they had never requested a copy of a recording for use in a disciplinary proceeding.

7.7.10 A total of 284 survey respondents also made entries in the Comment Box. It was made clear to participants that any answers given in this survey would remain confidential and, therefore, the Commission does not propose publishing these responses. However, on the basis of the information received, the following general observations can be made:

- The vast majority of those who provided comments said they believed that 999 calls were recorded and that it was entirely correct that this should be done, some expressing this in strong terms.
- A large number of respondents were unaware of the practice of recording calls other than 999 calls.
- Some respondents, though unaware that non-999 calls were being recorded, did not believe that such recording was a significant issue. By contrast, others expressed anger and disappointment that calls other than 999 calls were being recorded without people being made



aware; this applied particularly to private phone calls made to or from individual Garda members.

- Those who were aware of the practice of recording the main number at Divisional Stations believed this was of benefit to the organisation in the conduct of its duties.
- Some respondents expressed the view that all telephone lines into and out of Garda stations should be recorded, for the safety of both the Gardaí and the public. Others said they regarded the recording of all lines as essential for good policing.
- It was noted by some respondents that, in rural areas, there was a preference for ringing the local Garda station rather than 999 in the case of an emergency and, for that reason, they believed those lines should be recorded.

7.7.11 The Commission has been required by its Terms of Reference to investigate the operation of Garda telephone recording systems over more than three decades. Consequently, it has been necessary to contact a number of retired members of the force both to procure and to verify much of the information relied on in this Report. The Commission had hoped that all retired members of An Garda Síochána could also have been given the opportunity to assist it in its work by completing the same survey as that advertised to serving members on the Garda Portal.

7.7.12 With that in mind, the Commission approached the Garda Síochána Retired Members' Association (GSRMA) to ask for assistance in conveying the survey to retired members. It is with considerable concern and regret that the Commission must report that the GSRMA refused to provide the co-operation required, citing data protection concerns. Without such co-operation, it was not possible for the Commission to offer retired members the opportunity to participate in the survey.

#### **Control Room operators**

7.7.13 Although it appears that, in most Divisional Stations, there were no signs or labels to indicate that phones were recorded prior to 2011, the evidence before the Commission suggests that Gardaí whose duties regularly involved answering calls in Divisional Control Rooms would, over time, have become aware that recording was taking place.

7.7.14 The role of Control Room operator within Divisional Stations was not always clearly defined. Although some of the larger stations had members who worked in the Control

Room more or less permanently, other Gardaí also worked shifts in the Control Room from time to time, without any particular training and as part of their normal duties.

7.7.15 It was not possible, therefore, to contact all members who had acted in the capacity of telephone operator during the relevant period, but the Commission obtained details in respect of some members who had acted exclusively in that role and sent a detailed questionnaire to 26 telephone operators. A total of 15 replies were received, 13 of which were from operators who had worked during the period when multi-track recording was in use at Divisional Stations (1995-2013).

7.7.16 It is not possible to draw any firm conclusions from such a small sample size. However, the Commission notes that, even within this small group, there were differing levels of knowledge as to the existence, operation and use of systems to record non-999 calls. For instance, 9 of the respondents confirmed (i) that they were aware of calls to and from the Control Room being recorded, and (ii) that calls of an emergency nature could and did come into the Control Room on non-999 lines. Of those who responded, 8 thought that there was some justification for recording non-999 Control Room calls, whereas 3 said there was not.

#### **Advertisement in national newspapers**

7.7.17 From 26 October 2014 to 2 November 2014, the Commission placed an advertisement in a number of national Sunday and daily newspapers. Gardaí, Garda employees, solicitors and members of the public were asked to contact the Commission with any information relating to the recording of non-999 calls at Garda stations. A copy of the advertisement can be seen at Appendix 2 of this Report.

7.7.18 The Commission was contacted by 11 members of An Garda Síochána, both retired and acting, on foot of the advertisement. The information submitted by 6 of these individuals fell within the Terms of Reference and formed part of the Commission's investigation.

7.7.19 Two of the respondents informed the Commission that they had been aware that the main telephone line into their Divisional Station was recorded.

## **7.8. Senior Garda Management**

7.8.1 Given the hierarchical structure and culture within An Garda Síochána,<sup>85</sup> it is clear that rank and file Gardaí would not generally have considered it their responsibility to question actions taken by senior officers in terms of the provision of equipment and the use of that equipment. Many ordinary members of the force spoke, either in evidence

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<sup>85</sup> See Chapter 2

before the Commission or in writing, of their expectation that Senior Management would ensure that they were acting legally in the way in which they conducted policing operations. As Chapters 5 and 6 make clear, some technicians and other officers did raise questions and concerns from time to time over the operation of the telephone recording systems, in the expectation that those concerns would be put to Senior Management; but it seems that these concerns were not understood, not put before Senior Management or not responded to.

7.8.2 If a policy of recording non-999 calls was to be sanctioned, this should have occurred at senior Garda level. It has been the consistent evidence of all senior Gardaí who gave evidence to the Commission, including several former Garda Commissioners, that they were not aware of any recording other than that of 999 calls. As a result, the recording of certain non-999 lines took place, unnoticed and without review, for decades. This is one of the most surprising findings made in this Report.

7.8.3 The ‘Senior Management’ referred to in this section are those who filled the roles of Assistant Commissioner, Deputy Commissioner, Executive Director of ICT (Information and Communications Technology) and Chief Administrative Officer. The level of knowledge amongst former Commissioners of An Garda Síochána is considered separately below.

#### **Assistant Commissioners**

7.8.4 The Commission sent questionnaires to 14 former Regional Assistant Commissioners in An Garda Síochána. Thirteen responded. These responses gave the Commission an overview of what was known at Regional Assistant Commissioner level concerning telephone recording in Garda stations. The questions asked and a summary of the answers received are set out below.

7.8.5 The questionnaires sent to the former Regional Assistant Commissioners asked the following:

1. Please outline your knowledge of telephone recording systems which operated in Divisional Headquarters under your control.
2. Were you aware that all calls, 999 calls and non-999 calls, into the Control Room of Divisional Headquarters were recorded?
3. Did you ever discuss protocols or procedures in relation to recording and/or accessing telephone calls with your Divisional Superintendents?

4. Did you ever discuss protocols or procedures in relation to recording and/or accessing telephone calls with other regional assistant commissioners or with senior Garda Management?
5. Were you aware whether it was possible that Solicitor/client calls could be recorded in any Divisional Headquarters under your control?
6. Did you ever have occasion to access or use a recorded telephone call in the course of either a criminal or a disciplinary investigation?

7.8.6 Three former Regional Assistant Commissioners informed the Commission that they had no knowledge whatsoever of any form of telephone recording in Divisional Stations in An Garda Síochána under their control while 10 said they were aware that 999 calls were recorded in Divisional Stations. Only one former Assistant Commissioner was aware of a line other than a 999 line being recorded in a station under his control. This related to the recording of a telephone set up in an Incident Room in Sligo Garda Station.<sup>86</sup>

7.8.7 None of the former Regional Assistant Commissioners believed that they had ever discussed protocols or procedures in relation to the recording or accessing of telephone calls with their Divisional Superintendents, with each other or with anyone else in the Senior Management of An Garda Síochána.

7.8.8 None of the former Regional Assistant Commissioners were aware whether or not it was possible for calls between solicitors and prisoners to have been recorded in Divisional Stations under their control. None had any knowledge of it happening.

7.8.9 Two of the former Regional Assistant Commissioners said they had occasion to access a telephone recording in the course of an internal disciplinary investigation. On each occasion, the call accessed was made to a 999 line. One former Regional Assistant Commissioner said that he had accessed 999 calls in relation to criminal proceedings. One other respondent said that, while he had had no cause personally to access telephone recordings in relation to criminal proceedings, he was aware that it was common for 999 calls to be accessed.

7.8.10 In addition to seeking information from Regional Assistant Commissioners, the Commission interviewed Assistant Commissioner John O'Mahoney, who is currently in charge of Crime and Security, a position he has held since 2011.

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<sup>86</sup> See Ch 6

- 7.8.11 The position of Assistant Commissioner, Crime and Security, is one of particular importance within the organisation. During the relevant period, sections under his or her responsibility included Security and Intelligence, the Special Detective Unit (SDU) and Crime Policy and Administration. The last of these contained a small unit, staffed by members with legal training, with the task of advising the organisation on compliance with its legal obligations.
- 7.8.12 Assistant Commissioner O'Mahoney joined the force in 1977 and worked in Dublin throughout his early career, either in a Garda station or at Harcourt Square. In 2002, he was appointed Detective Superintendent in the National Bureau of Criminal Investigation, Harcourt Street, which involved the management of serious crime investigation on a national basis. After a brief period as Chief Superintendent in the Dublin Metropolitan Regional Office at Harcourt Square, he was appointed Detective Chief Superintendent in the Criminal Assets Bureau. In 2009, he was appointed Assistant Commissioner to the Western Region until 2011, when he was appointed Assistant Commissioner, Crime and Security, a position he still holds at the time of writing. At the same time, he was also Assistant Commissioner, Southern Region, from March 2015 and Assistant Commissioner, Garda National Traffic Bureau, from March 2016.
- 7.8.13 As detailed in the Second Interim Report of the Commission, Assistant Commissioner O'Mahoney was amongst the first members of Senior Management to be informed, in October 2013, of the emergence of non-999 recordings from Bandon Garda Station in the course of the Discovery process relating to the case taken by Mr Ian Bailey against the Garda Commissioner and others. He told the Commission that the initial concerns about the recordings related to their content rather than their origin.
- 7.8.14 It was a few weeks later when Assistant Commissioner O'Mahoney learned that there was an issue with non-999 recording that extended beyond Bandon Station to other Garda stations around the country. He described "*a general air of confusion*" amongst Senior Management as to what was being recorded. His own first concern was whether unauthorised recording had been taking place at Garda HQ and the possible security implications of that in terms of meetings with police forces from other jurisdictions.
- 7.8.15 In terms of his own knowledge of recording prior to this, he said that he had had no idea that calls other than 999 calls were being recorded:

*"...I would have been aware that anybody putting in a 999 call would obviously be.... that they were recorded. ...We use those for investigation.*

*Indeed they were provided in evidence in some cases in courts as to what the call was, or the nature of the call.”*

- 7.8.16 However, he also expressed the belief that all calls into the Control Rooms of Divisional Stations were recorded. This was owing to a lack of understanding that ordinary calls to the station were routed, at first instance, to the Control Room. This illustrates the confusion that the Commission encountered when dealing with many senior members of the force. When asked where he believed telephone calls that were made to the main station number were answered he stated:

*“My understanding is that any calls other than 999 calls would have gone into the public office and that they would not have been recorded.”*

Further confusion seems to have existed in relation to the fact that recording in Divisional Control Rooms was not restricted to incoming calls; outgoing calls on non-999 lines were also recorded.

- 7.8.17 In relation to the recordings from Bandon Garda Station that were first brought to his attention, Assistant Commissioner O’Mahoney said:

*“Obviously these calls in Bandon weren’t 999 calls, they were outside of the Communications Room. They were even outside of the main Public Office, I think. They were very much areas which would be ... very confidential...”*

- 7.8.18 In 2011, Assistant Commissioner O’Mahoney was involved in the organisational response of An Garda Síochána to issues concerning telephone recording arising from the Holness case. The case and its consequences are dealt with in detail elsewhere in this chapter. For the present, it is sufficient to note that the information that was brought to his attention at that time did not alter his understanding that only 999 calls were being recorded.

#### **Deputy Commissioners**

- 7.8.19 For the period with which the Commission is concerned, there were two Deputy Commissioner positions – one for Operations and the other for Administration (later renamed Strategy and Change Management). Both reported directly to the Garda Commissioner on the functioning of the organisation and advised on matters of policy.
- 7.8.20 The following officers who served as Deputy Commissioner during the period 1995-2013 also went on to serve as Garda Commissioner:

- Pat Byrne (Operations, May 1994-July 1996)
- Noel Conroy (Operations, July 1996-July 2003)
- Fachtna Murphy (Operations, July 2003-November 2007)
- Martin Callinan (Strategy and Change Management, January 2007-November 2007; Operations, November 2007-December 2010)
- Nóirín O’Sullivan (Operations, March 2011-March 2014; Strategy and Change Management, June 2013-March 2014)

Their evidence is considered under the “Garda Commissioners” heading below.

7.8.21 Two other officers also served as Deputy Commissioner during the period 1995-2013. They were:

- Thomas Fitzgerald (Strategy and Change Management, April 1998-April 2008)
- Walter Rice (Strategy and Change Management, September 2008-June 2013)

On the evidence before the Commission, neither appeared to have had any knowledge of the recording of non-999 telephone lines.

**Chief Administrative Officer (CAO)**

7.8.22 The CAO was a role of equivalent rank to Deputy Commissioner, with responsibility for overseeing the Finance, Human Resources and Information and Communications Technology (ICT) Sections. The Commission heard evidence from Mr Cyril Dunne, who was appointed CAO in April 2013.

7.8.23 Due to ill health Mr Dunne’s predecessor in the role, Mr John Leamy was unable to give evidence to the Commission in person. However, he informed the Commission in writing that he had no knowledge of the DAT or NICE recording systems and could not recall having had any involvement with them.

7.8.24 Mr Dunne joined An Garda Síochána in April 2013 following a career in banking and retail. As CAO, he reported directly to the Commissioner in relation to the areas for which he was responsible. His involvement in the events which followed the emergence of non-999 recordings from Bandon Garda Station in October 2013 is covered in the Second Interim Report of the Commission.

- 7.8.25 In terms of his knowledge of recording systems, Mr Dunne told the Commission that, prior to October 2013, he had no knowledge whatsoever of the existence of systems for recording telephone calls of any kind, whether 999 calls or otherwise. In the 6 months or so since taking up his position, it was not something that had come across his desk at all.

## 7.9. Garda Commissioners

- 7.9.1 In addition to the current Garda Commissioner, Ms Nóirín O’Sullivan, five former Commissioners attended to give evidence to the Commission. In advance of so doing, they were invited to furnish a statement concerning their knowledge of telephone recording systems in An Garda Síochána. The five former Commissioners were: Mr Patrick Culligan, Mr Patrick Byrne, Mr Noel Conroy, Mr Fachtna Murphy and Mr Martin Callinan. All of these gentlemen had served as Commissioner during either the DAT period (1995-2008) or the NICE period (2008-2013). Each had also served for a period as Deputy Commissioner, Operations, prior to their appointment as Commissioner.

### **Commissioner Nóirín O’Sullivan**

- 7.9.2 The present Garda Commissioner, Nóirín O’Sullivan, assumed that role (initially in an acting capacity) following the retirement of Commissioner Martin Callinan on 25 March 2014. For 3 years prior to that, she had served as Deputy Commissioner, Operations. From 31 May 2013, she had also assumed the role of Deputy Commissioner, Strategy and Change Management, on the retirement of Deputy Commissioner Walter Rice.
- 7.9.3 The role of Deputy Commissioner O’Sullivan (as she then was) in the emergence of information concerning non-999 recording at Divisional Stations in or around October 2013 is dealt with in detail in the Second Interim Report of the Commission. As Deputy Commissioner, Operations, in 2011, she also had a role in the review of telephone recording practices arising from the Holness case, as described elsewhere in this chapter.
- 7.9.4 Commissioner O’Sullivan has had a career in An Garda Síochána spanning 35 years. She joined the force in 1981 and has served across a wide range of Operational and Administrative functions. Her early career was spent mostly in the Drugs and Organised Crime area. In her evidence to the Commission, she confirmed that she had very little experience of Divisional Stations outside Dublin. In 2000, she was appointed Superintendent in the Garda College with responsibility for specialist training. During this period, she was also a Detective Superintendent in the Garda National Drugs Unit. In 2003, she was promoted to Chief Superintendent in the Garda Technical Bureau. In



2007, she was promoted to Assistant Commissioner in the Western Region and then to Human Resource Management. In 2009, she was appointed Assistant Commissioner, Crime and Security, and, in 2011, she was promoted to Deputy Commissioner, Operations. Her experience of police work is wide ranging and varied.

7.9.5 Regarding her general understanding of audio recording in Garda stations, Commissioner O’Sullivan told the Commission in evidence:

*“I was certainly aware... that 999 calls were being recorded and that they could be retrieved and used for evidence. Other than 999 calls, no, I wasn’t. Certainly during my experience working in the operational field, I would never have been aware that those recordings were going on, other than 999 calls.”*

7.9.6 Commissioner O’Sullivan agreed that it was surprising that a system for recording calls, other than 999 calls, could exist in Divisional Stations without her knowing about it:

*“Yes. I was certainly very surprised and I know the former Commissioner was also very surprised when we initially learned... that this practice had developed.”*

7.9.7 As with other senior officers, Commissioner O’Sullivan’s knowledge of the recording of 999 calls prior to October 2013 was little more than a general awareness that such calls were recorded by some means. Her knowledge of how the system operated was limited. For instance, though aware of the fact that, in some stations, 999 calls could ‘hunt’ onto other lines if not answered within a certain period, she believed that only the 999 calls on that secondary line were recorded, rather than every call on that line, as in fact was the case.

**Mr Martin Callinan**

7.9.8 Mr Callinan joined An Garda Síochána in 1973 and spent his first year working at Waterford Garda Station. Apart from a further year in Swinford, County Mayo, where he was Superintendent, Mr Callinan’s entire subsequent career in An Garda Síochána was spent in the DMA. His early career was spent in Dublin stations and in the Central Detective Unit. In 1998, he was promoted to Detective Superintendent and assigned to the National Bureau of Criminal Investigation. In 2001, he was appointed Detective Chief Superintendent in the Crime and Security Branch and, in 2005, he was promoted to Assistant Commissioner, National Support Services. He was appointed Deputy Commissioner, Operations, in 2007 and Garda Commissioner in 2010. Mr Callinan retired on 25 March 2014. The Commission has reported on the sequence of events

leading up to his retirement in its Second Interim Report of August 2015 relating to paragraphs 1(n) and (o) of the Terms of Reference.

7.9.9 Mr Callinan said that he was aware, from early in his career, that recording of 999 calls occurred in Dublin Castle in the 1970s. He described this as a general awareness, with no knowledge of the technicalities.

7.9.10 During his time in the National Bureau of Criminal Investigation, Mr Callinan travelled all over the country to wherever crimes had been committed. This, of course, meant spending time in Divisional Stations. He was asked whether he had any awareness of the SEL system existing in Divisional Stations. He said that he had a general awareness that 999 calls were recorded. In relation to 999 calls, he said:

*“But, no, certainly I personally – and I’ve been involved in a lot of investigations down through the years – I have never had recourse to look for 999 material and put it into – we’d say a file for the Director who may or may not direct that that material was useful if it was available.”*

7.9.11 Mr Callinan was aware of Command and Control at Harcourt Square. He knew that the main telephone exchange for the building was not contained in the Control Room and he believed that only 999 calls came into Command and Control.

7.9.12 It was put to Mr Callinan that, in Divisional Stations outside the DMA, either because of space or staffing restrictions, calls to the main station number were directed in the first instance to the Control Room and were answered there alongside 999 calls. Mr Callinan was unaware of this. He told the Commission that he would have assumed calls to the main telephone number of the station were answered in the Public Office and not in the Control Room. He said he had absolutely no knowledge of any recording taking place in Public Offices or Incident Rooms. Whilst he had experience during his time in Crime and Security of dealing with applications for lawful interceptions, he had never been aware of a general recording facility:

*“But I have never in my service come across a situation where I was aware that there was a facility there. If, for instance, I was down the country in charge of an Incident Room or conducting a murder and it was of value, and I don’t know how it would arise, but if it was of value to record the phone extension in the room that we needed that on, that I could slip up to the Chief and say will you direct a technician to record on that phone – I was never ever aware of that facility.”*

7.9.13 Mr Callinan was Garda Commissioner when the recording of non-999 calls emerged as an issue of concern in or around October 2013. On being informed of the existence of non-999 recording in Bandon and other Garda stations, he immediately took the view that there could be no lawful justification for this and ordered that the recording of anything other than dedicated 999 lines and Garda radio channels was to cease. The circumstances of how Mr Callinan came to be informed of the existence of non-999 recording were covered in the Second Interim Report of the Commission. The implementation of his instruction to terminate non-999 recording is dealt with in Chapter 6 of this Final Report.

**Mr Fachtna Murphy**

7.9.14 Mr Murphy joined An Garda Síochána in 1967 and retired, following four years as Garda Commissioner, in 2010. Mr Murphy's entire career in the force was spent in the DMA. He worked in Dublin Garda stations and the Central Detective Unit in Harcourt Square in the early years until in 1992, when he was promoted to the rank of Superintendent in charge of the Fraud Investigation Section. In 1996, he was promoted to the rank of Chief Superintendent and served in Dun Laoghaire Garda Station and then in the Criminal Assets Bureau. He was promoted to Assistant Commissioner and served some years in the Human Resource Management section in Phoenix Park. In July 2003 he was appointed Deputy Commissioner Operations where he served until his appointment as Garda Commissioner in 2007.

7.9.15 In his statement to the Commission, Mr Murphy said he was aware that 999 calls were recorded in Command and Control, Harcourt Square, and in Divisional Stations around the country, but that he had no knowledge of non-999 calls being recorded.

7.9.16 Mr Murphy said that, in his very early years as a Garda, he had done relief work as a telephone operator in Dublin Castle. He said that at that time (late 1960's), nothing was recorded and all 999 calls had to be logged manually by writing out the details on a piece of paper. He said he thought recording 999 calls was best practice in terms of preservation of life and property.

7.9.17 Mr Murphy said he could not comment on whether emergency calls could or did come in to the main number in Divisional Stations because he had never served outside Dublin. Mr Murphy was shown the 1996 correspondence between Chief Superintendent Cussen and other members of the Telecommunications Section which resulted in the decision to record the main station number at Divisional Stations outside the DMA. He said he had no knowledge of any of it. Mr Murphy emphasised that Telecommunications was on the Administrative side of the organisation and he was on the Operational side.

For this reason, he said he would have had no involvement with telephone recording systems.

7.9.18 In or around 2010, during Mr Murphy's tenure as Garda Commissioner, he approved a new 3-year Information and Communications Technology (ICT) Strategy for An Garda Síochána. This followed the appointment of a civilian Executive Director of ICT, Mr Liam Kidd, who took over the ICT function and the HR function. He said that he would have left the details of the ICT strategy to Mr Kidd.

7.9.19 The Commission drew Mr Murphy's attention to Telecommunications Section correspondence, beginning in 2005, in which it was proposed that the call recording equipment in Divisional Stations and Harcourt Square be replaced because it was obsolete and could no longer be supported. Mr Murphy, who at that time was the Deputy Commissioner Operations, said that he had no awareness of this proposal.

7.9.20 In terms of developing policy, Mr Murphy said that policy recommendations would come up through the various branches, and that the ultimate decisions would be made by the Commissioner, usually following discussions with one or both Deputy Commissioners. The policy as then decided would be disseminated to the force by way of a Circular or Directive, signed by the Commissioner and released by the relevant Assistant Commissioner of the branch.

7.9.21 Mr Murphy said that he would expect a decision to extend recordings to lines other than 999 lines to be "*signed off at a pretty high level*". He could recall no discussion of such matters during his time as Commissioner. He said that, had he known that there was a legal issue relating to the recording of telephone calls to Garda stations, he would have sought the advice of the Attorney General. He said that there was a very good relationship between the Attorney General and the Commissioner of the day.

**Mr Noel Conroy**

7.9.22 Mr Conroy joined An Garda Síochána in 1963. As with the previous two Garda Commissioners, he served almost all of his career in the DMA. He was appointed Inspector and Detective inspector in 1980 and 1984 respectively. In 1986 he served a brief period as Superintendent in New Ross, County Wexford but returned to Harcourt Square as Detective Superintendent to the Serious Crime Squad in the Central Detective Unit. In 1991 he was promoted to the rank of Chief Superintendent and in 1992 he was appointed Detective Chief Superintendent with responsibility for national security.

- 7.9.23 In May 1994 he was promoted to Assistant Commissioner and after a brief few months in Human Resources, he was moved back to Crime and Security Branch in November of that year. In 1996 he was promoted to Deputy Commissioner Operations. In July 2003 he was appointed Garda Commissioner. Mr Conroy retired from the force in November 2007.
- 7.9.24 In his statement to the Commission, Mr Conroy stated his recollection was that “999 calls were recorded at Divisional Headquarters throughout the country with the exception of the Dublin Metropolitan Region where all such calls were received at a Central Control Room known as Command and Control which had its base at Harcourt Square Dublin 2.” He said that he was not aware that non-999 calls were routinely recorded in many stations across the country and said that he had no experience of non-999 calls being used in either criminal or disciplinary proceedings.
- 7.9.25 In his evidence to the Commission, Mr Conroy confirmed that he had seen SEL consoles in stations in Dublin during the 1980s, but he was not aware that they had a recording facility. Mr Conroy confirmed that he was aware that 999 calls were being recorded although he could not recall when or how he learned of this. He said that he recalls trying to trace individuals making calls in relation to serious crimes.
- 7.9.26 In relation to the recording of non-999 calls, Mr Conroy said that when he first heard about it in March 2013, he was startled. He contrasted the ease with which this happened with the difficulties he encountered in getting authorisations for interceptions of telephone calls:
- “Bearing in mind the difficulties in dealing with the area that having to get authority to put on things, here this is a situation where absolutely people ringing a station and being recorded, that was totally foreign to me.”*
- 7.9.27 The Commission asked Mr Conroy about the DAT system that had been installed in Divisional Stations in 1995. His attention was drawn to a number of documents from Telecommunications Section in relation to the installation of that system. He said he was not aware of them. As Deputy Commissioner Operations, he said that he would have had little contact with the Telecommunications Section which would have come under the Deputy Commissioner Administration.
- 7.9.28 Mr Conroy said that he had absolutely no recollection of any discussion relating to telephone recordings taking place during his time in the force. He confirmed that he

would have used 999 calls in preparation for criminal trials but they would be clearly designated as having come in on 999 lines.

7.9.29 He was asked whether he considered the installation of the DAT system at Divisional Stations, with its capacity to record multiple lines including the main station number, as a new development. He said that in his view it was, but he was not clear at what level authorisation for the new system would have occurred. He believed that it would have been signed off at Assistant Commissioner level.

7.9.30 Mr Conroy's attention was drawn to the fact that, in a small number of Divisional Stations, non-999 lines other than the main station number were also recorded and that in some instances, this appeared to have been done on the authority of the Divisional Chief Superintendent. Mr Conroy expressed surprise that any Chief Superintendent would authorise non-999 calls to be tape recorded, saying: "*well that shouldn't happen. It shouldn't happen*" He concluded by expressing his own view that the recording of non-999 calls would be "*totally unlawful*".

**Mr Patrick Byrne**

7.9.31 Mr Patrick Byrne joined An Garda Síochána in 1965. Until he was promoted in 1988 to the rank of Superintendent and assigned as District Officer to Tipperary town, his entire career had been served in the DMA. He remained one year in Tipperary. In 1989 he was transferred to Operations in Garda Headquarters. He remained in Phoenix Park for the remainder of his service. In 1991 he was appointed as Chief Superintendent in Crime and Security; in 1992, he was appointed Assistant Commissioner, Personnel Branch; in 1994, he was appointed Deputy Commissioner Operations and in 1996 he was appointed as Garda Commissioner for a fixed term of seven years. Mr Byrne retired from An Garda Síochána in 2003.

7.9.32 In his statement to the Commission, Mr Byrne stated:

"It was always my understanding that 999 calls were, for obvious reasons, recorded in the Command and Control Centre, Harcourt Square, Dublin 2 and prior to moving to Harcourt Square, in Dublin Castle. It was also my understanding that the 999 calls to Communication Centres in Divisional Headquarter stations were also recorded.... I was always of the view that the only phone calls in Garda Stations that were recorded were 999 calls."

7.9.33 In his evidence before the Commission, Mr Byrne explained that in Ireland, An Garda Síochána is not just a policing service but a National Security Service as well, a role that is carried out by other agencies in other European countries. His career had largely been

spent in the security side. He said that he was aware of telephone interception which was statutorily authorised and through this he was very aware of the concept of recording. But in terms of the practice that had come to light in 2014 of recording calls other than 999 calls, he said that that was news to him.

7.9.34 Mr Byrne said that he would have always been aware that 999 calls in Command and Control in Harcourt Square were recorded but he did not know the legal basis for this nor the mechanics of it. He said that he had never used 999 calls in any criminal cases.

7.9.35 Mr Byrne said that his understanding was that even though not all calls that come in on a 999 line are emergency calls, all of them are recorded. At the same time, many calls of an emergency nature would come in to the direct line of the station, and although these were urgent calls for assistance, his understanding was that they were not recorded. Similarly, he said that, if a call came in to the Public Office of a Garda station, he would not expect that call to be recorded.

7.9.36 Mr Byrne was the Deputy Commissioner, Operations during the period in 1995 / 1996 when decisions were made to procure and install new DAT recording equipment in Harcourt Square, Anglesea St and Divisional Stations outside the DMA. The details of this process, including Mr Byrne's role in it, are set out in Chapter 5 of this Report.

7.9.37 In relation to his own level of knowledge of the DAT systems, the Commission referred Mr Byrne to Telecommunications Section correspondence that had resulted in a decision being taken in 1996 to record the main station number in Divisional Stations outside the DMA. Mr Byrne said that he had no recollection of seeing any of this correspondence but said that he had no doubt there would have been meetings and discussions concerning the matter. He said that *"this wouldn't have been decided on at just this level alone"* He said that because there was considerable expenditure involved, it would have had to have been discussed with various stakeholders including the Departments of Finance and Justice. He continued:

*"Whatever committee that was dealing with this, the first question that would be asked is why, why are you doing this, why is this being done, why is it necessary, why does it do to? You know, to get the financing for this, I can tell you, you'd have to go through many hoops, I would expect, in situations like buying cars, exactly the same, it's not just at that time that the Commissioner even could say, we'll get A, B, C, a type of car, this would be decided by other people involved in terms of Finance and Justice and cost factors and all of that. So I have no doubt that there were meetings and discussions before you came to this."*

Although he would have expected a detailed discussion of what was being decided, Mr Byrne said that he would not necessarily have expected to be consulted on the matter.

7.9.38 Mr Byrne was shown the Agenda for the IT & Telecommunications Executive Committee meeting which was to take place on 13 March 1995. That Agenda lists as an item for discussion: "Purchase of equipment (voice recording equipment)". Mr Byrne was Chairman of the Committee at that time but had no recollection of this issue being discussed. Nonetheless, he said that there would have to have been discussions about the matter and that there would have been minutes of that discussion.

7.9.39 He said that it was unusual for the Deputy Commissioner Operations to be chairing a committee which was essentially dealing with an administrative matter, namely telecommunications. With that in mind, on becoming Commissioner in July 1996, he switched chairmanship of the IT & Telecommunications Executive Committee from Operations to the Deputy Commissioner, Administration.

7.9.40 Mr Byrne was not in a position to shed any light on whether telephone-recording policy had been discussed at the IT & Telecommunications Executive Committee but he was of the view that it should have been brought before the Committee.

**Mr Patrick Culligan**

7.9.41 Mr Culligan joined An Garda Síochána in 1957. He served as Garda Commissioner from 1991 until 1996. In his statement to the Commission, Mr Culligan said that at some stage during his service he became aware that a facility existed to record 999 calls to stations. He said that he did not have any personal experience of the system being used and that he was not aware of non-999 calls being recorded at stations around the country. He also said he had no knowledge of non-999 calls being used in either criminal or disciplinary proceedings.

7.9.42 Mr Culligan was appointed Superintendent in 1980. In 1982, he was appointed Chief Superintendent. He was appointed Commissioner Crime and Security in 1989, Deputy Commissioner Operations in 1990 and Commissioner in 1991 until his retirement in 1996. He served in Garda Headquarters throughout this time apart from a period as Chief Superintendent in Crumlin from 1983 to 1986 and a year in Castlebar from 1986 to 1987. This latter appointment was the only period served outside the DMA.

7.9.43 Mr Culligan was Garda Commissioner when the DAT system was introduced into Divisional Stations outside the DMA. The Commission showed him documentation it had received in connection with the purchase and installation of the system, which is



dealt with in detail at Chapter 5 of this Report. He was shown Telecommunications Section correspondence which included reference to the purchase having been approved by the Assistant Commissioner 'D' Branch. When asked about this decision and whether it would have come to him as Commissioner, Mr Culligan said he would not have been aware of it as, to his recollection, such matters would have been overseen and signed off on by the IT & Telecommunications Executive Committee, which included outside expertise on such technical matters.

- 7.9.44 He went on to point out that, at that time, An Garda Síochána did not have any independent power of purchasing and that it was signed off by the Departments of Justice and Finance. He said that he would not have expected to be consulted about something like this:

*“No, and I know from previous experience that my predecessor or one of my predecessors that I worked closely with, he would never have been consulted on anything like this. [It] would be determined by people who knew what they were doing in consultation with the department that was responsible and these things never came to the Commissioners.”*

## **7.10. The Holness Case**

- 7.10.1 In July 2011, an issue arose in Waterford Circuit Court during the trial of four members of An Garda Síochána which ought to have brought the fact of non-999 telephone recording to the attention of the senior ranks of the force.
- 7.10.2 Four Gardaí were tried before Her Honour Judge Leonie Reynolds and a jury for offences of assault on a Mr Anthony Holness late at night on a street in Waterford on 29 January 2010. Mr Holness had complained to the Garda Síochána Ombudsman Commission (GSOC) in accordance with section 83(2)(b) of the Garda Síochána Act 2005. Following investigation, the Director of Public Prosecutions directed trial in the Circuit Court.
- 7.10.3 In August 2011, two Gardaí were found guilty of assault contrary to section 3 of the Non-Fatal offences Against the Person Act 1997. One was convicted of assault contrary to section 2 of that Act. One was acquitted. On 8 November 2011, the three Gardaí who had been found guilty were sentenced to custodial sentences, in one case suspended. One sentence of four months was suspended on conditions.

- 7.10.4 This case was of considerable importance, for both GSOC and An Garda Síochána. The charges, serious in nature, were made against four officers, two of whom held the rank of Sergeant. In the end, the case became the first prosecution following an investigation by GSOC to result in the imposition of custodial sentences on acting members of An Garda Síochána.
- 7.10.5 In the course of the trial, an issue arose as to the admissibility of the content of telephone calls made by two of the accused on the night of the alleged assault. There were two calls, both made to another of the accused, who was on duty in the Control Room at Waterford Garda Station at the time. The conversations were recorded on the NICE system. Audit trails from the NICE system confirm that the calls were made to the main station number, which was answered ordinarily in the Control Room. All calls to the main station number had been recorded as a matter of course in Waterford Station since 1996.
- 7.10.6 Counsel for the accused against whom this evidence was proffered objected to its admissibility on the ground that the recording of the calls constituted the offence of interception contrary to section 98 of the Postal and Telecommunications Services Act, 1983 as amended by section 13 of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993.
- 7.10.7 The learned trial judge heard evidence and legal argument in the absence of the jury. Much of the argument concerned the question of consent to the recording of calls. As is explained in Chapter 9 of this Report, the statutory definition of interception “does not include such listening or recording where either the person on whose behalf the message is transmitted or the person intended to receive the message has consented to the listening or recording.” On behalf of the accused it was submitted that they could not have consented to the recording as they were unaware of its existence.
- 7.10.8 The prosecution presented evidence to the effect that at the relevant time, all telephones that were being recorded in Waterford Garda Station had labels affixed to them to indicate this fact. The accused officers disputed this evidence.
- 7.10.9 The learned trial judge delivered her ruling at approximately 10 am on the morning of 22 July 2011 in the absence of the jury. The first part of her ruling dealt with a separate issue concerning the admissibility of CCTV footage of the incident. She then proceeded to rule on the admissibility of the telephone recordings, stating:

*“The issue to be determined is the lawfulness or otherwise of the practice of An Garda Síochána at Waterford Garda Station in recording all incoming*

*and outgoing calls on their public lines, and the admission of the evidence obtained under the use of such practices.”*

7.10.10 The learned trial judge found that on the facts the prosecution had failed to establish beyond reasonable doubt that the parties to the phone calls were aware that their calls were being recorded and that therefore, they could not have consented or even acquiesced to the interception of their calls. The learned judge went on to rule as follows:

*“In the circumstances I am satisfied that the practice engaged [in] by the Gardaí at Waterford Garda Station of recording all incoming and outgoing calls was in breach of the provisions of section 98 of the Postal and Telecommunication Service Act 1983 as amended... The prosecution have not opened any other authority to the Court which would empower the Gardaí to carry out such practices, and indeed, nor am I aware of any such authority.”*

7.10.11 Finally, the learned judge rejected the prosecution’s contention that the defendants, as servants or agents of An Garda Síochána, could be fixed with the consent of their employer to the recording of such telephone calls.

7.10.12 Consequently, the learned judge ruled that the evidence of the telephone recordings had been *“obtained in... an unlawful manner”* and was not admissible in evidence at the trial.

7.10.13 In *the* present context, the importance of this ruling for the Commission lies not in the exclusion of evidence from the trial, but in the fact that the ruling raised expressly the issue of the legality of recording telephone calls to Garda stations. Although the ruling of her Honour Judge Reynolds was not delivered in open court, news of the ruling made its way to various sections at Garda Headquarters shortly afterwards, via separate communications from the following officers:

- (i) District Superintendent, Waterford
- (ii) Chief Superintendent, Waterford
- (iii) Assistant Commissioner, South Eastern Region.

The information provided, and the response of senior Garda management to that information, are considered below.

### **Informing of Telecommunications Section**

- 7.10.14 Superintendent Chris Delaney was the District Officer for Waterford Garda Station at the time of the Holness case, having been appointed in December 2007. He had been attached to Waterford previously as a Sergeant from 1997 to 2002 and as Acting District Officer from June 2004 to February 2007. He told the Commission that during the course of his career he had come to understand that all calls into Divisional Control Rooms were recorded. From the time of the installation of the NICE system in 2008, he was also aware that certain lines in the Public Office and Sergeant's Office at Waterford Station were also recorded, in order to capture overflow calls from the Control Room.
- 7.10.15 Superintendent Delaney was present in court on 22 July 2011 when the ruling of the learned trial judge was read out. Immediately afterwards, he rang Superintendent Flynn at the Telecommunications Section in Garda Headquarters to inform him of the ruling, *"...because I was very conscious that it would have implications nationally."*
- 7.10.16 Superintendent Delaney's understanding of the ruling, which he conveyed to Superintendent Flynn, was that the crucial issue was not the recording of non-999 lines per se, but rather *"...the whole issue of notices and labelling of phones..."*. His focus on this aspect is understandable, as for many years he had been aware that non-999 calls into Divisional Control Rooms were being recorded without objection or concern. He also knew from experience that calls of an emergency nature could come in on the main station lines and considered the recording of those lines to be justified on that basis.
- 7.10.17 On receipt of this information, Superintendent Flynn sent an email to two Inspectors and a Sergeant in the Project Management section of Telecommunications as follows:
- "The NICE recording presented in evidence in a trial in Waterford has been ruled as inadmissible as the members were not clearly informed that the calls other than to the 999 phones were being recorded.*
- Where do we stand on policy and legislation regarding the recordings on NICE and TETRA and our right to record and retain such recordings."*
- 7.10.18 A response was received from one of the Inspectors, quoting a section of the operating manual for the National Digital Radio Service (NDRS) that referred to voice recording. The substance and effect of this section is dealt with in Chapter 6 of this Report. Following further discussion with the Inspectors from Project Management, Superintendent Flynn formed the view that appropriate labelling and signage would deal with the key issue arising from the Holness ruling. With this in mind, he sent an email at 2.25 p.m. on the same day to all Regional Telecommunications Sergeants stating:

“Please ensure that all telephone instruments in your Region that are connected to the NICE recorders are clearly labelled that they are being recorded.

Also in conjunction with local management discussions should be held regarding the addition of a poster, placed on the walls of control rooms or other offices where the extension is being recorded to inform members that the telephone is being recorded.”

The email was copied to the Chief Superintendent, IT & Telecommunications. Beyond that, it appears that senior Garda management were not informed of the steps being taken by Telecommunication Section. Nor did any communication take place with the sections of An Garda Síochána responsible for advising the organisation on legal issues – Crime Policy & Administration and Legal Affairs.

- 7.10.19 Superintendent Flynn told the Commission that, in receiving the information about the Holness ruling from Superintendent Delaney, he remained unaware that lines in the Public Office and Sergeant’s Office in Waterford were being recorded. He was told that the non-999 lines at issue in the case were in the Control Room, and assumed (correctly) that they related to the main station number.

#### **Informing of Garda Commissioner**

- 7.10.20 Immediately following the ruling on the morning of 22 July 2011, an Inspector who was attending the trial as an observer on behalf of An Garda Síochána wrote a report on the ruling for the Chief Superintendent at Waterford, Mr P.V. Murphy. Later that same day Chief Superintendent Murphy made contact with the Internal Affairs section at Garda Headquarters to inform them of the issue. Internal Affairs was the section within An Garda Síochána responsible for dealing with the Garda Síochána Ombudsman Commission. It held oversight of the Holness trial on behalf of the organisation, with a duty to report on any issues arising.
- 7.10.21 At 5.33 p.m. on 22 July an email was sent from Internal Affairs to various persons including the Private Secretary to the Commissioner and the Deputy Commissioner, Strategy and Change Management, Walter Rice. The email referred to the decisions made by Judge Reynolds on the CCTV and telephone-recording issues. In relation to the latter the email stated:

*“Ms Justice Reynolds determined that the audio evidence was obtained illegally and contrary to section 98 of the Postal and Telecommunications*

*Act 1983 as amended. The audio evidence has been excluded due to an illegal interception contrary to section 98.”*

No mention was made of the fact that the audio evidence had come from the recording of non-999 lines.

- 7.10.22 The above email was sent on a Friday evening. On the following Monday morning (25 July) Deputy Commissioner Rice responded by having a copy of the email sent once more to the Commissioner’s Private Secretary, adding:

*“Developments will be reported.”*

Notwithstanding this assurance, there is no evidence that Deputy Commissioner Rice played any further part in the response of An Garda Síochána to this issue.

- 7.10.23 The email from Internal Affairs was duly brought to the attention of the Garda Commissioner, Mr Martin Callinan, on Monday 25 July 2011. On a printout of the email, Commissioner Callinan wrote a note to the Deputy Commissioner Operations, Ms Nóirín O’Sullivan, asking:

*“What are the legal implications of this ruling?  
Do we need to regularise the Camera issue by way of written permissions?”*

The note was faxed to Deputy Commissioner O’Sullivan’s office on 26 July 2011.

- 7.10.24 In evidence to the Commission, Mr Callinan confirmed that his note to Deputy Commissioner O’Sullivan was intended to cover both the issues of CCTV and telephone recording. He also confirmed that he received no reports other than the email from Internal Affairs and remained unaware that the telephone recordings in question were of non-999 calls. He told the Commission:

*“Now my state of knowledge at that time was: this is the control room, it's 999 calls that are being recorded and it has come in on the 999 system and the guards... in the court case put forward this scenario that they weren't aware that their calls were being recorded and that was my understanding in total of what was going on. Now looking at all of this documentation - if that had come up to me, well, of course I'd have had a different view.”*

- 7.10.25 The documentation referred to by Mr Callinan consists of a number of reports sent to the Deputy Commissioner Operations from the Assistant Commissioner for the South Eastern Region, Mr K.G. Ludlow. These are discussed below.
- 7.10.26 The Commission asked Mr Callinan whether, if in his own mind he believed that Judge Reynolds' judgment was in relation to 999 calls, he was surprised to have such calls ruled as inadmissible on the grounds of illegality. He said that that was precisely why he had asked for a report on the legal implications of the ruling.
- 7.10.27 Although Commissioner Callinan's note clearly required a response, the evidence before the Commission suggests that no written response was provided to the Commissioner at any point. The present Commissioner, Ms O'Sullivan told the Commission in evidence that the normal practice for an issue such as this would be to wait until responses had come back from the various sections of the organisation dealing with the problem. At that point, any outstanding issues would be raised with the Garda Commissioner.

**Informing of Deputy Commissioner, Operations**

- 7.10.28 As stated earlier, the Chief Superintendent in Waterford received a report from an Inspector observing the Holness trial shortly after Judge Reynolds had given her ruling on the CCTV and telephone-recording issues. The Inspector summarised the ruling on the latter issue as follows:

*“She outlined in her judgment that the practice to record calls other than those on the 999 system and marked with ‘these calls are recorded’ was contrary to Section 98 of the Act. She found that other phones which recorded calls from members of the public to the Gardaí or between members without the knowledge that they were being recorded were contrary to the Act. She also found that the protocols in place did not indicate that the calls were being recorded.”*

- 7.10.29 The Inspector concluded by saying that in his opinion, Judge Reynolds' ruling had implications for An Garda Síochána as an organisation. In relation to the telephone-recording issue he suggested:

*“...each control room should contain a notice that the phones are subject to monitoring and that they are being recorded, there also may be a necessity to inform members of the public other than 999 callers that [their] conversation is being recorded.”*

- 7.10.30 In addition to informing Internal Affairs at Garda Headquarters about the issue, Chief Superintendent Murphy also forwarded the Inspector's report to Assistant Commissioner Ludlow of the South Eastern Region. At 10.36 p.m. on Friday 22 July 2011 a letter from Assistant Commissioner Ludlow was faxed to the office of the Deputy Commissioner Operations, Nóirín O'Sullivan, together with a copy of the Inspector's report. The letter repeated the Inspector's summary of the ruling as quoted above, thus making it clear that recordings in issue were of non-999 calls.
- 7.10.31 In giving evidence to the Commission, Commissioner O'Sullivan could not recall whether she read through Assistant Commissioner Ludlow's letter and the attached report when she returned to the office on Monday 25 July. At the very least, the existence of the letter was certainly brought to her attention, as a response bearing her signature was issued to the Assistant Commissioner, Crime & Security, Mr John O'Mahoney on that day.
- 7.10.32 Deputy Commissioner O'Sullivan's letter referred to the correspondence from Assistant Commissioner Ludlow and to the handwritten note of Commissioner Callinan and asked for

*“...your attention and urgent report by Superintendent, Crime Policy and Administration, who should, as a matter of URGENCY, address the issues now raised by the Commissioner – what are the legal implications of Judge Reynolds' ruling; and do we need to regularise the camera issue raised, by way of written authorisations / permissions?”*

The letter concluded:

*“Treat as URGENT please and report in early course to allow me revert to the Commissioner.”*

- 7.10.33 Copies of the letter were sent also to Deputy Commissioner Rice (Strategy and Change Management) and to Assistant Commissioner Ludlow.
- 7.10.34 On receipt of the letter, Assistant Commissioner O'Mahoney forwarded it to the acting Superintendent, Crime Policy & Administration, Mr Fergus Healy for action and response.
- 7.10.35 Whether because they did not read through the correspondence from Assistant Commissioner Ludlow or because their attention was focused on other aspects of the information provided in it, the fact that the telephone recordings in the Holness case



were of non-999 calls made no impact on either Deputy Commissioner O’Sullivan or Assistant Commissioner O’Mahoney. They remained of the belief that only 999 calls were being recorded in Garda stations.

7.10.36 Notwithstanding the urgency expressed by both Deputy Commissioner O’Sullivan and Assistant Commissioner O’Mahoney, the matter appears to have stalled at that point until a further report of Assistant Commissioner Ludlow, dated 23 August 2011, was forwarded to Deputy Commissioner O’Sullivan.

7.10.37 In this report, Assistant Commissioner Ludlow again outlined the two issues dealt with by Judge Reynolds’ ruling. In doing so he referred specifically to *“the operation of the 24 hour recording facility on incoming telephone lines at the communications room and public office at Waterford Garda Station...”* Superintendent Frank Walsh responded on behalf of the Deputy Commissioner by letter dated 30 August 2011 addressed to Assistant Commissioner O’Mahoney in which he requested that the Assistant Commissioner should:

*“Liaise, as necessary with Chief Superintendent, Community Relations on the first issue and submit a comprehensive report on both issues together with your views and firm recommendations”.*

7.10.38 Although there is no doubt that this second report from Assistant Commissioner Ludlow came through the office of the Deputy Commissioner Operations, Commissioner O’Sullivan has no personal recollection of seeing it, or of being informed of the fact that recording was taking place in the Public Office at Waterford as well as the Control Room. In evidence to the Commission she explained that if someone else from her office was sending a response on her behalf, it was usually an indication that she herself was not present at the time.

7.10.39 Commissioner O’Sullivan expressed the view that the references to recording non-999 lines including the Public Office would have raised alarm bells had they come to her attention, but also said they would not have caused the same level of alarm as the information that emerged two years later in relation to Bandon Garda Station. When asked why this was so, she explained that the difference in Bandon was that telephones in rooms other than the Communications Room and the Public Office were set to record. She said that this made the issue in Bandon a much broader one.

7.10.40 Commissioner O’Sullivan said she was aware that in some circumstances, unanswered 999 calls could “hunt” onto other lines in order that someone might answer them. She said that, even if she had been aware that non-999 lines in the Control Room and Public

Office at Waterford were being recorded, she might have assumed that only the 999 calls hunting onto those lines were being recorded.

7.10.41 Similarly, Assistant Commissioner O'Mahoney did not pick up on the fact that non-999 recording was taking place, although the reports from Assistant Commissioner Ludlow passed through his office. He said that, had he been aware of what was actually being recorded in Waterford and in other Divisional Stations, he "*would have stopped it immediately first and foremost... and then had a look [to] see what were the issues.*"

7.10.42 Ultimately, responsibility for assessing the legal implications of Judge Reynolds' ruling was delegated to Superintendent Healy, Crime Policy & Administration. Mr Healy, (now Chief Superintendent) told the Commission in evidence that he did not recall receiving the letter from the Deputy Commissioner addressed to Assistant Commissioner O'Mahoney and forwarded to him, although he presumed that he had. There was evidence that it had come to him by August 2011.

7.10.43 Chief Superintendent Healy said that, notwithstanding the "urgent" nature of the request in the letter from the Deputy Commissioner Operations, he would have considered this to have been an issue for "*the other side of the house*":

*"It is a Telecommunications issue... they've put in these systems, right, they should have authorised the legal basis on which they were entitled to do so."*

7.10.44 He could not recall whether he had contacted the Telecommunications Section about the matter at that time, but said that if, he had known that Telecommunications were trying to address the issue via the placing of labels and signs to indicate recording, he would not have prioritised the issue within his own unit, which was seriously understaffed and overburdened with work at that time.

7.10.45 Superintendent Healy did write to the Executive Director ICT<sup>87</sup> on 20 February 2012, citing the ruling of Judge Reynolds in the Holness case and stating:

*"I am to seek your advice with regard to the operation of recording of incoming telephone calls at the communications room and public offices in Garda Síochána Stations and in particular the arrangement in respect of the recording of Garda calls by ECAS.*

*Is any practice of notifying members of the recording of calls in place?"*

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<sup>87</sup> Information and Communications Technology.

7.10.46 It is apparent from this that Superintendent Healy was aware of the fact that recording was taking place in the Public Offices of some Garda Stations. However, he does not seem to have inferred from this that the recording of non-999 calls was taking place. As with Assistant Commissioner O'Mahoney and Deputy Commissioner O'Sullivan, he remained of the belief that only 999 calls were being recorded by An Garda Síochána.

**Further action: ICT and Legal Affairs**

7.10.47 On 12 October 2011, the Chief Superintendent Telecommunications, Mr Eamonn Murray, wrote to the Head of Legal Affairs concerning the ruling in the Holness case on the use of CCTV footage and "voice recordings of Control Room telephone conversations" as evidence. The letter asked for advice as to what actions, if any, required to be undertaken by Telecommunications Section in order to ensure the admissibility of such evidence in future.

7.10.48 It is not clear what prompted Chief Superintendent Murray to contact the Legal Affairs section at this time, or indeed, why such advice had not been sought earlier in July 2011, when the issues first arose.

7.10.49 On 18 November 2011, the acting Head of Legal Affairs<sup>88</sup> sent a letter to the Chief Superintendent Telecommunications which responded to this request for advice. In a paragraph entitled "Audio Recordings", it stated:

"With regard to audio recordings both the general public and employees are entitled to be made aware that telephone conversations are being recorded. However, section 2(a)(1)(c) [of the Data Protection Acts 1988 and 2003] states:-

*'Personal data shall not be processed by a data controller unless section 2 of this Act (as amended by the Act of 2003) is complied with by the data controller and at least one of the following conditions is met: ...the processing is necessary – (i) for the administration of justice ... (iv) for the performance of any other function of a public nature performed in the public interest by a person.'*

*Therefore, as all calls to the control room are considered the administration of justice An Garda Síochána do not need to inform members of the public that the calls are being recorded. It would be impractical for an individual making an emergency call to have to be informed that the call is being recorded."*

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<sup>88</sup> The position of Head of Legal affairs was not filled at this time. Mr Ken Ruane Solicitor was not appointed to that position until December 2011.

7.10.50 The basis for this advice is somewhat unclear. Firstly, the statement that “all calls to the control room are considered the administration of justice” should presumably have read: “the *recording* of all calls to the control room is considered *necessary* for the administration of justice” [emphasis added]. Secondly, and more substantively, it is not at all clear how that conclusion was or could have been reached. It is most likely based on an assumption that only emergency calls were recorded in Control Rooms, but that is not spelled out or explained in any way. Moreover, even that assumption is at variance with the original request of 12 October 2011 which was headed, “Recording of *all Telephone Lines* within An Garda Síochána” and asked for advice “...to ensure that *all available recordings* are admissible as evidence” [emphasis added]. Whether only 999 calls or all calls were under consideration, some reasons should have been provided for the conclusion that recording such calls was necessary for the administration of justice.

7.10.51 Having advised on the issue as regards the general public, the letter went on to provide the following advice and recommendations regarding employees of An Garda Síochána:

*“In a Garda station or an office under the control of the Commissioner, if telephone calls are being monitored or there is CCTV in place, employees of An Garda Síochána must be made aware of this fact, unless it is for the purposes of a covert criminal investigation. Notification of the monitoring is provided via strategically place[d] signs throughout the area that is being audio or visually monitored.*

*It may be prudent for An Garda Síochána to issue a HQ Directive with regard to audio recording and monitoring within premises under the control of the Commissioner of An Garda Síochána. This would ensure that all staff are fully aware of the reasons and legality of the recording and monitoring. Although it must be borne in mind the HQ Directive is not a substitute for notification signs within a station, these are essential.”*

7.10.52 Chapter 9 of this Report explores the issue of whether recording calls in the manner in which it was done in Divisional Stations could be justified on the grounds that it was necessary for the administration of justice. Whilst there may be some grounds for taking this view in respect of 999 calls, there do not appear to be any such grounds in relation to the indiscriminate recording of non-999 calls.

7.10.53 Chief Superintendent Murray, who had requested the advice from Legal Affairs, appears to have been unaware that the recordings at issue in the Holness case were calls to the main station number. In a statement to the Commission he indicated that he was aware

of 999 calls, radio traffic, calls from alarm companies and other emergency services being recorded in Control Rooms. Though aware of the Holness ruling, he appears to have assumed (as did almost every member of An Garda Síochána who dealt with the matter) that the only issue was whether Garda members answering calls in the Control Room were aware that they were being recorded.

- 7.10.54 Sometime after this letter of advice, a policy Directive (019/2012) was issued from Garda Headquarters on 28 February 2012. It was signed by the Executive Director ICT, Mr Liam Kidd and commenced as follows:

*“This Directive sets out the policy governing the recording of CCTV systems and the recording of emergency Telephone lines within Garda Control Rooms” [emphasis added].*

- 7.10.55 Under the headline “Audio Recordings”, the Directive stated:

*“With regard to audio recordings, both the general public and employees are entitled to be made aware that telephone conversations are being recorded.*

*Therefore, as emergency calls to Garda control rooms are considered the administration of justice An Garda Síochána does not need to inform members of the public that the calls are being recorded. It would be impractical for an individual making an emergency call to have to be informed that the call is being recorded. All members of staff must be informed that calls within control rooms are recorded.*

*Each District Officer will ensure that signage is in place in control rooms indicating what lines are being recorded and that staff members are made aware of this fact.”*

- 7.10.56 This Directive is confusing and inconsistent for the same reasons as the letter of advice on which it is clearly based. On the one hand it states that members of the public and Garda employees are entitled to be made aware of telephone recordings but then goes on to say that because emergency calls are considered an “administration of justice,” the public does not need to be informed of the recording. However, the Directive goes on to direct that staff working in control rooms should be informed that “calls within control rooms are recorded”. Given that the main station number was recorded in Divisional Control Rooms outside the DMA, this would appear to encompass calls other than 999 calls from the public. It is difficult to see how the indiscriminate recording of all calls to

the main station number could be regarded as necessary for the administration of justice. However, the evidence given by Mr Kidd to the Commission suggests that at the time this Directive was issued, he was not conscious of the fact that non-999 calls were being recorded as a matter of course on the system.

7.10.57 Mr Kidd's state of knowledge concerning the recording of telephone calls in Garda stations is a further example of the confusion that seems to have pervaded the senior ranks of An Garda Síochána on this subject. Mr Kidd took up his position as Executive Director ICT in July 2008, around the time when the NICE system was being installed throughout the country. He told the Commission that he was aware of the system coming in, but as all the decisions regarding purchase and installation had been made before he arrived, there was nothing that required his management or intervention.

7.10.58 As far as the operation of the system was concerned, Mr Kidd said that he knew from discussions with Chief Superintendent Murray that emergency numbers were recorded, but had not gone into the detail of how this was done, technically.

7.10.59 At some point, it was brought to his attention that recording was taking place in some Public Offices. In a letter of 23 April 2012 to the Head of Legal Affairs he stated:

*“Generally it is only in control rooms and some public offices that lines are recorded currently.”*

This knowledge, however, does not seem to have affected his belief that only emergency calls were recorded.

7.10.60 As indicated previously, on 20 February 2012, Superintendent Healy, Crime Policy & Administration had written to Mr Kidd seeking information as to what practices were in place to notify members of the telephone lines being recorded. On 29 February – the day after signing the HQ Directive on CCTV and telephone recording – Mr Kidd forwarded Superintendent Healy's request to the Telecommunications Section for consideration and response. The request was passed ultimately to Inspector O'Dea, who responded in April 2012 with a letter to the Chief Superintendent Telecommunications as follows:

*“I recommend that the staff be informed that all telephone calls in and out of the control room are recorded.*

*The emergency lines are normally classified as incoming calls only outgoing barred. If a Garda needs to call a person back a different line is selected by the PABX.*

*Therefore the telephone devices used in the control room are recorded as well as the radio traffic.”*

- 7.10.61 This is a clear statement that lines other than emergency lines in the Control Room were being recorded. Nonetheless, it does not seem to have given rise to any concern on the part of Chief Superintendent Murray – perhaps because the stated purpose of the recording was to preserve emergency-related communications.
- 7.10.62 Inspector O’Dea prepared a draft notice to be posted in Garda stations concerning CCTV and audio recording. On 23 April 2012 Mr Kidd forwarded a copy of the notice to the Legal Affairs Section, seeking advice on the wording of the proposed sign. As noted earlier, Mr Kidd included in his letter a reference to the fact that recording took place in some Public Offices as well as Control Rooms. The significance of this appears to have been missed by the Legal Affairs section, the response from which focused on the fact that HQ Directive 19/2012 made reference only to the recording of Control Room calls.
- 7.10.63 Following further correspondence between ICT and Legal Affairs a wording was eventually agreed for a sign to be put up in areas where CCTV / audio recording was taking place. This sign was regarded as a complete answer to the points raised by Judge Reynolds. No further action was deemed necessary and no further advice was sought by either Telecommunications Section or the Senior Management of An Garda Síochána.

**Report by Garda Síochána Ombudsman Commission (GSOC)**

- 7.10.64 In June 2013, GSOC published a report on the Holness case in compliance with its obligations under section 103 of the Garda Síochána Act, 2005. A copy of the report was also sent to An Garda Síochána.
- 7.10.65 Having dealt with the charges that were brought against the accused Garda members, the verdicts and the sentences that were imposed, the report went on to state:

*“During the course of the investigation and the trial, issues emerged that the Ombudsman Commission believes to be worthy of consideration by interested parties.”*

- 7.10.66 Amongst the issues mentioned was *“the lawfulness or otherwise of the Garda Síochána at Waterford Garda Station recording incoming and outgoing calls on their public lines, and the admission of the evidence obtained during the use of such practices...”* The

report went on to summarise the ruling of Judge Reynolds in relation to the admissibility of telephone-recording evidence and then concluded with the following observation:

*“On consideration of the ruling of the court the Garda Commissioner may wish to re-evaluate his practice regarding the recording of such calls and the consents required if it is to be permissible to use such recordings in evidence.”*

- 7.10.67 Here again there were inferences that could have been drawn by the Senior Management of An Garda Síochána regarding the kinds of calls that were being recorded in Waterford Station – specifically the reference to the recording of incoming and outgoing calls on their public lines. A moment’s thought would have led to the realisation that outgoing calls, by definition, could not have been 999 calls from members of the public.
- 7.10.68 Unfortunately, the response of Garda Management to this part of the GSOC report focused entirely on the issue of whether Gardaí in stations were aware that calls were being recorded. As it was considered that the 2012 policy Directive had addressed that matter, no further action was undertaken. The question of what lines were being recorded and why remained unexplored until the emergence of non-999 recordings from Bandon Garda Station a few months later.



## **Conclusions**

- 7.1** For all practical purposes, knowledge that certain non-999 lines were being recorded at Harcourt Square and, more significantly, at Divisional Stations outside the DMA, remained confined to members of the Telecommunications Section and an unknown proportion of local Garda officers who learned of the practice either directly from the technicians or through requesting recordings of emergency calls.
- 7.2** As set out in Chapters 5 and 6, the question as to what lines to record was decided essentially at Divisional level. From there, the recording of certain non-999 lines took place, unnoticed and without review, for decades. It appears that most, if not all, of those members who were aware of this fact, either did not consider it a significant change in policy, or believed that it was a policy approved by the Senior Management of the force.
- 7.3** The fact that, in 1996, the Chief Superintendent, IT & Telecommunications approved the recording of the main station number at Divisional Stations, without understanding that this is what he was doing, crucially inhibited the transmission of knowledge of non-999 recording to the upper ranks of An Garda Síochána.
- 7.4** The Commission has found almost total ignorance at the highest levels of the force of the fact that the main station number at Divisional Stations outside the DMA was being recorded since 1995 / 96. The Commission regards this as one of the most surprising findings made in this Report.
- 7.5** One contributing factor to this situation was the lack of any clear policy statement, sanctioned by the Garda Commissioner, regarding telephone recording at Garda stations. At no stage in the entire period covered by the Commission's investigation, since the first recording system was installed at Dublin Castle in the 1970s, did An Garda Síochána as an organisation or any Garda Commissioner adopt or circulate any formal statement setting out the policy of the organisation on the operation of telephone recording systems. An important incidental consequence is that the organisation never, at any time, gave any consideration to the lawfulness of recording telephone calls either from the general public or between members of the force.
- 7.6** A second contributing factor was the lack of effective oversight, particularly between 1995 and 2008, when the DAT system was in place. It is striking that when the time came to replace that system, an Inspector from the Telecommunications Section at Garda HQ had to ask individual technicians what was being recorded in their stations. The local variation in recording practices that emerged came as a complete surprise to him.

**7.7** The same lack of oversight was apparent in November 2013, when the then Deputy Commissioner, Nóirín O’Sullivan, sought information on what was being recorded at Garda stations nationwide. Once more, some of the information uncovered came as a surprise to those who should have known about it – from officers in the Telecommunications Section, Garda HQ, all the way up to the Executive Director, ICT and the Chief Administrative Officer.

**7.8** A third contributing cause of the continuing lack of knowledge of the senior ranks was that most senior officers served the majority of their careers in the DMA so that their understanding of how 999 calls were handled was shaped by Command and Control, Harcourt Square – that is, a Control Room dedicated specifically to emergency call response, while ordinary calls to the building were handled elsewhere. On the evidence before the Commission, even those Dublin-based officers who spent much of their careers carrying out investigations in other parts of the country seemed to have no clear knowledge of how calls were handled in Divisional Stations outside the DMA. They were not familiar with the geography or configuration of Control Rooms in those stations and did not appreciate that ordinary calls to the main station number were answered in the Control Room alongside 999 calls.

**7.9** However, the lack of understanding at higher levels concerning the operation and use of non-999 recording systems does not excuse the fact that no formal policy or Directive was issued from Garda HQ covering such essential matters as:

- What lines should and should not be recorded;
- Who had authority to approve recording of additional lines;
- The time for which recordings should be retained;
- Where they were to be stored;
- Whether and when they should be destroyed; and
- By whom access to or downloading of recordings should be authorised and in what circumstances.

**7.10** Within the hierarchical structure and culture of An Garda Síochána, rank and file Gardaí would not generally have considered it their responsibility to question actions taken by senior officers in terms of the provision of equipment and the use of that equipment. Many ordinary members of the force spoke, either in evidence before the Commission or in writing, of their expectation that Senior Management would ensure that they were acting legally in the way in which they conducted policing operations. Nonetheless, as Chapters 5 and 6 make clear, some technicians and other officers did raise questions and concerns from time to time over the operation of the telephone recording systems, in the

expectation that those concerns would be put to senior management; but it seems that these concerns were either not understood, not put before Senior Management or simply not responded to.

**7.11** The imperviousness of even the most senior ranks to clear information is also demonstrated by the reaction to reports concerning the Holness case in July 2011. The evidence given in Waterford Circuit Court during the trial of 4 members of the force ought to have alerted the senior ranks of the force to the fact of non-999 telephone recording at Waterford Garda Station. Although a number of senior Garda officers up to and including the Deputy Commissioner, Operations, received reports conveying this fact, the senior levels of the force did not properly or adequately consider the information. In the result, it was a further two years before the matter came to light generally, in October 2013.

## **8. THE LEVEL OF KNOWLEDGE OF THE EXISTENCE, USE AND OPERATION OF THE GARDA TELEPHONE RECORDING SYSTEMS WITHIN VARIOUS GOVERNMENT DEPARTMENTS AND NON-GOVERNMENT AGENCIES**

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### **8.1. Introduction**

8.1.1. This chapter reports on the level of knowledge of the existence, operation and use of the Garda telephone recording systems, detailed in Chapters 3 to 6 of this Report, in the State bodies listed in paragraph 1(f) of the Terms of Reference. This includes knowledge within:

- The Department of Justice
- The Office of the Minister for Justice
- The Office of the Attorney General
- The Office of the Chief State Solicitor
- The Office of the Data Protection Commissioner
- The Garda Síochána Ombudsman Commission
- The Office of the Director of Public Prosecutions

The Commission is also required to report on any instances where the Office of the Director of Public Prosecutions (DPP) used any of the information produced by these recording systems, for any purpose.

8.1.2. Chapters 3 to 6 of this Report contain a detailed account of the Commission’s findings in respect of the existence, operation and use of Garda telephone recording systems between 1 January 1980 and 27 November 2013. The task assigned to the Commission by paragraph 1(f) of its Terms of Reference is confined to reporting on the “level of knowledge” of these matters in the various State bodies listed. Axiomatically, such knowledge concerns recording systems that actually existed. For that reason, this chapter must be read throughout with reference to Chapters 3 to 6, which set out the facts that the Commission has established in respect of these matters.

- 8.1.3. Chapter 7 of the Report, which relates to the level of knowledge of these matters within An Garda Síochána, is also of importance in this context.

## **8.2 THE DEPARTMENT OF JUSTICE**

### **8.2.1. Introduction**

This section of this chapter covers the matters referred to in paragraph 1(f) of the Terms of Reference, insofar as they apply to the Department of Justice for the period 1 January 1980 to 27 November 2013. Thus, it will report on the level of knowledge of the existence, operation and use of the Garda recording systems within that Department.

- 8.2.2. Previous chapters have outlined the planning, procurement, installation, operation, management, alteration and termination of Garda telephone recording systems during this period. Chapter 7 sets out the level of knowledge of these matters within An Garda Síochána.

### **Available information and investigative methodology**

- 8.2.3. Mr Michael Flahive, the Assistant Secretary with responsibility for Criminal Law Reform and for the Garda Division within the Department of Justice from 2002 until 2014, gave evidence to the Commission. Other parts of his testimony featured in the Commission's Second Interim Report. In his evidence to the Commission, he said that he first became aware of telephone recording systems in Garda stations on 10 March 2014, when he read a letter of that date sent by the Garda Commissioner to the Secretary General of the Department. Mr Flahive discussed the telephone recording systems with the Garda Commissioner at the end of a meeting he attended at Garda Headquarters (HQ) later that day.
- 8.2.4. The evidence given by Mr Flahive provides a useful picture. It suggests that the knowledge of telephone recording at Garda stations within the Department was limited. He told the Commission:

*“Now we were aware, from our own departmental records, that we have, over the years, approved the purchase of recording systems and when we went on to check our records, which were extensive but extensive in terms of the kind of contractual documents you get in any procurement exercise. But nothing then or now, nothing that we saw, we think, could have alerted us to the wider use of this recording equipment. As far as we were concerned, it had always been purchased, the various iterations of it had always been purchased for the purposes of 999 calls and Control Room calls. So we made efforts ourselves, in terms of looking at our own documentation, to find out if we could discover what the origin of this was, why the practice had spread, as apparently it had, and we couldn’t.”*

8.2.5. He further went on to say that:

*“...we in the Department have gathered all of that documentation for this Commission about our authorisation of the purchase of the various equipment over the years...nothing in it would have indicated its intended use for these wider purposes.”*

8.2.6. Mr Flahive expressed concern at the absence in the Department of any full understanding of the origin and rationale of the telephone recording that had come to light. He said:

*“We were very unhappy that there wasn't a clear picture of why this had started, as I say, who authorised it? Why did it - why did it go beyond recording 999 calls? You know, how long it was going on for?”*

8.2.7. The Commission was greatly assisted by the provision of documents from the Department of Justice. Some 351 separate documents, in excess of 3,700 pages in total, were received and examined, in detail, by the Commission. These documents covered the period from 1973 until 2014.

8.2.8. As well as reviewing the documentary evidence provided, the Commission took statements and heard sworn oral evidence from various witnesses, in order to assess the level of knowledge of the existence, operation and use of Garda telephone recording systems over the relevant years within the Department of Justice.

8.2.9. Due to the complexity of the structure and workings of the Department of Justice, the passage of time and the absence of any definite date when the Department became aware

of the telephone recording, these information sources were examined with specific emphasis on:

- sanction given by the Department of Justice for the purchase and maintenance of telephone-recording equipment; and
- the presence of representatives from the Department on various Communications and Information Technology Committees and Boards where the legality or propriety of recording telephone calls at Garda stations was, or might have been, discussed.

8.2.10. This approach was taken in relation to the following time periods as they relate to Chapters 4 to 6:

- (iv) 1980 - 1995 (Chapter 4)
- (v) 1995 - 2008 (Chapter 5)
- (vi) 2008 - 2013 (Chapter 6)

### **1980 to 1995**

#### Radio Control Room, Dublin Castle

8.2.11. The temporal scope of the Commission’s investigation is delimited principally by paragraph 1(a) of the Terms of Reference. The principal relevant period is from 1 January 1980 to 27 November 2013. However, paragraph 1(a) also requires the Commission to “report whether any such installations were already in existence on 1<sup>st</sup> January 1980” [emphasis added]. Equally importantly, the Commission’s task, from the substantive point of view, is to investigate and report on “telephone recording systems, to record calls other than 999 calls to the Emergency Call Answering Service...”

8.2.12. As set out in Chapter 4 of this Report, the Commission has established that the first telephone recording system installed by An Garda Síochána anywhere in the country consisted of two, 24-track, reel-to-reel tape recorders installed in a new, purpose-built Radio Control Room, which was constructed at Dublin Castle in about 1973. Its purpose was the recording of 999 calls and other emergency-related communications to and from the Control Room. No facility for the recording of telephone calls was installed anywhere, other than in the Dublin Metropolitan Area (DMA), prior to 1980.

8.2.13. There is a level of uncertainty as to what extent the system recorded lines on which non-999 calls involving members of the public could be made or received. While it is likely that some non-999 telephone calls were recorded on the system, the Commission is satisfied that this was incidental to the primary object, which was to have an audio record of emergency calls and of the Garda response to those calls.

- 8.2.14. Although no documentation has been found in relation to the purchase of the recording equipment used in Dublin Castle, it can be safely assumed that the Department of Justice would have known of it, as the purchase could not have been completed without its approval or sanction.
- 8.2.15. The question remains as to what extent officials from the Department were aware of what the recorder was being used for. The Dublin Castle Control Room recorder was in use from 1973 until 1989, when the Command and Control function was transferred to Harcourt Square.
- 8.2.16. Between 1980 and 1989, the primary source of information to the Department regarding Garda communications equipment was the Radio Advisory Committee – an interdepartmental group with Garda representation and independent technical expertise, chaired by Professor Sean Scanlan, University College Dublin (UCD). Although the Dublin Castle system was purchased and installed some years before the Committee came into being, the Committee was aware of the existence of the system from as early as 1982, when proposals were first considered to move the Command and Control Centre for the DMA from Dublin Castle to Harcourt Square.
- 8.2.17. On the evidence before it, the Commission finds that the intended purpose of the Garda telephone recording system at Dublin Castle, as understood by the Radio Advisory Committee and by An Garda Síochána, was to record emergency-related communications traffic to and from the Radio Control Room.
- 8.2.18. In fulfilment of this purpose, the system appears to have recorded certain non-999 telephone lines into and out of the Control Room, as well as the 999 lines and radio traffic. These non-999 lines were intended mostly for internal Garda communication, but also allowed calls of an emergency nature to be transferred from the main telephone exchange in the building. They were recorded in pursuance of the overall goal of capturing all emergency-related communications but, as a necessary consequence, other non-emergency related calls on those lines were also recorded. On the evidence before it, the Commission could not establish whether the Department of Justice was aware of this fact.

#### Command and Control, Harcourt Square

- 8.2.19. From as early as July 1982, proposals were being considered by An Garda Síochána and the Radio Advisory Committee to move the Command and Control Centre for the DMA out of Dublin Castle. It was agreed that a new Control Centre for the DMA would be developed at Garda offices in Harcourt Square.



8.2.20. Multi-track recording equipment, similar to that installed in Dublin Castle, was purchased and installed in the new Command and Control Centre at Harcourt Square in or around 1988. The technical specification for the new equipment, which was approved by the Radio Advisory Committee, clearly indicated that:

- (i) The operators' consoles in the new Command and Control Centre included non-999 lines connected to the general telephone exchange for the building; and
- (ii) All communications to and from those consoles was to be recorded – including those on non-999 lines.

This is confirmed in a report from January 1989, provided to the Commission by the Department of Justice, entitled "*The New System*", which gives an overview of the new Garda radio and telecommunications facilities in the DMA and elsewhere around the country. The author of the report is unknown.

8.2.21. From this, the Commission concludes that officials within the Department of Justice were aware that the new Harcourt Square recording system would record certain non-999 lines, in addition to 999 calls and radio traffic. However, as Chapter 4 of this Report makes clear, it would also have been understood that:

- (i) Only calls to and from Command and Control were to be recorded; and
- (ii) The purpose of recording the console traffic at Command and Control was to preserve a record of all communications relating to emergency calls. The recording of any calls that were not emergency-related was a by-product of this overriding aim.

8.2.22. The legal implications of recording telephone calls, whether 999 or otherwise, do not appear to have been considered by the Radio Advisory Committee or by those within the Department of Justice with responsibility for approving the purchase of this system.

#### Divisional Stations (outside the DMA)

8.2.23. Chapter 4 contains a detailed report on the installation and use of consoles supplied by Standard Elektrik Lorenz (S.E.L.) in Divisional Stations in the 1980s. The sole aspect which related to recording was the use of a single cassette recorder inserted into the main console. Its purpose was the recording of 999 calls.

8.2.24. As stated in Chapter 4, the primary purpose of the cassette-tape recorder on the console was for 999 and radio recording. Only one channel at a time could be recorded. There is some evidence to suggest that the consoles at Divisional Stations were purchased with the intention that the recorder could be switched between 999 lines, radio channels and other, non-999, telephone extensions connected to the console. However, there is no evidence that this was done in practice.

8.2.25. Mr Des Matthews was the principal representative of the Department of Justice on the Radio Advisory Committee. In a statement to the Commission, he recalled that, in addition to the recording of 999 calls, there was an understanding that calls containing information of value to An Garda Síochána, in relation to issues of security or serious crime, could come in on non-999 lines and that there was a value to recording such calls if possible. With regard to the S.E.L. consoles, he stated:

*“The idea was that if and when such a call came in, the console operator could press a button on his control desk and record it...  
In essence there was no distinction to be made between such phone calls and 999 calls and they appeared to be equally appropriate for recording.”*

He added:

*“For direction on this matter the Committee would turn to the Garda Officer on the Committee, at the time a Deputy Commissioner. Did the Gardaí want or need this recording facility or did they not. Obviously the answer was ‘yes’ – otherwise the facility would not have been provided. There was no discussion of the legality of these recordings or of policy relating to them.”*

8.2.26. It appears, from this extract, that Mr Matthews and the Radio Advisory Committee approved the purchase of S.E.L. recorders with the intention that they could be used to record certain kinds of non-999 calls. It is important to note that this did not involve the indiscriminate recording of all calls on a given non-999 line. As Mr Matthews told the Commission, the understanding was that only calls chosen for recording by the operators would be recorded. According to Mr Matthews, this facility was provided solely in order to allow the recording of calls that were considered equivalent to 999 calls in terms of seriousness – such as bomb threats, or calls providing confidential information about serious and subversive crimes.

8.2.27. In the event, the Commission has found no evidence that the S.E.L. recorders at Divisional Stations were in fact used to record calls of this nature, though the possibility cannot be ruled out. As a matter of probability, the Commission has concluded that the S.E.L. recorders were not used for anything except the short-term recording of 999 calls.

### **1995 to 2008**

8.2.28. At some time in 1994, oversight of Garda telecommunications requirements passed from the Radio Advisory Committee to the newly created IT (Information Technology) and Telecommunications Executive Committee. This was a high-level committee chaired by a Deputy Commissioner with representatives from the Department of Justice and Finance. According to its own 1995 terms of reference, the Committee existed to direct, monitor and control IT and IT policy, strategy and implementation for An Garda Síochána, defining the scope of individual projects and setting up Project Boards to oversee these projects, subject to approval of the Commissioner and, in financial terms, the Minister for Justice.

8.2.29. No documentation from 1994 in relation to this Committee has been found. This is a significant gap in the information available to the Commission.

### Command and Control, Harcourt Square and Communications Centre Anglesea Street

8.2.30. As is discussed in detail in Chapter 5 and is also of relevance here, in May of 1994, after the founding of the IT and Telecommunications Executive Committee, the Telecommunications Section of An Garda Síochána began researching telephone-recording equipment, with a view to replacing the system then in place at Command and Control, Harcourt Square, and purchasing a new system for a proposed Communications Centre at Anglesea Street, Cork. On 1 December 1994, a tender specification document was prepared, inviting companies to quote for the supply and installation of Communications Logging Systems at Harcourt Square and Anglesea Street.

8.2.31. There was no express evidence before the Commission that the specification document was presented before the IT and Telecommunications Executive Committee, on which the Department of Justice was represented. It may be that it was discussed, to some extent, at a meeting on 13 March 1995, as the agenda for that meeting included “*purchase of equipment/voice recording equipment*”. However, in the absence of minutes of that meeting, the Commission could not establish whether a representative of the Department of Justice was present at it and, if they were present, what discussion, if any, took place regarding the proposed purchase of any recording equipment and the use to which it was to be put. This matter is discussed, in some detail, in Chapter 5.

- 8.2.32. On 3 May 1995, the Chief Superintendent, Telecommunications, on behalf of Assistant Commissioner O’Leary, “D” Branch, wrote to the Secretary General of the Department of Justice, seeking sanction to purchase recording systems from Dictaphone Ltd for Harcourt Square and Anglesea Street. The letter indicated the cost of the new equipment but gave no technical details as to its function, capacity or other similar aspects. A reply from the Department of Justice Garda Planning Section, dated 24 May 1995, confirmed that sanction for the purchase had been given by the Minister for Justice.
- 8.2.33. It is not possible for the Commission to make a definitive finding as to what extent the Department of Justice was aware of the nature or purpose of the recording equipment, the purchase of which was under consideration at that time. As far as Harcourt Square was concerned, the proposal was framed by An Garda Síochána as an upgrade of existing equipment. The equipment that was being replaced had been approved, in its time, by the Radio Advisory Committee and it would have been reasonable for the Department of Justice to assume that its replacement did not involve any departure from existing policy and practice.
- 8.2.34. In the case of Anglesea Street, the proposed equipment, although new, was intended to replicate the system in place in Harcourt Square, in a manner proportionate to the requirements of a Communications Centre for Cork City. Again, there was no reason, on the face of it, why the Department should have been aware that a change of recording policy was about to take place as a result of this purchase.
- 8.2.35. That change in policy (described in detail in Chapter 5) involved a decision, made at local level in Anglesea Street, to include the main station telephone number as one of the lines to be recorded. That decision was subsequently adopted by the Telecommunications Section, Garda HQ, as a policy for the installation of similar recorders in the other Divisional Stations outside the DMA.

Divisional Stations (outside the DMA)

- 8.2.36. As reported on in Chapters 4 and 5, by the early 1990s, the S.E.L. consoles installed in Divisional Stations were deemed obsolete and, in many cases, had ceased to function. The impetus to replace them with new recording equipment appears to have come from complaints made by Divisional officers and technicians in and around July 1995.
- 8.2.37. For present purposes, it is sufficient to note that, beginning in December 1995, the S.E.L. systems were upgraded. New recording equipment using the Digital Audio Tape (DAT) format was installed at each Divisional Station outside the DMA. The new equipment provided expanded facilities, allowing for the recording of multiple telephone

lines simultaneously. Where the S.E.L recorders could record only one line at a time, the DAT recording system could record 8 lines simultaneously.

- 8.2.38. In 1995, sanction would have been required from the Department of Justice before An Garda Síochána could purchase this DAT recording system. The Commission has received documents sanctioning such purchases for Harcourt Square and Anglesea Street, but there are no documents to confirm that sanction was sought for the purchase of the DAT recording systems for Divisional Stations.
- 8.2.39. The Commission is aware that, on 7 March 1996, Superintendent Geary, Telecommunications Planning, wrote to Chief Superintendent Cussen, IT and Telecommunications, informing him that the voice-logging equipment for Control Rooms in Divisional Stations had been delivered and was going to be installed. His approval was sought for recording on a number of specific lines including the “Telephone Attendant Operators Set” which was, in fact, the main station number. The Chief Superintendent, IT and Telecommunications, approved the list, although he did not know what the “Telephone Attendant Operators Set” was. He assumed that it was in some way associated with the 999-call recording system and remained unaware that he had, in fact, approved recording on the main station number.
- 8.2.40. At that time, Chief Superintendent Cussen represented the Garda IT and Telecommunications Section on the IT and Telecommunications Executive Committee. As he remained unaware that the proposed lines for recording included the main number for each Divisional Station outside the DMA, he could not have brought this to the attention of the Committee. Equally, there is no evidence that this change in policy was brought to the attention of any of the Senior Management in An Garda Síochána at that time.
- 8.2.41. It seems logical to conclude that, if members of the IT and Telecommunications Executive Committee, who were very high-ranking members of An Garda Síochána, did not know that the main station line in Divisional Stations was one of the lines that were to be recorded, the representatives of the Department of Justice on the same committee are most unlikely to have known.
- 8.2.42. In any event, as set out in Chapter 5, the evidence before the Commission suggests that the decision to purchase new DAT recording systems for Divisional Stations outside the DMA was not put before the Committee, at any stage, for discussion or approval.
- 8.2.43. Mr Ken O’Leary, the current Deputy Secretary in the Department of Justice, who has served within that Department since 1977, also gave evidence to the Commission.

- 8.2.44. When asked where responsibility lay between An Garda Síochána and the Department of Justice on issues relating to Garda telephone recording, he gave evidence that any decisions on matters of recording policy would, ultimately, be a matter for An Garda Síochána, albeit subject to departmental sanction, whether that be the Department of Justice, the Department of Finance or, in more recent times, the Department of Public Expenditure and Reform.
- 8.2.45. Mr O’Leary went on to say that the Department of Justice, in giving sanction for the purchase of recording equipment, would presume that the equipment involved would be operated lawfully by An Garda Síochána. It was not part of the Department’s responsibility to inspect or monitor the operation or use of such equipment by An Garda Síochána. Mr O’Leary also pointed out that the Department of Justice has no legal department; like all Government Departments, it relies on the Office of the Attorney General for legal advice. For this reason, he believed that questions about the legality of telephone recording would only have been raised by the Department of Justice if there was “*an obvious issue of concern*” – in other words, an issue that someone without specialist legal knowledge could identify as problematic.

### **2008 to 2013**

- 8.2.46. As outlined in Chapter 6 of this Report, the DAT recording systems installed in Harcourt Square and Divisional Stations outside the DMA were replaced in 2008 by a hard-disk recording system with central archiving, known as the NICE system.
- 8.2.47. The decision to replace the existing DAT recorders was made against the background of a long-running review of the functions and performance of Garda Control Rooms nationwide. The extent to which the Department of Justice was aware of this process is unclear.
- 8.2.48. In August 2004, in the context of complaints from Garda technicians and Divisional Officers about the DAT recorders, it was reported to Chief Superintendent Jeffers, Telecommunications Section (ICT), that the systems in Harcourt Square and the Divisional Stations were approaching obsolescence. It became clear that they would have to be replaced. No immediate action was taken, as the Chief Superintendent thought that the replacement of the recording system was of such magnitude that it should be considered as part of the wider Garda ICT strategy, with particular emphasis on how any new recording systems should interface with the National Radio Network and Control Room Strategy projects then under consideration.

- 8.2.49. The matter of replacing the DAT recording equipment was revived by the Garda Telecommunications Section in 2005 and came before the IT and Telecommunications Executive Committee in April 2005. Inspector O’Dea from the Telecommunications Planning Section was given the task of drafting tender specification documents for the required equipment.
- 8.2.50. Finding little or no documentation on the existing DAT systems, the Inspector sought information from the technicians in Divisional Stations. He became concerned at the apparent variation between stations as to what was being recorded and for how long the recordings were being kept. In a report to Chief Superintendent Jeffers, Telecommunications, in May 2005, Inspector O’Dea expressed the view that it was necessary to have clear policy decisions as to:
- (i) What should be recorded;
  - (ii) How long recordings should be retained for; and
  - (iii) Who is responsible for the recorded information.
- 8.2.51. In his response to the Inspector, Chief Superintendent Jeffers took the view that the replacement of the DAT recording systems should now be considered separately from the broader “*Control Room Strategy*”. He put forward a “*one for one*” replacement strategy, with an option for scaling up, in the event that future policy changes required equipment with greater capacity. In other words, each DAT recorder would be replaced by new equipment, with the same capabilities, plus a facility for future upgrades. The lines recorded would be limited to those already recording on the DAT systems. This limited replacement strategy was due to urgency, in that the existing recording equipment had to be replaced and Chief Superintendent Jeffers felt that it could not await the outcome of the broader policy reviews taking place within the Control Room Strategy and National Digital Radio projects. He believed that no issues regarding policy could arise if the new equipment was used only to record what was already being recorded.
- 8.2.52. The evidence suggests that the policy concerns voiced by Inspector O’Dea at this time were not brought to the attention of the IT and Telecommunications Executive Committee. From this, it is reasonable to conclude that the Department of Justice was not made aware of the apparent lack of recording policy and variations in recording practice that Inspector O’Dea had identified.
- 8.2.53. In September 2005, a draft tender specification document for new recording equipment was approved by the Assistant Commissioner, Strategy and Services. Despite this, the

process of tendering for new recording equipment did not progress further in 2005 or 2006.

- 8.2.54. In April 2007, another draft tender specification document, almost identical to the 2006 document, apart from increased cost figures, was prepared and subsequently approved by the Assistant Commissioner, Strategy and Services, and this was then sent to the Director of Finance for An Garda Síochána.
- 8.2.55. Almost contemporaneous with this tender document, in February 2007, it was proposed that the IT and Telecommunications Executive Committee should be disbanded and an ICT Advisory Committee (ICTAC) be established. The intention was that the new Committee would take a less ‘hands-on’ approach, focusing instead on strategic issues. ICTAC was chaired initially by a Deputy Commissioner and later by the Chief Administrative Officer (CAO) for An Garda Síochána. The Assistant Commissioner, Strategy and Services, was a member of the Committee, as were representatives from the Garda IT and Telecommunications Section, the Department of Justice and a number of lay people appointed by the Minister for Justice. This Committee was to provide advice to the Commissioner on IT and Telecommunications policies and strategies to be adopted by An Garda Síochána.
- 8.2.56. Reporting to the Advisory Board was an ICT Programme Board (later renamed the ICT Executive Board). This Board had more direct management responsibilities, including: project initiation, programme coordination, programme expenditure monitoring and project closure. It was chaired first by a Deputy Commissioner and later by the CAO. It included high-ranking members of An Garda Síochána and representatives from Garda Planning in the Department of Justice.
- 8.2.57. The ICT Programme Board, in turn, had oversight of several Project Boards that had been created to fulfil specific functions. One of these, the DigiCAD Project Board, was established to oversee, among other things, development of the National Digital Radio Project and the Garda Control Room Strategy. It was chaired by an Assistant Commissioner and included representatives from the Department of Justice.
- 8.2.58. This Project Board had a meeting in August 2007, during which a PowerPoint presentation was delivered detailing “*Key Business Decisions Required*”, including “*Voice recordings of Emergency and Non Emergency Calls*” and “*Legacy Radio Traffic at Control Rooms*”.
- 8.2.59. At the same time, a document entitled “*Proposal on Voice Recording – National Digital Radio Services and Garda Control Rooms*” was circulated to members of the DigiCAD



Project Board. It summarised the current position with regard to the recording of radio and telephone traffic, including 999 calls in Divisional Control Rooms, Anglesea Street, Cork, and Command and Control, Harcourt Square. The same document proposed that non-emergency and emergency call traffic to each of these Control Rooms be captured by deploying a call logger that would record only telephone traffic initiated or received at the Control Room.

- 8.2.60. The minutes of the meeting indicate that discussion was confined to the issue of voice recording of radio traffic under the National Digital Radio Project (NDRP). The proposal that both emergency and non-emergency telephone calls in and out of Divisional Control Rooms be recorded was not discussed.
- 8.2.61. In September 2007, the “*Proposal on Voice Recording – National Digital Radio Services and Garda Control Rooms*” was split into two separate documents: one dealt with the NDRP; the other dealt with Garda Control Rooms. The latter document proposed that all telephone traffic into and out of Divisional Control Rooms be recorded.
- 8.2.62. The final draft tender specification document to replace the DAT recording system was advertised on 26 October 2007. It contained no mention of the telephone lines that were to be recorded. The document required that a minimum of 12 analogue lines per station – 4 more than the DAT recording system – be capable of being recorded.
- 8.2.63. On 14 July 2006, section 43(1) of the Garda Síochána Act 2005 came into force. This made the Commissioner of An Garda Síochána the accounting officer in relation to the appropriation accounts of An Garda Síochána. Prior to this, the Secretary for the Department of Justice was the accounting officer. Thus, it was An Garda Síochána that sanctioned the award of the tender to Sigma Wireless Ltd, the company selected to install the digital recording system manufactured by NICE. The contract was signed on 17 July 2008
- 8.2.64. The Commission heard evidence from Mr Shane O’Connor who, in 2005, became an Assistant Principal Officer in the Finance and Resources Unit of the Garda Division, Department of Justice. He was also a member of the DigiCAD Project Board discussed above and in Chapter 6.
- 8.2.65. Although the Garda Commissioner became the accounting officer in relation to the appropriation accounts of An Garda Síochána in July 2006, Mr O’Connor gave evidence that the Centre for Management and Organisation Development (CMOD) within the Department of Finance continued to insist that expenditure applications from An Garda Síochána be transmitted *via* the Department of Justice, as a matter of course. He

stressed that the Department's role in this context was to ensure financial propriety and that there were no obvious flaws in applications for sanction submitted to the Department of Finance.

8.2.66. Mr O'Connor was aware, in 2007, of the documents cited above, in which reference was made to the recording of both emergency and non-emergency calls in Divisional Control Rooms. Crucially, however, he did not understand this to mean that non-999 telephone lines were being recorded. He assumed that the references to non-emergency calls meant only calls made on 999 lines that turned out not to be of an emergency nature.

8.2.67. Mr O'Connor told the Commission:

*"...that was our understanding, that it was only traffic in and out of the Control Room, which would be operational telephone traffic and particularly 999 calls. It was certainly never our understanding that any other lines within a Garda station could be captured in this way.... I never received any information that would help me to form the impression that any voice-recording equipment was being used to record any lines outside of the Control Room environment."*

8.2.68. Mr O'Connor was not aware that, in Divisional Stations outside the DMA, calls to the main station number were answered in the Control Room alongside 999 calls. His belief, at all times, was that traffic into and out of Control Rooms would be either 999 or emergency-type calls.

8.2.69. Mr O'Connor said that he was not aware of the possibility of non-999 calls coming into Control Rooms *via* the main station telephone number and being recorded. He told the Commission that, if he had seen something that caused him concern, such as, for example, a document or policy stating that An Garda Síochána were going to record all telephone conversations from private persons into and out of Garda stations, he would have asked himself if such an activity was "*wise or legal*". He took comfort from the fact that An Garda Síochána had its own legal department. He said that his Principal Officer did not express an alternate view as to the nature of emergency or non-emergency telephone calls and Mr O'Connor believed that the Principal Officer's understanding at that time was identical to his own.

8.2.70. According to Mr O'Connor, the documents provided to him as a member of the DigiCAD Project Board were circulated within the Department, up to Assistant Secretary level. There is no evidence of any concerns being expressed by any of Mr

O'Connor's colleagues in relation to what was said in those documents about the recording of emergency and non-emergency Control Room calls.

## 8.3 The Office of the Minister for Justice

### 8.3.1. Introduction

This section of this chapter addresses the matters referred to in paragraph 1(f) of the Terms of Reference, insofar as they apply to the Office of the Minister for Justice for the period from 1 January 1980 until 27 November 2013. Thus, it will report on the level of knowledge of the existence, operation and use of the Garda recording systems within that Office.

8.3.2. The Terms of Reference make a distinction between the Department of Justice and the Office of the Minister for Justice. They are in the same building, at 51 Saint Stephen's Green, Dublin 2. The Secretary General's office is in close proximity to the Minister's Office. The Private Secretary to the Minister acts as the link between the Minister and the Department of Justice.

8.3.3. Chapters 3 to 6 of this Report contain a detailed account of the Commission's findings in respect of the existence, operation and use of Garda telephone recording systems between 1 January 1980 and 27 November 2013.

### **Available information and investigative methodology**

8.3.4. In addition to reviewing the documentary evidence received from the Department of Justice, referred to, at length, earlier at section 8.2 of this chapter, and hearing sworn evidence from various witnesses including Secretaries General and officials within the Department of Justice and the Office of the Minister for Justice, the Commission also corresponded with the 17 holders of the office of Minister for Justice between 1970 and 27 November 2013.

8.3.5. The former Ministers were given a *précis* of the information contained in Chapters 3 to 6 of this Report. They were informed that the recording of all non-999 telephone lines had ceased on the instructions of the then Garda Commissioner, Mr Martin Callinan, in November 2013. The Commission requested a statement from them outlining their level of knowledge in relation to the existence, operation and use of telephone recording systems by An Garda Síochána during their tenures as Minister for Justice.

8.3.6. By way of background, and as already reported in great detail by this Commission in its Second Interim Report, the Garda Commissioner had been informed on or about 11 November 2013 that systems for the recording of telephone calls other than 999 calls existed in Garda stations. On receipt of that information, the Commissioner ordered that all recordings of all non-999 calls in Garda stations cease with immediate effect. The

Minister for Justice at the time, Mr Alan Shatter, became aware that telephone calls, other than 999 calls, had been recorded at Garda stations on 24 March 2014.

### **The Level of Knowledge within An Garda Síochána and the Department of Justice**

- 8.3.7. It is clear that, in normal circumstances, the knowledge of Garda telephone recording systems in the Office of the Minister for Justice will be almost totally dependent on the level of that knowledge in the Department of Justice itself. Similarly, the level of knowledge in the Department of the recording activity of An Garda Síochána was necessarily highly dependent on such information and reports as it received from An Garda Síochána, which was, in turn, dependent on the nature and level of knowledge in the force.
- 8.3.8. As reported in Chapter 7, a highly significant fact established by the Commission is that no formal statement setting out the policy of the organisation with regard to the operation of telephone recording systems was ever issued by or on behalf of the Garda Commissioner at any time since the first recording system was installed at Dublin Castle in the 1970s. Although a certain proportion of the Garda membership was or became aware of the telephone recording systems over time, the organisation as a whole was never formally and systematically put on notice as to what telephone lines were recorded and why.
- 8.3.9. It is central to the findings of this report that significant recording of calls other than 999 calls to Garda stations commenced in 1995, with the installation of the DAT tape systems. From that time, the main telephone line into Divisional Stations outside the DMA was recorded. The key decision as to what lines were to be recorded was made by a Chief Superintendent in the Telecommunications Section in 1996, on the mistaken understanding that he was approving only lines that recorded 999 calls. He did not know that one of the lines to be recorded was the main station number.
- 8.3.10. Since the Chief Superintendent did not know that he was approving the recording of non-999 lines, naturally, he could not and did not report the fact to his superiors. For all practical purposes, that knowledge remained confined to the Telecommunications Section and an unknown proportion of local Garda officers.
- 8.3.11. None of the persons who held the office of Garda Commissioner from 1991 to 2013 was aware of the fact that non-999 calls were being recorded in Divisional Stations outside the DMA.

- 8.3.12. For the foregoing and other reasons, An Garda Síochána did not report to the Department of Justice that it was engaged in the recording of non-999 calls. When former Commissioner Callinan learned, in October 2013, that Garda stations were recording non-999 lines, he issued an immediate instruction that it was to cease, which it did on 27 November 2013.
- 8.3.13. On 10 March 2014, Commissioner Callinan formally reported to the Secretary General of the Department of Justice, pursuant to section 40 of the Garda Síochána Act 2005, that recording of telephone lines that included non-999 lines had been taking place in Garda stations for a number of years. Subsequent searches in the files and records of the Department of Justice failed to bring to light any clear evidence of the origin of, or rationale for, Garda telephone recording, or who had authorised same.
- 8.3.14. The Commission has found that, on balance, the Department of Justice remained unaware that the main station number was routinely recorded in Divisional Stations outside the DMA during the entirety of the periods covered by the DAT systems (1995 to 2008) and the NICE system (2008 to 2013).

**The level of knowledge of the existence, operation and use of Garda telephone recording systems within the Office of the Minister for Justice.**

Telephone recording systems in Garda stations, 1980 - 1995

- 8.3.15. Eight Ministers for Justice held office during the years from 1980 to 1995. Of the Ministers for Justice who held office in the 1980s who are still living, only Mr Michael Noonan (14 December 1982 - 14 February 1986) remembered the Radio Advisory Committee. He told the Commission that he had been grateful for the efforts of the Committee in implementing a new communications infrastructure, which, as he understood it, was to enable members of An Garda Síochána to interact with each other on a station and Divisional level. He wrote to the Commission stating that the Radio Advisory Committee had already been set up when he came into office. He knew that it had been charged with the responsibility for providing high-level technological guidance to An Garda Síochána. He further wrote that:

*“I had neither knowledge nor recollection as to the recording capacity relating to 999 calls or otherwise enabled by the system or as to the fact that this practice of recording calls made to and from stations of An Garda Síochána continued up to recent times.”*

It is, of course, important to recall that the first recording of main station lines on the DAT system did not commence until 1995, long after Mr Noonan’s period in office as Minister for Justice.

Telephone recording systems in Garda stations, 1995-2008

- 8.3.16. Three persons held the office of Minister for Justice from 1995 until 2008, namely Mrs Nora Owen, Mr John O'Donoghue and Mr Michael McDowell. Neither Mr McDowell nor Mr O'Donoghue had any knowledge or information as to the planning, existence, operation and use of the telephone recording systems during their tenures. Mrs Owen, who was in office from 15 December 1994 until 26 June 1997, replied thus:

*“I served as Minister for Justice from the 15<sup>th</sup> December 1994 until 26<sup>th</sup> of June 1997 and during that time, I have no memory of ever being aware or receiving any briefings on the general recording of telephone communications in Garda Stations/Garda Control Centres/Garda Headquarters/Prisons etc throughout the country.*

*I have no memory or knowledge concerning the upgrading of telephonic systems in 1995/1996 as I, as Minister, would not have been involved in such procurement procedures.*

*My only involvement in telecommunications would have been my responsibilities as Minister for Justice in regard to legal interceptions covered by the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 and relevant other Acts. Any such actions by me would have been overseen by a Judge as required under the legislation.”*

- 8.3.17. The Commission accepts that Mrs Owen had no knowledge of the sanction for the update or the expanded capacity of the DAT recording systems in Harcourt Square, Anglesea Street or Divisional Stations during her time in office. It has seen no evidence that any consideration of policy or decisions about telephone recording were brought to the attention of the Department or the Minister. As has been explained above, the key decision was made by a Chief Superintendent in the Telecommunications Section on a mistaken basis and was not brought to the attention of any higher authority.

Telephone recording systems in Garda stations, 2008 - 2013

- 8.3.18. Three Ministers for Justice held office from the date of the installation of the NICE system in 2008 until 27 November 2013, namely, Mr Brian Lenihan, Mr Dermot Ahern and Mr Alan Shatter.
- 8.3.19. Mr Lenihan is deceased. Mr Shatter and his level of knowledge has been one of the subjects of this Commission's Second Interim Report. The Commission found that Mr

Alan Shatter did not become aware that non-999 calls had been recorded at Garda stations until 24 March 2014.

- 8.3.20. Mr Dermot Ahern, who served as Minister for Justice from 7 May 2008 until 19 January 2011, has written to the Commission as follows:

*“During my time as Minister for Justice, between 2008 and 2011, to the best of my recollection, I had no knowledge of or input into the planning, existence, operation and use of telephone reporting systems by An Garda Síochána.”*



## 8.4 Office of the Attorney General

### Introduction

- 8.4.1. This section of this chapter addresses the matters referred to in paragraph 1(f) of the Terms of Reference, insofar as they apply to the Office of the Attorney General for the period from 1 January 1980 until 27 November 2013. Thus, it will report on the level of knowledge of the existence, operation and use of the Garda recording systems within that office. The Office of the Attorney General includes a Parliamentary Counsel Section and an Advisory Counsel Section. It also has responsibility for the Chief State Solicitors' Office. The level of knowledge within the Chief State Solicitor's Office will be discussed in a further section of this chapter.
- 8.4.2. Previous chapters have detailed the planning, procurement, installation, operation, management, alteration and termination of Garda telephone recording systems during this period. Chapter 7 deals with the level of knowledge of these matters within An Garda Síochána and explores, in depth, the relevant correspondence and communications within it and the extent of communication between An Garda Síochána and the Office of the Attorney General on matters relating to telephone recording at Garda stations. This section of this chapter should, therefore, be read in the context of the detail and conclusions of Chapter 7.

### Available information and investigative methodology

- 8.4.3. In order to assess the level of knowledge of the existence, operation and use of Garda telephone recording systems within the Office of the Attorney General during the relevant period, the Commission reviewed all the documentary evidence available, took statements and heard sworn oral evidence from various witnesses.
- 8.4.4. The Office of the Attorney General and various personnel within that Office featured in the Commission's Second Interim Report. As stated in that Interim Report, the Director General and Senior Advisory Counsel were made aware of the existence of telephone recording systems recording non-999 calls in Garda station on 11 November 2013, when they were told by the then Commissioner of An Garda Síochána, Mr Martin Callinan, and the then Deputy Commissioner, Ms Nóirín O'Sullivan.
- 8.4.5. In addition, from the investigations already completed by this Commission, it was clear that, if An Garda Síochána had sought any legal advice on the installation or use of voice recording systems in Garda stations, that advice would have been sought from the

Office of the Attorney General. The Commission had seen no evidence that any such legal advice had been sought by An Garda Síochána at any time, either from the documents submitted by An Garda Síochána or those submitted by the Department of Justice, previously discussed in section 8.2 of this chapter.

**Was advice sought in relation to the Garda telephone recording systems before 11 November 2013?**

8.4.6. Though the Commission had previously found that senior staff in the Office of the Attorney General were not made aware of the telephone recording systems in Garda stations until November 2013, in the interests of caution, the Commission asked the Office of the Attorney General to ascertain whether any such advice (whether in respect of 999 or non-999 calls) had been sought at any time, but particularly during the following periods:

- (i) In the early 1970s, when the decision to commence recording 999 calls in Dublin Castle was first made;
- (ii) In 1983 / 84, when provision was made for some recording of 999 calls in Divisional Garda Stations;
- (iii) In 1995 / 96, when the decision to extend recording on DAT machines in Divisional Garda Stations to certain non-999 lines was made;
- (iv) In 2008, when the NICE system was introduced in Divisional Garda Stations to replace the DAT recording systems.

8.4.7. In response to the Commission's request, Mr Liam O'Daly, Director General of the Office of the Attorney General, stated:

*“The office has conducted a search of the titles of files in the office between 1970 and 1996, when we moved to an electronic system in Lotus Notes. We have conducted a search of file titles in the Lotus Notes system which were obtained between 1996 and 2006. We have also carried out a search of file titles and all Word documents generated in the office between 2006 and 2013. These searches include files which the Office has forwarded to the National Archives. The searches have not revealed any additional documents relating to the recording of telephone conversations, other than those in file 2013/05418 (Discovery of Garda station recordings of telephone conversations) which have already been furnished to the Commission.”*

8.4.8. The file referred to in that paragraph is the file that was generated at the time that the issue of recording of phone calls in Garda stations arose in the context of the Discovery

Order in the case taken by Mr Ian Bailey against the Garda Commissioner, the Minister for Justice and others. The Commission received this file in the course of its investigations into the matters referred to in paragraphs 1(n) and (o) of its Terms of Reference and it has been dealt with in the Second Interim Report of the Commission.

- 8.4.9. The Commission is satisfied that there is no evidence that An Garda Síochána sought advice from the Office of the Attorney General relating to the installation or upgrade of the telephone recording systems in Garda stations that are the subject of this Report.

**Instances where advice was or could have been sought in relation to telephone recording prior to November 2013**

- 8.4.10. The Commission is aware of several occasions when the advice of the Attorney General was, or could have been, sought in relation to telephone recording systems, and peripheral matters, in Garda stations prior to November 2013. These three occasions were:

- (i) In 2008, when the National Radio Digital Service (NDRS) was acquired for An Garda Síochána;
- (ii) When advice, dated 29 December 2011, was received from Ms Ruth FitzGerald, Advisory Counsel, on the issue of the Criminal Justice (Surveillance) Act 2009 which dealt with the recording of 999 calls;
- (iii) Following the ruling of her Honour Judge Reynolds in the case of *DPP v. Sergeant A. Kissane, Sergeant M. McEnery, Garda J. Burke and Garda D Hickey*, delivered in Waterford Circuit Criminal Court on 22 July 2011 (“the Holness Case”), when the Attorney General’s advice may have been sought on the lawfulness of the 24-hour recording facility on incoming telephone lines in the Communications Room and the Public Office at Waterford Garda Station.

- 8.4.11. The Commission asked Mr O’Daly, Director General of the Office of the Attorney General, to address these three instances and to establish whether any advices had been sought by An Garda Síochána in relation to voice recording.

**The National Digital Radio Service (NDRS), 2008**

- 8.4.12. Chapter 6 of this Report outlines, in detail, the consideration that was given to the legal implications of extending the NDRS to include recording all telephone calls into and out of Garda stations. This initiative was being led by Change Management within An Garda Síochána and a Project Board had been established to progress it. In April 2008, a report by a Sergeant John Jacob was submitted to the Chief Superintendent, Change Management, identifying legal issues in relation to the NDRS and voice recording.

Sergeant Jacob outlined what the NDRS project would mean for An Garda Síochána. He stated:

*“The NDRS project will deliver significant changes in relation to how An Garda Síochána conducts its business. The NDRS will support both radio and telephony communications. Additionally the radio network allows for all radio and telephone conversations to be recorded.”*

- 8.4.13. In his report, Sergeant Jacob outlined that a workshop of Senior Managers within An Garda Síochána had been established to consider the extent of voice recording that An Garda Síochána should carry out. Sergeant Jacob stated:

*“Some of the workshop participants felt that recording telephone conversations would be in breach of the Postal and Telecommunications Services Act, 1983, (Section 98 (1): Interception of telecommunications messages) and accordingly An Garda Síochána could not consider recording such conversations.”*

- 8.4.14. Sergeant Jacob requested a legal opinion from the Chief Superintendent, Change Management, in relation to two matters. The first was: *“Would An Garda Síochána be entitled to record all telephone conversations conducted over the NDRS network by Garda members or would such recordings be in breach of the Postal and Telecommunications Services Act, 1983, (Section 98 (1): Interception of telecommunications messages)?”*

- 8.4.15. The second request for a legal opinion related to the discoverability of all voice recordings in court. The Commission was furnished with minutes from a meeting of the National Digital Radio Service / Computer Aided Dispatch / Control Room Strategy Project Board in which reference was made to advice having been sought from the Office of the Attorney General.

- 8.4.16. Under the heading *“Legal Advice on Voice Recording and Data Retention”*, the Minute for 22 October 2008 states that:

*“Legal Section in Crime Policy and Admin has sought advice from the Attorney General in relation to retention of records; radio voice records and GPS data”.*

- 8.4.17. The minute goes on to describe a meeting with staff associations, which was held on 25 September, to discuss *“Voice Recording, GPS and Ambient Listening for deployment as part of NDRS.”*
- 8.4.18. The National Digital Radio Service / Computer Aided Dispatch / Control Room Strategy Project Board were informed that the Attorney General’s advice had been sought on the issue of retention of records and the staff organisations agreed to wait until this advice was received when they would meet again. The minute recorded that:
- “The staff associations agreed in the value in having voice recording and GPS as a members safety feature. They were concerned about the need for retention of records indefinitely and the use that will be made of those records”.*
- 8.4.19. A subsequent meeting of this Project Board, which took place on 4 November 2008, recorded under the same heading: *“Legal Advice on Voice Recording and Data Retention: This matter remains as of last meeting. Crime Policy & Admin are still awaiting response from the Attorney General on this matter. Change Management have requested an update from CP&A for our records.”*
- 8.4.20. In a letter dated 5 November 2008, the Chief Superintendent of the Legal Section, Crime Policy and Administration wrote to the Chief Superintendent, Change Management. The letter is headed *“Request for Legal Opinion in relation to National Digital Radio Services (NDRS) Voice Recording Matters”*.

The letter concludes with the following paragraph:

*“The Legal Section has sought the advice of the Attorney General regarding the relationship between the Data Protection Act 1988 and 2003 and the National Archives Act 1986 when it comes to the retention of Data/departmental records. This advice is awaited.”*

- 8.4.21. A letter, dated 17 November 2008, was sent from Legal Section, Crime Policy and Administration to the Chief Superintendent, Change Management, and marked for the attention of Inspector John Jacob. This letter is again headed *“Request for Legal Opinion in relation to National Digital Radio Services (NDRS) Voice Recording Matters”*. The letter was a legal opinion provided by the Legal Section, in response to Inspector Jacob’s request outlined above, offering legal advice on the recording of all telephone calls into and out of Garda stations. It concludes that, if one party to a

recorded conversation consented to the recording, the provisions of interception legislation were not engaged.

8.4.22. Finally, the letter states that the advice of the Attorney General had been sought regarding the use of “*Departmental Records*” when these contain personal data, which would ordinarily be destroyed pursuant to the Data Protection Acts (1988; 2003).

8.4.23. A further letter dated 19 December 2008, signed by Chief Superintendent Michael O’Sullivan and addressed to the Chief Superintendent Crime Policy and Administration, states that:

*“...the Attorney General is considering this matter to determine what category the data falls into (data under the Archives Act or data under the data protection legislation) and that his decision will inform An Garda Síochána in relation to developing policy.”*

8.4.24. Further correspondence from Inspector Anthony M. O’Donnell, dated 7 May 2009, states that:

*“...advices of the Attorney General on the impact of voice recording on Data Protection Legislation have not yet been received.”*

8.4.25. The Commission had not seen any opinion from the Attorney General’s Office in relation to the NDRS and requested that any documentation it had in relation to advices given be furnished to the Commission.

8.4.26. In response, Mr O’Daly stated:

*“It would seem clear from the reports of the NDRS Change Management Unit and the letters of 5 November 2008, 19 December 2008 and 7 May 2009 referenced by you ... that the Gardai intended to seek the advice of the Attorney General in relation to certain legal issues arising in the context of the operation of NDRS...*

*Despite extensive searches of our new case and records management system (which was put in place in 2006), a review of the file relating to the acquisition of the NDRS system, as well as a review of all incoming correspondence from Gardaí between 1 April 2008 and 31 November 2009 we have not been able to find any request for advice such as described in the documentation you have forwarded.*

*...as matters stand however, on the extensive searches carried out we have not been able to locate such a request for advice.”*

#### **Advice sought on the Criminal Justice (Surveillance) Act 2009**

- 8.4.27. Ms Ruth FitzGerald, Senior Advisory Counsel in the Office of the Attorney General, by letter dated 29 December 2011, advised members of An Garda Síochána on a wide range of recording and related issues including the applicability of the Criminal Justice (Surveillance) Act 2009. In the course of this lengthy written advice, which covered a number of types of audio and video recording by An Garda Síochána, she recommended, in particular, that the recording of 999 calls should be the subject of authorising legislation. She was not aware, at that time, that non-999 calls were being recorded.
- 8.4.28. Following receipt of Ms FitzGerald’s opinion, a letter dated 16 May 2012, was issued by Mr Donncha O’Sullivan of the Department of Justice to the Garda Commissioner, in which the Commissioner was asked to give information to the Department in relation to a number of matters, including audio recording of 999 calls and video recordings by cameras on Garda vehicles and at public order events, in order that legislation might be drafted to authorise recording in these circumstances. Mr O’Daly advised the Commission that the Office had not been able to find any further documentation in relation to Ms FitzGerald’s advice.

#### **The Holness Case**

- 8.4.29. The Holness case is discussed in detail in Chapter 7 of this Report. In the course of a trial in Waterford Circuit Court, Her Honour Judge Reynolds had refused to admit evidence of telephone calls that had been recorded in Waterford Garda Station on the basis that the recordings had been obtained in breach of section 98 of the Postal and Telecommunications Services Act 1983, as amended by section 13 of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993.
- 8.4.30. The Commission had seen no evidence that An Garda Síochána had sought legal advice on the issues that had arisen in that case and, specifically, on the interpretation of the 1983 and 1993 Acts cited above.
- 8.4.31. Mr O’Daly informed the Commission that the Attorney General’s Office had not been involved with that case, at the time, but had advised in relation to civil claims arising from the failed prosecution, as well as judicial review proceedings brought by the members of An Garda Síochána involved in the case who were subject to disciplinary action. Following the discovery of the DAT tapes in Bandon and the consultations that

occurred between An Garda Síochána and the Office of the Attorney General, the Holness case was raised but it had not been discussed before that.

- 8.4.32. This would appear to confirm the understanding of the Commission that no legal advice was sought by the Office of the Attorney General, in responding to the ruling of Judge Reynolds in the Holness case.

## 8.5 The Office of the Chief State Solicitor

### Introduction

- 8.5.1. This section of this chapter addresses the matters referred to in paragraph 1(f) of the Terms of Reference, insofar as they apply to the Office of the Chief State Solicitor (CSSO) for the period from 1 January 1980 until 27 November 2013. Thus, it will report on the level of knowledge of the existence, operation and use of the Garda recording systems within that Office.
- 8.5.2. The CSSO is a constituent element of the Attorney General's Office. It provides litigation services to the Attorney General and the Government. In effect, the function of the Chief State Solicitor is to act as the solicitor to Ireland, the Attorney General, Government Departments and Offices, and State Agencies.
- 8.5.3. Up until 2001, the CSSO also contained what is now the Solicitors' Division of the Office of the Director of Public Prosecutions (DPP). Records of case files from this section, that is, criminal prosecutions pre-2001, have been transferred to the databases of the Office of the DPP. The process of record keeping within the Office of the DPP will be explained further in this chapter. For present purposes, it is only necessary to note that records of criminal prosecutions in the CSSO were minimal and have all been copied over to the servers of the Office of the DPP over time.
- 8.5.4. As far as the CSSO is concerned, the telephone recording systems in Garda stations that are the subject of this Report first came to light during the State's compliance with a Discovery Order in the case of *Ian Bailey v Commissioner of An Garda Síochána, the Minister for Justice, Equality and Law reform, Ireland and the Attorney General* (2007/3424P).
- 8.5.5. Chapter 7 reported, in detail, that the senior ranks of An Garda Síochána, including all former Garda Commissioners, were unaware of the fact that telephone recording systems in Garda stations were recording non-999 calls, in particular, the main line to



Divisional Stations. Earlier in this chapter, in sections 8.2, 8.3 and 8.4, it was reported that various Government departments and agencies were similarly unaware of this fact until 2014. In light of that, it would be most surprising if the CSSO had any level of knowledge of the same facts.

**Available information and investigative methodology**

- 8.5.6. The Commission reviewed the documentary evidence provided by the Attorney General's Office, the Department of Justice and the Department of Legal Affairs within An Garda Síochána, as well as the entirety of the CSSO file relating to *Ian Bailey v. Commissioner of An Garda Síochána, the Minister for Justice, Equality and Law reform, Ireland and the Attorney General (2007/3424P)* generated between October 2013 and March 2014.
- 8.5.7. In addition, the Commission took statements and heard sworn evidence from various witnesses in order to assess the level of knowledge of the existence, operation and use of Garda telephone recording systems within the CSSO during the relevant period.

**Ian Bailey v. the Commissioner of An Garda Síochána and others**

- 8.5.8. The Commission heard evidence in relation to this matter from Ms Frederique Duchene, who is a State Solicitor attached to the Garda Litigation Section. She has also been responsible for this case since the action commenced in 2007.
- 8.5.9. The Commission has already reported on these matters in its Second Interim Report but it is appropriate to briefly summarise events here. In evidence to the Commission, Ms Duchene described how the CSSO complied with the Discovery Order in relation to the Bailey litigation. She divided this Discovery into parts. The first concerned Documentary Discovery. The second part related to telephone calls that a member of An Garda Síochána had requested be recorded.
- 8.5.10. On Friday, 18 October 2013, when it was hoped that the Affidavit of Discovery for the defendants would be finalised, Ms Duchene was informed that something had to be clarified and that the Affidavit could not be sworn then. On Monday, 21 October 2013, she received an email from Garda Stephen Nolan in the Office of Legal Affairs of An Garda Síochána stating that there was further material that needed to be reviewed before Discovery could be completed. Ms Duchene then spoke to Garda Nolan by telephone. He explained that recordings had been found of telephone calls received both through the emergency line and to the main station number. This did not strike Ms Duchene as surprising, as some telephone calls had already been part of the initial Documentary Discovery.

- 8.5.11. During the course of subsequent meetings, in December 2013 and March 2014, Ms Duchene was aware that there was an issue but she believed that it was an IT anomaly relating to Bandon, which resulted in the telephone lines being recorded. She was in attendance at a meeting of 10 March 2014, but has no recollection of the general recording issue being discussed when the meeting was sitting. She became aware of the existence of telephone recording systems recording non-999 calls in Garda stations nationally on 24 March 2014.

## **8.6 Garda Síochána Ombudsman Commission**

### **Introduction**

- 8.6.1. This section of this chapter addresses the matters referred to in paragraph 1(f) of the Terms of Reference, insofar as they apply to the Garda Síochána Ombudsman Commission for the period from 1 January 1980 until 27 November 2013. Thus, it will report on the level of knowledge within GSOC of the existence, operation and use of the Garda recording systems.

### **History**

- 8.6.2. The Garda Síochána Ombudsman Commission (GSOC) is an independent agency established under Part 3 of the Garda Síochána Act 2005 (hereinafter “the 2005 Act”). GSOC was officially appointed in February 2006 and became operational on 9 May 2007. Therefore, the Terms of Reference as they apply to that agency apply from 9 May 2007 to 27 November 2013 only.

- 8.6.3. The objectives, functions and powers of GSOC are set out in section 67 of the 2005 Act. The overall function of the agency is to investigate complaints received of possible misconduct by members of An Garda Síochána in an efficient, effective and fair manner.

- 8.6.4. Section 67(2) of the 2005 Act lists the functions of the agency as follows:

- “(a) to receive complaints made by members of the public concerning the conduct of members of the Garda Síochána,
- (b) to carry out the duties and exercise the powers assigned to it under Part 4 in relation to those complaints,
- (c) to issue guidelines for the informal resolution under section 90 of certain categories of complaints and to make procedural rules for investigations under section 95 ,
- (d) to report the results of its investigations under Part 4 to the Garda Commissioner and, in appropriate cases, to the Director of Public

Prosecutions and, if it reports to the Director, to send him or her a copy of each investigation file,

- (e) to conduct, in accordance with section 102, other investigations of matters concerning the conduct of members of the Garda Síochána,
- (f) to examine practices, policies and procedures of the Garda Síochána in accordance with section 106,
- (g) to draw up with the Garda Commissioner protocols in accordance with section 108, and
- (h) to carry out any other duties and exercise any other powers assigned to it under this Act.”

8.6.5. The 2005 Act was amended by the Garda Síochána (Amendment) Act 2015 to extend the powers of investigation of GSOC. That Act gave the Office greater autonomy in investigating the practices, policies and procedures of An Garda Síochána. The Act did not come into operation until 27 April 2015 and, therefore, the Commission is concerned with the powers and functions of GSOC under the Garda Síochána Act 2005, as they were prior to the passing of the Act of 2015.

8.6.6. In 2013, GSOC and An Garda Síochána published a second set of Protocols agreed between the two organisations. These 2013 Protocols replaced other protocols in place since August 2007. The 2013 Protocols include a chapter on the sharing of information, including evidence. While reference is made to the rules of access to certain systems within An Garda Síochána such as PULSE and computer systems, there is no reference made to telephone recording systems. This is unsurprising given the limited level of knowledge of Senior Management within An Garda Síochána, as discussed in Chapter 7, at the time the Protocols were drafted. Reference is made at paragraph 1.4.2 to the maintenance and retention of any audio or visual recordings made by An Garda Síochána during the course of the detention of persons according to the requirements of the Criminal Justice Act 1984 and the (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 and 2006. An Garda Síochána undertook to provide a working copy of any such recordings to GSOC.

#### **Available information and investigative methodology**

8.6.7. The Commission was provided with a number of files by GSOC, which will be discussed below. These clearly indicate that recordings other than 999 calls were brought to the attention of Investigations Officers from GSOC. However, the Commission is also concerned with the general level of knowledge within GSOC in relation to the recording systems in use within An Garda Síochána.

- 8.6.8. The Commission wrote to GSOC setting out a number of questions to be answered in relation to the knowledge of Garda recording systems within the Office. In their response, GSOC noted that, since they became operational on 9 May 2007, it was normal practice in the course of an investigation “*as part of the gathering of evidence and to satisfy all lines of inquiry for GSOC investigators to request audio recordings from An Garda Síochána where it was thought such recordings existed, such as 999 calls*”. These requests for audio recordings were made in writing and directly to the relevant Superintendent in charge of the Garda District relating to the complaint or referral. Subsequent to November 2013, such requests were made electronically through an electronic email system used between GSOC and An Garda Síochána, known as Gearáin. Under this new system, the request would specify the nature of the call, i.e. emergency (999) or other (non-999).
- 8.6.9. Prior to the investigation in 2010 in relation to the Holness Case, detailed below at paragraph 8.6.10, in general, GSOC were not made aware that non-999 calls were routinely recorded. There were instances prior to this investigation in which recorded 999 calls were provided to GSOC; however, it may be that a differentiation between non-999 and other recorded telephone calls could not be made or was not considered by the investigator and, hence, the existence of non-999 call recordings was neither raised nor identified as an issue.
- 8.6.10. GSOC were not aware of the DAT recorder system and were only made aware of the NICE recorder system during the investigation in the Holness Case.

### **Specific Case Reviews**

#### **Holness Case**

- 8.6.11. An extensive review of the Holness Case is provided in Chapter 7 of this Report, which addresses the knowledge within An Garda Síochána of the telephone recordings used in this case. This chapter will look at the knowledge of GSOC in relation to the Holness case.
- 8.6.12. On 8 February 2010, Mr Anthony Holness made a formal complaint of assault against 4 members of An Garda Síochána stationed in Waterford Garda Station following his arrest on 29 January 2010. This complaint was referred to GSOC on 9 February 2010, under section 102 of the 2005 Act, by the Superintendent in Waterford Garda Station. GSOC conducted an investigation into the complaint, which ultimately resulted in the prosecution of a number of Gardaí before Waterford Circuit Court in July 2011. This was the first prosecution taken by the DPP that resulted in custodial sentences being imposed on foot of an initial investigation conducted by GSOC.

8.6.13. Following correspondence with GSOC, a Direction dated 7 August 2014 was issued by the Commission, at the request of GSOC, under section 16 of the Commissions of Investigations Act 2004. The Direction sought the following documents:

- “1. Any statements relating to recorded telephone conversations taken by the Garda Síochána Ombudsman Commission during its investigation into the complaint made by Mr Anthony Holness.
2. Any statements relating to recorded telephone conversations taken by the Garda Síochána Ombudsman Commission which were included in the Book of Evidence for the Criminal Trial in Waterford Circuit Court.
3. Any other documents obtained during the Garda Síochána Ombudsman Commission investigation, including legal advice or directions concerning the introduction into evidence of telephone recordings.
4. A copy of the transcript of the criminal trial of Garda John Burke, Alan Kissane, Martha McEnery and Daniel Hickey which took place in Waterford Criminal Circuit Court in 2011.
5. A copy of the ruling of Judge Leonie Reynolds pertaining to the recorded telephone conversations in the above named trial.”

8.6.14. A review of the material subsequently provided to the Commission was conducted in order to establish when the issue of telephone recordings, the existence of the telephone recording systems and the operation and use of such systems first came to the attention of GSOC in relation to the Holness case. On 10 February 2010, following the referral to GSOC of the complaint by a Superintendent stationed in Waterford Garda Station, two members of the investigation team travelled to Waterford Garda Station. The Superintendent met the two Investigations Officers and briefed them on the referral. He played an audio recording of a telephone call that had been recorded on the night of the incident. A copy of the recorded call was provided to the Investigations Officers. On 24 March 2010, the same two Investigations Officers of GSOC took a statement, pursuant to section 21 of the Criminal Justice Act, 1984 and section 110 of the Garda Síochána Act 2005, from the Superintendent.

8.6.15. In this statement, the Superintendent stated the following:

*“I was later made aware by Inspector [A] and Sergeant [B] of the existence of a taped phone call which was received at the Garda Communications Room on the morning of the 29/1/10 shortly after the alleged incident. [the telecommunications technician] played this audio recording to Inspector A, Sergeant B and myself...”*

8.6.16. He also confirmed in the statement that the Telecommunications technician made a copy of the recording.

8.6.17. On the same day, to ensure continuity of evidence, the following statement was taken from the Telecommunications technician stationed in Waterford by an Investigations Officer of GSOC:

*“In Waterford Garda station there is a NICE Dictaphone system. This provides an audio recording of 999 calls, radio communications and other phones within the communications room. This was installed and is maintained by SIGMA, I have been trained as an administrator on this system both technically and operationally. Following a request for any radio communications in relation to the incident, I conducted a search and found that the radio communications were not being recorded for this period due to a suspected power outage to the recorded radio. Because of this I checked the remaining system to see if it was operating and during this system check I discovered an audio recording of an incoming phone call and brought it to the attention of [the] Superintendent. I was requested to download this audio recording which I did.”*

8.6.18. It is clear that GSOC was made aware of the specific recording system that was in operation in Waterford Garda Station at this time and that it was also informed that this equipment was used for the recording of *“999 calls, radio communications and other phones within the communications room”*. Further similar statements were made to investigating members from GSOC throughout the following months. On 7 October 2010, GSOC completed its investigation into the incident and forwarded an investigation file to the Office of the DPP. GSOC made recommendations regarding the charges that should be preferred against the 4 members of An Garda Síochána. It also referred to the telephone calls and the content of those calls when recommending the charges that it considered appropriate in this case.

8.6.19. Following the decision of the DPP to prosecute the 4 identified members of An Garda Síochána, further statements were taken by GSOC Investigations Officers. Of particular note, from this Commission's point of view, is a statement given by Mr John McMullan, the Project Engineer working with Sigma Wireless, to an Investigations Officer of GSOC on 21 June 2011, before the trial had commenced. In this statement, Mr McMullan gave the following detailed description of the NICE recording system as installed in the Communications Room in Waterford Garda Station:

*"I was involved in the installation of the NICE recording system at Waterford Garda Station in June 2008. The NICE recording system records telephone incoming and outgoing calls from specified lines in Waterford Garda Station. I am handing you a list containing the selected phone lines attached to the NICE recording system at Waterford Garda Station. The list is dated 1<sup>st</sup> of November 2008 and refers to the first maintenance check following the installation of the NICE recording system at Waterford Garda Station. The local Garda technician has the authority to change the selected lines in accordance with local demands and Garda policy. The Garda technicians based in Garda Headquarters have full control over the telephone system, this includes administration rights to add or remove selected lines. The local technician would be carrying out the physical work in the Garda Station i.e. physically removing or adding the selected line. I am not familiar with the Garda Policy or the necessary authorizations to add or remove a telephone line to the NICE recording system. The system records both Radio and telephone traffic to and from the station.*

*"The system operates as follows, when an incoming call is received on one of the selected lines attached to the NICE recording system it is recorded automatically on the hard drives installed at Waterford Garda Station, the call is then archived to a central storage system in accordance with pre-programmed instructions on the system. I understand the archiving occurs after 12 midnight in accordance with instructions given prior to the installation of the NICE recording system on the Garda Telephone Network. The data is stored for approximately 7 years on the central servers. An outgoing call from the selected lines is dealt with in the same manner. The Garda operator in the station has no function in activating the recording system, the system records automatically on a 24hr 7day 365 basis. The time on the NICE recording system is taken from a local router installed on the system, I am not in a position to say how the time is set on the router, this would be for the Gardaí operating the system. I understand that a ringmaster system operates at Waterford Garda station, the system is not*

*installed or maintained by SIGMA wireless and I am not in a position to comment on it. There is a WEB based application installed at local level in each Garda Station on the NICE recording system called NICE Inform which allows the local user to search and replay calls recorded on the system. The NICE Inform system also allows the local user to download and save the actual conversation from the call. The data (conversation) is downloaded as a WAV file however the disc created by the technician is governed by the software used to create the CD disc and the format selected by the technician. An electronic audit trail is recorded within the INFORM system, I am not in a position to say how long the system stores this data.”*

8.6.20. From this, it is clear that the details of the telephone recording system used in Waterford Garda Station, including its capabilities and functions, had been explained to the GSOC Investigations Officer. It is also clear from the content of this statement that the NICE system had been installed in more than Waterford Garda Station given the reference to Garda HQ and the reference to “each Garda Station” when describing the web-based application.

8.6.21. As already noted in Chapter 7, the recorded telephone calls were ruled inadmissible by Judge Leonie Reynolds. In this regard, the Court ruled:

“The issue to be determined is the lawfulness or otherwise of the practice of An Garda Síochána at Waterford Garda Station in recording all incoming and outgoing calls on their public lines, and the admission of the evidence obtained under the use of such practices.

In the circumstances I am satisfied that the practice engaged in by the Gardaí at Waterford Garda Station of recording all incoming and outgoing calls was in breach of the provisions of section 98 of the Postal and Telecommunications Service Act 1983 as amended by section 13 of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993. The prosecution have not opened any other authority to the Court which would empower the Gardaí to carry out such practices, and indeed, nor am I aware of any such authority. Further, I reject the prosecution’s contention that the third and fourth named defendants, as servants or agents of An Garda Síochána, must have consented to the interception of the calls on the basis that they are fixed with the consent of their employer, who was engaged in this practice.

It is therefore my view that the evidence obtained in such an unlawful manner cannot be admissible, and it would be dangerous and unsafe for me to do so.”



8.6.22. The case continued without the evidence of the audio telephone recordings. The prosecution led to the conviction of three members of An Garda Síochána. Custodial sentences were imposed on two of the three members. A fourth member was acquitted.

8.6.23. In June 2013, GSOC published its report in accordance with section 103 of the Garda Síochána Act 2005 regarding the complaint made by Mr Holness. In relation to the Circuit Criminal Court trial and the recording of telephone calls, the report noted that the Garda Commissioner “*may wish to re-evaluate the practice*” of recording calls on their public lines. It stated as follows:

*“During the course of the trial the lawfulness or otherwise of the Garda Síochána at Waterford Garda Station recording incoming and outgoing calls on their public lines, and the admission of the evidence obtained during the use of such practices became the subject of protracted legal argument. On the 29<sup>th</sup> of January 2010, shortly after the arrest of Mr Holness, there was telephone communication between certain of the accused. These calls were recorded on the Garda Síochána recording system and a recording was provided to GSOC. This recording was offered in evidence by the DPP. Objections were raised by the Defence. The Court held that the practice engaged in by the Gardaí at Waterford Garda Station of recording all incoming and outgoing calls on a particular phone line was in breach of the relevant statute on the recording of telephone communications, which requires that at least one of the parties to a phone call has consented to its being recorded. This requirement was deemed to have not been met on this occasion. The Court ruled that the evidence obtained in those calls was inadmissible. On consideration of the ruling of the Court the Garda Commissioner may wish to re-evaluate his practice regarding the recording of such calls and the consents required if it is to be permissible to use such recordings in evidence”.*

8.6.24. The response of An Garda Síochána to this case and the GSOC report is considered in Chapter 7 of this Report. It is sufficient to note here that no such “*re-evaluation*” of recording of telephone calls took place at this time despite the suggestion made by GSOC.

8.6.25. It should also be noted that, for the purpose of preventing complaints arising, section 106 of the 2005 Act provides for the examination of practices, policies and procedures of An Garda Síochána by GSOC. Such an examination may be undertaken if an issue comes to notice during the course of an investigation. Prior to 2015, this could be

recommended by GSOC but the express permission of the Minister for Justice was required in order for the examination to proceed. GSOC did not consider that the circumstances, as presented in the Holness case in relation to the recordings of non-999 calls, were such that warranted a review under section 106, as the issue had already been raised in its section 103 report.

**Other cases disclosed by GSOC**

- 8.6.26. On 31 October 2014, the Commission published an advertisement in the national newspapers. A copy of the advertisement is reproduced at Part 2 of Chapter 7 of this Report. In response to this advertisement, GSOC contacted the Commission on 5 December 2014. Following the publication of the advertisement, GSOC instructed its investigation teams to carry out a review of its investigation files to establish whether GSOC had observed, in the course of investigations undertaken, instances of recording by members of An Garda Síochána of telephone calls other than 999 calls at Garda stations.
- 8.6.27. The Director of Investigations requested all Senior Investigations Officers (SIO), together with their teams, to review the investigation file caseload covering the period since the commencement of GSOC in 2007. This review related solely to the identification of instances in the course of investigations where a team had requested details from An Garda Síochána of non-999 telephone calls recorded in a Garda station.
- 8.6.28. Each SIO reported his or her findings to the Director of Investigations. GSOC identified a total of 10 files in which the existence of recordings was observed. Of these, 7 contained recorded calls that were identified following the retirement of former Garda Commissioner Martin Callinan on 24 March 2014. Recorded calls in the other 3 files were identified by GSOC in 2011 and 2012. None of the GSOC files provided to the Commission predated the date of knowledge of the Holness Case.
- 8.6.29. On 10 December 2014, at the request of GSOC, the Commission issued a further Direction under section 16 of the Commissions of Investigation Act 2004 requiring GSOC to provide the details of these files to it. On 27 February 2015, GSOC complied with the Direction and provided copies of all 10 files to the Commission, together with a sworn Affidavit. While it was considered by GSOC that some of the material was subject to public interest privilege, the agency agreed to waive such privilege given the important nature of the work of this Commission. GSOC claimed legal professional privilege in relation to a small number of documents at the time.

- 8.6.30. Following a review of the documentation from various sources, it came to the Commission's attention that a further complaint was made to GSOC involving the recording of a non-999 call and that this material was not contained within the 10 files sent by GSOC to the Commission. Enquiries were made of GSOC regarding this complaint. A review was then completed by GSOC of the complaint, which had been made in 2011. Two files existed relating to the same individual. Neither of the files contained a specific complaint in relation to the recording of telephone calls.
- 8.6.31. A review of the first file did not identify any references to the recording of non-999 calls. One statement made to An Garda Síochána by the complainant referred to telephone calls made by and received from members of An Garda Síochána. There was no reference to whether these telephone calls were the subject of recording at a Garda station. The investigation that led to the provision of the statement was conducted by An Garda Síochána and no further details were given in relation to the telephone calls.
- 8.6.32. The second file involved a complaint made by the same individual and a copy of telephone transcripts was provided in the file to GSOC. However, the physical audio recordings were not sent as part of the file. The telephone calls were identified as being recorded at a particular Garda station. GSOC provided the files to the Commission and there is no reference in the material to the recording of non-999 calls. Of particular note, a search of outgoing calls from the Garda station to the complainant reveals no recordings existed. There is nothing in the file or in the transcript of the call that would alert a member of the review team to the fact that the recordings were of a non-999 line.
- 8.6.33. In relation to this material, it was noted by GSOC that the agency had "in excess of approximately 17,000 investigation files" at this time. Given the existence of the recordings in this particular instance and the manner in which they arose, GSOC could not definitively state that recordings of non-999 calls at Garda stations did not arise in other files. It would require a detailed review of over 17,000 files in order to confirm same.

## **8.7 The Office of the Data Protection Commissioner**

### **Introduction**

- 8.7.1. This section of this chapter is intended to cover the matters referred to in paragraph 1(f) of the Terms of Reference, insofar as they apply to the Office of the Data Protection Commissioner for the period from 1 January 1980 until 27 November 2013. Thus, it will report on the level of knowledge of the existence, operation and use of the Garda recording systems within that office.

## **History**

8.7.2. The office of the Data Protection Commissioner was established under section 9 of the Data Protection Act 1988 (hereinafter “the 1988 Act”). Section 9 of the Act states as follows:

“9 (1) For the purposes of this Act, there shall be a person (referred to in this Act as the Commissioner) who shall be known as an Coimisinéir Cosanta Sonraí or, in the English language, the Data Protection Commissioner, the Commissioner shall perform the functions conferred on him by this Act”

8.7.3. The Office is a body corporate and, although appointed by the Government, is an independent office. In 2003, the 1988 Act was amended by the Data Protection (Amendment) Act 2003, giving effect to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

8.7.4. Under the Data Protection Acts (1988; 2003), the Office of the Data Protection Commissioner has a supervisory role in relation to the processing of personal data by data controllers, including An Garda Síochána.

## **Available information and investigative methodology**

8.7.5. In addition to examining the documents available to it, as well as gathering statements and hearing sworn testimony, the Commission examined an application made by An Garda Síochána on 10 April 1989 to register as both a Data Controller and Data Processor under the 1988 Act.

8.7.6. As noted in Chapter 4, at this time, the Communications Centre in Dublin Castle, also known as Command and Control, was relocated to Harcourt Square. 999 calls and radio communications were recorded there. There was, at this time, a suggestion in a report provided to the Commission by the Department of Justice that “*all voice traffic, radio and telephone, will be recorded*”. However, this statement was qualified as follows: “*it should be noted that traffic that is patched through control will not be recorded*”. Earlier in this chapter, the Commission expressed that it is satisfied that the intention within An Garda Síochána was to record emergency-related communications, predominantly calls on the 999 lines.

8.7.7. As part of the application, a form, known as a “DPA1”, was completed by the Assistant Commissioner, Crime and Security. In section 4 of the application form, the description of all personal data “so kept or used” by An Garda Síochána listed the following entry:

*“(12) Command & Control logging system for recording and logging the handling of 999 calls from the general public to the Communications Centre at Dublin Metropolitan Area HQS., Harcourt Square, Dublin 2...”*

8.7.8. This application was processed and, from 21 June 1989, An Garda Síochána was registered as a Data Controller and Data Processor for the first time. No reference is made to the recording of any calls other than 999 calls received in Harcourt Square. There is no reference either to the fact that the “recording” of 999 calls means the recording of audio, rather than the production of a written record of the calls. As noted in Chapter 4, S.E.L. consoles were installed between 1983 and 1986 in a number of Divisional and District Stations both inside and outside the DMA and remained in operation during the early 1990s. There is no reference in the application to this audio-recording equipment that was in operation in these stations at this time. It was, as explained in Chapter 4, intended to provide a facility for recording 999 calls. The Commission has found no evidence that this facility was used for the recording of other calls, and no evidence that the recorded calls were retained.

8.7.9. The Office of the Data Protection Commissioner does not retain records of entries made to the Register indefinitely. No records are available to the Commission from 1990 to 1996 – the period during which the DAT recorders were purchased and installed within An Garda Síochána.

8.7.10. However, on 15 April 1996, internal correspondence between the Data Protection Manager within An Garda Síochána and the Chief Superintendent, Telecommunications, notes the “*current entry in the Data Protection Register*”. It states as follows:

*“... Command and control logging systems, and other incidents requiring a Garda response, for recording and logging the handling of 999 calls from the general public to the Communications Centre, Dublin Metropolitan Area HQ, Harcourt Square (and Communications Room, Cork City – proposed December 1995).”*

8.7.11. The register was clearly updated between 1989 and 1995 to include “*other incidents requiring a Garda response*” and also to include the “*recording and logging*” of the handling of 999 calls in the proposed new Communications Room in Cork City. There is no reference to the DAT recorder at Bandon Garda Station, which had been installed on a trial basis at that stage.

8.7.12. A member of An Garda Síochána wrote a report, dated 17 January 1997, which was sent to the Sergeant in charge of Audio Visual Recording. The report is headed “*Voice*

*Logging Recording Equipment and the Data Protection Act*". The Commission was not provided with any other documentation relating to this report. It is unclear who requested it or why it was compiled. However, it appears from its content and its reference to a "64 channel" voice recorder that it relates to the DAT recorder which was installed in Harcourt Square in 1995. It is clear, from the terminology of the report, that the member who drafted it reviewed and referred to the Data Protection Act 1988 and considered the question of whether audio recorded on that system came within the definition of "personal data" under the Act.

8.7.13. The report considers audio recordings and states:

*"An audio recording of the human voice is not data in the true sense (information in a form that can be processed). The only automatic operations (logical and arithmetical) carried out are to direct the tape or disc transport mechanism to a particular location on the media, and then necessitating a manual search of any recordings made at the time. (The recording media records 64 voice channels, each channel relating to a specific console operators phone, microphone or radio channel)"*.

8.7.14. The report then considers the meaning of a data file and states:

*"in order to construct a computerised data file containing personal data and allowing automatic operations be carried out on the data would require an operator to manually operate the equipment, enter a specific time and then listen to messages recorded at that time. He would then, having found a particular recording of interest, manually transcribe any information contained within the recording."*

The report continues:

*"For an audio recording to be processed automatically by means of logical or arithmetical operations would require digital signal processing capable of recognising spoken words and constructing a data file from information contained therein, or capable of recognising spoken words and acting on instructions according to the recognition of a word or words. The machines in use by An Garda Síochána do not possess these capabilities. The present state of the art in signal processing has not yet advanced to the point of providing facilities in commercial products for voice logging."*

*“A voice logging recording is an account of the spoken word including all extraneous signals and noise. It is not a formatted list of items and information, as a computerised record in a data file would be. It requires the operator to filter, interpret and transcribe information from a recording which although time stamped and dated is a chaotic dialogue of voices, tones and noise”.*

The report concludes:-

*“...the recordings from the Voice Logging Systems or the Confidential Call System in use by An Garda Síochána should not be regarded as Personal Data under the Act”.*

8.7.15. Although it is not known whether this report made its way to anyone higher than the Sergeant in charge of Audio-Visual Recording, it suggests that the understanding within the Telecommunications Section of An Garda Síochána at the time was that audio recordings did not come within the definition of personal data under the 1988 Act. It is not necessary for the Commission to comment on the interpretation of the 1988 Act which led the author to his conclusions.

8.7.16. The Commission was not provided with any other entries in the Data Protection Register covering the period when the DAT recorders were in operation, save for that in 2002, which predated the coming into force of the Data Protection (Amendment) Act 2003. At this point, all reference to “recording” of 999 calls is completely removed. The entry in relation to Command and Control now states the following:

*“...Computer aided dispatch system used to centrally deal with all emergency and incident calls to the Garda in the DMR and control all mobile units...”*

8.7.17. The description of the information kept by this system makes it clear that audio recording is not being referred to. The Commission was also provided with the registration details of An Garda Síochána for 2008-2009, which contain a similar entry and make no mention of audio-recording systems. It is probable that the exclusion of any reference to audio recording can be attributed to the view expressed in the internal Garda report from January 1997 that such recordings did not constitute personal data.

8.7.18. There is no further reference at all to recording, audio recording or logging systems within An Garda Síochána in the registration application. Therefore, it was not possible for the Office of the Data Protection Commissioner to be aware of the telephone

recording systems in use within An Garda Síochána throughout this period. The office was simply not informed of the systems.

- 8.7.19. The Commission heard evidence from Mr Billy Hawkes, who was the Data Protection Commissioner from 2005 to 2014. In relation to the original registration of An Garda Síochána, he stated that he interpreted “recording and logging” of calls to mean that a written record of a call was made, rather than an audio recording. Therefore, even if the reference had remained in the later registration applications, it was unlikely to have alerted the office to the “audio” nature of the recording.

#### **An Garda Síochána Data Protection Code of Practice**

- 8.7.20. On 12 November 2007, the Garda Síochána Data Protection Code of Practice was launched with the formal approval of the Data Protection Commissioner. The Code was described, at the time, as “the product of work undertaken by An Garda Síochána in close cooperation with the Office of the Data Protection Commissioner”. It was the first Code of Practice to be approved by the Data Protection Commissioner under the Data Protection Acts 1988 and 2003. Under Section 13(1) of the 1988 Act, the Data Protection Commissioner:

“...shall encourage trade associations and other bodies representing categories of data controllers to prepare codes of practice to be complied with by those categories in dealing with personal data”

- 8.7.21. The Code of Practice defined “personal data” as follows:

*“Personal data in the context of the Data Protection Act 1988 and 2003, means data relating to a living individual who is or can be identified either from the data or from the data in conjunction with other information that is in, or is likely to come into, the possession of the data controller. Examples of this are any report, statement, file, or electronically recorded entry from which a living individual can be identified... It also includes communications data (excluding content)...” [emphasis added]*

- 8.7.22. This suggests that An Garda Síochána remained of the view that the audio from the DAT recording systems did not constitute personal data. The introduction of the NICE system in 2008 does not appear to have changed this view.



- 8.7.23. Section 5 of the Code is headed “Areas of Responsibility”. It indicates that ultimate responsibility for the compliance of each employee of An Garda Síochána with the Data Protection Acts rests with the Garda Commissioner. It also states that:

*“All employees of An Garda Síochána are charged with the responsibility of ensuring that all data that they access, manage and control as part of their daily duties is done so in accordance with the Data Protection Acts and this Code of Practice.”*

- 8.7.24. The responsibility to comply with the Garda Síochána Code of Practice does not lie with the Office of the Data Protection Commissioner.

**Audit by the Data Protection Commissioner of An Garda Síochána 2011-2013**

- 8.7.25. The Office of the Data Protection Commissioner carried out an audit, under sections 10(1A) and (1B) of the Data Protection Acts, on data processing in An Garda Síochána from 2011 to October 2013. The Audit Team, made up of members of An Garda Síochána and staff from the Office of the Data Protection Commissioner, consisted of a Deputy Commissioner, an Assistant Commissioner and a Senior Compliance Officer. The audit focused on the processing of personal data in the PULSE system and the Code of Practice agreed between An Garda Síochána and the Office of the Data Protection Commissioner. It also included onsite inspections at Mullingar Garda Station and Limerick Garda Station – two Divisional Garda Stations where the NICE recorders were installed during the period of the audit.

- 8.7.26. The audit methodology is set out in the “Guide to Audit Process” produced by the Office of the Data Protection Commissioner. It states that:

*“The methodology used by the Audit Team during the actual inspection is primarily a questionnaire based approach. This is supplemented by visual inspections and examinations of selected uses of personal data within the organisation including manual interrogation by the Team of databases containing personal information. A physical inspection of security procedures will also typically be conducted”.*

- 8.7.27. A number of meetings took place between the Office of the Data Protection Commissioner and members of An Garda Síochána between August 2011 and April 2012. These meetings occurred following the ruling of Judge Leonie Reynolds in the Holness case. The April 2012 meeting took place following the issuance of a HQ Directive by the Executive Director, ICT, on the “Use and Monitoring and Recording of emergency telephone lines with Garda Control Rooms”.

8.7.28. An initial inspection by the Audit Team took place on 7 and 8 November 2012. Section 8 of the audit report deals with telephone-call data held by telecommunications companies. The audit makes no reference, whatsoever, to the recording of telephone calls by An Garda Síochána. This is unsurprising, given the total lack of reference made by An Garda Síochána to the audio recording of calls in the registrations since 1996 that have been made available to the Commission.

8.7.29. Mr Billy Hawkes, a former Data Protection Commissioner, gave sworn evidence in relation to the audit. He was asked whether he was surprised to learn of audio recordings existing within An Garda Síochána and whether they formed part of the audit. In evidence, he stated the following:

*“Yes I was surprised. The issue had not been raised in the course of the audit we had carried out on An Garda Síochána. We had no previous knowledge of this practice. As you will see from my statement, a member of the Audit Team informed me that the issue had not arisen in any form in the course of what was extensive contact with An Garda Síochána, both at Headquarters and at station level and in the course of the audit”.*

#### **Complaints to the Office of the Data Protection Commissioner**

8.7.30. The Commission wrote to Mr Hawkes on 20 August 2014, enquiring as to whether any complaints received by the Office for investigation under section 10 of the 1988 Act stated or implied that recording of non-999 telephone calls had been carried out by An Garda Síochána. A search of the Complaints Database was completed by the Office. No such complaints had been received.

#### **Communication between An Garda Síochána and the Data Protection Commissioner regarding the destruction of tapes**

8.7.31. This aspect has already been dealt with in the Second Interim Report of the Commission. For ease of reference, the relevant information is repeated here.

8.7.32. On 18 March 2014, Mr Ken Ruane completed a draft letter to be sent from the Garda Commissioner to the Data Protection Commissioner. The letter was approved and sent on 19 March 2014. The factual content was substantially the same as that in a letter of 10 March 2014 sent to the Secretary General of the Department of Justice, Mr Purcell. It referred to the emergence of recordings in the Bailey case and to the fact that some of these were captured by a Discovery Order and would have to be disclosed. It gave the same account of the background and extent of Garda telephone recording systems,

mentioned that recording of non-999 calls had been stopped in November 2013 and identified the issue now as being what action the Garda Commissioner (as Data Controller) should take with regard to the existing recordings.

8.7.33. The views expressed in the letter of the Garda Commissioner to the Data Protection Commissioner were as follows:

- That the tapes were likely to contain personal data for the purposes of the Data Protection Acts;
- That the Commissioner did not appear to have any lawful basis to retain the recordings;
- That section 2 of the Data Protection Acts may not have been complied with, in that the purpose for the recordings “at least in recent years, has not been explicit” and thus their retention may have been excessive; and
- That there was an issue as to whether section 2A of the Data Protection Acts, which allows processing of data in certain circumstances, could apply if there had been a breach of section 2 of the Act in the first place.

8.7.34. The letter concluded by saying that the Garda Commissioner would welcome an opportunity to meet the Data Protection Commissioner to ascertain his views, as Discovery in the Bailey proceedings would be finalised in the following week. He suggested that the Data Protection Commissioner could be briefed by Mr Ruane, the Head of Legal Affairs for An Garda Síochána, and a representative from the Garda ICT Section.

8.7.35. In the event, no such meeting took place. The Data Protection Commissioner, Mr Billy Hawkes, received the letter by email on 19 March 2014. He understood from it that there was an urgency in relation to compliance with the Discovery Order and so telephoned Mr Ruane, the person indicated in the letter as being the relevant contact. They discussed the matter and Mr Hawkes gave his opinion on the issues raised, as they had been presented to him in the letter.

8.7.36. In relation to the Bailey recordings, Mr Hawkes said that the tapes must be disclosed in accordance with the Discovery Order and that there was no basis under the Data Protection Acts to redact the names of individuals.

- 8.7.37. Mr Hawkes also said that if a data protection request was received it would have to be complied with fully in respect of all data held by An Garda Síochána, regardless of whether that data was obtained or retained lawfully.
- 8.7.38. As regards recordings that were unconnected with the Bailey case, Mr Hawkes expressed the view that An Garda Síochána would not appear to have lawful grounds for retaining them. It is important to note that Mr Hawkes drew this conclusion from the statements made by the Garda Commissioner in his letter that there was no explicit purpose for the recordings and that he did not think he had any lawful basis on which to retain them.
- 8.7.39. Finally, Mr Hawkes advised that, in the event that it was decided to destroy the recordings, consent would have to be obtained from the Director of the National Archives, in order to ensure consideration of any obligations under the National Archives Act 1986. The Garda Commissioner testified that he had not intended to destroy the tapes without an express instruction from the law officers of the State and for that reason, he referred the advice from the Data Protection Commissioner to the Office of the Attorney General for consideration.
- 8.7.40. In his evidence to the Commission, Mr Hawkes emphasised that he had given his advice in the context of the information provided to him by An Garda Síochána and, in particular, the view of the Garda Commissioner that there was no lawful basis for retaining the recordings. He said he was not made aware that the recordings could contain information relevant to the innocence or guilt of persons in other cases, which could affect the validity of court judgments. He accepted that there could potentially be a lawful basis for retaining recordings if there was a reasonable assumption that they contained such material; however, that was not something that was brought to his attention at the time and he had no information about it.

## 8.8 The Office of the Director of Public Prosecutions

### Introduction

- 8.8.1. This section of this chapter addresses the matters referred to in paragraph 1(f) of the Terms of Reference, insofar as they apply to the Office of the Director of Public Prosecutions (DPP) for the period from 1 January 1980 to 27 November 2013. Thus, it will report on the level of knowledge of the existence, operation and use of the Garda recording systems within that Office. The Commission is also required to report on any instances where that Office used any of the information produced by the recording systems for any purpose.

### The origin and structure of the Office of the Director of Public Prosecutions

- 8.8.2. The Office of the Director of Public Prosecutions (DPP) was established by the Prosecution of Offences Act 1974, which conferred on the DPP the function, previously performed by the Attorney General, of prosecuting both indictable and summary crime.
- Pursuant to section 8 of the Garda Síochána Act 2005, members of An Garda Síochána may bring summary and certain indictable prosecutions, but only in the name of the DPP. As mentioned, Section 8 allows certain indictable prosecutions to be brought and concluded in the District Court on the basis of the Director's general consent. This occurs nationally.
  - All criminal prosecutions on indictment are taken in the name of the People and are prosecuted at the suit of the DPP, except for a limited category of offences that are still prosecuted at the suit of the Attorney General. The DPP, in exercising her functions independently, decides whether to charge individuals with criminal offences and that charges that should be preferred. The Office of the DPP defines its mission as being "to provide on behalf of the People of Ireland a prosecution service that is independent, fair and effective."
  - The Office comprises two legal Divisions: the Solicitors' Division and the Directing Division. There is also an Administration Division that provides organisational, infrastructural, administrative and information services.

### Solicitors' Division and Directing Division

- 8.8.3. Nationally, if directions are required as to whether a matter should be prosecuted summarily or on indictment, a physical file will be opened in the Directing Division of

the Office of the DPP, along with separate physical files opened in one or more of the Solicitors' Division sections, depending on how the matter progresses.

- 8.8.4. In Dublin, matters that are directed to be tried on indictment are dealt with by the Solicitors' Division within the Office of the DPP. The Chief Prosecution Solicitor is the Head of the Solicitors' Division and her staff act as solicitors in all courts in Dublin.
- 8.8.5. The Solicitors' Division comprises a number of sections including, *inter alia*, Circuit Criminal Trials, a District Court section and a Court of Criminal Appeal section. The Solicitors' Division was established within the Office of the DPP in December 2001. It had previously been part of the Chief State Solicitor's Office (CSSO). The process of record keeping within the Office of the DPP will be explained further in this section. For present purposes, it is only necessary to note that digital records of criminal prosecutions in the CSSO were minimal and have all been copied over to the IT servers of the Office of the DPP over time.
- 8.8.6. In order for the DPP to act in cases of indictable crime or in District Court Appeals outside Dublin, each county has at least one appointed State Solicitor. Some heavily populated counties, such as Kildare, have two State Solicitors and some counties, such as Limerick, can have County and City Circuit Criminal Court prosecution lists and a State Solicitor for each list. If files are received by the Directing Division from these State Solicitors, the Directing Division considers them. It then gives directions, considers any potential guilty pleas and is informed of any post-trial verdict.

#### **Available information and investigative methodology**

- 8.8.7. The Commission took statements and heard sworn oral evidence from various witnesses, in order to assess the level of knowledge of the existence, operation and use of Garda telephone recording systems within the Office of the DPP.
- 8.8.8. The Commission, as a means of establishing the level of knowledge of Garda telephone recording systems within that Office, sought to ascertain if it had received evidence or statements from An Garda Síochána relating to calls other than 999 calls during the process of directing a prosecution or of prosecuting a prosecution.
- 8.8.9. The Commission examined and reviewed the documentary evidence available to it from An Garda Síochána in relation to the access and use of non-999 telephone recordings. This included access records retained by each Divisional Station within the timeframe of the Terms of Reference. These processes of access and retention in relation to non-999 recordings in each Divisional Station have been discussed in Chapter 5.

- 8.8.10. The Commission searched these records with a view to identifying cases where access was granted to recordings of non-999 calls. Having eliminated all cases of access to 999 calls, the Commission identified 151 recorded calls which were not clearly identified as 999 and were sought by members of An Garda Síochána for possible prosecutions nationwide, from 1 January 1980 until 27 November 2013. The earliest of these recordings was sought in August 1997. The last was sought in November 2013.
- 8.8.11. A table of these access records was sent to the Office of the DPP by the Commission to assist the Office in determining whether evidence arising from non-999 telephone recordings was considered at the direction stage of criminal prosecutions, or indeed in the prosecution itself, by way of evidence or disclosure to the defence.
- 8.8.12. As indicated in Chapters 4, 5 and 6 of this Report, recording of non-999 calls may also have taken place to a limited extent at the Command and Control Centre in Harcourt Square, Dublin. However, the Commission has not found any access records to recordings of non-999 calls, sought by investigating members of An Garda Síochána, which were used in prosecutions in Dublin. The Commission, therefore, concludes that the Office of the DPP remained unaware of the existence of non-999 recording in the DMA.

#### **Record keeping within the Office of the DPP 2000-2013**

- 8.8.13. At this stage, it is appropriate to detail the records available to the Office of the DPP. The Commission requested an overview from that Office regarding its document management systems, the types of files kept and the extent to which they are capable of disclosing information which might be relevant to the Commission's task. A summary of the overview provided follows.
- 8.8.14. As already outlined, all files received by the DPP from An Garda Síochána are sent through one of two channels. The first channel, concerning the prosecution of offences outside Dublin, is the State Solicitor for the relevant county. The computer records of such cases do not include the Books of Evidence (the evidence that the prosecution relies on in indictable cases). Therefore, the Books of Evidence are not stored on the database of the Office of the DPP. The sole records available on the DPP's databases in such cases are the letters that direct the institution of prosecutions and any internal submissions. This occurs because the Directing Officer in the Directing Division must be consulted when considering any possible plea and must be informed of any post-trial verdict. It is the State Solicitor that prosecutes the case.
- 8.8.15. The second channel, concerning the prosecution of offences in Dublin, goes straight to the Solicitors' Division in the Office of the DPP, where more documentation, including

the Book of Evidence, is available on the Director's databases. If a physical file is opened in the Solicitors' Division or the Directing Division, this is mirrored by a separate file being opened on the Office's computer system.

- 8.8.16. As of October 2008, there is one integrated management system in the Office of the DPP, called Axxia. It is the sole IT system used to run the legal work of the Office. The documents relating to 2000-2008 were stored on Lotus Notes databases; there were separate databases for the Directing Division and each section in the Solicitors' Division. In most cases, Lotus Notes was a file registry system containing key information on the cases, to include, *inter alia*, name and location of the commission of the offence, names of the accused, names of injured parties, primary charge, direction made and some internal correspondence (letters directing prosecution and internal submissions).

### **Record keeping within the Office of the DPP pre-2000 / 01**

#### **Directing Division**

- 8.8.17. Prior to 2000, there was no IT system (except for one used to record fees of counsel) in the Office of the Director of Public Prosecutions. The data was stored on typed index cards and the system was significantly more rudimentary than that used to store the post-2000 data. All the data on these index cards was input into a pre-2000 version of the Lotus Notes database. This is the format of the records from 1 January 1980 until 31 December 1999. All Lotus Notes databases were migrated to the Axxia system upon its implementation.

#### **Solicitors' Division**

- 8.8.18. As already mentioned, prior to 2001, this Division had been part of the CSSO. A number of sections were transferred from the CSSO in 2001, including the Criminal Trials Section, all of which had had their own Lotus Notes databases. These databases were essentially registry databases with very basic information. They were copied to servers in the Office of the DPP over time and unrelated civil matters were removed from them.

- 8.8.19. These databases included:

- Criminal Trial Registry, set up in 1998;
- District Court Registry, set up in 1993;
- Judicial Review, set up in 1995.



- 8.8.20. Although these sections would have been part of the CSSO until 2001, any matter sent to the Office of the DPP before that time should have basic information on the Direction Division Lotus Notes database which, in turn, has been transferred to the Axxia system.
- 8.8.21. All of the electronic files, dating back to the establishment of the Office of the DPP in 1975, are accessible on the Axxia system, though there is very limited data stored on the system in respect of pre-2000 matters and Directing Division matters, for the reasons already outlined.

**Results of the searches of the Office of the DPP databases regarding Terms of Reference paragraphs 1(l) and 1(f)**

**Term of Reference paragraph 1(l)**

- 8.8.22. The Commission is required, by Term of Reference paragraph 1(l), to report on any instances where the Office of the DPP used any of the information produced by the telephone recording systems relating to non-999 calls in Garda stations for any purpose during the relevant period.
- 8.8.23. The Office of the DPP has informed the Commission, after searching through their databases using the table provided by the Commission, that, of the 151 calls that were not clearly identifiable as 999 calls, they had records or files on record of 72 matters in which details of the access records to telephone recordings had been used in some capacity, whether at the direction stage or during the course of a prosecution as evidence or disclosure.
- 8.8.24. The Office of the DPP has examined these matches in order to ascertain whether the telephone recording referred to in each case had been positively identified in their files as a non-999 call. In the 72 relevant case files that the Office examined in detail, 3 contained no reference to the recording of phone calls. In the remaining 69 cases, the recorded calls were described as either “emergency”, “999”, “control room” or “communications room” calls.
- 8.8.25. The Commission has been informed by the Office of the DPP that their staff assumed that the terms “control room call”, “emergency call” and “999 call” were interchangeable terms for describing calls on dedicated 999 lines only. There is no evidence that any official from the Office understood that some “control room” or “emergency” calls could have been recorded on non-999 lines.

- 8.8.26. The Commission accepts that any Directing Officer or member of the Solicitors' Division who came across such a recording during the course of their directions or a prosecution, and saw it being described in the above terms, would not have known that such recordings could have been non-999 lines.

**Term of Reference paragraph 1(f)**

- 8.8.27. During the Commission's investigations in preparing its Second Interim Report, the DPP, Ms Claire Loftus, provided the Commission with a statement. She stated:

*"I first became aware of the issues dealt with in the former Commissioner's letter to the Secretary General on the morning of Tuesday 25<sup>th</sup> March 2014. At approximately 11 a.m., on 25<sup>th</sup> March 2014, the Deputy Director of Public Prosecutions briefed me on a telephone call which he had just received from the Director General of the Attorney General's Office, Liam O'Daly. Mr O'Daly, as reported to me by Barry Donoghue, informed him in very broad terms that it had been discovered that there was widespread recording of non-emergency calls in Garda Stations. The extent of the problem was not made clear but the fact that this had been discovered through work on discovery in the Ian Bailey Civil Proceedings was mentioned. I am not a party to those civil proceedings. Mr O'Daly also mentioned to the Deputy DPP that the recording of phone calls in a Garda Station had been aired previously in a case prosecuted in Waterford following an investigation by the Garda Síochána Ombudsman Commission..."*

- 8.8.28. There followed a statement by the Government in the early afternoon announcing the discovery of tape recordings of incoming and outgoing calls in Garda stations. The next day, 26 March 2014, the DPP met the then Interim Garda Commissioner, who briefed her on how the recordings had arisen in Divisional Stations around the country. In that meeting, the DPP was informed that there was no recording in Divisional Stations within the Dublin Metropolitan Area, as the recording of 999 calls was centralised in Command and Control at Harcourt Square.
- 8.8.29. The Commission then had to consider whether the DPP and her Office were, or ought to have been, aware, prior to March 2014, of non-999 recording occurring in Garda stations. The first issue to consider is whether or not recordings of non-999 calls were being relied on as evidence, or served as disclosure, during the course of criminal prosecutions at any level, inside and outside Dublin. This was dealt with in the section above regarding Term of Reference paragraph 1(l).

- 8.8.30. The Commission then considered whether the DPP and her Office should have become aware of the existence, operation and use of non-999 telephone recording during, or as a result of, the prosecution of the Holness case by the Garda Síochána Ombudsman Commission in 2011. The DPP's statement to the Commission itself notes the existence of the Holness case, though she describes it as "*a case prosecuted in Waterford following an investigation by the Garda Síochána Ombudsman Commission.*" The case and its aftermath have been discussed in detail in Chapter 7 of this Report and have been further discussed at paragraph 8.6.11 of this chapter.
- 8.8.31. On 8 February 2010, Mr Anthony Holness made a formal complaint of assault against 4 members of An Garda Síochána stationed in Waterford Garda Station. This complaint was referred to GSOC on 9 February 2010 under section 102 of the 2005 Act by the Superintendent in Waterford Garda Station. GSOC conducted an investigation into the complaint, which ultimately resulted in the prosecution of a number of Gardaí before Waterford Circuit Court in July 2011. This was the first prosecution taken by the DPP on foot of an initial GSOC investigation to result in custodial sentences being imposed on members of An Garda Síochána.
- 8.8.32. GSOC was made aware of the specific recording system that was in operation in Waterford Garda Station at this time and it was also informed that this equipment was used for the recording of "*999 calls, radio communications and other phones within the communications room*". On 7 October 2010, GSOC completed its investigation into the incident and forwarded an investigation file to the Office of the DPP.
- 8.8.33. Although GSOC sent its investigation file on the Holness case to the Office of the DPP for directions, it also made recommendations that charges should be preferred against the 4 members of An Garda Síochána who were involved in the case.
- 8.8.34. While the Holness case was prosecuted by the DPP, the carriage of it and the practicalities and day-to-day work of the prosecution were the remit of GSOC, the State Solicitor for Wexford and Prosecution Counsel.
- 8.8.35. It would seem that, even if the Office of the DPP had known that the pertinent phone call in this case was not a 999 call but, rather, an incoming call to the Waterford Control Room on a non-999 line, which seems improbable, it could also have been the case that,

after the decision to prosecute had been made, any legal or factual matters would be considered by GSOC, the State Solicitor for Wexford and Prosecution Counsel.

- 8.8.36. The Commission accepts that the Office of the DPP did not appreciate the significance of the witness statement that detailed that the NICE system was used to record “999 calls, radio communications and other phones within the communications room”.

## Conclusions

### Department of Justice

- 8.1 The Department of Justice was aware of the existence of a telephone recording system in the Radio Control Room at Dublin Castle. It was also aware, through the work of the Radio Advisory Committee, of the purchase and installation of a similar system at Command and Control, Harcourt Square, in 1989. The Department understood the aim and purpose of these systems to be the recording of communications relating to emergency calls. It could not be established whether the Department was aware that some non-999 telephone lines were recorded in pursuance of this aim.
- 8.2 In 1995, the Department was made aware of, and gave sanction to, the purchase of a replacement recording system for Harcourt Square and a new system for the Communications Centre at Anglesea Street, Cork. As set out in Chapter 5 of this Report, the system at Anglesea Street was subsequently used to record calls to the main station number as well as 999 calls. The Commission has found no evidence that the Department of Justice was made aware of this change in recording practice.
- 8.3 Also in 1995, new multi-track recorders were purchased for Divisional Stations outside the DMA. Sanction was required from the Department of Justice for this purchase, but the Commission has been unable to confirm whether such sanction was sought and given.
- 8.4 The recorders purchased for Divisional Stations were used to record the main station number as well as 999 lines. In a small number of stations, some additional non-999 lines were also recorded. The Commission found no evidence that the Department was aware of this.
- 8.5 On the evidence before the Commission, the Department's lack of knowledge concerning non-999 recording continued when the NICE system replaced the DAT system in 2008, notwithstanding the fact that correspondence between An Garda Síochána and Department officials included documents that referred to the recording of non-emergency Control Room calls.

### Office of the Minister for Justice

- 8.6 Although the Minister for Justice was formally responsible for sanctioning Garda Telecommunications expenditure from 1980 until 2006, neither the Office of the Minister for Justice nor any individual Minister for Justice had any knowledge of the

operation, existence or management of Garda telephone recording systems during that period of time.

- 8.7 The Commission has seen no evidence to suggest that any Minister for Justice was informed or put on notice, in any way, of the fact of Garda telephone recording. The lack of knowledge of successive Ministers for Justice is the simple consequence of the fact that senior ranks of An Garda Síochána were almost totally unaware of such recording systems as existed, as well as the lack of such knowledge in the Department.

Office of the Attorney General

- 8.8 The Commission is satisfied that there is no evidence that An Garda Síochána sought legal advice from the Office of the Attorney General regarding the recording of non-999 calls, at any time during the installation or upgrade of the recording systems that are the subject matter of this Report.
- 8.9 The Commission is satisfied that the Office of the Attorney General had no knowledge of the practice of recording telephone calls in Divisional Stations, prior to being informed of it by the Garda Commissioner in November 2013, as explained in the Commission's Second Interim Report.

Office of the Chief State Solicitor

- 8.10 The Commission finds that the Chief State Solicitor's office had no greater knowledge of the existence, operation or use of telephone recording systems than the branches of Government for which it acted in a legal capacity. In particular, it was not aware of the systematic recording of non-999 calls at Divisional Garda Stations until November 2013, at the earliest.

Garda Síochána Ombudsman Commission (GSOC)

- 8.11 The Commission accepts that GSOC was first on actual notice that a telephone recording system was in place within Garda stations from February 2010, once the relevant GSOC officials had heard the recording during their investigation in the Holness Case. There is no evidence to suggest that GSOC could have been on constructive notice before February 2010 at the earliest.
- 8.12 As a result of the ruling in the Holness case, GSOC suggested to the Garda Commissioner that An Garda Síochána might wish to "*re-evaluate the practice*" of

recording calls on their public lines. It was entitled to expect that such a recommendation would have been followed up on.

- 8.13 While GSOC has the power to examine the practices, policies and procedures of An Garda Síochána in order to prevent complaints arising, the Commission finds no reason why they should have done so in relation to the recording of telephone calls within An Garda Síochána.

Office of the Data Protection Commissioner

- 8.14 From 21 June 1989, An Garda Síochána was registered as a Data Controller and Data Processor with the Office of the Data Protection Commissioner. At this time, reference was made to the recording of 999 calls received in Command and Control, Harcourt Square. In 1995, the Register entry was changed to include the proposed new recording system at Anglesea St, Cork. Only 999 call recording was mentioned.

- 8.15 It appears that, at some point, in January 1997 or thereafter, An Garda Síochána adopted the view that audio recordings on the DAT systems installed at Harcourt Square, Anglesea Street and Divisional Stations outside the DMA did not come within the definition of “personal data” under the Data Protection Act, 1988, and that it was, therefore, unnecessary to inform the Data Protection Commissioner of their existence. This view remained unchanged in subsequent years. It was reflected in the Code of Practice devised by An Garda Síochána with the assistance and approval of the Office of the Data Protection Commissioner, and published in 2007.

- 8.16 In carrying out an audit of data processing within An Garda Síochána under Ss. 10 (1A) and (1B) of the Data Protection Acts between 2011 and October 2013, the Office of the Data Protection Commissioner was not made aware of the recording of telephone calls in Garda stations by An Garda Síochána.

- 8.17 The Commission finds that the Office of the Data Protection Commissioner had no knowledge of the existence, operation or use of non-999 telephone recording at Garda stations until 19 March 2014, when An Garda Síochána sought the advice of the Data Protection Commissioner as to what was to be done with the DAT recordings that were still in existence.

Office of the Director of Public Prosecutions

- 8.18 The Commission is satisfied that there is no material from which it could be inferred that the Office of the Director of Public Prosecutions (DPP) had reasonable means of knowing that non-999 calls were being recorded in Divisional Garda Stations outside the

DMA and / or in Command and Control, Harcourt Square, until such time as the DPP was informed in 2014 of the existence of non-999 Garda telephone recording systems.

- 8.19 In particular, the Commission has been unable to uncover any evidence that the Office of the DPP, in the course of handling evidence for prosecutions, had any reason to believe that statements regarding telephone calls received related to the recording of telephone calls other than 999 calls.



## 9. AUTHORISED BY LAW

### 9.1. SECTION I: INTRODUCTION

#### **The Seriousness of the Issue**

9.1.1 Paragraph 1(g) of its Terms of Reference requires the Commission:

“To establish whether the installation, operation and use of the said telephone recording systems was authorised by law”.

9.1.2 In one sense, this is the core of the investigation required by the Terms of Reference of the Commission. It raises the fundamental question of whether An Garda Síochána acted in accordance with the law when, commencing in 1995, they installed systems for the recording of telephone calls, other than emergency calls, at Divisional Garda Stations.

9.1.3 The events of March 2014, which led to the establishment of this Commission, show that both the Attorney General and the Taoiseach were seriously concerned that An Garda Síochána might have been acting unlawfully by establishing and operating non-999 telephone-recording systems.<sup>89</sup> The Commission has already dealt extensively with these events in its Interim Report of 31 August 2015 on paragraphs 1(n) and (o) of its Terms of Reference. The Attorney General regarded the matter as one of “great seriousness” from the moment when she first learned of it.<sup>90</sup> This view was shared by An Taoiseach when he was informed.<sup>91</sup> The Attorney General believed that it involved An Garda Síochána in “wholesale violation of the law.”<sup>92</sup> In her first written statement to this Commission, the Attorney General said that she had reported on the matter to the Taoiseach in the following way:

“I outlined the potentially very serious implications legally and constitutional, civil and criminal law issues that could arise from the breaches of the Constitution and the law and infringement of citizen's rights including the right to privacy.”<sup>93</sup>

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<sup>89</sup> See: “Interim Report of the Fennelly Commission: Terms of Reference (n) and (o)”, dated 31 August 2015 (hereinafter referred to as “Interim Report on 1 (n) and (o)”), at paragraphs 25.22, 25.28 and 3.5.

<sup>90</sup> Interim Report on 1 (n) and (o) at paragraph 24.1.

<sup>91</sup> Interim Report on 1(n) and (o) at paragraph 24.1 and 24.6 .

<sup>92</sup> Interim Report on 1(n) and (o) at paragraphs 24.3 and 24.9.

<sup>93</sup> Interim Report on 1(n) and (o) at paragraph 25.9.

9.1.4 The Commission did not, in its Interim Report of 31 August 2015, “address the important substantive issue as to whether and to what extent any actual recording was authorised by law.”<sup>94</sup>

9.1.5 It must now do so as required by paragraph 1(g) of the Terms of Reference.

### **Three aspects of the Recording Systems**

9.1.6 Under paragraph 1(g), the Commission must address the following three aspects of the non-999 telephone-recording systems:

- Installation: the legal authority for the installation of the recording systems;
- Operation: the legal authority for the operation of the systems including recording, retention and storage;
- Access: the legal authority for the extent of access to and use of the information recorded in the telephone calls by An Garda Síochána.

9.1.7 The core activity is unquestionably the act of recording telephone calls. That is why the Terms of Reference repeatedly use the expression “telephone recording systems” [emphasis added]. The act of recording necessarily implies the storage or retention of the recorded calls, at least for some period. It also implies the possibility of future access to them and their potential use for a purpose or purposes. Such purposes could, in principle, include their use in further Garda investigation of crime or as evidence in criminal or disciplinary proceedings. It is also, of course, possible, at least in principle, that recorded calls would be used for purely private purposes unrelated to any official Garda activity. In this connection, the Commission draws attention to paragraphs 1(h) and (i) of the Terms of Reference, where the Commission is required to establish whether An Garda Síochána recorded telephone conversations between solicitors and their clients and whether any recordings were used for any improper or unlawful purposes. Those matters are addressed in Chapters 10 and 11 of this Final Report.

9.1.8 Prior to the consideration of whether the recording systems were authorised by law, it is worth recalling the nature and operation of the telephone-recording systems, as set out in Chapters 4, 5 and 6 of the Final Report.

9.1.9 Firstly, there were no systems installed or in operation to record non-999 calls exclusively. Insofar as the recording of non-999 calls has taken place, it has occurred in the context of systems that also recorded 999 calls and / or Garda radio traffic.

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<sup>94</sup> Interim Report on 1(n) and (o) at paragraph 3.6.

- 9.1.10 In brief, for the period 1980-1995, systems were in operation at the Radio Control Centre, Dublin Castle, and later Command and Control, Harcourt Square, to record all emergency-related communications into and out of the dedicated emergency response centre for the Dublin Metropolitan Area (DMA). This included the recording of a small number of non-999 lines connected to consoles in those emergency response centres.
- 9.1.11 During the same period, single-track recorders, manufactured by Standard Elektrik Lorenz (S.E.L), were installed in communications consoles at Divisional Stations throughout the country. The Commission is satisfied, on the evidence before it, that these recorders, insofar as they were used at all, were used only to record 999 calls.
- 9.1.12 Beginning in 1995, the recorders in Divisional Stations outside the DMA were replaced by multi-track Digital Audio Tape (DAT) recorders, allowing simultaneous recording of up to 8 lines. As is described in Chapter 5, from this point on, the main station line in almost all Divisional Stations was recorded, together with 999 lines and Garda radio traffic. In a small number of stations, other non-999 lines were also recorded, as set out in Chapter 5. In particular, certain lines used by members of An Garda Síochána for confidential calls were recorded at Bandon Garda Station, for reasons that are unknown. Such lines do not appear to have been recorded in any other Garda station.
- 9.1.13 Although there is evidence that the recording of the main number at Divisional Stations was prompted, at least in part, by a desire to capture calls of an emergency nature that came in on that line, the inevitable result was that a large number of non-emergency calls were also recorded.
- 9.1.14 An Garda Síochána, as an organisation, did not formulate any policy regarding which lines were to be recorded on the DAT systems when acquired. Former senior Garda officers, including at least one former Garda Commissioner, expressed the view that a policy such as was adopted would necessarily have to have been, that is, should have been, formulated at a higher level. Nonetheless, the facts are that Senior Garda Management did not discuss or sanction the operation of the system to record non-999 calls.
- 9.1.15 Most of the recordings made on these systems, whether 999 calls or otherwise, were retained and stored indefinitely by An Garda Síochána.
- 9.1.16 It is important to note that the Commission is required only to consider whether the recording of non-999 calls at Garda stations between 1 January 1980 and 27 November 2013 was authorised by law. The Commission does not answer academic questions, such

as whether, in principle, the recording and retention of calls on certain non-999 lines could be authorised by law in appropriate circumstances.

- 9.1.17 Accordingly, when the Commission refers to “the recording systems” in Chapter 9, it encompasses only the systems operated by An Garda Síochána to record non-999 telephone calls between 1980 and 2013.

#### **A matter of law**

- 9.1.18 This paragraph requires the Commission to report on whether the telephone-recording systems in place were “authorised by law”. That is part of the “matter...of significant public concern” identified in the Commission’s Terms of Reference, pursuant to s. 3(1)(a) of the Commissions of Investigation Act 2004, on which the Commission is required to make a report.

- 9.1.19 Section 32(1) of the Act requires the Commission to:

“prepare a written report, based on the evidence received by it, setting out the facts it established in relation to the matters referred to it for investigation.”

- 9.1.20 The question of whether the telephone-recording systems were ‘authorised by law’ is principally a matter of law rather than of fact.

- 9.1.21 The Commission emphasises, at the outset, that it does not enjoy the authority of a court to pronounce on the law. Only the Courts have the power to decide ultimately on the legal matters dealt with in this chapter. The Commission, not being a court, cannot do more than express its considered opinion on those matters.

#### **The meaning of “authorised by law”**

- 9.1.22 In its literal sense, the expression, “authorised by law”, raises the question of whether the law gave any positive authority to An Garda Síochána for the “installation, operation and use of the said telephone recording systems”.

- 9.1.23 Paragraph 1(g) does not merely require the Commission to state whether there was explicit legal authority for the operation of the telephone-recording systems. In a literal sense, the Commission could simply state that the telephone-recording systems were not “authorised by law”, but that would be an incomplete and, indeed, evasive answer. It would not respond to the essence of the question. Clearly, there was no explicit legal authority. No express question is posed in the Commission’s Terms of Reference as to whether the systems would be unlawful without authorisation; but that question is

implicit. If the installation, operation or use of the systems were contrary to or prohibited by law, they would equally not be “authorised by law”. The Commission does not ascribe any restricted or narrowly literal meaning to the expression “authorised by law”. The Commission is required to investigate and report fundamentally on whether it considers the operation of the telephone-recording systems at Garda stations to have been lawful. In simple terms, if there was no such authorisation, was its operation contrary to the law?

9.1.24 The Commission should consider all relevant aspects of the law in order to determine the unavoidable and fundamental issue, which is whether it was lawful to engage in the recording and related activities without such legal authority.

9.1.25 The Commission is not required to consider whether the system was in compliance with all possible aspects of national or international law potentially engaged by a system that was wide reaching in operation and that clearly did not benefit from any legal authority. The Commission is satisfied, in the light of the forgoing considerations, that the question of whether the operation of the telephone-recording systems was authorised by law requires examination of the following areas of law:

- (i) **Common law:** Whether the telephone-recording systems were lawful under the common law;
- (ii) **Statute:** Whether those systems were authorised by statute, which necessarily includes an inquiry as to whether they were prohibited by statute;
- (iii) **The Constitution:** Whether the systems involved an invasion of constitutional rights, in particular, the constitutional right to personal privacy;
- (iv) **European Convention on Human Rights:** Whether the operation of the systems constituted a violation of the European Convention on Human Rights and Fundamental Freedoms (“the Convention”) as applied in the domestic law of the State by the provisions of the European Convention on Human Rights Act 2003;
- (v) **European Union law:** Whether the systems infringed the law of the European Union, including the Charter of Fundamental Rights of the European Union.

### **Relevant changes in the law**

9.1.26 The law changes over time. The Terms of Reference consider the period from 1980 to 2013, while the effective period of the Garda recording of non-999 calls is from 1995 to 2013. In that period, there were some changes to the applicable law. The most notable are:

- (i) The law regarding the offence of interception of telephone calls was changed when s. 98 of the Postal and Telecommunications Services Act 1983 was amended by s. 13 of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993;
- (ii) The European Convention on Human Rights Act 2003, for the first time, gave effect to the provisions of the Convention in the domestic law of the State, as against organs of the State;<sup>95</sup>
- (iii) Several Directives of the European Union relating to the confidentiality of communications were adopted and transposed into Irish law from time to time from the late 1990s, with the effect that, from the relevant dates, provisions of the Directives had direct effect in Irish law;
- (iv) From 1 December 2009, the Charter of Fundamental Rights of the European Union entered into force: Articles 7 and 8 of the Charter cover, in principle, the same subject matters as Article 8 of the Convention.

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<sup>95</sup> See: Section 3 of the European Convention on Human Rights Act, 2003; and, Article 29, Section 6 of the Constitution.

## 9.2. SECTION II: AUTHORISED AT COMMON LAW

- 9.2.1 The systems for recording telephone calls were operated by An Garda Síochána, a body established under earlier statutes dating from 1924 and continued in being by s. 6 of the Garda Síochána Act, 2005. An Garda Síochána enjoy such powers as originate under common law or are authorised by statute. This is the context in which the issue as to whether the recording system operated in the exercise of a common-law power needs to be considered.<sup>96</sup>
- 9.2.2 The operation of the Garda telephone-recording systems has never been the subject of legal challenge.<sup>97</sup> That is, no doubt, because the fact that they were being used to record non-999 calls was not generally known prior to the events giving rise to the establishment of this Commission in 2014.
- 9.2.3 As a matter of historic fact, the State operated, for a period of years which cannot be determined, a system whereby the Minister for Justice granted to An Garda Síochána, on application by the Garda Commissioner, warrants permitting the listening to or “tapping” of specific telephone lines and the recording of telephone conversations. The system was purely administrative. The Home Secretary in England and Wales similarly granted warrants to the Police. Both of these systems came to an end coincidentally, though for quite different reasons, in the early 1980s. In neither jurisdiction was there any express statutory provision authorising the grant of the telephone-tapping warrants. The legal justifications advanced or considered in each jurisdiction provide useful insights into the question of the lawfulness of the activity of listening to or recording telephone calls by public authorities. It is for that reason that, in the absence of any judicial guidance, at least in this jurisdiction, the Commission finds it particularly useful to consider the legal basis for the telephone-tapping warrant system.

### **A Summary of the Warrant system in Ireland**

- 9.2.4 The only source of public information about the system of warrants for the tapping of telephones was located in answers to parliamentary questions, and a small number of additional references, in Dáil or Seanad debates. The most complete explanation was provided by Mr Michael Noonan, T.D., Minister for Justice, in a public statement, made

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<sup>96</sup> The terms of reference use the expression, “installation, operation and use.” The term “operation” is here and elsewhere used as an abbreviation.

<sup>97</sup> In *DPP v Burke, Hickey, McEnery and Kissane* (Unreported, Her Honour Judge Reynolds, 22 July 2011) during the course of a criminal trial in the Circuit Court, the trial judge ruled inadmissible in evidence the contents of certain telephone conversations recorded at Waterford Garda Station on the ground that their recording constituted a breach of s. 98 of the Postal and Telecommunications Services Act, 1983 (“the 1983 Act”) as amended by s. 13 of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993. The legality of the recording system was not an issue before the Court.

on 20 January 1983, concerning what was ultimately held to have been the unconstitutional action of tapping the telephones of two journalists, Ms Geraldine Kennedy and Mr Bruce Arnold.<sup>98</sup>

9.2.5 The following description is based on the answers provided to parliamentary questions and the statement of Deputy Noonan on 20 January 1983. Deputy Noonan stated that the formalities had been “tightened up” in the early 1970s. The system was as follows. An application was first made in writing by the Commissioner of An Garda Síochána (or, in his absence, a Deputy Commissioner authorised by the Commissioner). The application was accompanied by a formal certificate stating that the warrant was required for the prevention or detection of serious crime and that the information could not be obtained in any other way. The written application, including the name and address of the telephone subscriber but not any supporting details, was submitted to the Department of Justice. Details sufficient to show the general purpose and need for the warrant were given orally to a nominated officer of the Department and, in turn, by that officer to the Minister. The warrant, where granted, was under the hand and seal of the Minister. It was sent to the Department of Posts and Telegraphs to be put into effect. When the warrant was no longer needed, an application was made for its withdrawal. A positive review was carried out at quarterly intervals. If it was to be continued, a certificate had to be furnished that it was yielding results.<sup>99</sup>

### **Historical Development**

9.2.6 An examination of the parliamentary record does not disclose when the practice of issuing warrants for the tapping of private telephone lines commenced. For many years, its very existence was denied.

9.2.7 On 25 February 1927, Mr J.J. Walsh, Minister for Posts and Telegraphs gave an unqualified assurance in Dáil Éireann:

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<sup>98</sup> *Kennedy v Ireland* [1987] 1 I.R. 587.

<sup>99</sup> See, in terms of the parliamentary record on telephone tapping: Mr Brendan Corish, T.D., Parliamentary Secretary to the Minister for Posts and Telegraphs, in what appears to be the first acknowledgment of the existence of the practice (Dail Deb 15 December 1949, vol 118, no 16); Mr Oscar Traynor, T.D., Minister for Justice (Dail Deb, 20 November 1957, vol 164, col 711) Mr Michael Hilliard, T.D., Minister for Posts and Telegraphs (Dail Deb, 28 June 1960, vol 138, no 4) Mr Charles Haughey, T.D., Minister for Justice (Dail Deb, 16 November 1961; vol 192, no 3) Mr Charles Haughey, T.D., Minister for Justice (Dail Deb, 28 February 1963 vol 200, no 4, ); Mr Charles Haughey T.D. (Dail Deb, 15 April 1964, vol 208, no 11); Mr Kevin Boland, T.D., on behalf of the Minister for Justice (Dail Deb, 16 May 1968, vol 234, no 11); Mr Desmond O'Malley, Minister for Justice, (Dail Deb, 4 June 1970, vol 247, no 4); Mr O'Malley, (Dail Deb, 4 June 1970); Mr Desmond O'Malley, Minister for Justice (Dail Deb. 17 February 1972, vol 258, no 14); Mr Patrick Cooney, Minister for Justice (Dail Deb, 10 May 1973, vol 265, no 7); Mr Gerard Collins, Minister for Justice (Dail Deb, 28 February 1980, vol 318, no 5); Mr Gerard Collins, Minister for Justice (Dail Deb, 11 December 1980, vol 325, no 6).



“that as a policy or as a practice no such thing [as telephone tapping] exists in the service.”<sup>100</sup>

9.2.8 Deputy Walsh went on to say that, on entering the service, he had given:

“general and definite instruction that no tapping whatever of any communications passing through the service, whether in the form of telegrams, letters or telephone calls, should occur.”

9.2.9 On 23 April 1931, this assurance was effectively repeated by Mr Heffernan, T.D., Parliamentary Secretary to the Minister for Posts and Telegraphs, when it was said that there was not:

“any such thing taking place as tapping of telephones.”<sup>101</sup>

9.2.10 Those unqualified assurances were never publicly withdrawn and would appear to have continued as the official State policy over the ensuing years. It would be reasonable to assume that no official telephone tapping took place in the State over the ensuing decades.

9.2.11 However, in the month of December 1949, two answers were given to parliamentary questions which are difficult to reconcile with previous assurances that the State did not engage in telephone tapping.

9.2.12 On 6 December 1949, Captain Cowan, T.D., asked Mr Everett, T.D., Minister for Posts and Telegraphs, whether members of An Garda Síochána were permitted to tap telephone lines, or otherwise to listen into and record private telephone conversations and, if so, to state the circumstances in which this might occur. Deputy Everett replied with an unequivocal “no” and added that the second part of the question accordingly did not arise.<sup>102</sup> [emphasis added]

9.2.13 On 15 December 1949, Captain Cowan, T.D., similarly posed the question:

“whether officials of the Post Office or members of his Department listen in to, or make records of private telephone conversations, or whether records

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<sup>100</sup> Mr J.J. Walsh, Minister for Posts and Telegraphs (Dail Deb, 25 February 1927, vol 18, no 5).

<sup>101</sup> Mr Heffernan, Parliamentary Secretary to the Minister for Posts and Telegraphs (Dail Deb, 23 April 1931, vol 38, no 2).

<sup>102</sup> Mr Everett, T.D., Minister for Posts and Telegraphs (Dail Deb, 6 December 1949, vol 118, no 14).

of such private telephone conversations are made in his Department...”  
[emphasis added]<sup>103</sup>

9.2.14 In what appears to have been the first acknowledgment of the existence of a State system of listening into and recording private telephone conversations, Mr Brendan Corish, T.D., as Parliamentary Secretary to the Minister for Posts and Telegraphs, replied that:

“This is done in very exceptional cases and where the public interest requires it and then only in obedience to warrants issued in those cases by the Minister for Justice.”<sup>104</sup>

9.2.15 The distinction between the answers seems to lie in the fact that it was the Department of Posts and Telegraphs, rather than the Gardaí, who carried out telephone tapping under a warrant issued by the Minister for Justice. The Parliamentary Secretary was unable, when asked, to provide any statutory or other legal authority for the practice.<sup>105</sup> In response to a question from Dr Maguire, T.D., regarding whether the practice had been inspired by events in Northern Ireland, the Parliamentary Secretary stated that it had not been introduced in the previous two years, but did not provide any information as to when the practice, which was directly contrary to the assurances given in 1927 and 1931, had commenced.

9.2.16 These exchanges suggest that the practice of telephone tapping began sometime during the period 1931-1947.

9.2.17 In 1957, Mr Oscar Traynor, T.D., Minister for Justice, in answering a parliamentary question, referred to a purported legal basis for the practice, as follows:

“Interceptions are made on the authority of the Minister for Justice in exercise of a long standing power the existence of which is explicitly recognised in Section 56 of the Post Office Act, 1908.”<sup>106</sup>

9.2.18 It cannot escape comment that an activity, the very existence of which was denied in the 1920s and 1930s, was said in the 1950s to have been conducted “in exercise of a long-standing power.” References to s. 56 of the Post Office Act 1908 were repeated in

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<sup>103</sup> Captain Peadar Cown, T.D., (Dail Deb, 15 December 1949, vol 118, no 14).

<sup>104</sup> Mr Brendan Corish T.D., Parliamentary Secretary to the Minister for Posts and Telegraphs (Dail Deb, 15 December 1949, vol 118, no 14)

<sup>105</sup> Ibid at no. 16

<sup>106</sup> Mr Oscar Traynor, T.D., Minister for Justice (Dail Deb, 20 November 1957, vol 164, no 71).

various forms over the years. Sometimes, it was said that warrants were issued under the Post Office Act 1908.<sup>107</sup>

9.2.19 However, the true position, very carefully expressed in the answer of Mr Desmond O'Malley, as Minister for Justice, on 17 February 1972 appears to be as follows:

“The question of the legal authority has also been raised on a number of occasions, of which the first appears to have been on 20th November, 1957 (Volume 164, column 711), when the then Minister for Justice, dealing with a question that related to letters and telegrams as well as to telephone calls, replied to the effect that interceptions were made on the authority of the Minister for Justice in exercise of a long-standing power recognised in section 56 of the Post Office Act, 1908. I invite attention to the fact that what was said was that the power was recognised by the section, not that it was granted by it. The position, as far as I am concerned, is that the legal advice available to me is that the present practice is perfectly in order.”<sup>108</sup>

9.2.20 Mr O'Malley's explanation, as he appeared implicitly to acknowledge, raised the question of what was the source of the power, if it was not, as he said, contained in the Post Office Act 1908.

9.2.21 Counsel on behalf of the State used similar terminology in the course of submissions in the case of *Kennedy and others v Ireland*:

“It is submitted on behalf of the defendants that the right to issue such warrants is recognised by the provisions of s. 56 of the Post Office Act, 1908.”<sup>109</sup> [emphasis added]

9.2.22 Section 56 of the Post Office Act 1908 did not, in fact, confer any power to intercept telephone calls. The section dealt with postal packets. It read:

(1) “If any officer of the Post Office, contrary to his duty, opens or procures or suffers to be opened any postal packet in course of transmission by post, or wilfully detains or delays, or procures or suffers to be detained or delayed, any such postal packet, he shall be guilty of a misdemeanour, and being convicted thereof shall be liable,

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<sup>107</sup> Mr Michael Hilliard, T.D., Minister for Posts and Telegraphs (Dail Deb, 28 June 1960, vol 138, no 4).

<sup>108</sup> Mr Desmond O'Malley, T.D., Minister for Justice (Dail Deb, 17 February 1972, vol 258, no 14).

<sup>109</sup> *Kennedy v Ireland* [1987] 1 I.R. 587 at page 589.

at the discretion of the court, to imprisonment with or without hard labour, or to a fine, or to both such imprisonment and fine.

- (2) Provided that nothing in this section shall extend to the opening, detaining, or delaying of a postal packet returned for want of a true direction, or returned by reason that the person to whom the same is directed is dead or cannot be found, or shall have refused the same, or shall have refused or neglected to pay the postage thereof, or to the opening or detaining or delaying of a postal packet under the authority of this Act or in obedience to an express warrant in writing under the hand of a Secretary of State: Provided that the warrant in Scotland may be either under the hand of a Secretary of State or of the Secretary for Scotland, in Ireland shall be under the hand and seal of the Lord Lieutenant, and in the Isle of Man shall be under the hand of the Governor issued with the sanction of a Secretary of State.”<sup>110</sup>

9.2.23 Section 56(2) of that Act referred to a power of the Lord Lieutenant (later adapted to the Minister for Justice) to issue a warrant for the opening of a postal packet.<sup>111</sup> It did not, however, confer any such power.

9.2.24 Section 89 of the Act contained an extended definition of the term, “postal packet”, providing that it:

“means a letter, post card, reply post card, newspaper, book packet, pattern or sample packet, or parcel, and every packet or article transmissible by post, and includes a telegram..”.<sup>112</sup>

9.2.25 Even that extended definition did not include a telephone call. It is likely that this was due to the fact that the essence of the prohibition had remained on the statute books since 1710, long before the invention of the telephone.<sup>113</sup>

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<sup>110</sup> Section 56 of the Post Office Act, 1908.

<sup>111</sup> Mr Charles Haughey, as Minister for Justice, explained on 23 April 1964 that an Adaptation Order was made by the President of the Executive Council on 19 July 1926, under subsection (2) of section 11 of the Adaptation of Enactments Act, 1922, determining that the Minister for Justice is the appropriate Minister to exercise this function of issuing postal warrants (Dail Deb, 23 April 1964, vol 209, no 3). Neither the Department of Justice nor the National Archives were able, upon request, to provide the Commission with a copy or any other record of this Adaptation Order. It seems a copy of the Order was never retained.

<sup>112</sup> Section 89 of Post Office Act, 1908.

<sup>113</sup> Section 56 of the Post Office Act, 1908 reproduced section 25 of the Post Office (Offences) Act, 1837 which, in turn, re-enacted, without material amendment, section 40 of the Post Office (Revenue) Act of 1710.

- 9.2.26 In *A-G v Edison Telephone Company of London Ltd*, the Crown sought injunctive relief and various declarations that the Edison Telephone Company had infringed its monopoly rights under the Telegraph Acts of 1863 and 1869. It was held that a telephone call was a telegraphic communication within the meaning of the 1863 and 1869 Acts, although the telephone had not been contemplated in 1869.<sup>114</sup> There is, however, no provision of the Post Office Act 1908 which requires that it is read in conjunction with previous statutes. The Commission is satisfied that there is no basis upon which the meaning of “postal packet” could be extended to include a communication by telephone.
- 9.2.27 It seems clear, therefore, that s. 56 of the Post Office Act 1908 contained no provision granting power to the Minister for Justice (even as successor to the power of the Lord Lieutenant) to issue a warrant authorising the listening to or interception of telephone calls. In fact, that Act contained no provision whatever about telephone calls.
- 9.2.28 The Commission has been unable to obtain the text of any legal advice which had been before the Ministers for Justice in 1957 (Mr Oscar Traynor) or 1972 (Mr Desmond O’Malley). However, it has been able to examine a number of documents from the 1980s, a period when consideration was being given to changes in the structure of the Department of Posts and Telegraphs, to developments at the European Court of Human Rights (ECtHR) and to contemporaneous discussions in the United Kingdom. A careful draft of a Memorandum for Government of March 1981 on the issue of telephone tapping contained statements which may be summarised as follows:
- (i) Warrants were issued by the Minister for Justice “in exercise of what has been taken to be a long-standing power that is recognised in – though not conferred by – section 56 of the Post Office Act 1908”;
  - (ii) That section made it an offence to open, detain or delay any “postal packet” except in obedience to an express warrant under the hand of the Minister for Justice (as successor to the Lord Lieutenant);
  - (iii) That section referred only to a “postal packet, but it had been interpreted as also “recognising the power to issue warrants for the tapping of telephone calls;”
  - (iv) The basis for this latter interpretation was described as being “rather technical”, depending on a combination of definitions in an earlier Act

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<sup>114</sup> *AG v Edison Telephone Company of London Ltd* (1880) 6 Q.B.D. 244.

of 1869, and the decision in *A-G v Edison*: the Memorandum proceeded to remark that this interpretation “may be uncertain.”

- 9.2.29 It is notable that the carefully worded parliamentary answers given, in particular, by the Ministers for Justice, respectively Mr Oscar Traynor in 1957 and Mr Desmond O’Malley in 1972, claimed, at the most, that warrants could be issued “in exercise of a long-standing power recognised in section 56 of the Post Office Act, 1908.”
- 9.2.30 Mr O’Malley added, “what was said [by Mr Oscar Traynor] was that the power was recognised by the section, not that it was granted by it.”[emphasis added]
- 9.2.31 In circumstances where the section did not, in its own terms, confer any power to intercept telephone communications and the Ministers did not claim that it did, the question must be asked as to where the power resided.
- 9.2.32 None of the parliamentary answers provide any information as to the use, if any, to which the fruits of phone tapping pursuant to warrants were ever put. It does not appear that they were ever used, in particular, as evidence in proceedings in court. Successive Ministers for Justice declined, in the public interest, to provide any information as to the number of warrants in existence at any particular time. It seems to the Commission to be likely that the position was, as was stated in England, that the fruits of phone tapping were not explicitly used in any prosecution or investigation.
- 9.2.33 The Commission will next examine the history of the warrant system as operated in England.

### **The Warrant System in England**

- 9.2.34 The warrant system, as operated in England up to the early 1980s, is explained in three sources in particular:
- (i) The Report of a Committee of three Privy Councillors appointed to inquire into the interception of communications presented to parliament on 18 December 1957. The Committee was established as a result of public concern<sup>115</sup> arising from the disclosure, on the authority of the Home Secretary, of the contents of an intercepted telephone conversation to the Bar Council in connection with an inquiry into the propriety of the behaviour of a barrister. The Senior

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<sup>115</sup> See “Telephone Tapping: Law and Practice,” *The Listener* (Dublin, 12 June 1958) where it was noted by the distinguished legal writer that it was “a shock to find” that such material could “be passed on to outside bodies.”

Member of the Committee was Lord Birkett and it is known as the Birkett Committee;

- (ii) The judgment of Sir Robert Megarry, Vice Chancellor, in *Malone v the Commissioner of Police of the Metropolis* [1979] 2 All ER;
- (iii) The judgment of the ECtHR in *Malone v United Kingdom v United Kingdom* (1984) 7 EHRR 14. This important decision followed the decision of the (English) Chancery Division in *Malone v the Commissioner of Police of the Metropolis* [1979] 2 All ER 620.

9.2.35 The Birkett Committee had been asked “to consider and report upon the exercise by the Secretary of State of the executive power to intercept communications...” It concluded that the origin of the power to intercept communications could only be “surmised.” One of the principal arguments advanced for the origin of the power was that it was based on the royal prerogative. The Committee reached no conclusion as to whether this was so, but said that the power had been exercised from very early times in respect of postal communications and had been recognised as a lawful power in successive Acts of Parliament. The power to intercept telephone messages had been exercised from time to time since the introduction of the telephone.

9.2.36 Insofar as telephone interceptions were concerned, until the year 1937, the Post Office had acted upon the view that this power was enjoyed by any operator of telephones and was not contrary to law. Therefore, warrants, not being necessary, were not issued by the Secretary of State. No view along these lines appears ever to have been entertained in Ireland, although, as already shown, the fact that there was any practice of issuing warrants was denied and was not publicly acknowledged until 1949. From 1937, a different view was taken in England. The Birkett Committee reported that it had then been considered undesirable that records of telephone conversations should be made by Post Office servants and disclosed to the Police or to the Security Service without the authority of the Secretary of State. Thereafter, interception of telephone messages was treated in the same way as that of postal packets. At the time of the Birkett Committee’s deliberations, the relevant section in force was s. 58(1) of the Post Office Act 1953, which reproduced s. 56 of the Post Office Act 1908. The Birkett Committee summed up its view on the legality of intercepting telephone calls as follows at paragraph 51 of its report:

“We are therefore of the opinion that the state of the law might fairly be expressed in this way.

- (a) The power to intercept letters has been exercised from the earliest times, and has been recognised in successive Acts of Parliament.
- (b) This power extends to telegrams.
- (c) It is difficult to resist the view that if there is a lawful power to intercept communications in the form of letters and telegrams, then it is wide enough to cover telephone communications as well.”

9.2.37 In short, the Birkett Committee appeared to accept that a power, the legal basis or origin of which it was unable to identify, had been exercised for a very long time. It is, nonetheless, notable that its report stated the following:

“There is no doubt that the interception of communications, whether by the opening or reading of letters or telegrams, or by listening to and recording telephone conversations, is regarded with general disfavour. In this country where the power to detain and open letters has been in existence from very early times and has been used by successive Governments for very many years, public feeling has only been aroused on rare occasions when it was suspected or feared that the practice was being abused in some way, in circumstances which do not warrant its use. Whether practised by unauthorised individuals or by officials purporting to act under authority, the feeling still persists that such interceptions offend against the usual and proper standards of behaviour as being an invasion of privacy and an interference with the liberty of the individual in his right to be “let alone when lawfully engaged upon his own affairs.”

9.2.38 Some twenty years later, in *Malone v Commissioner of Police of the Metropolis*, the plaintiff sought declarations that the tapping of his telephone by the police on foot of a warrant granted by the Secretary of State had been unlawful.<sup>116</sup> Mr Malone had been unsuccessfully prosecuted for receiving stolen property, but had learned in the course of his trial that the police had been listening to his telephone. He cited, *inter alia*, Article 8 of the Convention and advocated recognition of a right to privacy of telephone communications, both of which contentions were rejected by Megarry V.C. It was also contended that the tapping of telephones was not authorised by law.

9.2.39 Megarry V.C. accepted that there was

“no statute which in terms authorises the tapping of telephones, with or without a warrant.”

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<sup>116</sup> *Malone v the Commissioner of Police of the Metropolis* [1979] 2 All ER.



9.2.40 However, he went on to say that:

“any conclusion that the tapping of telephones is therefore illegal would plainly be superficial in the extreme.”

9.2.41 His ruling on the matter was as follows:

“Finally, there is the contention that as no power to tap telephones has been given by either statute or common law, the tapping is necessarily unlawful. The underlying assumption of this contention, of course, is that nothing is lawful that is not positively authorised by law. As I have indicated, England is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden....If the tapping of telephones by the Post Office at the request of the police can be carried out without any breach of the law, it does not require any statutory or common law power to justify it: it can lawfully be done simply because there is nothing to make it unlawful. The question, of course, is whether tapping can be carried out without infringing the law.”<sup>117</sup>

9.2.42 Following an analysis of the effects of certain Telegraph Acts and of the Post Office Act 1969 (the equivalent of the Post Office Act 1908), Megarry V.C. firstly accepted, as had the Birkett Committee, that there was no “statute which in terms authorised the tapping of telephones, with or without a warrant.” The Act of 1969 did “not in terms empower the Home Secretary to issue a warrant” of the type in question. However, he went on to hold that the Act had provided clear recognition of the power of the Secretary of State, firstly, by providing a defence to criminal charges of interfering with communications and, secondly, by requiring officials of the (then newly established independent) Post Office to provide information to Crown officials to the same extent as had been required of the former Postmaster General.

9.2.43 The writer John Lambert found it “difficult to feel satisfied with this line of reasoning.”<sup>118</sup> He contended that, in “the area of executive power, the courts have traditionally worked from the principle that there must be clear statutory or common law authority for the exercise of the power claimed.” The Commission, as later explained, finds the reasoning of this writer highly persuasive, particularly in the Irish jurisdiction.

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<sup>117</sup> *Malone v the Commissioner of Police of the Metropolis* [1979] 2 All ER 620 at page 367.

<sup>118</sup> John Lambert ‘Notes of Cases. Executive authority to Tap Telephones’ (1980) 43 (1) *The Modern Law Review* at page 65.

9.2.44 There is a significant difference between the approaches adopted by the Birkett Committee and by Megarry V.C. in *Malone*. The former referred, throughout its report, to the power to intercept communications. It spoke of “conflicting opinions that [had] been put before [the Committee] on the source of the Secretary of State’s power to intercept communications...” It is implicit in the report that what was involved was the exercise of a power, whether by or on behalf of the Crown, the Executive or the Secretary of State. At no point did the Birkett Committee suggest that the practice of issuing warrants did not require to be supported by law. The decisive point in the judgment of Megarry V.C., on the other hand, was that the tapping of telephones by the Post Office at the request of the Police did not require any statutory or common law power to justify it. He accepted that there was no statute which conferred power expressly on the Secretary of State to issue warrants authorising the tapping of telephones, but the result flowed from the fact that there was nothing unlawful in the practice.

9.2.45 In short, the Birkett Committee recognised that a power existed, the origins of which it was unable to discern other than by “surmise.” Megarry V.C. applied to the practice of the issuing of warrants by the Secretary of State to the Post Office (formerly the Postmaster General) for the listening in to telephone calls at the request of the Police the common-law maxim that everything is lawful which is not made unlawful. Each of these solutions is fraught with difficulty. To supply the legal justification for the exercise of a power from the mere fact of its exercise begs the question. It says that, because it has been done, it must be lawful. The second approach, namely that of Megarry V.C. is, perhaps, more surprising. He applied to the exercise of a power by the Secretary of State to authorise another public authority to listen to telephones of private subscribers on behalf of the police a maxim historically taken as an expression of the freedom of the citizen at common law. As the matter has been expressed by O’Donnell J:

“In classic common law theory a person can be said to have a right to do that which is not specifically prohibited by law.”<sup>119</sup>

9.2.46 It is surprising to find that principle being applied to the exercise of a power by a public authority such as a Minister. In fact, the reasoning of Megarry V.C. in *Malone* has not been followed in the United Kingdom. In *R v Somerset County Council ex parte Fewings*, Lord Justice Laws held:

“Public bodies and private persons are both subject to the rule of law; nothing could be more elementary. But the principles which govern their relationships with the law are wholly different. For private persons, the rule

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<sup>119</sup> *Minister for Justice, Equality and Law Reform v Bailey* [2012] 4 IR 1 at page 121.

is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books ... But for public bodies the rule is opposite, and so of another character altogether. It is that any action taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed it exists for no other purpose.”<sup>120</sup>

- 9.2.47 The reasoning of Lord Justice Laws was approved on appeal by the Court of Appeal and is widely cited.
- 9.2.48 The Commission would further note that the very fact that the warrant system is said to be surrounded by safeguards, such as the need to be satisfied that the listening to calls is for the purpose of protecting public security or the investigation or prevention of crime, demonstrates that it is a public power and not an individual’s freely committed act that is at issue.
- 9.2.49 When one adds to the foregoing the consideration that what is involved is the provision of authority to a public body, namely the Post Office, to listen to the private communications of individuals, which would otherwise be in breach of their constitutional right to privacy, it becomes almost axiomatic that the power can have no legal basis unless conferred by statute.

#### **Authorisation of the Warrant System by Common law**

- 9.2.50 Finally, it is appropriate to consider whether the warrant system, as practised in this jurisdiction from at least the 1940s to the 1980s, was lawful at common law. It can be said, to begin with, that, insofar as the English system was or might have been based on the royal prerogative, a matter left unresolved by the Birkett Committee, it could have no application in Ireland since the foundation of the State. No such principle was relied upon or even mentioned by any Minister for Justice in dealing with the exercise of the power in this jurisdiction. Insofar as it might have been believed for some years that the royal Prerogative had survived the establishment of Saorstát Éireann or the adoption of the Constitution in 1937, such beliefs could not have survived the decision of the Supreme Court in *Byrne v Ireland* in which Walsh J stated:

“All royal prerogatives to be found in the common law of England and in the common law of Ireland prior to the enactment of the Constitution of Saorstát Éireann, 1922, ceased to be part of the law of Saorstát

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<sup>120</sup> *R v Somerset County Council ex parte Fewings* [1995] 3 All ER 20.

Éireann because they were based on concepts expressly repudiated by Article 2 of that Constitution and, therefore, were inconsistent with the provisions of that Constitution and were not carried over by Article 73 thereof.”<sup>121</sup>

- 9.2.51 If the royal prerogative had not continued to be part of the law of *Saorstát Éireann*, it would not have benefited from the provision of Article 50 of the Constitution in 1937 and would not continue to have had “full force and effect” following its coming into operation.
- 9.2.52 More generally, it is fundamental to the legal and constitutional nature of the State that Ireland is a State founded on the rule of law. Public authorities such as Government Ministers and An Garda Síochána must act within the limits of the powers conferred on them by law. It is quite inconsistent with these principles that State authorities could exercise a power to tap telephones, without clear legal authority, in relation to the private conversations of individuals. The Commission is of the opinion that there was no common law power to operate the warrant system.

#### **Authorisation of Recording Systems at Common Law**

- 9.2.53 The history of the warrant system provides a useful backdrop to analysis of the question as to whether An Garda Síochána was lawfully entitled at common law to install, establish and operate systems for the recording of telephone calls generally regarding individuals who might make telephone calls to or receive them from Garda stations. The system of warrants was accompanied by a number of administrative safeguards designed to ensure that the telephone conversations of private persons would be listened to and recorded only to the extent that was shown to be necessary for the protection of the security of the State or the detection or prevention of serious crime. The warrant could be given only under the hand and seal of the Minister for Justice. The interception would continue only for so long as it was demonstrated to be justified by those objectives.
- 9.2.54 None of those safeguards, or any equivalents, were in place in Garda stations recording telephone calls by means of DAT tapes or, later, the NICE system. There was no specific authority for listening to calls. No purpose or need had to be identified. There was no provision for a limit on the time for which recordings could be made or the resultant recordings held.
- 9.2.55 The Commission is unaware of any power at common law entitling the State to intercept communications between individuals. The Commission is also of the opinion that the installation and operation of the general recording of calls, and the retention of those

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<sup>121</sup> *Byrne v Ireland* [1972] IR 241 at page 274.

recordings at Garda stations with which this Commission is concerned, are without lawful authority at common law. In particular, this was done with no notice to or consent from the persons being recorded. The recordings necessarily included many calls which were of a purely private nature. The Commission concludes that the operation of the Garda telephone-recording systems was not authorised and was thus not lawful at common law.

## 9.3 SECTION III: AUTHORISED BY STATUTE

### **The Garda Síochána Act 2005**

9.3.1 The statutory powers of An Garda Síochána are set out in The Garda Síochána Act 2005. Pursuant to s. 5 of the Police Forces Amalgamation Act 1925, An Garda Síochána, established by the Garda Síochána Act 1924, and the former Dublin Metropolitan Police were amalgamated into one force, under the name of the former. The first considered statement of the function of An Garda Síochána is contained in s. 7(1) of the Garda Síochána Act 2005, which provides as follows:

“The function of the Garda Síochána is to provide policing and security services for the State with the objective of—

- (a) preserving peace and public order,
- (b) protecting life and property,
- (c) vindicating the human rights of each individual,
- (d) protecting the security of the State,
- (e) preventing crime,
- (f) bringing criminals to justice, including by detecting and investigating crime, and
- (g) regulating and controlling road traffic and improving road safety.”

9.3.2 Thus, s. 7 is expressed at a high level of generality. It is descriptive of the nature of the duties of An Garda Síochána, considered as a body, as a police force. For particular powers, it is necessary to look elsewhere. Nonetheless, it may be relevant to note that s. 7(1) (c) designates one of the objectives of An Garda Síochána to be “vindicating the human rights of each individual...” That provision serves as a reminder that An Garda Síochána, in exercise of its powers, should not act in such a fashion as to infringe the human rights of any person unless a particular power, notably the power of arrest and detention, is conferred by law.

9.3.3 Section 7(3) provides:

“In addition to its function under subsection (1), the Garda Síochána and its members have such functions as are conferred on them by law including those relating to immigration.”

9.3.4 This provision recognises the reality that the particular powers of An Garda Síochána are provided for in statutes dealing with the myriad of duties which members of the Garda Síochána carry out in the course of their policing work. Provisions are made in Criminal Justice Acts, Road Traffic Acts and many other pieces of legislation for matters such as arrest, detention, search, taking of samples and very many other matters.

9.3.5 Section 7(4) further provides:

“This section does not affect any powers, immunities, privileges or duties that members of the Garda Síochána have by virtue of any other enactment or at common law.”

9.3.6 This section acknowledges that An Garda Síochána enjoys parallel powers under the common law. The Commission has already concluded that An Garda Síochána did not have any authority under the common law to record telephone calls.<sup>122</sup>

#### **The Failure to Consider the Issue**

9.3.7 There has never been any express statutory authority for the installation, operation or use of telephone-recording systems at Garda stations. At no stage has any member of, or anyone on behalf of, An Garda Síochána suggested to the Commission that any such authority existed.

9.3.8 Indeed, as noted in the Interim Report of the Commission on paragraphs 1(n) and (o) of its Terms of Reference, the reaction of the former Garda Commissioner, on learning of the existence of the practice of recording non-999 calls, was to issue an immediate instruction that it was to cease forthwith. The Commissioner told the Commission that he considered the recording to be unlawful because those speaking on the telephones were unaware that they were being recorded.<sup>123</sup>

9.3.9 The Commission has investigated the events leading to the installation of the DAT tape-recording system in Divisional Garda Stations in 1995.<sup>124</sup> It is a remarkable and surprising fact that no consideration at all appears to have been given by any of those concerned, even at a high rank in the force, to the question of whether An Garda

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<sup>122</sup> See section 2 of Chapter 9.

<sup>123</sup> Interim Report on paragraphs 1 (n) and (o) at paragraph 7.7.

<sup>124</sup> See chapter 5 of the Final Report.

Síochána had lawful authority to record calls made by the public to, or received by the public from, Garda stations. As noted elsewhere in this Report, the question of whether the new equipment raised data-protection issues was considered.<sup>125</sup> However, no consideration at all was given to the fundamental question, which was whether it was lawful for An Garda Síochána to record calls at all.

9.3.10 The failure of An Garda Síochána to advert to the question of the lawfulness of recording is all the more surprising when one recalls that the improper interception of telephone calls by An Garda Síochána, in the operation of the former non-statutory warrant system, to intercept the telephone calls of two journalists had led, in 1983, to the resignation of both the Garda Commissioner and the Deputy Commissioner. The warrants had purported to authorise the communication, to an Assistant Commissioner of An Garda Síochána, of the contents of telephone conversations on the lines of the two journalists. In the case of *Kennedy and Arnold v Ireland*, these acts had been held to have been a violation of the constitutional right to privacy of the journalists concerned.<sup>126</sup>

9.3.11 These matters were the subject of public knowledge, and indeed of notoriety, and must have been known above all to An Garda Síochána. The warrant system had been utterly different from the more generalised system of recording operated from 1995. It had, in effect, been replaced by the provisions of the Postal and Telecommunications Services Act 1983, as amended by the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993. An Garda Síochána should have been alert to the possible legal implications of any recording of or listening into telephone calls.

#### **The Requirement of Statutory Authority**

9.3.12 A distinction needs to be drawn between An Garda Síochána as a body and individual members of the force. Legislation typically confers particular policing powers on individual members of the force. As has been stated by Professor Dermot Walsh:

“The powers and authority are not conferred on the Garda Síochána or on the Garda Commissioner with a view to being delegated downwards to individual members to exercise on behalf of the force. It is as if each member is a public body equipped with the most extensive and intrusive summary powers known to the law.”<sup>127</sup>

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<sup>125</sup> See chapter 5 of the Final Report

<sup>126</sup> *Kennedy v Ireland* [1987] IR 587

<sup>127</sup> Dermot Walsh, “The Constitutional Silence on Policing” in Eoin Carolan and Oran Doyle (eds) *The Irish Constitution: Governance and Values* (Thomson Round Hall 2008) pages 231 to 239.



- 9.3.13 It is obvious that all decisions relating to the acquisition and installation of the telephone-recording systems in Garda stations with which the Commission is concerned were taken by An Garda Síochána as a body and not by individual members of the force in the performance of their policing duties.
- 9.3.14 In this context, it is material to recall the *ultra vires* principle. An Garda Síochána, being a body established by statute, may not act in excess of the powers conferred upon it.
- 9.3.15 The leading case on the topic of statutory powers is *Howard and others v Commissioners of Public Works in Ireland*.<sup>128</sup> The applicants sought declarations by way of Judicial Review to restrain the Commissioners of Public Works (OPW) from building and maintaining a visitors' centre in an area of outstanding natural beauty in the Burren in County Clare. They contended that the OPW had no statutory power to carry out these works, but also that, in the absence of planning permission, it would constitute an unlawful development contrary to the Local Government (Planning and Development) Act 1963. Costello J., in the High Court, decided in favour of the applicants on both grounds. It is the first of these matters that is of the most direct relevance to the work of this Commission. Costello J. held that the OPW were acting *ultra vires* in continuing with the erection of the visitors' centre. The OPW appealed to the Supreme Court but confined the appeal to the planning aspect of the matter. Thus the conclusion and reasoning of Costello J. on the matter of statutory powers remained undisturbed and was subsequently approved as a correct statement of the law by Hamilton C.J. in *Keane v An Bord Pleanála*.<sup>129</sup>

9.3.16 Costello J. stated:

“It has long been established as a general principle of the construction of the powers of statutory corporations that whatever may be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*.....”<sup>130</sup>

9.3.17 Costello J. cited, as authority for this proposition, the decision of the House of Lords in *Attorney General v Great Eastern Railway Company*,<sup>131</sup> where Lord Blackburn held:

“where there is an act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not

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<sup>128</sup> *Howard and others v Commissioners of Public Works in Ireland* [1994] 1 IR 101.

<sup>129</sup> *Keane v An Bord Pleanála (No. 3)* [1997] IR 184 at page 212.

<sup>130</sup> *Howard and others v Commissioners of Public Works in Ireland* [1994] 1 IR 101 at page 112.

<sup>131</sup> *Attorney General v Great Eastern Railway Company* (1880) 5 App Cas. 473.

expressly or impliedly authorise is to be taken to be prohibited and those things that are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited.”<sup>132</sup>

9.3.18 Costello J. also cited the following passage from Halsbury's Laws of England:

“The powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of incorporation, or may be fairly regarded as incidental to, or consequential upon, those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited.”<sup>133</sup>

9.3.19 This statement was also cited in the Supreme Court decision of *Attorney General at the relation of O.F. Fishing Ltd v Port of Waterford Company*,<sup>134</sup> where the Court noted:

“the well-established proposition that a body created by statute enjoys only those powers which are expressly or by necessary implication conferred upon it.”

9.3.20 It is also a reiteration of the following principle stated by Professor Dermot Walsh:

“in the area of executive power, the courts have traditionally worked from the principle that there must be clear statutory or common law authority for the exercise of the power claimed.”<sup>135</sup>

9.3.21 As a general principle, it is fundamental that acts done by a public authority, particularly those which impinge upon the Constitutional rights of citizens, must be authorised by law. This principle has been expressed as follows, admittedly in the context of the Convention:

“The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law.”<sup>136</sup>

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<sup>132</sup> *Attorney General v Great Eastern Railway Company* (1880) 5 App Cas. 473 at 478.

<sup>133</sup> Halsbury's Laws (4th edn) vol 9, paragraph 1333.

<sup>134</sup> *Attorney General at the relation of O.F. Fishing Ltd v Port of Waterford Company* [2007] 2 I.R. 156 per Fennelly J. at page 162.

<sup>135</sup> Dermot Walsh, ‘The Constitutional Silence on Policing’ in Eoin Carolan and Oran Doyle (eds) *The Irish Constitution: Governance and Values*. (Thomson Round Hall 2008) pages 231 to 239.

<sup>136</sup> Per Lord Bingham in *R (Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307.

9.3.22 In this context, it is worth recalling the statement of Laws L.J. in *R v Somerset County Council ex parte Fewings*:

“...For public bodies the rule is...that any action taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed it exists for no other purpose”<sup>137</sup>.

9.3.23 The Commission is satisfied that the operation of a system that recorded calls into and out of Garda stations on non-emergency telephone lines required statutory authority. In application of that principle, it is clear that no power to establish telephone-recording systems was conferred on An Garda Síochána by any statute. It is equally clear, in the view of the Commission, that such activity is not merely incidental to its principal function and that no such power was conferred by necessary implication. Before reaching a final conclusion on that point, however, it is necessary to consider the statutory framework under which the force is established and the express functions conferred on it.

#### **The unlawful operation of the Recording System**

9.3.24 The primary function of An Garda Síochána, as stated in the Act of 2005, is “to provide policing and security services for the State...”.<sup>138</sup> Prior to enquiring as to whether the recording of non-999 telephone calls into certain Garda stations was something An Garda Síochána was empowered to do as being incidental to its principal function, it would be necessary to have evidence that the recording was done in order to serve that primary purpose. In fact, however, the Commission has heard no evidence that the recording systems were installed or operated with those objectives in mind. Certainly, there has been evidence that, in some cases, the facility to play back a recorded call dealing with a crime or other emergency was found to be useful. But the Commission has heard no evidence that the systems were installed for or confined to such purposes.

9.3.25 Individual Gardaí carry out their duties in investigating crime, in some respects, by resort to compulsory powers. These powers are contained in many statutes and deal with such matters as arrest, detention, searching of premises, taking of bodily samples, seizure of items of property amongst others. Gardaí may well, however, be able to conduct an investigation by relying in whole or in part on the voluntary co-operation of members of the public, including suspects. They may obtain a search warrant entitling them to enter a dwelling by force, if necessary, in search of items of evidential value. They may, on occasion, be in a position to achieve the same result though the consent of

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<sup>137</sup> *R v Somerset County Council ex parte Fewings* [1995] 3 All ER 20.

<sup>138</sup> Section 7(1) Garda Síochána Act, 2005.

the owner of the dwelling. In *People (DPP) v Boyce*,<sup>139</sup> the Supreme Court held that a Garda was entitled to take a blood sample from a suspect in custody with his consent and without resort to equivalent statutory powers.

9.3.26 Turning to the systems of telephone recording, there was no question of consent having been given to the recording of calls made into or received from Garda stations by members of the public. There was never a recorded message informing callers that calls were recorded. Three separate aspects of the systems need to be noted. The first is the fact of the recording. The second is the retention for an indeterminate period of time of the recording in the form of a tape or, later, on a hard drive. The third is the possibility that any particular recording could, at least in principle, be accessed by An Garda Síochána.

9.3.27 This activity was, in its nature, intrusive. It involved the recording, without permission or notice, of the telephone conversations of all individuals who called the main station number of particular Garda stations and the retention in permanent form of the record in a form capable of being accessed. Most importantly, all this was carried out by a public authority, the police force of the State.

9.3.28 Where a statutory body such as An Garda Síochána acts in excess of its statutory powers it acts unlawfully. It can be restrained by an appropriate Court Order from continuing to do so, as happened in *Howard and others v Commissioners of Public Works in Ireland* where Costello J. held that the applicants were entitled to a Declaration and an appropriate Injunction.<sup>140</sup> The mere description of the system in those terms is coercive of the conclusion that express legal authority was essential. There was none. It follows from this conclusion that the operation of the telephone-recording systems was *ultra vires*. The Commission is satisfied it was not merely unauthorised but unlawful.

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<sup>139</sup> *People (DPP) v Boyce* [2009] 2 I.R. 124.

<sup>140</sup> *Howard and others v Commissioners of Public Works in Ireland* [1994] 1 IR 101, where Costello J. held that the applicants were entitled to a Declaration and an appropriate Injunction. It might be noted that the *ultra vires* issue was not appealed. The Defendant limited its appeal to the ground relating to the requirement for planning permission. Once it did not succeed on this ground, the appeal was dismissed.

## 9.4 SECTION IV: PROHIBITED BY STATUTE

### **Preliminary**

- 9.4.1 The Commission has considered whether there was any positive legal authority, at common law or by statute, for the telephone-recording systems operated by An Garda Síochána. It has concluded that there was not. They were not authorised either at common law or by statute. Hence the systems were not “authorised by law” in the sense of paragraph 1(g) of the Terms of Reference.
- 9.4.2 The Commission now turns to consider whether the operation of the telephone-recording systems was prohibited by law. It is axiomatic that, if they were prohibited, they were not lawful and could not be considered to be “authorised by law”. Specifically, the Commission poses the question of whether the recording of telephone calls at Garda stations constituted the commission of any criminal offence.
- 9.4.3 The Commission proposes to consider the applicability of legislation making, what was defined as, the “interception” of telephone calls an offence contrary to s. 98 of the Postal and Telecommunications Services Act 1983 (“the 1983 Act”), as amended by s. 13 of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 (“the Interception Act of 1993”). Due to the period covered by the Terms of Reference, this exercise involves the application of the provision to the telephone-recording system both before and after its amendment. For convenience, s. 98, as amended, will on occasion be referred to as “the interception legislation”.
- 9.4.4 The Commission will also consider the principle of confidentiality of communications, which was transposed into Irish law under SI 336 / 2011 European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011.
- 9.4.5 The interception legislation needs to be considered, in particular, because of the important role it played in the events of March 2014 upon which the Commission has already reported to the Taoiseach. In its Interim Report on Terms of Reference paragraphs 1(n) and (o), the Commission explained the crucial importance attached by the Attorney General to the interception legislation.<sup>141</sup>

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<sup>141</sup> Interim Report on 1(n) and (o) at paragraph 25.22 (the passage of 1 (n) and (o) should read Postal and Telecommunications Services Act, 1983).

9.4.6 The Commission did not, in that Interim Report, reach any conclusion on the question of whether the recording activities of An Garda Síochána at Garda stations were “authorised by law”. The Commission concluded, however:

“Having regard to the specific concerns of the Attorney General about section 98 of the Postal and Telecommunications Act 1983 (as amended), the Commission will need to consider whether the definition of the term “interception” in that legislation, particularly after its amendment in 1993, includes the recording of a telephone call by the person receiving the call. From 1993, recording does not amount to the offence of interception, unless it occurs “in the course of transmission” and where either party to the call consents to the recording.”<sup>142</sup>

#### **Background to the Interception Legislation**

9.4.7 The background to the inclusion of the offence of interception in telecommunications legislation which provided for a quite different subject, specifically, the creation of a State-sponsored telecommunications service, is worth setting out briefly. The offence of “interception” was first enacted in Irish law in s. 98 of the Postal and Telecommunications Services Act 1983. Until that point, what is commonly referred to as “telephone tapping” was not a criminal offence on the statute book. However, a non-statutory warrant system was being operated by the State, and the Department of Justice were alive to the pressing need for statutory provision in this area.<sup>143</sup>

9.4.8 In the period leading up to the formulation of this legislation, the services of the Department of Justice were conscious of a number of developments believed to be capable of affecting the existing system under which warrants were issued by the Minister for Justice permitting the tapping of the telephone lines of subscribers.

9.4.9 Firstly, it was observed that it was a moot question whether the existing system of warrants authorising interception would withstand challenge on constitutional grounds, it being possible that a right to privacy might, in the future, be found to be one of the unenumerated personal rights of the citizen guaranteed by Article 40 of the Constitution.<sup>144</sup>

9.4.10 Secondly, the legal services of the Department of Justice had taken note of and had considered the implications of the decision of the ECtHR of 1978 in *Klass v Germany*.<sup>145</sup> The Court had considered whether systems of surveillance of mail, post and

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<sup>142</sup> Interim Report on 1(n) and (o) at paragraph 25.22.

<sup>143</sup> Draft Memorandum for Government, dated March 1981 (Ref: S/80).

<sup>144</sup> Ibid.

<sup>145</sup> *Klass v Germany* (1978) 2 EHRR 214.

telecommunications in the Federal Republic of Germany complied with the Convention. The Court considered that surveillance measures by a State, once applied to a given individual, resulted in an interference by a public authority with the exercise of that individual's right to respect for his private and family life, home and correspondence and thus an interference with the right to privacy guaranteed by Article 8 of the Convention.<sup>146</sup> This interference did not result in a violation of the Convention in view of the fact that the German system was governed by law and surrounded by sufficient safeguards. The legal services of the Department of Justice, in 1981, expressed the view that it would be:

“very difficult in the light of the [Klass] case to avoid the conclusion that our system of interception of communications would be declared to be in breach of Article 8 if it were challenged before the Court of Human Rights.”

- 9.4.11 Thirdly, close attention was paid to contemporaneous debates in England regarding the desirability or otherwise of putting the system of warrants on a statutory footing, although it was, of course, known that the legal challenge to the existing system in the English Courts had failed.<sup>147</sup> However, it was also noted that the result in the case in question, the *Malone* case, was currently the subject of challenge before the ECtHR.<sup>148</sup>
- 9.4.12 Fourthly, it was conceded that there was a certain degree of uncertainty about the validity of the legal basis for the interception of telephone calls as practised at that time.
- 9.4.13 All the arguments having been considered, the Minister concluded that the administrative system was operating satisfactorily and had not given rise to abuses. This was, of course, prior to the events, which occurred later in 1982, when the telephones of two political journalists were unlawfully tapped pursuant to a warrant issued by the Minister for Justice. This gave rise to the High Court proceedings in *Kennedy and Arnold v Ireland*<sup>149</sup> where the High Court held that there had been:

“a deliberate, conscious and unjustifiable interference by the State through its executive organ with the telephonic communications of the plaintiffs...”<sup>150</sup>

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<sup>146</sup> The issue of compliance with Article 8 of the European Convention on Human Rights is considered under Section 5.

<sup>147</sup> *Malone v Commissioner of Police of the Metropolis* [1979] 2 All ER 620, this case is discussed in more detail under Section 4.

<sup>148</sup> It was later the subject of the decision in *Malone v United Kingdom* (1984) 7 EHRR 14.

<sup>149</sup> *Kennedy v Ireland* [1987] I.R. 587, discussed in detail under Section 4 of Chapter 9.

<sup>150</sup> *Kennedy v Ireland* [1987] I.R. 587 at page 593.

- 9.4.14 The Minister for Justice recommended to the Government that, although there were strong arguments in favour of introducing legislation providing for the power to authorise interception, the balance of advantage lay on the side of retaining the existing system of purely administrative regulation for as long as possible.<sup>151</sup>
- 9.4.15 In fact, the offence of “interception” was inserted, by way of amendment, into draft legislation which provided for the creation of the State bodies, “An Bord Telecom Éireann” and “An Post”, in the following circumstances.
- 9.4.16 Since the foundation of the State, both the postal and telephone services were under the care of the Department of Posts and Telegraphs.<sup>152</sup> In 1981, a White Paper, entitled “Reorganisation of Postal and Telecommunications Services”, was published after the Government had considered comments on proposals in a Green Paper published in 1980.<sup>153</sup> The White Paper recommended the transfer of each of these functions to independent State-sponsored bodies with a large measure of independence. A draft scheme of a Bill was prepared with that object in mind. The Postal and Telecommunications Services Bill 1982 was introduced in Dáil Éireann in May 1982. The Bill lapsed with the dissolution of the twenty-third Dáil on 4 November 1982. On 10 May 1983, the Bill was restored to the Order Paper, in pursuance of Standing Order No. 105 of the Standing Orders Relative to Public Business. Up to that point, the Bill had contained no provision creating an offence of interception of telephone calls.
- 9.4.17 On 12 May 1983, two days after the reintroduction of the Bill, the Minister for Posts and Telegraphs, Deputy Jim Mitchell, T.D., circulated amendments which he intended to add to the Bill, which introduced the terms of s. 94 (this later became s. 98). Deputy Mitchell responded to concerns strongly expressed by Deputy John M. Kelly, T.D., a renowned expert on constitutional law, about the recent disclosure in the media that a businessman had recorded and transcribed the contents of a telephone conversation between two other persons which he had, it was claimed, accidentally overheard on a crossed line. According to Deputy Kelly’s account, that businessman had given transcripts of the telephone conversation so recorded to a trade union official. Deputy Kelly contended that these acts had amounted to a breach of the constitutional rights to privacy of the participants in the original telephone call but could not identify any statutory prohibition and welcomed the amendment.<sup>154</sup> It appears that the text of the amendment had existed for some time before being introduced.

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<sup>151</sup> Draft Memorandum for Government, dated March 1981 (Ref: S/80), at paragraph 17; “Memorandum for the Government” dated 1982, at paragraph 23.

<sup>152</sup> Section 1(ix) of the Ministers and Secretaries Act, 1924: “The Department of Posts and Telegraphs shall comprise the administration and business generally of public services in connection with posts, telegraphs and telephones...”

<sup>153</sup> Department of Post and Telegraphs, *Reorganisation of Postal and Telecommunications Services* (1981, White Paper).

<sup>154</sup> The Constitutional right to privacy is discussed under Section 5 of Chapter 9.



### **The Postal and Telecommunications Services Act 1983**

- 9.4.18 The Postal and Telecommunications Services Act 1983 provided principally for the transfer of the postal and the telecommunications services, previously provided by the Minister for Posts and Telegraphs, to two newly created independent bodies, which became, respectively, An Post and An Bord Telecom Éireann. An Bord Telecom Éireann was the body established to operate the telecommunications, including telephone, services.<sup>155</sup>
- 9.4.19 An overview of the legislative history of section 98 of the 1983 Act is vital to an understanding of the question being addressed at this point of the Report, namely whether An Garda Síochána or individual members of the force, by operating the telephone-recording systems, committed the offence of interception of telecommunications messages created by that section. In the interests of simplicity of exposition, this Report will now focus on a consideration of the offence of "interception". The cognate offences, such as attempting or authorising interception, are included in the analysis.

#### **(A) Section 98 – Offence of Interception**

- 9.4.20 Section 98(1) of the 1983 Act provided:

“A person who—

- (a) intercepts or attempts to intercept, or
- (b) authorises, suffers or permits another person to intercept, or
- (c) does anything that will enable him or another person to intercept, telecommunications messages being transmitted by the company or who discloses the existence, substance or purport of any such message which has been intercepted or uses for any purpose any information obtained from any such message shall be guilty of an offence.”

- 9.4.21 Section 98(5) of the 1983 Act contained the definition for “interception” that underpinned the offence. Oddly, it did not define the verb “intercept”, used in the

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<sup>155</sup> Section 9 of the Act required the Minister to cause a limited company to be formed. Under s.2 of the 1983 Act, the “company” was defined as “the postal company or the telecommunications company, as the case may require”. In turn, the “telecommunications company” was defined under s.2 as “the company referred to in section 10 (1) (b)”, which provision provided the name of “the company” as “Bord Telecom Éireann or, in the English language, The Irish Telecommunications Board”. The word “limited” was dispensed with under S.I. No. 408/1983 “Postal and Telecommunications Services Act 1983 (Bord Telecom Eireann) (Vesting Day) Order, 1983” which provided 1 January 1984 as the vesting day for the company.

provision creating the offence but, rather, the noun “interception”. Section 98(5) defined the offence of “interception” as follows:

“In this section, “interception” means listening to, or recording by any means, or acquiring the substance or purport of, any telecommunications message without the agreement of the person on whose behalf that message is transmitted by the company and of the person intended by him to receive that message.” [emphasis added]

- 9.4.22 The “company” referred to in the 1983 Act was “Bord Telecom Éireann”. This is significant, as no offence was committed under the section where messages were transmitted by means of a private network or by any other telecommunications provider.<sup>156</sup>
- 9.4.23 In simple terms, a person is guilty of interception if he or she listens to or records a telecommunications message being transmitted by Bord Telecom Éireann without the agreement of both intended parties to that message.
- 9.4.24 The Commission has been unable to find any reported decision of the Irish Courts regarding the meaning of “interception” as defined, prior to its amendment under the 1993 Act. Section 98 was considered by the Court of Criminal Appeal in *People (Director of Public Prosecutions) v Dillon*.<sup>157</sup> The facts were that a Garda Inspector had taken possession of a mobile telephone, the property of a suspected drug dealer, and listened to some calls, giving a fictitious name, ‘Mick’. The Court held that the caller had not intended to speak to the fictitious ‘Mick’ and that the person whose consent or agreement was in contemplation was “the person [the caller] intended to receive the telephone message, as opposed to the person actually receiving it.”
- 9.4.25 The conclusion thus reached in *People (Director of Public Prosecutions) v Dillon* is almost entirely hypothetical. The facts concerned a Garda listening in to calls, received on a mobile telephone taken from a suspect and, as the Court found, intended to be heard, not by the Garda, but by the owner of the mobile telephone. It is difficult to envisage such a set of facts occurring in the case of the recording of telephone calls made to Garda stations and recorded on the recording systems operated there.

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<sup>156</sup> The provision was amended by s. 9 of the Postal and Telecommunications Services (Amendment) Act, 1999, which repealed this definition and replaced it with a reference to a “licenced operator”, as defined under s.111 (2) and s. 111(3) of the 1983 Act, as amended, which was later extended to an “authorised undertaking” under S.I. 306 of 2003, ‘European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations’ 2003.

<sup>157</sup> *People (Director of Public Prosecutions) v Dillon* [2002] 4 IR 201.

9.4.26 While the relevant facts, in the *Dillon* case, occurred after the amended definition had come into force, the Court, while referring at a number of points to the Interception Act of 1993, does not appear to have been referred to, and certainly did not itself refer to, the amended definition of “interception” provided by the latter statute. Consequently, it decided the case based on the original definition, which was no longer the law. In *People (Director of Public Prosecutions) v Geasley*, the Court of Criminal Appeal held that “Dillon cannot be regarded as providing a binding interpretation of s. 98(5) of the Act of 1983, as amended by s. 13(3) of the Act of 1993”. Nonetheless, the decision is clearly a persuasive authority on the interpretation of the section prior to its amendment.<sup>158</sup>

9.4.27 Hardiman J., in delivering the judgment of the Court, stated:

“The first aspect of subs. 5 which was drawn to our attention in this case was its considerable breadth. It is quite clear that it is broad enough to include activities outside the traditional notion of “telephone tapping”... These activities are within the definition of “interception” (which is criminalised by the earlier provisions of s. 98) if they are done without the “agreement” of each of two persons, *viz* the person making the call and “the person *intended by him* to receive that message. In the course of argument, an English statute speaking of the consent of “the parties to the telephone call” was opened but it appears to us that the scope of the Irish provision is broader than that.”<sup>159</sup>

9.4.28 The Court of Appeal concluded that the s. 98(5) definition was broader than its United Kingdom (UK) counterpart, but did not consider the meaning of the words “being transmitted by the company”. The UK equivalent was contained in s. 1 of the United Kingdom Interception of Communications Act 1985. The Interception Act, unlike its counterpart in this jurisdiction, did not define “interception” but provided, under s. 1, “a person who intentionally intercepts a communication in the course of its transmission by post or by means of a public telecommunication system shall be guilty of an offence”.

9.4.29 The issue as to whether a person who records a telephone call to which he or she is a party could be found guilty of the offence of interception arose in *R v Hammond & Ors* where the Defendants conspired to defraud a telecommunications company which operated a telephone service providing betting information.<sup>160</sup> The telecommunications company recorded telephone calls made by the first-named Defendant to the company.

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<sup>158</sup> *People (Director of Public Prosecutions) v Geasley* [2010] 3 ILRM 317.

<sup>159</sup> *People (Director of Public Prosecutions) v Dillon* [2002] 4 IR 201.

<sup>160</sup> *R v Hammond, McIntosh & Gray* [2002] EWCA Crim 1423.

These recorded calls later formed the basis of statements, ruled admissible at trial, which led to the conviction of the Defendants. The Court of Criminal Appeal unanimously held that the recordings made by the telecommunications company of calls it had received from the Defendant did not amount to an interception of a communication in the course of transmission. Keith J. held:

“The critical feature is that the telephone calls were recorded by the persons to whom the calls were made, and subject to any statutory guidance as to the meaning of the word 'interception', we would have thought that if a recording of a telephone call is to be regarded as an interception, it can only be so regarded when the recording is not made by either the maker of the call or the receiver of it, but by a third party”.<sup>161</sup>

- 9.4.30 In *R v. Effik*, incriminating telephone conversations, conducted by an Accused on a cordless telephone, were secretly recorded by the police without warrant.<sup>162</sup> The calls were recorded through the use of a radio receiver placed in an adjoining flat, which recorded the signals transmitted between the cordless handset and the base station. It was argued that the evidence distilled from the recorded calls was inadmissible on the basis that the Police did not have a warrant to conduct a lawful interception. The House of Lords held that an interception had not occurred in those circumstances, as the cordless telephone was a privately-run system and, although connected to the British Telecommunications system designated as a public telecommunications system for the purposes of the Act, was not part of it.<sup>163</sup>
- 9.4.31 The Interception of Communications Act 1985 was subsequently repealed and replaced by the Regulation of Investigatory Powers Act, 2000 (“the RIPA Act”). The RIPA Act expanded the prohibition to include calls intercepted during the course of transmission over a telecommunications system whether public or private. Section 2(2) provides that a person intercepts a communication in the course of its transmission by means of a telecommunication system only where the contents of the communication are made available, while being transmitted, to a person other than the sender or intended recipient of the communication.
- 9.4.32 The Court of Appeal of England and Wales in *R v Hardy* considered the meaning of the phrase “in the course of transmission” under the RIPA Act.<sup>164</sup> Two undercover police officers recorded, without warrant, their telephone conversations with the Accused. Hughes J., delivering the judgment of the Court of Appeal, ruled that the tape recordings

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<sup>161</sup> *R v Hammond, McIntosh & Gray* [2002] EWCA Crim 1423 at paragraph 6.

<sup>162</sup> *R v Effik* [1995] 1 AC 309.

<sup>163</sup> *R v Effik* [1995] 1 AC 309 at page 309.

<sup>164</sup> *R v Hardy* [2003] 1 Cr App R 30.

could not amount to an interception of a communication in the course of its transmission within the meaning of s. 2(2) of the RIPA Act 2000:

“For present purposes the important words are “while being transmitted”. What happened here was that one party to the telephone calls (the undercover officer) taped the calls. The contents of the calls were not made available, whilst being transmitted, to any third party. This is not a case of telephone tapping. It is exactly the same as the undercover officer secreting a tape recorder in his pocket or briefcase whilst meeting the suspect face-to-face, something which he also did in this case. It is surveillance. It requires authorisation. The Act provides for it. But it is not interception...”

There is, moreover, good reason why this should be the meaning of “interception”. A person who speaks to another on the telephone knows that that other may in due course be able to relate the conversation to somebody else, including to a court. The fact that party B to such a conversation can support his account of what was said by a tape recording does not convert the discussion into one which party A was entitled to prevent party B from speaking about.

The position of a telephone conversation which is intercepted and overheard by a third party, unknown to one or both of the parties to it, is different. Such a conversation may legitimately be regarded by the two speakers as something which could only be revealed by one of them. That is what is separately provided for as ‘interception’ for the purposes of the 2000 Act. [Counsel] conceded that if the submission made on behalf of the appellant were correct, it would be an offence for any householder to put a tape recorder on his own private telephone. We are quite satisfied that Parliament intended to make no such provision and has not done so.”<sup>165</sup>

9.4.33 Under Irish law, the definition of interception under s. 98 of the 1983 Act limited the offence to the recording, or listening into, of “telecommunications messages being transmitted by the company”.

9.4.34 The case law of the Courts of England and Wales, which is merely of a persuasive authority, suggests that the phrase “being transmitted by the company” excludes, from the scope of the interception prohibition, recorded telephone calls where the recorder is placed either at the point of departure of the telecommunications signal or at its terminus. This could have effectively negated the historic anomaly under s. 98 that a

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<sup>165</sup> *R v Hardy* [2003] 1 Cr App R 30 at paragraphs 31-35.

party to a telephone call could be guilty of an offence of interception merely by listening to it.

9.4.35 Nonetheless, the decision of the Court of Criminal Appeal in *People (Director of Public Prosecutions) v Dillon*, while not addressing that precise issue, suggests that s. 98 was broader than its UK counterpart. The Commission is satisfied that the definition of interception under s. 98(5), which required the agreement of both parties to the recording of a telecommunications message, probably broadened the definition of “interception” beyond its ordinary meaning.

9.4.36 It is not in accordance with the ordinary use of language, and is counterintuitive, to regard a person receiving a telephone call by answering the telephone as committing the act of “intercepting” it. The Oxford English Dictionary defines “intercept” as follows:

- (i) “To seize, catch or carry off (a person, ship, letter etc) on the way from one place to another; to cut off from the destination aimed at.
- (ii) To stop the natural course of (light, heat, water etc); to cut off (light) from anything.
- (iii) To interrupt, break in upon....
- (iv) To stop, check or cut off (passage or motion) from one place to another.”<sup>166</sup>

9.4.37 In its ordinary sense, to intercept is to intervene in the course of the passage of something (a physical article, message or communication) between two persons or places. Essentially, the meaning of the word ‘intercept’ in ordinary language provides that something is done to a thing, for present purposes a message, in the course of its progress or movement from one place to another. A ball may be intercepted in its passage from one team member to another by an opposing player. A traveller may be intercepted while on his journey from one place to another. It would not be in accordance with normal usage to speak of intercepting a person at the end of his journey.

9.4.38 The Commission is satisfied that s. 98 does not use the word ‘intercept’ in its ordinary meaning but assigns to it the special meaning set out in s. 98 (5). Moreover, the meaning there adopted is exhaustive; it says that “interception” means, not that it merely includes, the acts set out in that section.

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<sup>166</sup> The Oxford English Dictionary, 2<sup>nd</sup> ed. vol. VII (Oxford: Clarendon Press, 1989).

9.4.39 The Commission is satisfied that the s. 98(5) definition of “interception” was, from the outset, significantly defective in ways which will now be discussed, some of which were later identified in the course of preparation of the Interception Act of 1993. In examining the implications of the definition, it is important not to lose sight of the fact that this is legislation purporting to create a criminal offence and that clear language is required. Moreover, this legislation is addressed to the population as a whole, rather than to An Garda Síochána specifically.

9.4.40 The fact was that “interception” was, no doubt unintentionally, defined extraordinarily broadly. The following are some of the principal implications:

- (i) The acts of listening and recording were treated identically: each was defined as an “interception”. It was an offence for a person to answer the telephone and even to listen to a call, without the agreement of the person making the call. While it might possibly have been intended that the act of recording a telephone conversation mechanically would be criminalised, it was absurd when it is appreciated that it applied equally to the act of “listening” to a telephone call. Read literally, the section made it an offence for the receiver of a telephone call to listen to it without some process of obtaining the agreement of the caller. It might, of course, be presumed that in practice the agreement of the caller would be implied, but it was scarcely necessary to legislate for such an obvious matter;
- (ii) Even in the case of recording, it is surprising that an offence was created. The routine use of a telephone-answering machine would require the consent of the caller. Again, agreement could be presumed if the caller continued to speak and allowed his message to be recorded. However, the definition included recording “by any means”. Taken literally, that could include taking notes or making a written record of a telephone conversation. More generally, it seems most unlikely that the Oireachtas intended to make it a criminal offence for a person to record a telephone call received by him or her;
- (iii) The definition also included the act of “acquiring the substance or purport of a telecommunications message”. This would mean that a person to whom the substance of a telephone call was communicated by the person who had received it would commit the offence of interception by receiving the information, if he or she did not obtain “the agreement of the person on whose behalf that message is

transmitted by the company and of the person intended by him to receive that message.” That person would commit a further offence by recording the substance of it “by any means,” without such consent. Recording “by any means” presumably would include making notes of it or dictating it onto a tape machine;

- (iv) The offence, as the section still stands, is committed by any person who “discloses the existence, substance or purport of any such message which has been intercepted...”. Bearing in mind that the definition, before amendment, included “listening to” a telephone call, an offence would, at that time, have been committed by anyone who, having listened to a telephone call, told anyone else about it;
- (v) It would also be committed by any person who “uses for any purpose any information obtained from any such message.” In this case, it is unclear whether it is at all a defence for such a “user of information” to rely on the agreement of the transmitter of the call;
- (vi) The section would have the effect of making it an offence for the receiver of a telephone call conveying threats or obscene messages or nuisance calls to record them or to enable a third person to listen to it for the purpose of providing evidence. Section 98(2)(a)(i) created an exception only where the listening or recording was “for the purpose of an investigation by a member of the Garda Síochána of a suspected offence under section 13 of the Post Office (Amendment) Act, 1951.” In any event, the 1951 Act concerned only specific types of call. There was no exception for calls made for general criminal purposes.

9.4.41 In the view of the Commission, the Oireachtas intended to create an offence of “interception” of telecommunications messages. That term was used, however, to include both listening to and recording such messages. That fact, in itself, shows that what the legislature had in contemplation was acts of listening or recording which amounted to interception. Using the word, ‘interception’, in that normal sense, it would be an offence for any person to listen in to or to record a telephone conversation between two other persons. It is difficult to believe that it was ever intended to create an offence of listening to or recording a telephone message by the person receiving it with the implications set out above.

9.4.42 In the event, there was, so far as the Commission has been able to discover, no prosecution for any offence under s. 98(1) of the 1983 Act at any time from its passing



until its amendment by s. 13 of the Interception Act of 1993. Furthermore, as appears from the general sections of this Report concerning the installation of telephone-recording systems in Garda stations, although a limited amount of non-999 call-recording took place at Dublin Castle and Harcourt Square prior to 1995, this was clearly incidental to the recording of all emergency-related communications traffic at Command and Control for the DMA. The unique structure of Command and Control meant that the proportion of non-emergency calls recorded on those lines was likely to be very low. The systematic recording of non-999 lines at Divisional Stations outside the DMA did not commence until 1995, by which time the Interception Act of 1993 was in force. The system of S.E.L recorders, which preceded the DAT system in Divisional Stations and is described in Chapter 4 of this Report, was used to record calls other than 999 calls. Nonetheless, an analysis of the history of the 1983 Act, the realisation that its definition of “interception” was defective and its consequent amendment is highly relevant to the question of whether An Garda Síochána or its members committed offences contrary to s. 98 by operating the recording systems.

**(B) Section 110 – Authorisation**

9.4.43 Section 98(2) of the 1983 Act provides for certain exceptions to the offence of “interception”:

“(2) Subsection (1) shall not apply to any person who is acting —

- (a) (i) for the purpose of an investigation by a member of the Garda Síochána of a suspected offence under section 13 of the Post Office (Amendment) Act, 1951 (which refers to telecommunications messages of an obscene, menacing or similar character) on the complaint of a person claiming to have received such a message, or
- (ii) in pursuance of a direction issued by the Minister under section 110, or
- (iii) under other lawful authority, or
- (b) in the course of and to the extent required by his operating duties or duties for or in connection with the installation or maintenance of a line, apparatus

or equipment for the transmission of telecommunications messages by the company”.

9.4.44 Paragraphs (a) (i) and (iii) would appear broad enough to exclude most relevant and lawful police action. Section 13 of the Post Office (Amendment) Act 1951 created a number of offences of sending messages by telephone which are “grossly offensive or of an indecent, obscene or menacing character;” or which are “false, [and sent] for the purpose of causing annoyance, inconvenience, or needless anxiety to any other person...”.<sup>167</sup>

9.4.45 The Section 110 direction referred to in paragraph (a) (ii) was designed to provide an exception to cover cases of interception authorised under the existing warrant system.<sup>168</sup> The Act contained no express provision placing the warrant system, as it then existed, on a statutory basis. The Minister, there referred to, was the Minister for Posts and Telegraphs by virtue of s. 2(1) of the Act. The Act certainly contained no express reference to the Minister for Justice. In practice, the Minister for Justice issued a warrant which was then implemented by the Minister for Posts and Telegraphs by way of a s. 110 direction issued to Bord Telecom Éireann.<sup>169</sup> Section 110 of the 1983 Act provided:

“(1) The Minister may issue directions in writing to either company requiring the company -

(a) [not relevant]

(b) to do (or refrain from doing) anything which he may specify from time to time as necessary in the national interest or to enable the Government or the State to become a member of an international organisation or a party to an international agreement or to discharge its obligations as a member of an international organisation or as a party to an international agreement.” [emphasis added]

9.4.46 The Commission has been provided with a number of important internal files of the Department of Justice on which the following is based. On 2 March 1984, the Minister for Communications, Deputy Jim Mitchell, T.D., (to whom the functions of the Minister for Posts and Telegraphs had been transferred),<sup>170</sup> wrote to Deputy Michael Noonan, T.D., Minister for Justice “regarding the arrangements for the interception of postal

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<sup>167</sup> Since amended by s. 4(2) of the Communications (Regulation) Act 2007.

<sup>168</sup> See detailed discussion of the warrant system provided under section 2.

<sup>169</sup> Ibid.

<sup>170</sup> Section 3 of the Ministers and Secretaries (Amendment) Act 1983.

packets and telecommunications messages under warrants issued by the Minister for Justice”.

9.4.47 Deputy Mitchell enclosed, what he described as, “a copy of the revised directions drafted by the Attorney General which I have issued to An Post and Bórd Telecom Éireann.”

9.4.48 The draft directions purported to be issued “in exercise of the powers conferred on [him] by Section 110 of the Postal and Telecommunications Services Act, 1983”.

9.4.49 They purported to require the body to which they were to be addressed, so far as telephone calls were concerned, Bord Telecom Éireann, to:

“act in obedience to any warrant issued by the Minister for Justice requesting the opening or interception (within the meaning of Section 98(5) of the Act) of such telecommunications messages as may be specified in the warrant and the transmission of all such messages to such person as is named in that behalf in the warrant.”

9.4.50 Also attached was a specimen form of warrant, headed “SECRET”, appearing to be intended for use by the Minister for Justice. That form also purported to cite s. 110 of the 1983 Act as its legal authority. However, that section conferred no power on the Minister for Justice.

9.4.51 These documents appear to show that, in spite of the expressed intention not to place the warrant system on a statutory footing,<sup>171</sup> a general power of the Minister for Posts and Telegraphs (later the Minister for Communications) in s. 110 of the 1983 Act to give directions to the telecommunications company, Bord Telecom Éireann, “as necessary in the national interest”, was to be used for just that purpose. The preservation of the existing warrant system for the authorisation of telephone tapping appears to have been intended to be achieved in that indirect fashion, and without referring to it in the legislation.

### **Interception Act 1993 – amendment to “interception”**

9.4.52 The process of amendment of the 1983 Act took many years. It is convenient to commence on 20 January 1984, when the Department of Justice wrote to the Minister, under the title “Telephone Tapping”, and attached a draft Memorandum for Government and draft Heads of Bill. These dealt with proposals for a statutory scheme of warrants

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<sup>171</sup> See previous discussion regarding Section 56 of the Post Office Act, 1908, in Section 2, Chapter 9.

for interception of telephone or telecommunications messages. They did not mention the definition of ‘interception.’

9.4.53 In the course of preparation of what became, firstly, the Interception of Postal Packets and Telecommunications Messages (Regulation) Bill 1985 and, ultimately, the Act of 1993 of the same name, it was noted in the Department of Justice that the definition in the Act of 1983 was unduly broad. The following are some instances:

(i) In a note entitled, “Telephone Tapping etc: Notes for a Draft Bill”, on 23 August 1984, an official of the Department of Justice suggested that the definition of the offence extended to cases to which the warrant system did not apply. It was suggested that the definition be amended. The author drew attention to an Australian statutory definition of interception as consisting of “listening to or recording, by any means, such a communication in its passage over the Telecommunications system without the knowledge of the person making the communication.” He also referred to the recent judgment of the ECtHR in *Malone v United Kingdom*, which stated that, in the English system, “the expression ‘interception’ is used to mean the obtaining of information about the contents of a communication without the consent of the parties involved.” [emphasis added]

(ii) On 18 September 1984, this official wrote to a parliamentary draftsman, communicating instructions that:

“s. 98(5) of the Postal and Telecommunications Act 1983...seems to be defective in that the definition of “interception” in subsection (5) makes the scope of the offence far wider than it should be, with the result that warrants are apparently, as a matter of law, required for interceptions for which there is not, nor will be, any question of issuing them. We shall probably ask you to amend subsection (5).....” [emphasis added]

(iii) On 3 April 1985, this official noted that “clause 1 of the British Bill”<sup>172</sup> creates a general offence of intercepting a communication “in the course of its transmission by post or by means of a public Telecommunications system.” [emphasis added]

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<sup>172</sup> This became the United Kingdom Interception of Communications Act, 1985.

(iv) On 20 September 1985, another senior official of the Department wrote:

“Finally, it will be recalled that earlier this year it was agreed orally that the definition of “interception” in the 1983 Act is open to the interpretation that goes beyond what was intended and that could create problems in relation to the issue of the warrants”.

9.4.54 In the event, a typewritten text from the Parliamentary Draftsman’s Office, dated 7 November 1985 and headed, “Interception of Postal Packets and Telecommunications Messages (Regulation) Bill 1985”, contains the first version of the new definition of “intercept”, as follows:

“In this section ‘intercept’ means listen to, or record by any means, in the course of its transmission, a telecommunications message but does not include such listening or recording where either the person on whose behalf the message is transmitted or the person intended to receive the message has consented to the listening or recording, and cognate words shall be construed accordingly.”

9.4.55 The first White-Copy version of the Bill, circulated in December 1985, contained the same definition in a version of s. 13(3) providing for a new subsection (6) of the amended Act of 1983. This version of the definition remained unaltered throughout the passage of the legislation, a process which took 8 years. It is and has been the applicable definition of the term “intercept” since 1993.

9.4.56 There was consistent recognition, throughout that 8-year period, that the 1983 definition of interception had been seriously defective. An undated and unsigned internal Department of Justice note of 1991 states the following:

“But in any event there is the fundamental difficulty that the provisions in section 98 prohibiting interception depend on the definition of “interception” in subsection (5) and that definition is fundamentally defective in not being limited to interception of the message in the course of its transmission and, to a lesser extent, in requiring the agreement of the person on whose behalf the message is transmitted (as well as that of the recipient) in order to justify interception. These defects were to be got rid of in the new subsection (6) to be inserted by section 13(3) of the 1987 Bill. Meanwhile, unless the courts were to apply the obscure doctrine as to

statutory mistakes, it would apparently be an offence for the Gardaí to listen in by agreement with a subscriber to a telephone call by a blackmailer.”  
[emphasis added]

9.4.57 The definition of “intercept” contained in the draft of November 1985 remained intact and became law, without amendment. It was discussed once in the Dáil. On 29 October 1992, Deputy Gallagher, T.D., Minister of State at the Department of the Marine, referred to a question raised by Deputy Durkan, T.D., as to why the definition of “interception” did “not include listening or recording where one of the parties concerned in the conversation has consented to the listening or recording.”

9.4.58 Deputy Gallagher responded by pointing out that:

“There are many examples of when a person might want his or her phone calls intercepted — for example, if he or she were being blackmailed or in a kidnapping.”<sup>173</sup>

9.4.59 It was not, strictly speaking, accurate to say that the receiver of a blackmailing call could not, without committing the offence of “interception”, permit a member of An Garda Síochána to listen in to a blackmailing call. Section 98(2) provided an exception for the case of “an investigation by a member of the Garda Síochána of a suspected offence under section 13 of the Post Office (Amendment) Act, 1951.” However, that was a narrowly drawn exception. There were, undoubtedly, cases where it was absurd to criminalise the act of listening to or recording certain calls without the consent of the caller. For example, the exception covered only a Garda investigation and did not include the case of a recipient of an obscene, threatening or other criminally-related call asking a friend or relative to listen for the purpose of protection or preservation of evidence.

9.4.60 The principal purpose of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 was, as appears from its title, to regulate and to provide an express statutory basis for the interception of postal packets and telecommunications messages.

9.4.61 It confers authority on the Minister for Justice to grant authorisations by warrant for interception of telecommunications messages, but only for the purpose of criminal investigation (limited to cases of serious crime as defined) or in the interests of the

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<sup>173</sup> Deputy Gallagher, T.D., the Minister of State at the Department of the Marine (Dail Deb, 29 October 1992, vol 424, no 6).

security of the State.<sup>174</sup> A warrant is required to specify “the telecommunications address to which the proposed interception relates.”<sup>175</sup> An application for an authorisation for the purposes of criminal investigation must be made by the Garda Commissioner in writing.<sup>176</sup> A warrant remains in force for a maximum period of three months, subject to a power of extension.<sup>177</sup>

#### **Whether the offence of interception was committed by Gardaí**

- 9.4.62 Having reviewed the history and content of the interception legislation, the Commission must address the question of whether An Garda Síochána or any of its members could have committed offences contrary to the provisions of s. 98 of the Postal and Telecommunications Services Act, 1983, firstly, in the period between 1983 and 1993 and, secondly, after 1993, when the definition of interception was amended.
- 9.4.63 There have, so far as the Commission has been able to discover, been no prosecutions for offences contrary to the section.

#### **(A) Criminal liability under the Act of 1983 pre amendment**

- 9.4.64 It will be recalled that the act of “interception” occurred under the definition contained in s. 98(5) of the 1983 Act where a telephone call was listened to or recorded “without the agreement of the person on whose behalf that message is transmitted by the company and of the person intended by him to receive that message.” In short, both parties to the call had to consent to any recording. Otherwise, the recording amounted to “interception”.
- 9.4.65 It is important to emphasise the distinction between a breach of s. 98, committed by a member of the force which may render the contents of an intercepted telephone call inadmissible and the commission of a criminal offence.
- 9.4.66 This distinction was emphasised in *People (Director of Public Prosecutions) v Dillon*, the only reported decision which considered s. 98(5) prior to amendment. Hardiman J., having said that An Garda Síochána acted in breach of s. 98(5), then stated:

“For the reasons set out above it appears to us that no agreement which would take the action of the Inspector in listening to the conversation out of the category of “interception” has been demonstrated in this case. In so holding, we are not of course implying that an offence under s. 98 was

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<sup>174</sup> Section 2 of the Interception Act of 1993.

<sup>175</sup> Section 2(4)(c)(ii) of the Interception Act of 1993.

<sup>176</sup> Section 6(1) of the Interception Act of 1993.

<sup>177</sup> Section 2(5) of the Interception Act of 1993.

committed by Inspector Quilter or any other person. That could only be established in criminal proceedings directed specifically to the point and, in such proceedings, the issue would be different. The issue here is whether “agreement” within the meaning of subs. 5 has been positively established. In order to establish an offence, however, such “agreement” would have to be excluded beyond a reasonable doubt. It is, to say the least, extremely doubtful if this could be done”<sup>178</sup>

9.4.67 Insofar as the period from 1983 to 1993 is concerned, the first and most important fact to be noted is that, as the Commission reports elsewhere,<sup>179</sup> there was, in effect, no general system of recording at Garda stations other than *via* the S.E.L. consoles which, insofar as the Commission has been able to discern, were used only for the recording of a single 999 line. The DAT recording systems were not installed in any Garda stations until 1995, at the earliest. Thus, with the exception of certain lines at Dublin Castle, and later Harcourt Square, only 999 calls were recorded prior to 1995.<sup>180</sup> In the view of the Commission, it is extremely difficult to foresee the exclusion beyond a reasonable doubt of the agreement of a person to the recording of an emergency or 999 telephone call.

9.4.68 The consequence is that, prior to 1995, there was no general recording of telephone calls at Garda stations, other than of 999 calls. There could not, therefore, be any question of members of An Garda Síochána committing the offence of “interception” of telecommunications messages at Garda stations. There were not in existence at Garda stations, prior to 1995, any of the telephone-recording systems contemplated by paragraph 1 of the Terms of Reference of the Commission. There was no recording and there could not have been any act of “interception”, as defined, of any calls other than 999 calls.

9.4.69 The Commission concludes that, for all reasonable and practicable purposes, there was no basis in fact on which members of An Garda Síochána could have been found guilty of the offence of interception in the period between 1983 and 1993.

#### **(B) Criminal liability under the Act of 1983 post amendment**

9.4.70 As has been pointed out in some detail above, the definition of the term “interception” was amended in 1993 in two important respects:

- (i) By the insertion of the words “in the course of transmission”;

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<sup>178</sup> *People (Director of Public Prosecutions) v Dillon* [2002] 4 I.R. 501.

<sup>179</sup> See Chapter 4 of this Report

<sup>180</sup> See above at paragraph 8.11



(ii) By providing that the term “intercept”:

“does not include such listening or recording where either the person on whose behalf the message is transmitted or the person intended to receive the message has consented to the listening or recording.”

9.4.71 The telephone-recording systems installed and operated in Garda stations with which the Commission has been concerned in the period after 1993 fall into two stages:

(i) The DAT tape system installed in Divisional Stations between 1995 and 1997;

(ii) The NICE system which replaced it between 2008 and 2009.

9.4.72 For the purpose of the legal issue considered here, there is no material difference between those two systems. Both involved the recording of telephone calls received at or made from Garda stations on certain telephone lines. While the lines actually recorded varied to some extent from one Garda station to another, the recording took place at one end of the line and not at any intermediate stage.

9.4.73 Each of those systems involved the recording of telephone calls as received at or made from Garda stations. That means that calls were recorded at one end of the transmission, rather than at any point “in the course of transmission” of a call between the external caller or receiver of the call and the relevant Garda station. Calls were not listened to or recorded at any intermediate stage in the course of transmission. This is in contrast with ‘interception’ in the true sense, where a person listens in to a telephone conversation between two other persons or records that call by, for example, attaching wires or listening devices.

9.4.74 The Commission has quoted the definition of the verb “intercept” provided in the Oxford English Dictionary.<sup>181</sup> Essentially, the meaning of the word ‘intercept’ in ordinary language means that something is done to a thing, for present purposes a message, in the course of its progress or movement from one place to another. The legislative history of the definition shows that the words “in the course of transmission” were deliberately inserted.

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<sup>181</sup> See Chapter 4 of the Final Report

- 9.4.75 The Commission concludes that the recording by An Garda Síochána of telephone calls to Garda stations on the telephone-recording systems did not amount to “interception” for the simple reason that the recording took place at the termination of the transmission of each message and not during its course. In no case did the recording of telephone calls at Garda stations take place in the course of their transmission along the telecommunications system between the maker or sender of the call (whether the Garda station or an outside caller) and the receiver or intended receiver of the call. That conclusion, taken on its own, is sufficient to enable a conclusion to be reached that neither An Garda Síochána as a body, nor any of its members, committed offences of interception contrary to s. 98 of the Postal and Telecommunications Services Act 1983, as amended by s. 13 of the Interception Act of 1993. Consequently, it is, strictly speaking, unnecessary for the Commission to consider the separate question of the consent of “either the person on whose behalf the message is transmitted or the person intended to receive the message”.
- 9.4.76 Nonetheless, for the sake of completeness, the Commission considers, as a separate question, the implications of the express provision that interception “does not include such listening or recording where either the person on whose behalf the message is transmitted or the person intended to receive the message has consented to the listening or recording.” This means that a person does not commit the offence by the simple act of listening to a call without obtaining the agreement of the caller, as had been the case under the 1983 definition of “interception”. Nor does it appear that an offence is any longer committed by the act of “acquiring the substance or purport of, any telecommunications message.” Those words have been removed from the definition.
- 9.4.77 The question remains whether a member of An Garda Síochána commits the offence by recording a telephone call in the light of the provision that “interception” does not include recording where “the person intended to receive the message has consented to the listening or recording.”
- 9.4.78 For a number of reasons, it is difficult to conceive of any situation in which it would occur that a Garda receiving a telephone call which was recorded on any of the Garda Síochána recording systems would be held to have committed the offence of interception or any of the cognate offences:
- (i) The gist of the offence, the *actus reus*, would be the act of recording: there would have to be evidence that a particular Garda took part in the act of installing or operating the recording equipment for him or her to be guilty of “interception”. The hypothetical Garda answering a

telephone in a Garda station would not have committed the act of recording;

- (ii) In those cases where the Garda, either answering the telephone or making an outgoing call, was aware that the telephone was recorded, he or she would appear necessarily by that very act to have consented to the recording for the purposes of the definition;
- (iii) In those cases where such a Garda, answering the telephone or making an outgoing call, was unaware that the call was being recorded, any recording would be taking place without his or her knowledge and obviously no offence could be committed.

9.4.79 There is one possible situation in which a defence based on the consent of “the person intended to receive the message” might not take the case outside the definition of “interception”. Anyone involved in the installation, setting up or turning on of recording equipment might be said to commit the act of recording a telecommunications message for the purpose of the definition. Such a person would not be “the person intended to receive the message” and his or her consent to the recording would not take the case outside the definition. However, the recording would still not be ‘in the course of transmission’. Thus, for that reason, the recording would not, in any event, amount to “interception”.

#### **Absence of Authorisation**

9.4.80 For the sake of completeness, the Commission wishes to make it clear that, quite apart from the question of whether the installation and operation of the telephone-recording systems were positively authorised by law, in the sense of an express law providing legal authority for them, which they were not, there could never have been any question of the grant of specific authorisations for the acts of recording. As the Commission pointed out in its Interim Report on paragraphs 1(n) and (o) of its Terms of Reference, the Attorney General made a particular point of the absence of any evidence that authorisations existed which permitted interception of telephone messages by An Garda Síochána.<sup>182</sup> The Commission confirmed that the Attorney was certainly correct in her observation. It continued:

“[T]he Commission is satisfied from its investigations to date that no question ever arose of An Garda Síochána obtaining statutory authorisation for the recording of telephone calls to Garda stations. The possible need for authorisation for the telephone-recording systems at Garda stations did not

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<sup>182</sup> Interim Report on 1(n) and (o) at paragraph 25.23

occur to anyone in An Garda Síochána. Authorisation for listening to or downloading particular recordings is a different matter.”

9.4.81 Authorisation for the tapping or interception of particular telephone lines has been the subject of the following legislation:

- (i) Section 110 of the Postal and Telecommunications Services Act, 1983, provided that the Minister for Communications might “issue directions in writing to either company requiring the company.... to do (or refrain from doing) anything which he may specify from time to time as necessary in the national interest...” Although this provision made no express reference to the authorisation of tapping or interception of telephone calls, it appears to have been intended to provide a mechanism for the continuation of the administrative system for the issue of warrants authorising telephone tapping.<sup>183</sup>
- (ii) Section 2 of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 expressly authorises the Minister for Justice to issue warrants for the interception of telecommunications messages, subject to a number of conditions and safeguards. In particular, any such warrant must specify the particular telecommunications address in relation to which messages are to be intercepted.

9.4.82 All systems of tapping of telephones, whether under the former administrative system or either of the two statutory systems, were intended to enable the interception or recording of messages to particular designated telephone lines related to identified individual persons.<sup>184</sup> In all cases, they were accompanied by important conditions and restrictions. In particular, they were to be granted to discover information regarding the commission of serious crime or affecting the security of the State. They were limited in time. The generalised recording of telephone calls under the systems operated in Garda stations was absolutely and entirely different. The recording was not subject to any time limit; it was not related to any specific investigation; it was not directed at any identified individual persons. There was not, nor could there be, any possibility of obtaining statutory authorisations for this activity.

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<sup>183</sup> See Section 2.

<sup>184</sup> Ibid.

### **Confidentiality of communications**

9.4.83 On 1 July 2011, Statutory Instrument (S.I.) 336/2011 European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011, transposed Article 5 of Directive 2002/58 EC into Irish law.<sup>185</sup>

9.4.84 Regulation 5, entitled “confidentiality of communications”, provides as follows:

“Confidentiality of communications

5. (1) Without prejudice to section 98 of the Act of 1983 and section 2 of the Act of 1993 and except where legally authorised under a provision adopted in accordance with Article 15(1) of the Directive on privacy and electronic communications, the listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, is prohibited. [emphasis added]

5.(2) [not relevant]

5. (3) A person shall not use an electronic communications network to store information, or to gain access to information already stored in the terminal equipment of a subscriber or user, unless

(a) the subscriber or user has given his or her consent to that use, and  
(b) the subscriber or user has been provided with clear and comprehensive information in accordance with the Data Protection Acts which –

(i) is both prominently displayed and easily accessible, and  
(ii) includes, without limitation, the purposes of the processing of the information.”

9.4.85 Regulation 5 of S.I. 336/2011 prohibited “listening, tapping, storage or other kinds of interception or surveillance of communications...by persons other than users without the consent of the users concerned.” Under Regulation 2(2) a “user” means:

“any natural person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to this service.”

9.4.86 An Garda Síochána is not a user as it is not a natural person. The recording of telephone calls made to and from Garda stations fell within that prohibition. As previously stated, the Garda recording system did not benefit from any statutory authority, either under

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<sup>185</sup> The background and analysis of this provision is dealt with in detail in Section 7 of Chapter 9.

Article 15(1) of Directive 2002/58 or otherwise. An Garda Síochána were, therefore, prohibited from carrying on that activity and acted in clear breach of Regulation 5 of S.I. 336/2011 in recording telephone calls, storing their content and making them available for access.

## 9.5 SECTION V: AUTHORISED BY THE CONSTITUTION

### Introduction

- 9.5.1 The Commission must also consider whether the general recording system was “authorised by law” under paragraph 1 (g) of the Terms of Reference in light of the Constitution. In particular, it will examine whether the recording system operated in breach of the Constitutional rights of those persons recorded on the system, which included both members of the public and members of An Garda Síochána.

### The Right to Privacy

- 9.5.2 The right to privacy is not explicitly provided for in the Constitution. Rather, it is one of the unenumerated personal rights guaranteed under Article 40.3, sub-paragraph 1, which provides as follows:

“The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen”.

- 9.5.3 The constitutional right to privacy was first recognised by the Supreme Court in the context of the right to marital privacy in *McGee v Attorney General*.<sup>186</sup> A general right to privacy was then firmly established in *Norris v The Attorney General*,<sup>187</sup> although the plaintiff was unsuccessful in his challenge to the constitutionality of s. 61 and s. 62 of the Offences Against the Person Act 1861 and s. 11 of the Criminal Law Amendment Act 1885, which effectively criminalised homosexual acts.
- 9.5.4 The dissenting judgment of Henchy J. is generally regarded as the leading account of the constitutional genesis of the general right to privacy and has been cited with approval by the Courts on many occasions.<sup>188</sup> Henchy J. described the unenumerated right to privacy as follows:

“Having regard to the purposive Christian ethos of the Constitution, particularly as set out in the preamble (“to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations”), to the denomination of the State as “sovereign, independent, democratic” in

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<sup>186</sup> *McGee v The Attorney General* [1974] I.R. 284.

<sup>187</sup> *Norris v The Attorney General* [1984] 1 I.R. 36.

<sup>188</sup> *Fleming v The Attorney General* [2013] IEHC 2, where Kearns P. stated that the cited passages, “may be taken to represent the current judicial consensus”, at paragraph 50.

Article 5, and to the recognition, expressly or by necessary implication, of particular personal rights... there is necessarily given to the citizen, within the required social, political and moral framework, such a range of personal freedoms or immunities as are necessary to ensure his dignity and freedom as an individual in the type of society envisaged. The essence of those rights is that they inhere in the individual personality of the citizen in his capacity as a vital human component of the social, political and moral order posited by the Constitution.

Amongst those basic personal rights is a complex of rights which vary in nature, purpose and range (each necessarily being a facet of the citizen's core of individuality within the constitutional order) and which may be compendiously referred to as the right of privacy”.

9.5.5 It is beyond doubt that the constitutional right to privacy specifically extends to protect the privacy of telephone calls, following the seminal decision of Hamilton P. in *Kennedy v. Ireland*.<sup>189</sup> The Plaintiff journalists had their private telephones tapped pursuant to a warrant issued by the Minister for Justice under the former non-statutory system, described earlier in this Report.<sup>190</sup> The Minister later conceded that there had been no justification for issuing the warrant in question. The Plaintiffs were awarded damages for a breach of their personal right to privacy under Article 40.3.1 of the Constitution.

9.5.6 Regarding the constitutional right to the privacy of telephone calls, Hamilton P. stated:

“The nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely, a sovereign, independent and democratic society. The dignity and freedom of an individual in a democratic society cannot be ensured if his communications of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with.”<sup>191</sup>

9.5.7 Hamilton P. held the constitutional right to privacy protected communications of a private nature, written or telephonic, from deliberate, conscious and unjustifiable intrusion or interference.<sup>192</sup>

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<sup>189</sup> *Kennedy v Ireland* [1987] IR 587.

<sup>190</sup> See Section 3.

<sup>191</sup> *Kennedy v Ireland* [1987] IR 587, at page 592.

<sup>192</sup> *Kennedy v Ireland* [1987] IR 587, Hamilton P. also confirmed that, although the second-named Plaintiff was an English national who did not hold Irish citizenship, he was also entitled to assert a constitutional right to privacy.



9.5.8 It is important to note that the rights guaranteed by the Constitution also create concurrent obligations. As citizens enjoy a constitutional right to privacy, the Gardaí, in acting as an organ of State in receipt of confidential information, are placed under a corresponding obligation to take steps to protect the confidentiality of that information. As Quirke J. noted in *The National Maternity Hospital v The Information Commissioner*:

“The State itself has a general obligation to respect the right to privacy of its citizens. Public bodies and other state agencies entrusted with private sensitive information affecting the rights and interests of individual members of the public are, in general, required to keep that information confidential”.<sup>193</sup>

9.5.9 The recording systems digitally stored quantities of private information pertaining to individuals which were, at least in principle, available for access by certain members of Gardaí in Divisional Stations. The positive obligation placed upon the Gardaí to protect the confidentiality of that information was not respected through the operation of the general recording system.

9.5.10 In *Digital Rights Ireland Ltd v Minister for Communications*.<sup>194</sup> it was held that the constitutional right to privacy necessitated, as a corollary, a right to confidential communication. McKechnie J. extended the right to privacy of telephone calls to include the right to be free from surveillance. McKechnie J. held:

“I can see no logical reason why the court's comment could not apply mutatis mutandis to electronic surveillance. A person has a right not to be unjustifiably surveilled; such is therefore a general right to confidential communication”.<sup>195</sup>

9.5.11 McKechnie J. concluded:

“It is therefore clear that the interception of telephone conversations without lawful justification or surveillance is in general illegal (see *Kennedy v. Ireland* [1987] I.R. 587)”.<sup>196</sup>

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Therefore, there is no doubt that, in principle, all persons recorded on the recording system, regardless of citizenship or nationality enjoyed the constitutional protection of the privacy of their telephone calls.

<sup>193</sup> *National Maternity Hospital v Information Commissioner* [2007] 3 IR 643, at page 663.

<sup>194</sup> *Digital Rights Ireland Ltd v Minister for Communications* [2010] 3 IR 251.

<sup>195</sup> *Ibid*, at page 285.

<sup>196</sup> *Ibid*.

### **The Inviolability of the Dwelling**

- 9.5.12 Article 40.5 of the Constitution provides “the dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law”.
- 9.5.13 Certain private telephone calls made to and from the home may have engaged the constitutional guarantee of the inviolability of the dwelling.
- 9.5.14 In *Schrems v Data Protection Commissioner*,<sup>197</sup> Hogan J. considered the application of the right to privacy under Article 40.3 of the Constitution and held that Article 40.5 of the Constitution had also been engaged. Hogan J. held:

“One might add that the accessing by state authorities of private communications generated within the home – whether this involves the accessing of telephone calls, internet use or private mail – also directly engages the inviolability of the dwelling as guaranteed by Article 40.5 of the Constitution....”<sup>198</sup>

### **Intention and Telephone Recording**

- 9.5.15 The intention of An Garda Síochána in relation to its operation of the recording system is not relevant to the issue of whether these constitutional rights are, in fact, engaged.
- 9.5.16 In *The People v J.C.*,<sup>199</sup> O’Donnell J., on behalf of the majority of the Court, recently noted:

“only deliberate and conscious breaches of constitutional rights could lead to exclusion of evidence. But the Constitution is a guarantee of rights against invasion and that guarantee is not limited to intentional breaches.... The constitutional concept of a right and a correlative duty to protect it, involves the focus upon the right interfered with, rather than a consideration of the intention of the wrongdoer. Intent may be relevant to the seriousness of the breach, but is not relevant to whether there was a breach or not”.<sup>200</sup>

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<sup>197</sup> *Schrems v Data Protection Commissioner* [2014] 3 IR 75.

<sup>198</sup> *Ibid*, at page 92.

<sup>199</sup> *The People v JC* [2015] IECS 31 (Unreported, Supreme Court, O’Donnell J., 15th April 2015)

<sup>200</sup> *The People v JC* (O’Donnell J.) at paragraph 38

9.5.17 Although it must be acknowledged that the Commission has been unable to find any specific policy basis for the system, that the recording of non-999 lines was approved by the Chief Superintendent, Telecommunications, without an understanding that this is what was being suggested, and that Senior Garda Management and many Garda members were unaware that non-999 calls were recorded, the recording systems under investigation were installed and operated so as to record the range of calls they ultimately recorded. The installation and operation of the systems in those circumstances could not be described as mere inadvertence. The possibility that recording, storage or access may have taken place accidentally (from the perspective of Senior Management in An Garda Síochána) does not affect the question of whether there were infringements of constitutional rights in the operation of the telephone-recording systems..

### **The Nature of the Calls Recorded**

9.5.18 It is to be recalled that the telephone-recording system operated by An Garda Síochána captured the telephone calls of recorded persons acting in different circumstances and capacities. The following are some examples of the recorded calls which arise for consideration:

- (a) Lay person to Garda station (emergency or '999' calls)
- (b) Lay person to Garda station (non-emergency calls)
- (c) Garda member to member (internal non-emergency calls)
- (d) Garda member to lay person (non-emergency calls)

9.5.19 In addition, the telephone-recording system, not only recorded calls, but stored them permanently either on DAT tapes from 1995 or, from 2008, in digital format on the NICE system. These recordings, made in Divisional Stations, were available for access to Garda members on request, although, in practice, the Commission has uncovered a very limited level of access to such recordings. Although, as the Commission has recorded in Chapter 5 of this Report, there was no uniform policy on how the recordings could or should be accessed and it was left to the local Garda technicians to develop their own practices, most of the technicians restricted access to the machine and to the recorded telephone calls and took the responsibility on themselves to deal with any access requests. The Commission is satisfied that there was no systematic abuse of the recording system and no evidence of a practice of downloading recorded calls for any purpose other than on request by a member of An Garda Síochána for the purposes of a criminal investigation or the investigation of an internal disciplinary matter.

9.5.20 The first issue which arises for consideration is whether the constitutional right to privacy of telephone calls extends, in principle, to all calls recorded on the system, regardless of their content or of the context in which they were made.

9.5.21 In *Idah v Director of Public Prosecutions*,<sup>201</sup> the Appellant challenged the lawfulness of his conviction on the basis that the trial Judge had erred in law in admitting into evidence some of his telephone conversations where the calls recorded had not been authorised under the provisions of the Criminal Justice (Surveillance) Act 2009 (“the 2009 Act”). The trial judge had decided that the recordings were admissible as the constitutional right of privacy was not engaged where the nature of the call was in furtherance of criminal activity.

9.5.22 The Court of Appeal, in its consideration of the scope of the unenumerated right to privacy under Article 40.3.1, expressly approved the approach of the Law Reform Commission regarding the application of a “reasonable expectation of privacy doctrine”. MacMenamin J. stated:

“The court accepts that, as the Law Reform Commission pointed out in its Report on Privacy in 1998, a person is entitled to “reasonable expectation of privacy” even in a public place. The Commission's Report takes care to identify context as being a major factor in determining the extent of the right of privacy and giving rise to a “reasonable expectation of privacy”...”.<sup>202</sup>

9.5.23 The decision in *Idah* represents acceptance by the Courts of the principle that the protection of a right to privacy will be informed by the question as to whether an individual could have had a reasonable expectation of privacy, which, until that point, was a principle largely employed by the ECtHR.

9.5.24 MacMenamin J. then concluded:

“In the particular circumstances of this case, where one is dealing with an alleged plot to import large quantities of controlled drugs, the common good must weigh heavily in the balance. It cannot be said that the accused's reasonable expectation of privacy extends to involvement in any such alleged illegal enterprise”.

9.5.25 Therefore, the question as to whether an individual call recorded on the system benefited from the protection of the right to privacy can only be determined by taking into account

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<sup>201</sup> *Idah v Director of Public Prosecutions* [2014] IECCA 3.

<sup>202</sup> *Idah v Director of Public Prosecutions* [2014] IECCA 3 at page 13

the context of the conversation at issue and whether the caller could reasonably have expected that the call would remain private. This factor is significant in the context of ‘999’/ emergency calls which is dealt with separately.<sup>203</sup>

9.5.26 In *Director of Public Prosecutions v Dillon*,<sup>204</sup> the Court of Criminal Appeal rejected arguments that the constitutional right to privacy of a telephone conversation is restricted to a conversation which is, in some sense, personal to one or both of the parties to the conversation or that the right to privacy could not apply to a conversation which was for the purpose of furthering the commission of a crime. Hardiman J., writing for the Court, rejected both propositions in finding that the content of the telephone call could have no impact upon the application of the constitutional right to privacy, since to hold otherwise would allow the Gardaí unlawfully to record telephone calls with impunity where the fruits of the recording were of evidential value.

9.5.27 From the reasoning in *Dillon*, it seems to follow that the majority of persons recorded on the general non-999 recording system enjoyed a constitutional right to the privacy of their telephone conversations and the existence of such a right is not impacted upon by the content of any recorded conversation.<sup>205</sup> Therefore, in principle, the nature of the content of the calls recorded, which must necessarily range, for example, from mundane routine matters, to private discussions regarding the personal lives of the callers, to the reporting of theft or crime, does not alter the application of the constitutional right to privacy of the caller. The content may be relevant to the seriousness of the breach, or the availability of justifications for the breach, but not to the application of the Constitution. The consequent constitutional obligations placed on the Gardaí to ensure the confidentiality of communications, particularly regarding storage and access, are engaged regarding all recorded calls.

9.5.28 Some of the calls captured by the recording system were made between members of the Gardaí during the course of duty. This took place principally at Bandon Garda Station, where a number of extensions used by Garda members for private calls were recorded, for reasons that remain unknown. In other stations where the main number was recorded, an unknown proportion of calls involved members ringing the station from outside, or from other stations. The issue as to whether this constitutional protection of the privacy of telephone calls is also enjoyed by members of the Gardaí, recorded in the workplace, was subsequently considered by Hardiman J. in his dissenting judgment in *The Director of Public Prosecutions -v- J.C.* Hardiman J. expressed the view that a

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<sup>203</sup> See Chapter 14.

<sup>204</sup> *The People (Director of Public Prosecutions) v Dillon* [2001] 4 IR 501 at 513.

<sup>205</sup> This reasoning is similar to the approach taken by the European Court of Human Rights regarding the applicability of Article 8 ECHR.

member of the Gardaí was equally entitled to rely on the constitutional right to the privacy of telephone calls and thus on an expectation that such calls would not be recorded in such circumstances.<sup>206</sup> Hardiman J. stated:

“A garda is entitled to the same rights in this regard as any other citizen. Neither a garda nor anyone else can have this right breached by the State and the result of the breach proved in evidence against her in a serious criminal case. If it were otherwise, the Constitution could be breached with impunity, the rights it assures not vindicated, and there would be no disincentive to a public authority or an individual public official simply ignoring the law and even defying the Constitution. The breach would actually be rewarded when its fruit or result is admitted as evidence on the side of those committing the breach of the Constitution. This is to set the Constitution itself at naught. It is to infringe the Constitution a second time.<sup>207</sup>

### **Justifications for the recording system**

- 9.5.29 The Commission has failed to uncover any policy document authorised or approved by the Senior Management of An Garda Síochána that sets out a specific justification for the calls recorded on the system. Insofar as the limited evidence received by the Commission has indicated that the system was installed in order to ensure that emergency calls were recorded and / or that Garda members were courteous in their dealings with the public, such justifications as could have been advanced so as to justify an invasion of a constitutional right would necessarily have had to be based on a statutory provision. The Commission is satisfied the system was unlawful in the absence of any statutory power which provided for its operation.
- 9.5.30 The decision in *Herrity v Associated Newspapers Ltd*<sup>208</sup> also supports the principle that competing rights or justifications cannot be invoked where telephone recordings are made unlawfully. The Plaintiff sought damages for breach of her constitutional right to privacy, arising from a breach on the part of the Defendant of s. 98 of the Postal and Telecommunications Services Act 1983, as amended by s. 13 of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993. The Defendant sought to justify the publication of the information by reference to the competing constitutional right to freedom of expression. Dunne J. refused to consider such a justification where the Defendant newspaper had obtained the information

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<sup>206</sup> *The Director of Public Prosecutions -v- J.C.* [2015] IESC 31

<sup>207</sup> *The Director of Public Prosecutions -v- J.C.* [2015] IESC 31, at paragraph 14.

<sup>208</sup> *Herrity v Associated Newspapers Ltd* [2009] 1 IR 316.

unlawfully.<sup>209</sup> In this regard, it is important to note that, although it did not breach s. 98 of the 1983 Act as amended, the Commission is satisfied that the system was unlawful in the absence of statutory authority. Any competing rights and duties in relation to the operation of the recording system, when applied to certain calls the recording of which may be justified, in principle, in the light of the public interest, could only be invoked pursuant to appropriate statutory justification.

9.5.31 In contrast, it is to be noted that the general recording systems were an incursion upon the right to privacy which did not benefit from any statutory authority and were not operated in accordance with law. Therefore, since any potential justifications are somewhat academic, they will be considered briefly.

9.5.32 It is well settled that the constitutional right to privacy is not an absolute right. Rather, it is a qualified right that may be balanced against other competing rights and interests. The right to privacy is subject to the constitutional rights of others and to the requirements of public order, public morality and the common good.<sup>210</sup> An example of a factual situation in which the Gardaí successfully justified an intrusion upon the right to privacy arose in *The People v Kenny*<sup>211</sup> where Barron J., in answering a consultative case stated from the District Court, held that, while an Accused in custody enjoyed a right to privacy under the Constitution, this right was not breached where the Accused was placed under observation.

9.5.33 It is important to note, however, that the recording of certain types of personal calls on the recording system, such as took place at Bandon Garda Station, could never be justified. In contrast, the recording of other calls to the Control Room, including emergency calls, could be justified in principle, albeit the Commission has not uncovered any clear policy statement by An Garda Síochána which sets out a justification for the recording of these calls. This gives rise to two distinct means through which the constitutional right to privacy has been infringed by the system: through the recording of inherently personal information which could never be justified and, through the recording of some calls, the recorded content of which may have served a public interest, but which were nonetheless recorded unlawfully. This distinction was underlined by Clarke J. in *Cogley v. Radio Telefís Éireann*,<sup>212</sup> where it was stated:

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<sup>209</sup>This analysis was mirrored in the United Kingdom in *Coulson v News Group Newspapers Limited* [2012] EWCA Civ 1547.

<sup>210</sup>*Cogley v Radio Telefís Éireann* [2005] 4 I.R. 79 at page 90, *Barry v Medical Council* [1998] 3 IR 387, *Hickey and Agnew v Sunday Newspapers Ltd* [2011] 1 IR 228, *Kennedy v Ireland* [1987] IR 587 at page 394.

<sup>211</sup>*The People v Kenny* [1992] 2 IR 141

<sup>212</sup>*Cogley v. Radio Telefís Éireann* [2005] 4 I.R. 79, at page 90.

“A useful starting point for the purposes of this case seems to me to be to distinguish between a right of privacy in the underlying information whose disclosure it is sought to prevent, on the one hand, and, on the other hand, a situation where a right to privacy which does not extend to that underlying information but it is contended that the methods by which the information has been obtained amount to a breach of privacy.

There are certain matters which are entirely private to an individual and where it may validly be contended that no proper basis for their disclosure either to third parties or to the public generally exists. There may be other circumstances where the individual concerned might not, having regard to competing factors which may be involved, such as the public interest, be able to maintain that the information concerned must always be kept private, but may make complaint in relation to the manner in which the information was obtained.”

9.5.34 The Commission is satisfied that the systems operated unlawfully, in circumstances where they did not benefit from required statutory authorisation. As an organisation, An Garda Síochána has not provided any clear policy statement setting out a coherent purpose and rationale for the recording systems as they were operated. They operated to record calls indiscriminately and stored calls indefinitely, in circumstances where their operation was unknown to many members of the force. While the Garda telephone-recording systems were principally operated in breach of the constitutional right to the privacy of telephone calls, they also gave rise to other corresponding constitutional rights and obligations, such as the right to confidential communication and, in the context of certain recorded calls which emanated from the home, the protection of the inviolability of the dwelling.

9.5.35 In *Kane v Governor of Mountjoy Prison*,<sup>213</sup> the Supreme Court considered what lawful justifications could arise in the context of surveillance conducted by the Gardaí. The Garda Síochána had followed the Plaintiff following his release from prison and kept him under overt physical surveillance in and around his home and while travelling in a motor car. Finlay C.J. held:

“I would agree with the view expressed by the learned trial judge, that if overt surveillance of the general type proved in this case were applied to an individual without a basis to justify it, it would be objectionable, and I would add, would be clearly unlawful. Overt surveillance including a number of Gardaí on foot closely following a pedestrian, and a number of

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<sup>213</sup> *Kane v Governor of Mountjoy Prison* [1988] IR 757.



garda cars, marked as well as unmarked, tailing a driver or passenger in a motor car would, it seems to me, require a specific justification arising from all of the circumstances of a particular case and the nature and importance of the particular police duty being discharged.”<sup>214</sup>

9.5.36 Widespread State surveillance, which infringes the right to privacy, cannot be justified by the Gardaí on a general non-statutory basis. A surveillance measure must be specifically and adequately justified. The Court considered surveillance of a “general type” to be not only objectionable but clearly unlawful where it lacked any specific justification couched in light of a particular Garda duty.

9.5.37 Finlay C.J. observed:

“Such surveillance is capable of gravely affecting the peace of mind and public reputation of any individual and the courts could not, in my view, accept any general application of such a procedure by the police, but should require where it is put into operation and challenged, a specific adequate justification for it.”

9.5.38 In *DPP v Idah*,<sup>215</sup> cited above, MacMenamin J. noted that the State was entitled to intrude upon the right to privacy in certain circumstances, but only in accordance with law:

“There can be no doubt that the State may make incursions into the right of privacy in accordance with law. This is particularly the case in circumstances where the State is seeking to provide in relation to “the investigation of arrestable offences, the prevention of suspected arrestable offences and the safeguarding of the State against subversive and terrorist threats”. Nevertheless that law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which public authorities are entitled to resort to such covert measures and it must provide necessary safeguards for the rights of individuals potentially affected.”

9.5.39 In addition, in considering the adequacy of such potential justification, it is well established that any measure which infringes the personal rights contained in Article 40.1 must be proportionate to its objective. The principle of proportionality in Irish law was outlined by Costello J. in *Heaney v. Ireland*<sup>216</sup> where it was stated as follows:

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<sup>214</sup> *Kane v Governor of Mountjoy Prison* [1988] IR 757 at 769.

<sup>215</sup> *Idah v Director of Public Prosecutions* [2014] IECCA 3.

<sup>216</sup> *Heaney v Ireland* [1994] 3 I.R. 593

“The means chosen must pass a proportionality test. They must :-  
(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;  
(b) impair the right as little as possible, and  
(c) be such that their effects on rights are proportional to the objective.”<sup>217</sup>

9.5.40 Even were the recording system justified, it fails the proportionality test elucidated by Costello J. The indiscriminate recording and retention of all calls to and from the Control Room of Garda stations over a large number of years, even if it could be rationally connected to the objective of recording all calls of an emergency nature, was an entirely disproportionate impairment of the constitutional rights of citizens.

9.5.41 In this regard, the decision of Hogan J. in *Schrems v Data Protection Commissioner*, regarding the adequacy of justification for widespread State surveillance, is worthy of consideration. While the Court acknowledged that State surveillance may be justified in certain circumstances, the requirement for appropriate safeguards was emphasised:

“Naturally, the mere fact that these rights are thus engaged does not necessarily mean that the interception of communications by state authorities is necessarily or always unlawful. The Preamble to the Constitution envisages a “true social order” where the “dignity and freedom of the individual may be assured”, so that both liberty and security are valued. Provided appropriate safeguards are in place, it would have to be acknowledged that in a modern society electronic surveillance and interception of communications is indispensable to the preservation of state security. It is accordingly plain that legislation of this general kind serves important – indeed, vital and indispensable – state goals and interests”.<sup>218</sup>

9.5.42 In the view of the Commission, such justification was difficult to envisage in the context of mass indiscriminate recording of telephone calls on non-999 lines. It was further noted by Hogan J.:

“It is very difficult to see how the mass and undifferentiated accessing by state authorities of personal data generated perhaps especially within the home – such as emails, text messages, internet usage and telephone calls – would pass any proportionality test or could survive constitutional scrutiny on this ground alone. The potential for abuse in such cases would be

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<sup>217</sup> *Heaney v Ireland* [1994] 3 IR 593 at page 607

<sup>218</sup> *Schrems v Data Protection Commissioner* [2014] 3 IR 75 at page 93

enormous and might even give rise to the possibility that no facet of private or domestic life within the home would be immune from potential state scrutiny and observation”.

9.5.43 The references to potential for abuse and lack of immunity from potential State scrutiny or observation are important. It is not possible for the Commission to say that information from Garda telephone-recording systems was, as an absolute negative proposition, never used improperly or unlawfully. As appears from Chapter 11 of the Final Report, the Commission finds it reasonable to conclude, based on the evidence before it, that no widespread or systematic, indeed probably no significant, misuse of information derived from non-999 telephone recordings took place. The mere existence of the recordings means that potential abuse could not be ruled out, however. The lack of clear statutory safeguards left the recordings stored on the recording system open to abuse. In *Schrems*, Hogan J. concluded:

“That general protection for privacy, person and security in Article 40.5 would thus be entirely compromised by the mass and undifferentiated surveillance by state authorities of conversations and communications which take place within the home. For such interception of communications of this nature to be constitutionally valid, it would, accordingly, be necessary to demonstrate that this interception of communications and the surveillance of individuals or groups of individuals was objectively justified in the interests of the suppression of crime and national security and, further, that any such interception was attended by appropriate and verifiable safeguards.”<sup>219</sup>

9.5.44 The decision of Hogan J. is clearly relevant when considering telephone calls recorded on the recording systems. The constitutional right to privacy necessitates that the mass recording of telephone calls undertaken by the Garda Síochána must not only be objectively justified under statute but also benefit from the provision of appropriate safeguards, given the potential arising for abuse of the data amassed by the State.

### **Conclusion**

9.5.45 Adopting the foregoing principles to the general recording system, it is clear that, generally, the persons whose communications were recorded on the Garda telephone-recording systems enjoyed a constitutional right to the privacy of their telephone conversations. The operation of the recording system was unlawful and contrary to the Constitution. Its operation breached the duty placed on the Gardaí to respect the

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<sup>219</sup> Ibid at page 95

confidentiality of sensitive information. The recording of calls breached the constitutional right to privacy and, in some circumstances, the guarantee of the inviolability of the dwelling. The system did not benefit from a specific statutory justification. It was entirely disproportionate to any objectives advanced for its installation. The recording system operated continuously without any statutory basis and did not benefit from the provision of appropriate safeguards to prevent potential abuse, as required by the Constitution. For those reasons, it was operated contrary to the Constitution and breached the Constitutional rights of those persons it recorded.

## 9.6 SECTION VI: EUROPEAN CONVENTION ON HUMAN RIGHTS

### Introduction

- 9.6.1 Article 8.1 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter “the Convention”) provides that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”
- 9.6.2 Article 8.2 provides that there “shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law.....”
- 9.6.3 An Garda Síochána is indisputably “a public authority”. The European Court of Human Rights (ECtHR) has consistently held that the protections thus accorded to the right to respect for the private life, home, and correspondence of all persons, extends to a right to privacy of telephone calls.<sup>220</sup> There has never been any law in force authorising the recording, storage and access of non-999 telephone calls to or from Garda stations.
- 9.6.4 For that reason, Article 8 of the Convention, at first sight, provides a particularly apt framework for examination of the lawfulness of the Garda Síochána activity of recording and retaining records of telephone calls, which is the subject of this chapter. The recording of telephone calls to and from the public and the recording of calls between members of the Gardaí who were unaware of the recording are matters of particular concern.
- 9.6.5 However, the Convention is an international instrument and does not have direct effect in the domestic law of the State. The Commission must, therefore, consider, in the first instance, the status and effect of the Convention in Irish law.

### Domestic legal effect of the Convention

- 9.6.6 Article 29, section 6, of the Constitution provides:

“No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.”

- 9.6.7 Thus, an international treaty such as the Convention, as has been repeatedly affirmed by the Courts, can become part of the domestic law of the State only insofar as may be determined by an Act of the Oireachtas.<sup>221</sup> The Supreme Court so ruled expressly in respect of the Convention. To quote Maguire C.J.:

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<sup>220</sup> *Klass v Germany* (1978) 2 EHRR 214.

<sup>221</sup> The Oireachtas comprises the President and both Houses of the Oireachtas: Article 15, section 2(2) of the Constitution.

“No argument can prevail against the express command of section 6 of Article 29 of the Constitution before judges whose declared duty it is to uphold the Constitution and the laws.”<sup>222</sup>

9.6.8 Murray C.J. more recently explained the position as it was prior to the entry into force of the Act of 2003:

“The European Convention on Human Rights may only be made part of domestic law through the portal of Article 29.6 and then only to the extent determined by the Oireachtas and subject to the Constitution.”<sup>223</sup>

“No claim could be made before a court in Ireland for a breach as such of any provision of the Convention. To admit such a claim would have been to treat the Convention as directly applicable in Irish law.”<sup>224</sup>

9.6.9 That, the Chief Justice continued, “is still the position subject to the special exception of a claim against an “organ of the state” as defined in s. 3 of the Act of 2003...”

9.6.10 Thus the position which had prevailed previously was, of course, changed, insofar as the Convention was concerned, by the coming into force of the European Convention on Human Rights Act 2003 on 31 December 2003.<sup>225</sup> Until that date, however, the position was clear. No provision of the Convention had the force of law in the State and no such provision could be invoked in the Courts of the State.

9.6.11 It is true that the provisions of the Convention, once ratified by Ireland, were binding on the State in international law. Individuals had the right to bring individual petitions against the State in the ECtHR. The ECtHR had (and continues to have) power to grant relief to individuals against a contracting State in the form of “just satisfaction” as provided by Article 41 of the Convention. Such judgments are binding on the State under the Convention. They do not, however, have binding effect in the Courts of the State.

9.6.12 From the perspective of the Commission and its consideration of whether the Garda telephone-recording systems were “authorised by law”, the provisions of the Convention could have had no application in the law of the State at the time of the installation of the DAT systems between 1995 and 1997.

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<sup>222</sup> *Re O’Laighléis* [1960] I.R. 73.

<sup>223</sup> *J. McD. v P.L.* [2010] 2 I.R. 199 at 247.

<sup>224</sup> *Ibid.* at 250.

<sup>225</sup> S.I. No. 483/2003 European Convention on Human Rights Act 2003 (Commencement Order) 2003.

9.6.13 Those telephone-recording systems were, nonetheless, still in operation on 31 December 2003, when the 2003 Act entered into force. The legislation, depending on its terms, is capable of having effect in respect of the operation and use of the DAT systems from that date, and for the entire subsequent period of operation of the NICE system from its installation in 2008. It must be emphasised that the Convention could have effect in the domestic law of the State only as determined by the Act of 2003. Moreover, it could have such effect only from the date of the entry into force of that Act. The Act did not have retrospective effect.<sup>226</sup>

### **The European Convention on Human Rights Act 2003**

9.6.14 The European Convention on Human Rights Act 2003 came into force on 31 December 2003. That Act did not, of course, transpose the Convention in anything like its entirety into national law. It gave effect to it in three important ways:

(i) **As a rule for interpretation of national law:** s. 2(1) of the Act provides:

“In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.”

(ii) **By placing an obligation on organs of State to act according to the Convention:** s. 3(1) of the Act provides:

“Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.”

(iii) **Through the declaration of incompatibility:** s. 5 of the Act provides:

“In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this

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<sup>226</sup> *Dublin City Council v Fennell* [2005] 1 IR 604.

Act as “a declaration of incompatibility”) that a statutory provision or rule of law is incompatible with the State’s obligations under the Convention provisions.”

9.6.15 Section 2 has had the greatest practical effect, insofar as it imposes a broad duty on the Courts to interpret any statutory provision or rule of law in the light of the Convention. However, as the Commission has already found, there has never been any rule or provision of the common law or any statutory provision conferring authority on An Garda Síochána to install, operate or use the telephone-recording systems in the manner it has done at many Garda stations for many years. Thus, there is no provision of Irish law to which s. 2 could be applied; there is no law which can be interpreted in the light of the Convention.

9.6.16 For the same reason, s. 5 of the 2003 Act cannot be relevant. There is no “statutory provision or rule of law” providing for the recording of telephone calls at Garda stations which could be identified as the subject of a Declaration of Incompatibility pursuant to that provision.

**(A) Section 3 of the 2003 Act**

9.6.17 The Convention, not having direct effect in domestic law:

“does not of itself provide a remedy at national level for victims whose rights have been breached by reference to the provisions of the Convention.”<sup>227</sup>

9.6.18 On the other hand, the:

“contracting states are under an obligation in international law to secure respect for the rights it declares within their domestic systems.”<sup>228</sup>

9.6.19 Thus, the Oireachtas may:

“if it chooses, legislate to provide for express statutory protection of particular Convention rights as a means of fulfilling Convention obligations.”<sup>229</sup>

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<sup>227</sup> *J. McD. v P.L.* [2010] 2 I.R. 199 at 248, per Murray C.J. See also *O’Donnell and others v South Dublin County Council and others*, [2015] IESC 28 at paragraph 78, per MacMenamin J.

<sup>228</sup> *Ibid*, *J. McD. v P.L.* at page 315 per Fennelly J. Article 1 of the Convention provides: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.

<sup>229</sup> *Ibid* at page 247.



9.6.20 In this context, s. 3 is clearly of great relevance. It imposes an express positive obligation on State bodies to act in a manner compatible with the Convention provisions generally. “Every organ of the State” is required “subject to any statutory provision or rule of law” to “perform its functions in a manner compatible with the State’s obligations under the Convention provisions.” As stated in the context of the application of s. 2 and s. 5 of the 2003 Act, there is no “statutory provision or rule of law” providing for the recording of telephone calls at Garda stations, and so no statutory mandate was ever provided to An Garda Síochána such that would operate to exclude the application of s. 3.

**(B) Organ of State**

9.6.21 Section 1(1) of the Act provides a non-exhaustive definition of the term, “organ of State.”

9.6.22 The term, organ of State:

“includes a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised...”

9.6.23 An Garda Síochána is clearly a “body...established by law....” It is quintessentially an “organ of State” the statutory function of which, as described in s. 7(1) of the Garda Síochána Act 2005, is “to provide policing and security services for the State”.<sup>230</sup> As noted above, An Garda Síochána is also “a public authority” for the purposes of Article 8 of the Convention.

9.6.24 Consequently, s. 3 of the Act imposed a clear and unequivocal obligation on An Garda Síochána, as from 31 December 2003, to act “in a manner compatible with the State’s obligations under the Convention provisions.” That amounted to a statutory duty to comply with the provisions of the Convention.

9.6.25 That statement of the obligation of An Garda Síochána as a body would be a sufficient basis for analysis of the question of whether the installation, operation and use of the telephone-recording systems were “authorised by law”. It is notable, however, that s. 3 of the Act proceeds to provide for a civil remedy in damages for breach of s. 3(1). The balance of the section reads:

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<sup>230</sup> Section 7(1) of Garda Síochána Act, 2005.

- (2) A person who has suffered injury, loss or damage as a result of a contravention of subsection (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.
- (3) The damages recoverable under this section in the Circuit Court shall not exceed the amount standing prescribed, for the time being by law, as the limit of that Court's jurisdiction in tort.
- (4) Nothing in this section shall be construed as creating a criminal offence.
- (5)
  - (a) Proceedings under this section shall not be brought in respect of any contravention of subsection (1) which arose more than 1 year before the commencement of the proceedings.
  - (b) The period referred to in paragraph (a) may be extended by order made by the Court if it considers it appropriate to do so in the interests of justice.

9.6.26 It is notable that the remedy in damages provided for by s. 3 is available only “if no other remedy in damages is available...” It may be for this reason that there is no record of an actual award of damages pursuant to the section in respect of An Garda Síochána in the exercise of its functions. However, the principle of the availability of a remedy in damages is not in doubt<sup>231</sup>

9.6.27 In *Herrity v Associated Newspapers*,<sup>232</sup> the High Court (Dunne J.) awarded damages to the Plaintiff for breach of her constitutional right to respect for her private and family life, her home and her correspondence. It seems clear that the recording of the Plaintiff’s personal telephone calls described in that case and their publication would have constituted a breach of the Plaintiff’s right to private and family life, her home and her correspondence just as much as they amounted to a breach of her constitutional rights. However, the acts complained of took place in November 2003, whereas the Act of 2003 only came into force on 31 December 2003. Consequently, Dunne J. dealt with the matter as follows:

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<sup>231</sup> In *Pullen v Dublin City Council* [2010] 2 ILRM 61, Irvine J. awarded damages to the Plaintiff arising from a breach of s. 3 of the 2003 Act on the part of Dublin City Council. In *O’Donnell and others v South Dublin County Council and others* [2015] IESC 28, the damages aspect of the proceedings instituted by the fourth-named Plaintiff was remitted to the High Court.

<sup>232</sup> *Herrity v Associated Newspapers* [2009] 1 I.R. 316.

“Submissions were made to me in relation to the right to privacy as protected under the European Convention on Human Rights. The publication in this case occurred before the European Convention on Human Rights Act 2003 came into effect on the 31st December, 2003. It was noted in the course of submissions that the right to freedom of expression under the Constitution was in accordance with the provisions of the European Convention on Human Rights, and it does not seem to me to be necessary to make any observation on the provisions of the convention.”<sup>233</sup>

9.6.28 It is clear that, if the acts of interference with the right to privacy of the Plaintiff had taken place after the entry into force of s. 3 of the European Convention on Human Rights Act 2003, s. 3(1) of the Act would have applied. However, the consequence of the proviso contained in s. 3(2) — “if no other remedy in damages is available”—would, no doubt, have been that no remedy in damages would have been available to the Plaintiff.

9.6.29 The absence of a remedy in damages would not appear to prevent the obligation contained in s. 3(1) from applying or from An Garda Síochána having been in breach of it. The proviso is contained in sub-section 2. It merely means that, although a wrong may have been committed, there is no need to provide a remedy in damages, if one is already available in law.

9.6.30 Section 3(1) obliges any organ of State to “perform its functions in a manner compatible with the State's obligations under the Convention provisions.”

9.6.31 In *O’Donnell and others v South Dublin County Council and others*,<sup>234</sup> MacMenamin J., speaking for a unanimous Supreme Court, stated:

“in order to establish that it [a County Council] has committed a wrong, it is necessary, by virtue of s. 1 ECHR Act 2003, that a Council defaulted in its “functions” which include powers and duties.”

9.6.32 As already stated, it is provided by s. 7(1) of the Garda Síochána Act 2005 that the “function of the Garda Síochána is to provide policing and security services for the State...”<sup>235</sup>

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<sup>233</sup> *Herrity v Associated Newspapers* [2009] 1 I.R. 316 at pages 343 to 344.

<sup>234</sup> *O’Donnell and others v South Dublin County Council and others* [2015] IESC 28.

<sup>235</sup> Section 7(1) of Garda Síochána Act, 2005.

- 9.6.33 The objectives of the performance of that function include “vindicating the human rights of each individual..”<sup>236</sup>
- 9.6.34 In the course of performing its function, An Garda Síochána performs many acts and provides many services to the public, including the provision of telephone lines at Garda stations which are available for the use of members of the public and members of An Garda Síochána.
- 9.6.35 The Commission concludes that, if the activity of An Garda Síochána, on which it has reported in detail elsewhere in this Report, in installing, operating and using telephone-recording systems at Garda stations for the recording of telephone calls constituted an infringement of the rights of persons, whether members of the public or of An Garda Síochána, to respect for private life, home and correspondence as protected by Article 8, it would have been carried out in contravention of s. 3 of the European Convention on Human Rights Act 2003.
- 9.6.36 The Commission must then examine the question of whether the installation, operation and use of the Garda telephone-recording systems were authorised by law for the purpose of paragraph 1(g) of its Terms of Reference in the context of the Convention as it applies in the domestic law of the State through, what has been called, the portal of Article 29.6 of the Constitution and, since 31 December 2003, s. 3 of the European Convention on Human Rights Act 2003.
- 9.6.37 As already explained, the question to be considered is whether An Garda Síochána has complied with the obligation imposed on it as an organ of State by s. 3 of that Act to “perform its functions in a manner compatible with the State's obligations under the Convention provisions.”
- 9.6.38 Article 8 of the Convention is entitled: “Right to respect for private and family life”. It provides:
- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
  2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

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<sup>236</sup> Section 7(1) (c) of Garda Síochána Act, 2005.

9.6.39 In brief, Article 8.1 lays down the substance of the right enjoyed by providing that everyone “has the right to respect for his private and family life, his home and his correspondence.” Article 8.2 provides that there “shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law...,” which is subject to the further conditions laid down.

## **Breach of European Convention on Human Rights**

### **(A) Process of Analysis**

9.6.40 The examination of whether a State has committed a violation of Convention rights, for present purposes Article 8, involves a three-stage analysis:

1. Whether the complaint comes within the scope of the Article, i.e., whether the Article is engaged;
2. Whether there is an interference with the right;
3. If so, whether the interference is in accordance with law and, if so, necessary in a democratic society.

9.6.41 The Commission will consider each of these headings. Consideration of the third heading is simplified by the fact that, as the Commission has explained, there are no provisions in Irish law authorising the recording of telephone calls at Garda stations. Thus, the installation, operation and use of the systems cannot be said to be “in accordance with law”. For that reason, it is not strictly necessary to consider whether their operation was necessary in a democratic society, in furtherance of any of the potential legitimate aims set out in the Article. Nonetheless, brief reference will be made to the criteria which have been laid down by the ECtHR even when an interference is in accordance with law.

### **(B) The Scope of Article 8**

9.6.42 The ECtHR considers that the notion of “private life” is broad, that it is not susceptible of exhaustive definition,<sup>237</sup> and that it must not be interpreted restrictively.<sup>238</sup>

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<sup>237</sup> *Pretty v United Kingdom* (2002) 35 EHRR 1, at paragraph 61; *S and Marper v United Kingdom* (2008) 48 EHRR 1169, at paragraph 66; *PG and GH v United Kingdom*, App no. 44787/98 (ECtHR, 25 September 2001), at paragraph 59.

<sup>238</sup> *Amann v Switzerland* (2000) 30 EHRR 843.

9.6.43 An important element in considering whether a recording system interferes with the notions of “private life” and “correspondence” under Article 8 is whether the recorded persons could have had a “reasonable expectation of their privacy”. In its leading decision in *Von Hannover v Germany*,<sup>239</sup> the ECtHR spoke of “legitimate expectation of protection and respect for his or her private life”. The ECtHR has explained how the question of whether a person’s private life is concerned in one case as follows:

“There are a number of elements relevant to a consideration of whether a person’s private life is concerned by measures effected outside a person’s home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person’s reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character. Private-life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain. It is for this reason that files gathered by security services on a particular individual fall within the scope of Article 8, even where the information has not been gathered by any intrusive or covert method...”<sup>240</sup>

9.6.44 Following the principles laid down by the ECtHR, national Courts have also generally adopted, as a test for the existence of an occasion of privacy, whether the relevant person has a reasonable or legitimate expectation that his or her privacy will be respected.<sup>241</sup>

9.6.45 Similarly, the ECtHR has adopted a broad interpretation of the notion of the term “correspondence” in Article 8. Since its judgment in 1978 in *Klass v Germany*, the Court has consistently held that telephone conversations “are covered by the notions of “private life” and “correspondence” referred to by this provision.”<sup>242</sup>

9.6.46 In the view of the Commission, there is no question but that the recording of the telephone conversations and associated and consequential acts, such as retention of the

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<sup>239</sup> *Von Hannover v Germany* (2005) 40 EHRR 1.

<sup>240</sup> *PG and GH v United Kingdom*, App no. 44787/98 (ECtHR, 25 September 2001) at paragraph 57.

<sup>241</sup> See: *Hickey and another v Sunday Newspapers* [2011] 1 I.R. 228, per Kearns J. and *Idah v Director of Public Prosecutions* [2014] IECCA 3; For examples in the United Kingdom, see *R(Catt) v Commissioner of police of the Metropolis* [2015] UKSC 9, per Lord Sumption at paragraph 4 and *Campbell v MGN Ltd* [2004] 2 AC 457.

<sup>242</sup> *Klass v Germany* (1978) 2 EHRR 214; *Malone v United Kingdom* (1984) 7 EHRR 14; *Halford v United Kingdom* [1997] 24 EHRR 523; *Kopp v Switzerland* (1998) 27 EHRR. 91.

recordings and the possibility of access to the contents of such calls of persons on telephone lines to Garda stations, fall within the scope of Article 8 of the Convention. Telephone calls come within the references to private and family life, home and correspondence. This is so whether the participants in those calls were members of the public or members of An Garda Síochána.

**(C) Interference with Article 8 Rights**

9.6.47 Whether there has been an “interference” with “private and family life” is the second step in the three-stage process of analysis. It is clear that the operation of the Garda telephone-recording systems fell within the scope of Article 8.1. An Garda Síochána, as a “public authority” for the purposes of Article 8.2 is obliged not to interfere with the right guaranteed by Article 8.1, except where the interference is “in accordance with law” as required by Article 8.2.

9.6.48 It is important not to confuse “interference” with “violation” of rights, the term used in Article 34 of the Convention in respect of cases where individual petitions are made to the Court. There may be “interference” but, provided that it is in accordance with law and in pursuit of a legitimate aim, the State will not be found to have violated the Convention.

9.6.49 The question is whether the operation of the telephone-recording systems constituted an “interference” with the right to “private and family life” of the persons recorded. It should be noted that what was involved included, not merely the original recording of the telephone calls without notice to the persons recorded, but also:

- (i) The retention, without any notice to the persons whose telephone calls were recorded, and storage of the recordings of calls;
- (ii) The possibility of granting access to the content of recorded calls to others, at least within An Garda Síochána;
- (iii) The possibility of communication of the content of calls to other persons or bodies.

9.6.50 The case law of the ECtHR treats of monitoring of personal communications, including telephone conversations, in a wide range of different circumstances. There may, for example, be strategic monitoring which is aimed at collecting information by intercepting telecommunications in order to identify and avert serious dangers, such as an armed attack on a State’s territory or the commission of international terrorist attacks or other serious criminal offences. In other cases, the Court has dealt with individual monitoring or surveillance, which may include the interception of telecommunications

of specific persons, with the purpose of averting or investigating the commission of offences which the persons monitored are suspected of planning or of having committed.<sup>243</sup>

9.6.51 Firstly, it may be that the mere existence of a system of surveillance established by a public authority, capable of being used in respect of individuals, is sufficient to constitute an interference with rights. For example, in a case where the applicants were part of a group of persons who were likely to be affected by measures of interception but were unable to demonstrate that the impugned measures had actually been applied to them:

“the mere existence of legislation which allows a system for the secret monitoring of communications entails a threat of surveillance for all those to whom the legislation may be applied. This threat necessarily strikes at freedom of communication between users of the telecommunications services and thereby amounts in itself to an interference with the exercise of the applicants’ rights under Article 8...”<sup>244</sup>

9.6.52 Here, the existence of legislation permitting the examination, use and storage of intercepted communications constituted an interference with Article 8 rights.<sup>245</sup> However, that test cannot be applied so broadly as to apply to an entire population.<sup>246</sup> It must be shown that there is a reasonable likelihood that surveillance measures were or are applied to any particular complainant. The Court does not, however, necessarily demand direct proof.<sup>247</sup>

9.6.53 It must be recognised that, in many such cases, the complainants may be unable to demonstrate that their communications have been intercepted, recorded or listened to, but they are, nonetheless, in a position to identify legal provisions providing for those acts. That is, of course, not so in the case of the Garda telephone-recording systems. Their very existence was unknown to the public and, indeed, according to the evidence received by the Commission, to a great number of members of the force.

9.6.54 The Grand Chamber of the ECtHR has, as recently as December 2015, made a detailed and considered statement clarifying the position of an applicant complaining of being

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<sup>243</sup> *Weber & Saravia v. Germany* [2006] ECHR 1173.

<sup>244</sup> *Weber & Saravia*, paragraph 78, *Association for European Integration v Bulgaria* App no 62540/00(ECHR 28 June 2007); *Liberty v United Kingdom* (2009) 48 EHRR 1 at paragraph 56.

<sup>245</sup> *Liberty v UK* (2009) 48 EHRR 1, paragraph 57.

<sup>246</sup> *Kennedy v United Kingdom* [2010] ECHR 682, at paragraph 122.

<sup>247</sup> *Kennedy v United Kingdom*, [2010] ECHR 682, at paragraphs 122 and 123.



the victim of secret surveillance measures without having to prove that they had been applied to him.<sup>248</sup> The key passage is as follows:

“Accordingly, the Court accepts that an applicant can claim to be the victim of a violation occasioned by the mere existence of secret surveillance measures, or legislation permitting secret surveillance measures, if the following conditions are satisfied. Firstly, the Court will take into account the scope of the legislation permitting secret surveillance measures by examining whether the applicant can possibly be affected by it, either because he or she belongs to a group of persons targeted by the contested legislation or because the legislation directly affects all users of communication services by instituting a system where any person can have his or her communications intercepted. Secondly, the Court will take into account the availability of remedies at the national level and will adjust the degree of scrutiny depending on the effectiveness of such remedies. As the Court underlined in *Kennedy*,<sup>249</sup> where the domestic system does not afford an effective remedy to the person who suspects that he or she was subjected to secret surveillance, widespread suspicion and concern among the general public that secret surveillance powers are being abused cannot be said to be unjustified (see *Kennedy*, cited above, § 124). In such circumstances the menace of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users or potential users a direct interference with the right guaranteed by Article 8. There is therefore a greater need for scrutiny by the Court and an exception to the rule, which denies individuals the right to challenge a law in abstracto, is justified. In such cases the individual does not need to demonstrate the existence of any risk that secret surveillance measures were applied to him. By contrast, if the national system provides for effective remedies, a widespread suspicion of abuse is more difficult to justify. In such cases, the individual may claim to be a victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures only if he is able to show that, due to his personal situation, he is potentially at risk of being subjected to such measures.”<sup>250</sup>

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<sup>248</sup> *Zakharov v Russia* App no 47143/06 (ECtHR 4 December 2015).

<sup>249</sup> *Kennedy v United Kingdom* [2010] ECHR 682.

<sup>250</sup> *Zakharov v Russia* App no 47143/06 (ECtHR 4 December 2015) at paragraph 171.

- 9.6.55 Before expressing any conclusion on this matter, the Commission will refer to a number of general propositions derived from individual decisions of the ECtHR which appear most relevant.
- 9.6.56 The Court does not draw a distinction between calls recorded on a personal or private telephone line and those on a business or professional line.<sup>251</sup> Telephone calls from business premises are *prima facie* covered by the notions of “private life” and “correspondence.”<sup>252</sup> Even public information may fall within the scope of private life where it is systematically stored and collected in files by the authorities.<sup>253</sup>
- 9.6.57 The Commission finds it particularly instructive to consider the case of *PG and JH v United Kingdom*.<sup>254</sup> The Applicants were suspected of involvement in very serious crime including armed robbery. The Police wished to obtain samples of the Applicants’ speech in order to compare them for identification purposes.<sup>255</sup> They obtained authorisation to install covert listening devices in the cells being used by the Applicants and to attach covert listening devices to the police officers who were to be present when the Applicants were charged and when their antecedents were examined. The matter recorded ranged from the giving of personal details when they were charged to a conversation about football instigated by a police officer.<sup>256</sup> The United Kingdom argued that the aural quality of the Applicants’ voices was not part of private life but was rather a public, external feature. In particular, the recordings made while they were being charged – a formal process of criminal justice, in the presence of at least one police officer – did not concern their private life.<sup>257</sup>
- 9.6.58 The Court did not accept that recordings taken for use as voice samples could be regarded as falling outside the scope of the protection afforded by Article 8. A permanent record had been made of the person’s voice and it was subject to a process of analysis directly relevant to identifying that person in the context of other personal data. The Court concluded that the recording of the Applicants’ voices when being charged and when in their police cell disclosed an interference with their right to respect for private life within the meaning of Article 8.1 of the Convention.<sup>258</sup>

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<sup>251</sup> *Amann v Switzerland* (2000) 30 EHRR 843 where telephone calls to the Soviet Embassy in Berne were intercepted and entered on a national security card index; *Halford v United Kingdom*, (previously cited) where recording was conducted by the Police of both the office and home telephone calls of a senior police officer; the ECHR held that the officer had a reasonable expectation of privacy. *Rotaru v Romania* App no. 28341/95 (ECtHR 4 May 2000), at paragraph 44.

<sup>252</sup> *Copland v United Kingdom* (Application no. 62617/00 ECHR 2007-1).

<sup>253</sup> *Rotaru v Romania* App no. 28341/95 (ECtHR 4 May 2000), paragraph 44.

<sup>254</sup> *PG and GH v United Kingdom*, App no. 44787/98 (ECtHR, 25 September 2001).

<sup>255</sup> *PG and GH v United Kingdom*, at paragraph 16.

<sup>256</sup> *PG and GH v United Kingdom*, at paragraph 52.

<sup>257</sup> *PG and GH v United Kingdom*, at paragraph 54.

<sup>258</sup> *PG and GH v United Kingdom*, at paragraphs 9 and 60.

9.6.59 While it must be acknowledged that the telephone recording systems operated by An Garda Síochána differed in some important respects from the activity considered in *PG and JH v United Kingdom*, the Commission is satisfied that the recording and storage of non – 999 telephone recordings by the Garda Síochána telephone-recording system discloses an interference with Article 8.1 of the Convention.

**(D) In Accordance with law**

9.6.60 Whether such an “interference” with “private and family life” under Article 8 of the Convention is justified as both “in accordance with law” and “necessary in a democratic society” is the final step in the three-stage process of analysis. This question can be dealt with briefly.

9.6.61 It is well established principle that for an interference with Article 8 of the Convention to be held “in accordance with the law”, the interference in question must have some basis in domestic law. This primary obligation includes requirements over and above basic compliance with domestic law.<sup>259</sup>

9.6.62 In *Malone v United Kingdom*, the Court of Human Rights further noted:

“The Court would reiterate its opinion that the phrase “in accordance with the law” does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention ...The phrase thus implies - and this follows from the object and purpose of Article 8...that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1... Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident”.<sup>260</sup>

9.6.63 It is clear that no power to establish the telephone recording systems was conferred on An Garda Síochána by any statute or authorised at common law. As the Commission is satisfied the interference with the rights protected by Article 8 had no basis in law, it was not in accordance with law, as required by the Convention. The Commission is further satisfied, therefore, that the operation of the recording system amounted to a violation of Article 8.

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<sup>259</sup> *Silver and Others v United Kingdom*, App No. 5947/72 (ECtHR, 25 March 1983) at paragraph 86

<sup>260</sup> *Malone v United Kingdom v United Kingdom* (1984) 7 EHRR 14 at paragraph 67

## **Conclusion**

- 9.6.64 The Commission has come to the conclusion that the installation, operation and use of the telephone-recording systems at Garda stations amounted to an interference with the rights of persons recorded to [their] “private and family life, [their] home and [their] correspondence”.
- 9.6.65 The recording was indiscriminate. It recorded all calls to and from Garda stations on the ordinary main switch or public line of each of the Garda stations concerned. The calls included were made from and to the homes or the places of work of the callers. The calls were recorded regardless of content. Many, perhaps most, were made for normal and legitimate reasons concerned with the work of An Garda Síochána. Clearly, however, many would have been of a personal or family nature. Even those related to Garda matters would often, in the nature of things, relate to the personal life of those concerned. No notice was given, whether by recorded message or otherwise, of the fact that the calls were being recorded.
- 9.6.66 It follows that the recording constituted an infringement of the rights of privacy protected by Article 8.1 of the Convention. Since An Garda Síochána, as an organ of State, was obliged by s. 3 of the European Convention on Human Rights Act 2003 to perform its tasks in a manner compatible with the Convention provisions, the installation, operation and use of the Garda telephone-recording systems constituted an infringement of the rights of the persons whose calls were recorded. Since there was no legal authority for the recording, it was not “in accordance with law” as required by Article 8.2 of the Convention. Furthermore, it was not, insofar as paragraph 1(g) of the Commission’s Terms of Reference is concerned, “authorised by law”.

## 9.7 SECTION VII: AUTHORISED UNDER EUROPEAN UNION LAW

### Introduction

- 9.7.1 The Commission examines, finally, whether the Garda telephone-recording systems were authorised by law in the sense of being lawful under the law of the European Union (hereinafter “EU Law”). Since the mid 1990s, the European Community, and now the European Union, have established principles concerning the protection of personal data and personal privacy, initially in parallel with but, increasingly, independently of the European Convention on Human Rights. Most relevantly, a principle of confidentiality of communications has been laid down by certain Directives of the European Union (formerly the European Community).
- 9.7.2 The Commission now examines that principle and considers whether the Garda telephone-recording systems were operated so as to be in breach of it or of provisions of the law respectively of the European Community (EC) or, from 1 December 2009, of the European Union (EU).<sup>261</sup> As it happens, the Court of Justice of the European Union, on 21 December 2016, at a time when this Final Report was at an advanced stage of preparation, delivered its judgment in Joined Cases C-203/15 *Tele2 Sverige AB v Post-och Telestyrelsen* and C-698/15 *Secretary of State for the Home Department v Watson and others* (hereinafter ‘*Tele2 and Watson*’).<sup>262</sup> That judgment is of particular importance for this Report, since it deals explicitly with the principle of ‘confidentiality of communications.’
- 9.7.3 The Commission re-emphasises, at the outset, that it does not enjoy the authority of a court to pronounce on the law and that it certainly is not a court or tribunal enjoying the power to make a reference to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union. The conclusions expressed by the Commission in this section represent its considered opinion based on its own appreciation and understanding of the law.

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<sup>261</sup> The Lisbon Treaty, comprising the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) entered into force on 1 December 2009.

<sup>262</sup> Judgment of 21 December 2016, *Tele2 Sverige* C-203/15, EU:C:2016:970

9.7.4 The recent judgment in *Tele2 and Watson* renders the task of the Commission simpler insofar as the ultimate question of the lawfulness of the telephone-recording systems is concerned. However, the legal landscape, both at European and national levels, has varied during the history of the existence and operation of the recording systems. The applicable EC or EU law,<sup>263</sup> as contained in Directives, has varied over the period of operation of the Garda telephone-recording systems. The Treaty of Lisbon, modifying the Treaty on European Union and establishing the Treaty on the Functioning of the European Union did not come into force until 1 December 2009. The Charter of Fundamental Rights of the European Union (hereinafter “the Charter”) had “the same legal value as the Treaties” from the same date.<sup>264</sup> The legal provisions applicable to the DAT tape systems, which were installed beginning in 1995, and of the NICE systems, which replaced them from about 2008, varied over time. The terms and effects of the national regulations transposing the relevant Directives have also varied significantly over the relevant period.

### **The Relevant Directives**

9.7.5 For more than twenty years, first the European Community and now the European Union has extended into the field of protection of fundamental human rights in respect of the privacy of personal data and of communications.

9.7.6 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter “The Data Protection Directive”) is generally regarded as the reference text, at European level, on the protection of personal data. The object of the Data Protection Directive, as it states in Article 1(1), is “to protect the fundamental rights and freedoms of natural persons, and in particular their privacy with regard to the processing of personal data”. The Data Protection Directive anticipated the provision of Article 8 of the Charter. Article 8 is based on that Directive as well as on Article 8 of the European Convention of Human Rights and other instruments.<sup>265</sup>

9.7.7 Directive 97/66/EC concerning privacy in the telecommunications sector was adopted to further particularise and complement the aims of the Data Protection Directive.<sup>266</sup> Directive 97/66/EC was itself repealed and replaced by Directive 2002/58/EC. Directive 97/66, together with its successor Directive 2002/58, are often referred to interchangeably as “the e-Privacy Directive.” However, they will be referred to separately in this section, for ease of reference, as the Commission must consider the

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<sup>263</sup> Hereinafter referred to for ease of reference as “European Union law”, unless otherwise stated.

<sup>264</sup> Article 6 (1) of the Treaty on European Union.

<sup>265</sup> Explanations Relating to the Charter of Fundamental Rights [2007] O.J 303/17, Title II at paragraph 8.

<sup>266</sup> Directive 97/66 together with its successor, Directive 2002/58 is often referred to as the e-Privacy Directive, their numbering is retained in this chapter in order to distinguish between them.

application of each Directive at the material time it remained in force. The judgment in *Tele2 and Watson* interprets Directive 2002/58. Its reasoning would have applied equally to Directive 97/66. These two Directives, which were adopted successively in 1997 and 2002, contain provisions with regard to confidentiality of communications. They are the subject of this section and are as follows:

- 1. Directive 97/66/EC - Directive on Privacy in the Telecommunications Sector**  
Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (hereinafter “Directive 97/66”);
- 2. Directive 2002/58/EC - Directive on Privacy and Electronic Communications**  
Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (hereinafter “Directive 2002/58”).<sup>267</sup>

9.7.8 It will be necessary to consider these Directives in relation to the particular Garda telephone-recording systems in existence at the relevant time: in effect, the DAT system from approximately 1995 and the NICE system from approximately 2008.

#### **Scope of European Union law: Area of Criminal law**

- 9.7.9 The Commission now considers, in the first instance, whether the Directives apply or applied to the Garda telephone-recording systems or whether their installation, operation and use fall outside the scope of EC or EU law, as the case may be, by virtue of being concerned with the area of criminal law, initially under Article 14(1) of Directive 97/66 and later under its successor, Article 15(1) of Directive 2002/58.
- 9.7.10 The Data Protection Directive was enacted prior to the entry into force of the Treaty of Lisbon. It has, as its legal basis, the general harmonisation clause of the internal market under Article 95 EC (now Article 114 TFEU). Therefore, the Data Protection Directive was adopted under the competence of the then European Community to regulate the internal market rather than any competency in the area of police or judicial co-operation. The European Community was not empowered to harmonise the laws of the Member States in the area of criminal law. Article 95 EC also represented the legal basis for the subsequent Directive 97/66/EC and its successor Directive 2002/58/EC. Therefore, these

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<sup>267</sup> Electronic communications replaces and includes telecommunications (see Recital 4 and Article 2).

Directives could not harmonise data protection law within the area of criminal law. For that reason, each of these Directives contains recitals and provisions taking note of the limits to the competence of what was, at the time of their adoption, the European Community and later the European Union.

9.7.11 Article 3.2 of the Data Protection Directive, which acted as the parent Directive, states:

“This Directive shall not apply to the processing of personal data in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law by a natural person in the course of a purely personal or household activity.”

9.7.12 Similarly, recital 11 of Directive 97/66 reflects this exclusion, as it notes that the Directive, in principle:

“does not address issues of protection of fundamental rights and freedoms related to activities which are not governed by Community law”.

9.7.13 This provision was repealed and replaced by recital 12 of Directive 2002/58, which recognises:

“it is for Member States to take such measures as they consider necessary for the protection of public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the enforcement of criminal law...”<sup>268</sup> [emphasis added]

9.7.14 Article 1(3) of each Directive also, in materially identical terms, states that it does not apply:

“to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law.”<sup>269</sup> [emphasis added]

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<sup>268</sup> Recital 11 in the case of Directive 97/66; recital 12 in the case of Directive 2002/58.

<sup>269</sup> Article 1(3) Directive 97/66, Article 1(3) of Directive 2002/58.



9.7.15 Therefore, Article 1(3) recognises the legal basis of the Directive and the limitations of its application to the areas of state security and criminal law. It is recognition of the scope of EU law.

9.7.16 In addition and quite separately, Article 14(1) of Directive 97/66, provided:

“Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 5, 6 and Article 8(1), (2), (3) and (4), when such restriction constitutes a necessary measure to safeguard national security, defence, public security, the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the telecommunications system, as referred to in Article 13(1) of Directive 95/46/EC.”

9.7.17 Similarly, Article 15(1) of Directive 2002/58 provides:

“Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union.”

9.7.18 It is apparent, therefore, that the Directives do not apply to what is called the activities of the State which relate to State security matters and the area of “criminal law”. The central question, for the Commission, therefore, is whether the installation, operation and use of the Garda telephone-recording systems were designed to operate in that area of reserved Member State competence described as activities which “relate to State security” or are in “the area of criminal law” or the “enforcement of criminal law.” Do those systems fall outside the scope of the Directives and, most importantly, the principle of confidentiality of communications? The judgment in *Tele2 and Watson* provides a clear answer, at least to the first question.

9.7.19 *Tele2 and Watson* concerned national legislation of Sweden and the United Kingdom providing for obligatory retention of traffic and location data (not records of content) and access to that data by national authorities. The Court had, firstly, to decide whether such national legislation fell within the scope of Directive 2002/58.

9.7.20 The issue arose whether the provisions of Article 1(3) or 15(1), individually or in combination, had the effect that the national legislation under consideration fell outside the scope of Directive 2002/58. The Court ruled very clearly that legislative measures adopted by Member States pursuant to the provisions of Article 15(1) were not excluded from the scope of the Directive. The Court held:

“Article 15(1) necessarily presupposes that the national measures referred to therein, such as those relating to the retention of data for the purpose of combating crime, fall within the scope of that directive, since it expressly authorises Member States to adopt them only if the conditions laid down in the directive are met.”<sup>270</sup>

9.7.21 Consequently, it was clear that the legislative provisions, respectively, of Sweden and the United Kingdom, which were the subject of the proceedings before the Courts of those two Member States that had referred questions to the Court of Justice, fell within the scope of Directive 2002/58. The Court held, therefore:

“The protection of the confidentiality of electronic communications and related traffic data, guaranteed in Article 5(1) of Directive 2002/58, applies to the measures taken by all persons other than users, whether private persons or bodies or State bodies. As confirmed in recital 21 of that directive, the aim of the directive is to prevent unauthorised access to communications, including ‘any data related to such communications’, in order to protect the confidentiality of electronic communications.”<sup>271</sup>  
[emphasis added]

9.7.22 The Court concluded:

“ in so far as Article 15(1) of Directive 2002/58 enables Member States to restrict the scope of the obligation of principle to ensure the confidentiality of communications and related traffic data, that provision must, in accordance with the Court’s settled case-law, be interpreted strictly.....that provision cannot, therefore, permit the exception to that obligation of

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<sup>270</sup> *Tele2 and Watson* at paragraph 73.

<sup>271</sup> *Tele2 and Watson* at paragraph 77.

principle and, in particular, to the prohibition on storage of data, laid down in Article 5 of Directive 2002/58, to become the rule, if the latter provision is not to be rendered largely meaningless.”<sup>272</sup> [emphasis added]

- 9.7.23 An issue of fact then arises as to whether the Garda recording system was an activity within these areas.<sup>273</sup> The Commission refers, at this point, to its report, particularly Chapters 3 to 6, on the installation, operation and use of the Garda telephone-recording systems.<sup>274</sup> To begin with, the Garda telephone-recording systems were neither authorised by nor did they give effect to any provision of the criminal law.
- 9.7.24 The Commission heard evidence along the following lines. One of the principal recommendations made in 1996, in relation to the installation of the DAT systems, was that the recording of the main switch at Garda stations could help to ensure that Garda telephone operators would be courteous and efficient in answering calls from the public. The Commission also heard evidence that it was considered desirable that calls conveying bomb threats or hoax calls should be recorded. Finally, and perhaps most importantly, the Commission heard evidence that recording the main station number enabled An Garda Síochána to capture calls of an emergency nature from persons who called the station directly rather than ringing 999. The evidence suggests that this was a common occurrence in some Divisional Stations. However, no clear statement was ever issued, by or on behalf of the Garda Commissioner, setting out the policy objectives that led to the acquisition, installation and operation of the Garda telephone-recording systems.
- 9.7.25 Most importantly, no evidence has been identified by the Commission that the recording of telephone calls at Garda stations was implemented in a manner proportionate to the object of investigating or preventing crime. Undoubtedly, many calls to Garda stations did indeed report the commission of crime, but all calls to and from the main number at the relevant Garda stations were recorded generally, indiscriminately and the recordings retained regardless of any connection between any call and the investigation of crime.
- 9.7.26 In this connection, it is also relevant to recall the Commission’s conclusion that the Garda telephone-recording systems were not authorised by any law in force in the State, whether by common law or by statute. Consequently, it seems to the Commission difficult to say that the recording of telephone calls is an activity of Ireland as a Member State which takes place in the area of criminal law, if the recording, as the Commission has concluded, is not authorised by law. In addition, the Commission has received no

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<sup>272</sup> *Tele2 and Watson* at paragraph 89.

<sup>273</sup> Hereinafter jointly referred to as “the area of criminal law”, for ease of reference.

<sup>274</sup> Chapters 3,4,5 and 6 of the Final Report.

evidence that the system was installed, operated or used in this area of criminal law. Any measures purportedly adopted under Article 14 of Directive 97/66 or Article 15 of Directive 2002/58 must amount to a necessary and proportionate measure within those excluded areas. What is conclusive is that the Garda telephone-recording systems were not installed or operated and did not store or retain data, nor were provisions regarding access to data, under the authority of any legislative measure, capable of benefiting from the provisions of Article 15(1) of Directive 2002/58. For that reason alone, the Commission is of the view that the Garda telephone-recording systems did not benefit from the provisions of Article 15(1) of Directive 2002/58.

9.7.27 In addition, insofar as concerns the rights protected by the Charter of fundamental Rights of the European Union and Articles 7 and 8 in particular, the Court emphasises:

“under Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must respect the essence of those rights and freedoms.”<sup>275</sup>

9.7.28 The Commission is, therefore, driven to the conclusion that the installation, operation and use of the Garda telephone-recording systems were not conducted in an area of reserved Member State competence described as activities which “relate to State security” or are in “the area of criminal law” or the “enforcement of criminal law”.

#### **Direct Effect of the Directives**

9.7.29 Having concluded that, as the recording systems come within the scope of EU law, they, therefore, were not adopted pursuant to any measure which avoided the application of EU law *per se*, the issue arises as to whether the provisions of the Directives, as they applied respectively at different times in the absence of transposition into national law, were capable of having direct effect as against An Garda Síochána. It is to be recalled that, as a general principle, subject to exception, EU Directives are not directly effective, meaning that, unless transposed into national law, they may not be invoked as against individuals in a national Court. Individuals may rely only on such national laws. The Commission will now consider whether Article 5 of each of the Directives was capable, prior to transposition into national law in 2011, of having direct effect as against An Garda Síochána by reason of their operation of the recording systems.

#### **(A) Directive 97/66 – Directive on Privacy in the Telecommunications Sector**

9.7.30 Article 1(2) of Directive 97/66 stated that its provisions “particularise and complement Directive 95/46/EC.”

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<sup>275</sup> *Tele2 and Watson* at paragraph 94

9.7.31 Directive 97/66 provided:

“for the harmonisation of the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the telecommunications sector.....” [emphasis added]

9.7.32 Article 5 of Directive 97/66 is the provision that is of particular relevance to the operation of the Garda telephone-recording systems. It was headed “Confidentiality of the communications.”

9.7.33 Article 5 provided:

(6) Member States shall ensure via national regulations the confidentiality of communications by means of a public telecommunications network and publicly available telecommunications services. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications, by others than users, without the consent of the users concerned, except when legally authorised, in accordance with Article 14 (1)

(7) [not relevant]

9.7.34 Article 15 obliged Member States, including Ireland, to transpose Article 5 of the Directive into national law by 24 October 2000 at the latest.<sup>276</sup>

9.7.35 Ireland did not transpose Directive 97/66 within the permitted time. The Commission of the European Communities brought an infringement action against Ireland, which was discontinued on 27 January 2004, at a time when Ireland was about to adopt S.I. 192/2002.<sup>277</sup>

9.7.36 S.I. No. 192/2002 European Communities (Data Protection and Privacy in Telecommunications) Regulations 2002 was adopted on 8 May 2002 for the stated purpose of giving effect to Directive 97/66. However, those regulations contained no provision designed to implement Article 5 concerning the “confidentiality of communications.”

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<sup>276</sup> By way of derogation from the general obligation to transpose not later than 24 October 1998.

<sup>277</sup> Judgment of 26 April 2005, *Commission v Ireland*, C-459/01, EU:C:2005:250

9.7.37 On the face of it, therefore, Ireland had also not implemented the principle of the confidentiality of communications in the telecommunications sector after the date permitted of 24 October 2000. The DAT system had, at that time, been in operation in a number of Divisional Garda Stations from 1995 and 1996. The Commission will later discuss whether, though not implemented in Irish law, the obligation to respect confidentiality of communications could have had binding legal effect on An Garda Síochána in the period after 24 October 2000.

**(B) Directive 2002/58 – Directive on Privacy in the Electronic Communications Sector**

9.7.38 Directive 2002/58/EC repealed Directive 97/66/EC with effect from the date provided for its transposition, which was to be not before 31 October 2003.

9.7.39 Directive 2002/58/EC contained an effectively identical provision, giving effect to the “Confidentiality of communications”, to that contained in the repealed Article 5 of Directive 97/66. It provided:

“Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned” [emphasis added]

9.7.40 In summary, Article 5 requires Member States to enact legislation to ensure confidentiality of communications and, in particular, to prohibit “listening, tapping, storage or other kinds of interception or surveillance of communications...”

9.7.41 Directive 2002/58 was transposed into Irish law by S.I. No. 535/2003 - European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) Regulations 2003. S.I. No. 535/2003 was dated 6 November 2003. It revoked S.I. No. 192/2002.<sup>278</sup> It is to be recalled that S.I. No. 192/2002 purported to transpose Directive 97/66 but did not contain any act of transposition concerning the principle of confidentiality of communications. The provisions of S.I. No. 535/2003, regarding transposition of Article 5 of Directive 2002/58, are rather more complex than in the case of Directive 97/66.

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<sup>278</sup> See Regulation 24.1 of S.I. 535/2003.

- (i) S.I. No. 535/2003 contains no provision expressly purporting to transpose the principle of confidentiality of communications set out in Article 5 of the Directive.
- (ii) Regulation 5(1), however, appears to implement Article 5.3 of Directive 2002/58, which relates to storage of or access to information on terminal equipment of subscribers or users and is of subsidiary relevance.
- (iii) Regulation 5.3 refers to “section 98 of the Act of 1983” which is defined in Regulation 2(1) as meaning the Postal and Telecommunications Services Act 1983.<sup>279</sup>
- (iv) The Explanatory Note to the Statutory Instrument states:

“The provisions of Article 5.1 of the Directive relating to confidentiality of communications are not transposed in the Regulations as adequate provisions were already on the statute book by virtue of Section 98 of the Postal and Telecommunications Services Act 1983. (No. 24 of 1983) as amended.”

- (v) No such suggestion had been made when S.I. No 192/2002 was adopted to give effect to Directive 97/66. In any event, as the Explanatory Note correctly states, it “is not part of the Instrument and does not purport to be a legal interpretation.”

9.7.42 S.I. No. 336/2011 - European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 revoked S.I. No. 535/2003. The Explanatory Memorandum states that, *inter alia*, S.I. 336/2011 consolidates the provisions of the existing Statutory Instruments transposing, what it calls, “the e-Privacy Directive.”

9.7.43 The preamble to S.I. No. 336/2011, dated 1 July 2011, states that it is being adopted for the purpose of giving effect to Directive 2002/58/EC. It refers also to other Directives.

9.7.44 Regulation 5 is headed “Confidentiality of Communications” and provides as follows:

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<sup>279</sup> Although the definition does not refer to the Act as amended in 1993, section 14(2) of the Interpretation Act 2005 requires that it be read as amended. Thus the reference to “section 98 of the Act of 1983” must be read as meaning the section as it stood after amendment by s. 13 of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993.

“Without prejudice to section 98 of the Act of 1983 and section 2 of the Act of 1993 and except where legally authorised under a provision adopted in accordance with Article 15(1) of the Directive on privacy and electronic communications, the listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, is prohibited.” [emphasis added]

9.7.45 The underlined words are taken from the text of Article 5 of Directive 2002/58. Thus it was not until 2011, following the passing of three previous statutory instruments which remained silent on the provision, that Ireland gave express effect to the principle of confidentiality of communications. That principle had, of course, been laid down in Directive 97/66. Ireland had been obliged to give effect to it from 24 October 2000 and was now doing so, at least in express terms, for the first time.

#### **Temporal summary**

9.7.46 The position regarding the transposition of the principle of confidentiality of communications, first provided by Directive 97/66 and then by Directive 2002/58, falls into three periods as follows:

- (i) For the period from 24 October 2000 (the final date provided for transposition) until 8 May 2002, the date of S.I. 192/2002, there was no transposition.
- (ii) S.I. 192/2002 also contained no provision transposing the principle of confidentiality of communications, although it was later stated that it was considered that s. 98 of the 1983 Act (as amended) was, or had been, sufficient. The Commission has concluded it was not. Thus, until the repeal of Directive 97/66 by Directive 2002/58, which took effect at the latest on 31 October 2003, there was also no transposition.<sup>280</sup> Therefore, for the period from 24 October 2000 until 31 October 2003, it needs to be considered whether:
  - As was later suggested in the Explanatory Note to S.I. 535/2003, s. 98 of the 1983 Act as amended had given effect to Article 5, possibly with the support of the principle of conforming interpretation;

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<sup>280</sup> S.I. 535/2003 was adopted on 6 November 2003, six days after the final date set by Directive 2002/58 for transposition.



- Whether the provisions of Article 5 of Directive 97/66 establishing the principle of confidentiality of communications, not having been implemented, had direct effect as against An Garda Síochána by virtue of its being an organ of the State.
- (iii) For the period from 31 October 2003 (the final date provided for transposition of Directive 2002/58) until 1 July 2011, the date from which S.I. 535/2003 was revoked, the same two questions arise in slightly different form in the light of the partial transposition of the provisions of Article 5 of that Directive.
- (iv) From 1 July 2011, Article 5 of Directive 2002/58 was, at least purportedly, transposed by Regulation 5 of S.I. No. 336/2011.

### **Conforming interpretation**

9.7.47 In general, the Courts of the Member States are obliged to interpret national law, so far as that is possible, so as to give effect to a Directive that is being implemented or which the Member State is bound to implement. The Court of Appeal in England drew attention to this principle in the specific context of the principle of confidentiality of communications, noting that one purpose of the enactment of the (UK) Regulation of Investigatory Powers Act 2000 had been to implement Article 5 of Directive 97/66.<sup>281</sup>

9.7.48 The principle of conforming interpretation is inherent in the system of the Treaties. It requires the national court, not only to interpret provisions of national law specifically intended to implement the Directive, so far as possible, to be in conformity with the objectives of the Directive, but also to consider national law as a whole and to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure the full effectiveness of the Directive.<sup>282</sup>

9.7.49 In *Marleasing*,<sup>283</sup> the Court of Justice held that:

"... in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording

<sup>281</sup> *Coulson v Regina* [2013] EWCA Crim 1026 at paragraph 29.

<sup>282</sup> Judgment of 5 October 2004, *Pfeiffer*, C-397/01 to C-403/01, EU:C:2004:584.

<sup>283</sup> Judgment of 13 November 1990, *Marleasing SA*, C-106/89, EU:C:1990:395

and the purpose of the directive in order to achieve the result pursued by the latter...”<sup>284</sup>

9.7.50 In *Pupino*, the Court of Justice also explained, in the case of a Framework Decision, that:

“[t]he national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision.”<sup>285</sup>

9.7.51 However, the Court also noted:

“the principle that national law must be given a conforming interpretation cannot lead to an interpretation that is *contra legem*....”<sup>286</sup>

9.7.52 The obligation of conforming interpretation applies whether the relevant provisions were adopted before or after the Directive at issue. National Courts are required to interpret provisions of national law “as far as possible” in the light of the purpose of the Directive in order to achieve the result pursued by the Directive.<sup>287</sup> That means that the obligation requires such an interpretation only insofar as it is possible.<sup>288</sup> In *Minister for Justice v Altaravicius*, Murray C.J. held:

“The principle of conforming interpretation is limited, as the Court of Justice has pointed out in *Pupino* and other cases, to the extent that it is possible to give such an interpretation. It does not require a national court to interpret national legislation *contra legem*. If national legislation, having been interpreted as far as possible in conformity with community legislation to which it purports to give effect, but still falls short of what is required by the latter, a national court must, as a general principle, apply that legislation as interpreted although there may be other consequences for a member state which has failed to fully implement a directive or framework decision”.<sup>289</sup>

9.7.53 It seems clear that the State authorities, at the time of the adoption of S.I. 535/2003, believed that the existing provisions of s. 98 of the 1983 Act, as amended, sufficiently gave effect to the requirements of Article 5(1) of Directive 2002/58 to show that Ireland

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<sup>284</sup> Judgment of 13 November 1990, *Marleasing SA*, C-106/89, EU:C:1990:395, paragraph 8.

<sup>285</sup> Judgment of 16 June 2005, *Pupino*, C-105/03, EU:C:2005:386, paragraph 61.

<sup>286</sup> Judgment of 16 June 2005, *Pupino*, C-105/03, EU:C:2005:386, paragraph 24.

<sup>287</sup> *OCS One Complete Solutions Ltd v Dublin Airport Authority Plc* (Unreported, Supreme Court, Clarke J. 30<sup>th</sup> January 2015) at paragraph 5.2.

<sup>288</sup> *Minister for Justice v. Altaravicius* [2006] 3 IR 158, at page 156.

<sup>289</sup> *Ibid.*

had complied with its obligation. However, this assumption is not evidenced in any legislative act. It is merely stated in an Explanatory Note, which has no legal effect. If that view was being taken by the State in 2003, it seems natural to assume that the State's failure to implement Article 5 of Directive 97/66 when adopting S.I. 192/2002 was for the same reason.

- 9.7.54 In any event, the obligation of the national court is a general and objective one. It is not based on any expression of view or intention outside the legislative process. There was, however, a general intention, stated in the preambles to both S.I. 192/2002 and S.I. 535/2003, to implement the Directive, including Article 5. This was accompanied by a partial implementation in 2003, combined with a stated belief that s. 98 of the 1983 Act, as amended, represented sufficient transposition.
- 9.7.55 The essential question is whether the State was correct in holding this view; in particular, whether a national court would be in a position, in accordance with that principle, to interpret s. 98 of the 1983 Act, as amended, in such a way that the section gives effect to the principle of confidentiality of communications provided for by Article 5, respectively, of Directive 97/66 and Directive 2002/58.
- 9.7.56 In approaching this issue, the Commission bears in mind that each of the transposing Statutory Instruments evidences, at a general level, an intention to implement the Directive, by using the expression “for the purposes of giving effect to...” Neither Statutory Instrument, however, contains any express provision implementing the principle of confidentiality of communications.
- 9.7.57 It is true that Article 5(1) of S.I. 535/2003 gave effect to Article 5.3 of Directive 2002/58 in respect of the use of “of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user...” However, in the view of the Commission, that is a quite different activity from “listening, tapping, storage or other kinds of interception or surveillance of communications...”. The presence of Regulation 5(1) of S.I. 535/2003 transposing Article 5(3) of Directive 2002/58 would not make it possible for a court to interpret that paragraph of the Regulation so as to give effect to a provision which it does not purport to transpose. Moreover, while the Garda telephone-recording systems stored information, it was not “information stored in the terminal equipment of a subscriber or user...” A “user” is defined in Article 2 as a “natural person”. An Garda Síochána is not a “natural person”.
- 9.7.58 The consideration of s. 98 of the 1983 Act, as amended, can be very brief. The Commission has examined this provision in considerable detail with a view to deciding

whether the Garda activity of recording telephone calls made to and from Garda stations constituted the commission of the offence of “interception” as defined in s. 98 as amended. Recording does not constitute ‘interception’ as that term is statutorily defined, as the calls were not recorded in the course of transmission.

- 9.7.59 The Commission does not believe that s. 98 of the 1983 Act, as amended, could be interpreted pursuant to the principle of conforming interpretation so as to give effect in Irish law to the principle of confidentiality of communications set out in Article 5 of each of Directive 97/66 and 2002/58.

### **Direct Effect of Directives 97/66 and 2002/58**

- 9.7.60 If, in the alternative, it is not possible to interpret the provisions of s. 98 of the 1983 Act, as amended, or S.I. No 535/2003 according to the principle of conforming interpretation in the light of Article 5 of Directive 97/66 or Directive 2002/58, so as to give effect to the principle of respect for the confidentiality of communications laid down in those articles, the alternative question arises as to whether those provisions can be considered to have direct effect against An Garda Síochána, as an organ of State, in light of principles of EU law concerning the direct effect of Directives that have not been properly transposed under national law.

- 9.7.61 In *Foster v British Gas*,<sup>290</sup> the Court of Justice has laid down as a principle that:

“wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the state.”<sup>291</sup>

- 9.7.62 The rationale for this principle was previously stated in *Ratti*, where the Court of Justice noted:

“...a Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails”.<sup>292</sup>

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<sup>290</sup> Judgment of 12 July 1990, *Foster v British Gas*, C-88/89, EU:C:1990:313

<sup>291</sup> Judgment of 12 July 1990, *Foster v British Gas*, C-88/89, EU:C:1990:313, paragraph 16

<sup>292</sup> Judgment of 5 April 1979, *Ratti*, C-148/78, EU:C:1979:110, paragraph 22.

9.7.63 The principle extends to bodies which are organs or “emanations” of the State:

“...unconditional and sufficiently precise provisions of a directive could be relied on against organizations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals.

“It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.”<sup>293</sup>

9.7.64 It is particularly apposite, in the case of An Garda Síochána, to refer to a case concerning a police force in its capacity as an employer. In *Johnston v Chief Constable of the Royal Ulster Constabulary*,<sup>294</sup> the Court of Justice stated:

“..... Individuals may rely on the directive as against an organ of the State whether it acts qua employer or qua public authority. As regards an authority like the Chief Constable, it must be observed that ...the Chief Constable is an official responsible for the direction of the police service. Whatever its relations may be with other organs of the State, such a public authority, charged by the State with the maintenance of public order and safety, does not act as a private individual. It may not take advantage of the failure of the State, of which it is an emanation, to comply with Community law.”<sup>295</sup> (emphasis added)

9.7.65 The issue, therefore, is whether Article 5 of Directive 97/66 and 2002/58, respectively, which gave effect to the principle of respect for the confidentiality of communications, was clear, unconditional and sufficiently precise so as to enable a conclusion to be reached that they became directly effective following the failure of the State to transpose them, in due time, into Irish law. Here, it is to be recalled that Article 5 provides that Member States are obliged to:

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<sup>293</sup> Judgment of 12 July 1990, *Foster v British Gas*, C-88/89, EU:C:1990:313, paragraph 18 and 20.

<sup>294</sup> Judgment of 15 May 1986, *Johnston v Chief Constable of Royal Ulster Constabulary*, C-222/84, EU:C:1986:206.

<sup>295</sup> Judgment of 15 May 1986, *Johnston v Chief Constable of Royal Ulster Constabulary*, C-222/84, EU:C:1986:206, paragraph 56.

“prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned...”

- 9.7.66 While Article 5 is not wholly unconditional insofar as it is subject to exception, the Commission considers it to be sufficiently clear, precise and unconditional to enable a national Court to find that the provision is, in principle, capable of having direct effect. While Article 15(1) entitles a Member State to legislate to restrict the scope of the right to the confidentiality of communications where such a restriction is justified in areas such as defence, public security, and the prevention, investigation, detection and prosecution of criminal offences, the non 999 recording systems operated by An Garda Síochána did not benefit from any legislative basis. Therefore, the Commission is satisfied that the derogation available under Article 15 was not availed of by An Garda Síochána. It is also clear, above all from the case of *Johnson v Royal Ulster Constabulary*, that An Garda Síochána, as the national police force, would be regarded as an organ of the State against which the terms of an unimplemented Directive may be invoked in the national court.
- 9.7.67 Thus, the obligation to “ensure the confidentiality of communications”, whether as expressed in Directive 97/66 or Directive 2002/58, is capable of having direct effect against An Garda Síochána for the benefit of any person affected by the recording of telephone conversations.
- 9.7.68 It would seem that the provisions of Article 5 of Directive 97/66 were capable of being directly effective as against An Garda Síochána from 24 October 2000 until the repeal of that Directive on 31 October 2003.
- 9.7.69 It would also appear that the provisions of Article 5 of Directive 2002/58 were capable of being directly effective as against An Garda Síochána from 31 October 2003 until the the adoption of S.I. 336/2011 on 1 July 2011. Each of the Directives was unconditional and sufficiently clear and precise to satisfy the test for the direct effect of a Directive that has not been implemented in national law.
- 9.7.70 As previously stated, from 1 July 2011, Article 5 of Directive 2002/58 was effective in Irish law by virtue of Regulation 5.1 of S.I. 336/2011.<sup>296</sup>
- 9.7.71 It follows that, as from 1 July 2011, the principle of confidentiality of communications was no longer merely a principle of EU law; it became an express principle of national law. It follows that, as from that date, An Garda Síochána, by the manner in which they

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<sup>296</sup> As a provision of national law, the application of Regulation 5 of S.I. 336/2011 is considered in Chapter 4.

operated telephone-recording systems at Divisional Garda Stations, acted in breach of a principle of national law of confidentiality of communications.

## **Confidentiality of Communications**

### **(A) General principles**

9.7.72 In the light of the conclusions expressed in the preceding section, it is necessary to examine the judgment in *Tele2 and Watson*. The Court explained, firstly, at a general level, the status, nature and sources of the rights protected by Article 5. The following references emphasise the fundamental importance of the rights guaranteed:

- (i) As noted above, recital 21 of Directive 2002/58, quoted at paragraph 3 of the judgment, proclaimed that the principle of confidentiality of communications is:

“guaranteed in accordance with the international instruments relating to human rights, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the constitutions of the Member States.”<sup>297</sup>

- (ii) According to Article 1(2) the provisions of the Directive “particularise and complement” Directive 95/46, whose object is the protection of:

“the fundamental rights and freedoms of natural persons, and in particular their privacy with regard to the processing of personal data.”

- (iii) The Court also quoted, as *travaux préparatoires*, the explanatory memorandum of the Proposal for Directive Directive 2002/58 of the European Parliament and of the Council stating that the EU legislature sought:

‘to ensure that a high level of protection of personal data and privacy will continue to be guaranteed for all electronic communications services regardless of the technology used’.<sup>298</sup>

- (iv) It also noted that the Directive:

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<sup>297</sup> Recital 3 to Directive 2002/58.

<sup>298</sup> *Tele2 and Watson*, at paragraph 82.

“contains specific provisions designed...to offer to the users of electronic communications protection against risks to their personal privacy that arise from new technology and the increasing capacity for automated storage and processing of data.”<sup>299</sup>

(v) The Court drew particular attention to the obligations of the Member States:

“Article 5(1) of the Directive provides that the Member States must ensure, by means of their national legislation, the confidentiality of communications effected by means of a public communications network and publicly available electronic communications services, and the confidentiality of the related data.”<sup>300</sup>

9.7.73 Article 7 of the Charter states:

“Everyone has the right to respect for his or her private and family life, home and communications”.

9.7.74 Article 8 of the Charter states:

“Everyone has the right to the protection of personal data concerning him or her”.

9.7.75 In relation to the application of the Charter, the Court also noted that Directive 2002/58:

“seeks to ensure, in particular, full respect for the rights set out in Articles 7 and 8 of the Charter” of Fundamental rights of the European Union.”<sup>301</sup>

9.7.76 The provisions of Articles 7 and 8 of the Charter have had, as already stated, the “same legal value as the Treaties” since 1 December 2009. Directive 2002/58, at its recital 2, states that it “seeks to ensure full respect for the rights set out in Articles 7 and 8 of the Charter.”<sup>302</sup>

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<sup>299</sup> *Tele2 and Watson*, paragraph 83.

<sup>300</sup> *Tele2 and Watson*, at paragraph 84.

<sup>301</sup> *Tele2 and Watson*, at paragraph 82.

<sup>302</sup> *Tele2 and Watson*, at paragraph 82.



**(B) Concrete Provisions**

9.7.78 The Commission, in Chapters 4, 5 and 6, has analysed and reported on the three principal practical aspects of the operation of the telephone-recording systems that are relevant to the protection of the rights of persons whose telephone conversations were recorded and retained. They are:

- (i) The act of recording telephone calls;
- (ii) The retention of the content of those recorded calls;
- (iii) The facilities for allowing access to those recorded calls.

9.7.79 In considering the principle of confidentiality of communications, laid down by Article 5(1) of Directive 2002/58, the Commission has found the judgment of the Court of Justice in *Tele2 and Watson* to be particularly relevant. The following conclusions relate to each of the three named aspects of the recording systems.

9.7.80 The facts underlying the two references made to the Court of Justice from the Courts of Sweden and the United Kingdom in *Tele2 and Watson* did not concern the recording of the content of telephone calls. The legislation, in each case, provided for the imposition of extensive legal obligations to retain data. Nonetheless, the decision is of crucial significance to an evaluation of the lawfulness of the Garda telephone-recording systems: firstly, from 24 October 2000, when the principle of confidentiality of communications had direct effect; and secondly, as implemented in national law since 1 July 2011.

**(C) Recording of telephone calls**

9.7.81 Article 5(1) of Directive 2002/58, as already noted, obliges Member States to prohibit the “listening, tapping, storage or other kinds of interception or surveillance of communications”. This provision expresses the core requirement of confidentiality of communications which Member States are required to enforce.

9.7.82 The Court of Justice, in its judgment in *Tele2 and Watson*, explained the fundamental character of the rights involved. It is of particular importance that it drew a key distinction between two categories of legislation. The first was legislation providing for the retention of certain surrounding information concerning communications. The second was legislation providing for “retention of the content of a communication”, which, as stated by the Court, “is such as to affect adversely the essence of those rights...” In the latter respect, the Court pointed out that, even in the case of limitations provided by law permitted by Article 52(1) of the Charter, such limitations “must respect the essence of those rights and freedoms...”.

9.7.83 The Court stated:

“That data includes, inter alia, the name and address of the subscriber or registered user, the telephone number of the caller, the number called and an IP address for internet services. That data makes it possible, in particular, to identify the person with whom a subscriber or registered user has communicated and by what means, and to identify the time of the communication as well as the place from which that communication took place. Further, that data makes it possible to know how often the subscriber or registered user communicated with certain persons in a given period...”<sup>303</sup>

9.7.84 The Court concluded that:

“That data, taken as a whole, is liable to allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as everyday habits, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them...”

9.7.85 It added, in agreeing with the Opinion of the Advocate General:

“that data provides the means...of establishing a profile of the individuals concerned, information that is no less sensitive, having regard to the right to privacy, than the actual content of communications.”<sup>304</sup>

9.7.86 Nonetheless, the Court held that, by reason of its not permitting retention of the content of a communication, the legislation was not “such as to affect adversely the essence of those rights...” The importance of this distinction is that the Garda telephone-recording systems, by way of contrast with what was provided for by both the Swedish and United Kingdom legislation, did, in fact, record the content of the telephone calls of all members of the public who called into or were called on any of the lines of the relevant Divisional Garda Stations. Consequently, it is clear that the recording activity in question was such as to affect adversely the essence of the rights to privacy in relation to the content of those calls.

9.7.87 As already stated, the Court attaches particular importance to Article 52(1) of the Charter, which provides that any limitation on the exercise of the rights and freedoms

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<sup>303</sup> *Tele 2 and Watson*, at paragraph 98.

<sup>304</sup> *Tele 2 and Watson*, at paragraph 99.

under the Charter must be provided for by law and respect the essence of those rights and freedoms.

#### **(D) Retention of Data**

- 9.7.88 The very act of recording necessarily entails the retention of the recorded data, the data in issue being recorded telephone calls, for at least some period of time. The chapters of this Report outlining the facts and history of the telephone-recording systems show that, during the DAT period from roughly 1995 to 2008, calls were recorded onto digital audio tapes, which were retained for various periods and in varying circumstances. The net result was that more than 3000 tapes were in possession of An Garda Síochána in November 2013 when the recording was terminated on the orders of the Garda Commissioner. On that same date, an unquantifiable quantity of recorded material was retained on hard disk both centrally and at individual stations. It is necessary to consider these facts in the light of the principle of confidentiality of communications.
- 9.7.89 One of the acts prohibited by Article 5(1) of Directive 2002/58 is the “storage of communications and the related traffic..” Clearly, An Garda Síochána, by retaining recorded calls on DAT tapes and hard disks in circumstances where they could not, legally speaking, be considered to be a party to those calls, were engaged in that prohibited activity.
- 9.7.90 All of the statements made by the Court of Justice in its judgment in *Tele2 and Watson* regarding retention, which are quoted under the heading, “Recording”, above, are directly relevant. It remarked that the Swedish legislation provided for “a general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication...” It is true that the Garda telephone-recording systems operated only in a number of Garda stations and did not operate universally in the manner there described. However, they recorded all calls made to the relevant Garda stations “generally and indiscriminately.”
- 9.7.91 The Court observed:
- “interference entailed by such legislation in the fundamental rights enshrined in Articles 7 and 8 of the Charter is very far-reaching and must be considered to be particularly serious.”<sup>305</sup>
- 9.7.92 There is no doubt that the Garda telephone-recording systems, as they were operated, infringed the rule prohibiting storage of data laid down as part of the principle of confidentiality of communications.

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<sup>305</sup> *Tele 2 and Watson* at paragraph 100.

### (E) Access to Recorded Data

9.7.93 The chapters of this Report outlining the facts and history of the telephone-recording systems also give an account of the practices regarding access to recorded calls followed at Garda stations. There was, of course, no legislation governing access. Nor were there any applicable instructions, rules or protocols that carried the sanction and authority of the Garda Commissioner.

9.7.94 Article 5(1) of Directive 2002/58 contains no express reference to access to recorded material. However, recital number 21, like recital 16 to Directive 97/66, states:

“Measures should be taken to prevent unauthorised access to communications in order to protect the confidentiality of communications, including both the contents and any data related to such communications, by means of public communications networks and publicly available electronic communications services.” [emphasis added]

9.7.95 There was some dispute in *Tele2 and Watson* as to whether the Directive applied to access. The United Kingdom Government, in particular, argued that legislation regarding retention, but not legislation relating to access to data, fell within the scope of the Directive. Advocate General Saugmansgaard submitted convincingly, “the issue of the retention of data cannot be entirely separated from the issue of access to that data.”<sup>306</sup>

9.7.96 In *Tele2 and Watson*, it was submitted by both the United Kingdom and the Commission of the European Union that only legislation relating to the retention of data but not legislation relating to the access to that data by competent national law enforcement authorities falls within the scope of Directive 2002/58. The Court of Justice ruled, however, that the scope of the directive extends to a legislative measure relating to the access of the national authorities to the data retained by the providers of electronic communications services.<sup>307</sup> The Court confirmed its view by referring to recital 21 of the directive, which states that its aim is to prevent any unauthorised access to communications, including ‘any data related to such communications,’ in order to protect the confidentiality of electronic communications.

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<sup>306</sup> Opinion of Advocate General Saugmansgaard of 19 July 2016, *Tele2 Sverige*, C-203/215, EU:C:2016:572, paragraph 125.

<sup>307</sup> *Tele 2 and Watson* at paragraph 76.

9.7.97 The data recorded by the Garda telephone recording systems are not, of course, ‘retained by the providers of electronic communications services.’ Nonetheless, An Garda Síochána is a State authority, which is bound by the principle of confidentiality of communications. Any act of access to a non 999 telephone call captured by the Garda recording system would appear to be a breach of that principle. Article 5 of Directive 2002/58 requires Member States to ‘prohibit listening, tapping, storage or other kinds of interception or surveillance of communications...’ (emphasis added). That prohibition was transposed into Irish law by Regulation 5 of S.I. No. 336/2011 - European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011. Regulation 5(1), which is subject to qualifications, none of which are material, provides:

‘Without prejudice to section 98 of the Act of 1983 and section 2 of the Act of 1993 and except where legally authorised under a provision adopted in accordance with Article 15(1) of the Directive on privacy and electronic communications, the listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, is prohibited.’

9.7.98 In the view of the Commission, this provision prohibited An Garda Síochána, in the absence of legal authority granted by legislation, from having access to the recorded calls of persons whose communications on non 999 lines were recorded by the Garda telephone recording systems.

9.7.99 In the result, the Commission is satisfied that the aspect of the principle of confidentiality of communications relating to access to data, taking the form, as here, of recorded telephone communications, encompasses the arrangements regarding access to such data.

### **Summary**

9.7.100 In summary, Article 5 requires Member States to enact legislation to ensure confidentiality of communications and, in particular, to prohibit activities described as: “listening, tapping, storage or other kinds of interception or surveillance of communications...” without the consent of the users concerned and except when legally authorised under Article 15(1). A “user” is defined under Article 1 of the Directive as a “natural person”. As An Garda Síochána are not a natural person, in the view of the Commission, the issue of consent does not arise. While Article 15(1) entitles a Member State to legislate to restrict the scope of the right to the confidentiality of communications where such a restriction is justified in areas such as defence, public security, and the prevention, investigation, detection and prosecution of criminal

offences, the general recording system did not benefit from any legislative basis. Therefore, the Commission is satisfied that the derogation available under Article 15 was not availed of by An Garda Síochána.

- 9.7.101 The Commission is satisfied that the principle in EU law of direct effect of directives meant that the principle of confidentiality of communications expressed in those directives applied to An Garda Síochána as an emanation of the State, in a situation where Ireland had failed to transpose the principle into Irish law within the time stipulated. It considers it to be sufficiently clear, precise and unconditional to enable a national Court to find that the provision is, in principle, capable of having direct effect.
- 9.7.102 The principle of confidentiality of communications laid down by the directives was ultimately transposed into Irish law by Regulation 5 of S.I. 336/2011. An Garda Síochána were therefore prohibited, as a matter of national law, from July 2011, from operating systems of recording telephone calls which breached that principle.
- 9.7.103 Article 7 of the Charter of Fundamental Rights of the European Union replicates in substance the provisions of Article 8.1 of the Convention. The Commission has concluded that An Garda Síochána acted in breach of Article 8 by operating the telephone recording systems to record and retain, indiscriminately, all calls on certain non-999 lines at certain Garda stations. It follows that An Garda Síochána was similarly in breach of Article 7 of the Charter from 1 December 2009, the date upon which the Charter had full legal effect. Furthermore, to the extent that the operation of the systems infringed the provisions of Article 7 or Article 8 of the Charter, it was not “provided for by law” as required by Article 52 of the Charter for any limitation on those rights. As stated previously, the Commission has concluded that the systems as operated by An Garda Síochána were not authorised by any national legal provisions.
- 9.7.104 In these circumstances, the Commission has considered the recent judgment of the Grand Chamber of the Court of Justice delivered as recently as 21 December 2016 in *Tele2 and Watson*, which considered the interpretation and scope of Article 5 of Directive 2002/58. The Commission is conscious that that case concerned more or less universal retention obligations imposed on providers of publicly available electronic communications services.
- 9.7.105 The telephone recording systems operated by An Garda Síochána differed in important respects from the activities considered by the Court of Justice in *Tele 2 and Watson*. With some exceptions, as a general proposition, the systems they operated recorded up to the time the call was transferred to an extension only persons who telephoned certain lines at some twenty Garda stations. While it seems, in principle that the obligation to

respect the principle of confidentiality applied to An Garda Síochána, the Commission observes that, there has to date been no authoritative judicial interpretation of the scope of the principle or of the particular prohibited acts, namely “listening, tapping, storage or other kinds of interception or surveillance of communications...”. Thus, while the Commission cannot, therefore, be definitive about that matter the telephone recording systems operated by An Garda Síochána to record non-999 calls were, in the view of the Commission, not authorised by law within the meaning of paragraph 1(g) of the Terms of Reference.

## **Conclusions**

- 9.1 The Commission is satisfied that the systems that were installed and operated at Garda stations to record and retain non-999 calls were not authorised by law. That conclusion has been reached under several headings of law, namely:
- An Garda Síochána had no authority at common law to install and operate these systems;
  - An Garda Síochána was not authorised by statute to install and operate these systems;
  - An Garda Síochána, in operating these systems, infringed the rights of the persons recorded to personal privacy as guaranteed by the Constitution;
  - An Garda Síochána, in operating these systems as an organ of State for the purposes of the European Convention on Human Rights Act 2003 and as a public authority for the purposes of Article 8 of the Convention, violated the rights to respect for private life, home and correspondence guaranteed by that Article;
  - An Garda Síochána, in operating these telephone recording systems, infringed the principle of confidentiality of communications laid down by Directives adopted by the European Union and the provisions of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.
- 9.2 It follows from this that An Garda Síochána was not authorised by law to use the recorded information obtained from non-999 calls as a result of operating these systems.
- 9.3 Although the installation, operation and use of these systems was not authorised by law, the Commission is of the view that the operation of these systems did not involve the commission of the offence of interception under the Postal and Telecommunications Services Act, 1983, as amended by the Postal Packets and Telecommunications Messages (Regulation) Act, 1993.



## 10. Recording of Solicitor/Client Calls

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### 10.1 Introduction

10.1.1. The Terms of Reference of the Commission, at paragraphs 1(h) and (i), require it to investigate and report on the following matters:

- (h) To establish whether any telephone conversations between solicitors and their clients were recorded by the said telephone recording systems.
- (i) To establish whether any information obtained from the said telephone recording systems by An Garda Síochána was used by it either improperly or unlawfully and, in particular, whether any recordings as may have been made by An Garda Síochána of Solicitor/Client telephone conversations were used for any purpose whatsoever.

10.1.2. The issue of solicitor/client calls arose very shortly after the existence of a recording system for non-999 calls became known. In her evidence to the Commission, during the investigation of the retirement of former Garda Commissioner Martin Callinan, the Attorney General, Ms Máire Whelan S.C., stated that it had occurred to her as a potential problem when the matter was reported to her at a meeting in her office on Tuesday, 20 March 2014.

10.1.3. The protection of legal professional privilege and the privacy of the solicitor/client relationship are fundamental to the criminal process. Any infringement of this privilege would be of the greatest concern. Given the lack of knowledge generally of the system employed by An Garda Síochána, and the implications for the criminal process that this system would have, should it be employed in a manner that impinged on the sanctity of the solicitor/client relationship, it was of the utmost importance that the Commission investigate fully the system employed and the processes used, in order to establish whether any infringement of that relationship had occurred.

### 10.2 Legal basis for solicitor/client confidentiality

10.2.1. It is a fundamental tenet of our criminal justice system that a person suspected of the commission of a criminal offence is, as of right, entitled to reasonable access to legal advice. The issue is larger than one of legal professional privilege, which usually concerns the right of one party to litigation to access to documents in the possession of

an opposing party or the admissibility in evidence of the contents of legal advice. In the criminal context, the overriding question is the guarantee of fair procedures at every stage of the process of the investigation of crime.

- 10.2.2. In *The People (Director of Public Prosecutions) v. Healy* [1990] 2 I.R. 73<sup>308</sup>, Finlay C.J. expounded on the constitutional character of the right of access to legal advice as follows:

“The undoubted right of reasonable access to a solicitor enjoyed by a person who is in detention must be interpreted as being directed towards the vital function of ensuring that such person is aware of his rights and has the independent advice which would be appropriate in order to permit him to reach a truly free decision as to his attitude to interrogation or to the making of any statement, be it exculpatory or inculpatory. The availability of advice from a lawyer must, in my view, be seen as a contribution, at least, towards some measure of equality in the position of the detained person and his interrogators.

“Viewed in that light, I am driven to the conclusion that such an important and fundamental standard of fairness in the administration of justice as the right of access to a lawyer must be deemed to be constitutional in its origin, and that to classify it as merely legal would be to undermine its importance and the completeness of the protection of it which the courts are obliged to give.”

- 10.2.3. It is axiomatic that the right of a suspect to consult a solicitor implies that he or she must be entitled to do so privately, a matter now expressly laid down in the Custody Regulations<sup>309</sup>. The judgment of the Court of Criminal Appeal delivered by Barrington J. in *Director of Public Prosecutions v Finnegan* (Unreported, Court of Criminal Appeal, Barrington J., 15 July 1997) makes this point clearly. In that case, the Appellant had been permitted to speak to his solicitor on the telephone from the Garda station, but members of An Garda Síochána had remained in the room. While they withdrew some distance, they heard some of the conversation. The Court accepted that the members of An Garda Síochána had not deliberately set out to defeat the Appellant’s right but, nonetheless, the Court held that there had been a breach of his constitutional right to consult with his solicitor in private. The Court ruled, at p. 42, that:

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<sup>308</sup> *The People (Director of Public Prosecutions) v. Healy* [1990] 2 I.R. 73 at P 81

<sup>309</sup> S.I. No. 119/1987 – Criminal Justice Act 1984 (treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987.

“There was a breach of [the Appellant’s] constitutional rights when he was denied private access by telephone to his solicitor. From that point on he was in unlawful detention.”

10.2.4. Apart from the constitutional rights involved, it is, of course, also the case that the communications between solicitor and client are privileged. The importance of legal privilege is reflected in the case law relating to the solicitor/client relationship and the treatment of a prisoner in custody.<sup>310</sup>

10.2.5. It is obvious that respect for legal privilege is binding on An Garda Síochána, in relation to solicitor/client phone calls. Legal privilege also binds the Commission. It is provided by s. 20 of the Commissions of Investigation Act 2004 (“the Act”), which states that witnesses before the Commission have the same privileges and immunities as a witness in proceedings in the High Court. Section 21(1)(a) of the Act provides that:

“nothing in this Act compels...the disclosure by any person of any information that the person would be entitled under any rule of law or enactment to refuse to disclose on the grounds of any privilege or any duty of confidentiality...”

10.2.6. The effect of sections 20 and 21 of the Commissions of Investigation Act 2004 is that the Commission may rule on cases of refusal to disclose information or to produce documents on the ground of privilege. Its power is limited to deciding whether the claim is duly made out. The Commission has no power to override a claim of privilege properly made.

10.2.7. Therefore, the Commission has taken the view that it is not entitled to listen to recordings of telephone calls for the purpose of deciding, by reference to their content, whether they were calls between solicitor and client, unless the privilege attached to such conversations had been waived by the client. Without listening to a recording, the Commission could not ascertain the identity of the client by whom such privilege could be waived. The Commission does not believe that it has been prevented from investigating whether the Garda telephone recording systems recorded and / or accessed telephone calls between solicitors and their clients at Garda stations. It was able to rely on significant other evidence including: custody records; audit trails; documentary evidence such as access requests; and evidence of Garda technicians and other Garda witnesses in interviews and correspondence with the Commission. All this was cross-

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<sup>310</sup> The State (Harrington) v Commissioner of an Garda Síochána, unreported, High Court, December 14<sup>th</sup>, 1976, Director of Public Prosecutions v Bernard Finnegan, unreported, 15<sup>th</sup> July 1997.

referenced with the results of the searches that the Commission undertook of the Garda recording system as outlined below.

**Relevant legislation**

10.2.8. The importance of the solicitor/client relationship and the right of an arrested person to consult his or her solicitor in private was put on a statutory footing by Regulation 11 of the Criminal Justice Act 1984 (Treatment of Persons in Custody) Regulations 1987, which provides:

(1) “An arrested person shall have reasonable access to a solicitor of his choice and be enabled to communicate with him privately.

.....

(3) A consultation with a solicitor may take place in the sight but out of hearing of a member”.

10.2.9. Section 5A(8) of the Criminal Justice Act 1984, as inserted by s. 9 of the Criminal Justice Act 2011, confirms that a consultation would include a conversation that a prisoner has with his or her solicitor while in custody.

**Garda regulations**

10.2.10. Regulation 11 of the Criminal Justice Act 1984 (Treatment of Persons in Custody) Regulations 1987 is addressed in a Garda briefing document entitled, “Regulation 11: Visits and Communications”. This document repeats the wording of the Regulation, as quoted at paragraph 11 above, and goes on to provide:

“11(5)(a) An arrested person may make a telephone call of reasonable duration free of charge to a person reasonably named by him .... provided that the member in charge is satisfied that it will not hinder or delay the investigation of crime. A member may listen to any such telephone call and may terminate it if he is not so satisfied...

11(5)(b) Subparagraph (a) is without prejudice to the provisions of paragraph (1).”

10.2.11. The issue of solicitor/client phone calls is not dealt with directly in the Garda briefing document, but it is mentioned in the “notes” section on page 11, in relation to Regulation 11(5). It is stated that a person in custody may contact another person and that this communication may be monitored by a member of the force (reflecting Regulation 11(5)). This monitoring relates to non-solicitor/client calls. The note indicates that such monitoring is not permitted in the case of a solicitor/client telephone call, as provided by paragraph 11(1) listed above.

- 10.2.12. This document emphasises the privacy that attaches to solicitor/client phone calls. The reference to monitoring other calls is also important. It must be clear to all parties, solicitor, client, and Garda, which lines are recording and which lines are not.
- 10.2.13. Of note also is Regulation 23, which provides that particulars of any telephone calls made by prisoners should be recorded in the relevant custody records. The requirement under this regulation, that particulars of telephone calls be noted in the relevant custody records, provided the Commission with a valuable source of reference in the course of its investigations of this module of its Terms of Reference.

### 10.3 Solicitor/client privilege and Law Society of Ireland

- 10.3.1. It was clear from the outset that solicitors, in general, and especially solicitors practising in the area of criminal law, would necessarily have a particular interest in the investigation by the Commission of possible recording at Garda stations of conversations between them and their clients.
- 10.3.2. On 4 April 2014, in advance of the formal establishment of the Commission, the President of the Law Society of Ireland, Mr John P. Shaw, wrote to the Taoiseach to express concern, on behalf of the solicitors' profession, at the implications of matters that had come to light. He wrote this letter following discussions with both the Council of the Law Society and the Law Society's Criminal Law Committee. The Law Society subsequently forwarded a copy of this letter to Mr Justice Fennelly, prior to the establishment of the Commission. The letter describes what had been revealed as "deeply disturbing" and states that it strikes "directly at the foundations of our criminal justice system." It also cites the passage from the judgment of the Court of Criminal Appeal delivered by Barrington J. in the case of *Director of Public Prosecutions v. Finnegan* cited at paragraph 6 above.

The Law Society letter continues:

*"Any breach of the right to private access to a solicitor is, in and of itself, a breach of a person's constitutional rights. It is important to note that, even where a detainee has not been charged or lawfully convicted, any interception of a telephone call between a client and their solicitor is a breach of their Constitutional rights to privacy and rights protected under the European Convention on Human Rights.*

*“Where a person also then becomes subject to proceedings following such a breach their constitutional rights to a fair trial and due process may also be affected. The protection afforded to conversations between clients and their solicitors for the purpose of obtaining legal advice is central to the Constitutional right to a fair trial, the justice system as a whole and may be a potential breach of the Article 8 privacy rights of individuals protected by the European Convention on Human Rights”<sup>311</sup>*

10.3.3. The letter lists some 41 issues that the Law Society believed needed to be addressed by the Commission. Among the matters listed for inclusion in the Commission’s Terms of Reference are:

- *“Identify all instances where solicitor-client confidentiality was breached by the very recording/interception”;*
- *“Identify any instances where conversations between solicitor-client were covertly monitored and/or were used in subsequent investigations.”*

10.3.4. The Law Society also suggested that the Terms of Reference of the Commission should extend to any other covert listening devices / recording devices / interceptions / monitoring other than telephones. In the event, the Terms of Reference, as finally drafted, limit the Commission’s remit to telephone recording systems only.

10.3.5. The Commission fully appreciated and understood the serious concerns expressed by the Law Society. It would be an extremely grave matter if it were to emerge that An Garda Síochána had been engaged in recording, listening to or obtaining access to recordings of conversations between solicitors and their clients. It was, therefore, of the utmost importance that the matter be thoroughly investigated.

10.3.6. It was apparent that the letter from the President of the Law Society was prompted by a sense of shock and surprise in the profession on learning that An Garda Síochána had been engaged in recording telephone calls at Garda stations. At the same time, the President did not suggest, either to the Taoiseach or to the Commission, that the Society or its members were aware that there was any extant problem of recording of solicitor/client calls.

10.3.7. It is not surprising that the Law Society did not, therefore, at that time offer to provide the Commission with any evidence of knowledge of such activity. It is also important to note that the Commission did not receive any spontaneous complaints from solicitors

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<sup>311</sup> Article 8 of The European Convention on Human Rights.

stating that they were aware of or suspected such improper activity on the part of An Garda Síochána. Solicitors did contact An Garda Síochána directly however, and this is dealt with at paragraph 10.7 below.

- 10.3.8. On 28 July 2014, the Commission arranged a meeting with Mr Ken Murphy, Director General of the Law Society, Ms Shalom Binchy, Chairperson of the Law Society's Litigation Committee, Mr James McGuill, former President of the Law Society and former Chairman of the Criminal Law Committee and Ms Emma-Jane Williams, Secretary to the Criminal Law Committee.
- 10.3.9. At the meeting, it was agreed that, while solicitors would be concerned if it was shown that their calls to clients had been recorded, it would be much more serious if it were to be shown that these recorded calls had been accessed subsequently by members of An Garda Síochána.
- 10.3.10. The meeting focused on the most effective way of addressing the issues raised by paragraphs 1(h) and (i) of the Commission's Terms of Reference, as outlined above. It was explained that there were two distinct periods for which recorded material existed: the period from 1995 to 2008, during which calls were recorded on DAT recorders which were located in Divisional Stations throughout the country; and the period from 2008 to 2013, when calls were recorded by the NICE system which collated the data centrally at Garda Headquarters (HQ) in Phoenix Park.
- 10.3.11. It was suggested by representatives of the Law Society that a feasible method of looking at instances where clients made calls to their solicitors whilst in custody would be to examine custody records for the Divisional Stations and to note when a call was recorded as having been placed or received by a person in custody. These calls could then be located in the database of recorded and, more importantly, accessed calls. The Commission conducted a pilot project on the feasibility of this approach which is detailed below, commencing at paragraph 10.4.

## **10.4 Custody records – Pilot study**

- 10.4.2. As described above, suspects are entitled to have access to and to receive advice from their solicitors while in detention. That may entail telephone communications between a detainee and his or her solicitor. Regulation 23 of the Criminal Justice Act 1984 (Treatment of Persons in Custody) Regulations 1987 requires that the fact of any such call be recorded in the custody record that is kept in all Garda stations where prisoners are detained. This custody record is a record of all actions taken with respect to the

detainee, including all calls made by him or her, the number called and the telephone used, but not, of course, the content of the call.

- 10.4.3. Examination of the custody records would show whether any detainee had made a telephone call to his or her solicitor. It was suggested that, if the Commission had the date and time of such a call, it would be possible to ascertain whether that call had been recorded and accessed.
- 10.4.4. It is clear from the information contained on the DAT tapes that have been collated is extremely limited and often not reliable. Whilst dates appear on some tapes, these dates may not necessarily reflect the time of the recordings on the tape, as tapes were often used and re-used. Also, it is virtually impossible to pin down a particular call at a particular time and date without listening to dozens of calls, which would be an extremely time-consuming process.
- 10.4.5. In relation to the NICE period (2008 – 2013), date and time and any other data available from the custody records might prove to be of more assistance, since these recordings are stored centrally at Garda HQ and are capable of being searched.
- 10.4.6. In an endeavour to pursue this line of inquiry, the Commission obtained custody records from the Garda Station at Ennis, Co Clare, for the year 2008.
- 10.4.7. These books have been examined by the Commission for the whole of 2008. It has been estimated that it would take up to three weeks for one person to examine and investigate the records for one year. Given that records would have to be examined for a period of almost 30 years, and given that there could be up to 20 Garda stations involved, it quickly became apparent to the Commission that this approach was not feasible and it was decided not to continue the project.
- 10.4.8. The Commission concluded that, whilst custody records were not, in themselves, a practical way of proceeding, they could be used as required to support data collected by other means.

## **10.5 1995 – 2008 (The DAT period)**

- 10.5.1. Because the DAT recordings could not be searched by telephone number, the Commission was forced to limit the scope of its investigations for this period. Even if the problems of observing legal privilege and callers' privacy rights were somehow overcome, to listen to every recorded call on the 3,000 or more tapes still in existence would take years, if not decades to complete.



- 10.5.2. Adopting a more general approach, the Commission sought to identify, firstly, those stations where the recording of solicitor / client calls was either impossible or inherently unlikely during this period, based on the location of recorded telephones within the station.
- 10.5.3. Outside of the DMA, recording took place only at Divisional Headquarters stations. In almost all of these stations, the only non-999 telephone line to be recorded was the main telephone number for the station.
- 10.5.4. Though it is not impossible for a solicitor / client conversation to have been recorded on the main station line, it is extremely unlikely, for the following reasons:
- The telephone for the main station line was located in the Control Room of each Divisional station. This room was, in effect, the nerve centre of Garda operations for the Division, where emergency calls were handled and Garda resources were managed via radio communications. Notice boards in the room would often contain sensitive and confidential information. As a matter of principle and practice, members of the public, including prisoners, were not admitted to these rooms.
  - All Divisional Stations had telephones in other parts of the station that were not recorded and could be used by prisoners to call their solicitors. In many cases, there was a dedicated telephone extension set aside for this purpose. Thus, if a solicitor called the main station line, it would be a simple matter for the Control Room operator to transfer the call to an unrecorded extension somewhere in the station. Transferring the call would also mean that the main station line was then free to receive other calls from members of the public. Because of this, there is no reason to believe that prisoners would be brought into a room containing sensitive information and allowed to use the main station telephone line to talk to their solicitor.
- 10.5.5. As detailed in Chapter 5 of this Report, the Commission found a total of 4 Divisional Stations where non-999 lines other than the main station line were recorded during this period. The Commission has investigated, insofar as it can, whether solicitor / client calls were or could have been recorded on these lines.

- 10.5.6. In Mill Street Garda station, Galway, a line in a room used as an Incident Room for major criminal investigations was recorded, apparently on the instruction of the District Superintendent. The technician who connected the line told the Commission in evidence that he labelled the telephone as being recorded, and that there were other lines in the room that were not recorded. The Incident Room was on the second floor of the station and, by its nature, would often contain sensitive information. Prisoners were processed on the ground floor in a dedicated area; there was no reason for them to be brought up to the Incident Room at any time. Accordingly, there is no reason to believe that solicitor / client calls would have been recorded on this line at any point.
- 10.5.7. In both Waterford and Wexford Garda stations, lines in the Public Office of the station were recorded. In both stations, calls to the main station telephone line would transfer automatically to the Public Office if they were unanswered in the Control Room. The decision to record the Public Office lines appears to have been motivated by the desire to capture the transferred calls from the main station telephone line, but in doing so, all calls to these Public Office lines were recorded.
- 10.5.8. Although the Commission has established that these lines were not recorded with the intention of capturing solicitor / client calls, it is possible that some such calls were recorded. In both stations, prisoners were processed in areas either in or near the Public Office and it is possible that a prisoner may have been instructed or allowed to use a recorded line to communicate with his or her solicitor.
- 10.5.9. Finally, in Bandon Garda station, a number of non-999 lines were recorded, for varying periods, for reasons that are mostly unknown. The details are set out in Chapter 5 of this Report. In the course of its work under paragraph 1(m) of the Terms of Reference, which instructs the Commission “to identify and review” recordings relating to the Garda investigation of the death of Madame Sophie Toscan du Plantier, the Commission found evidence that four solicitor / client calls had been recorded at Bandon, on lines other than the main station telephone line.
- 10.5.10. In the course of complying with a Discovery Order issued by Hedigan J. in the civil cases taken by Mr Ian Bailey and Ms Catherine Jules Thomas against An Garda Síochána and others (known, for the purposes of this Report, as “the Bailey case”), a total of 10 DAT tapes were produced by a Telecommunications technician in Bandon Garda Station, which referred to the period 1997 / 1998 and 2002 / 2003. In order to check whether these tapes contained anything of relevance to the Discovery Order, they were listened to by members of An Garda Síochána from January to April 2014. This exercise is described, in detail, in Chapter 12 of this Report.

- 10.5.11. All of the calls on these 10 tapes were listened to by An Garda Síochána – over 42,000 in total. Of these, some 282 were deemed by An Garda Síochána to be relevant to the murder investigation.
- 10.5.12. The Commission carried out a verification exercise on a sample of these tapes and members of the Commission’s legal team listened to calls on three telephone lines which had contained the most calls of relevance to the murder investigation.
- 10.5.13. In the course of this exercise, the Commission found that 4 solicitor/client calls had been recorded at Bandon Garda Station on lines which fell on lines other than the main station telephone line. These telephone lines should not have been recorded, a statement which applies, *a fortiori*, to the recording on them of solicitor/client calls. The Commission has also established that one or more members of An Garda Síochána listened to these calls in late 2013 or early 2014. This occurred as part of the Garda exercise of listening to the Bandon DAT tapes, which was intended to identify which calls were relevant for the purposes of the Discovery Order in the Bailey action. It goes without saying that members of An Garda Síochána should not have listened to these calls. On the other hand, the Commission has seen no evidence to suggest that those members of An Garda Síochána listened to those solicitor/client calls in order to obtain information about or to use their contents. The listening occurred contemporaneously with and incidental to the Discovery exercise.
- 10.5.14. The Commission has not been able otherwise to establish whether any of these solicitor/client calls had been accessed, at any time, by An Garda Síochána. The DAT system, unlike the NICE system, left no audit trail, i.e., no record of whether a call had been accessed. However, these solicitor/client calls were a small number of the total calls recorded on the three channels. They were not designated solicitor/client lines. In short, the recording, and listening to, of these solicitor/client calls is to be deplored. But the Commission is satisfied that these events occurred through inadvertence and not as part of any policy of recording solicitor/client calls so as to use their contents, which would have been an extremely serious matter.
- 10.5.15. As described, in detail, in Chapter 5 and Chapter 12 of this Report, the recording that occurred in Bandon Garda Station is not typical of other Divisional Stations. Lines were recorded in Bandon that were not recorded elsewhere and these 4 calls occurred on channels that were outside those that were recorded in other Divisions. The Commission is aware of two other Divisional Stations (Waterford and Wexford) where lines in the Public Office were recorded that may, on occasion, have been used by prisoners speaking to their solicitors. These exceptional situations aside, the Commission is

satisfied that solicitor/client calls were not systematically recorded on the DAT systems between 1995 and 2008.

## 10.6 Search of NICE recordings

- 10.6.1. Following its consultation with the Law Society, the Commission decided to conduct a technical examination of the recordings in Divisional Stations made during the NICE period only (2008 – 2013).
- 10.6.2. The following practical considerations led the Commission to this decision:
- (i) It was not technically possible or physically feasible to conduct a meaningful inquiry in relation to the DAT tapes, because they consisted of more than 3000 tapes recorded at different Divisional Garda stations over a period of more than 12 years.
  - (ii) The DAT recordings could be searched only if the date and time of a particular call was supplied. They could not, as in the case of the NICE system, be searched against telephone numbers.
  - (iii) Even if the date and time of a call were available, it would only be possible to locate the call on the DAT system by listening to all calls made in and around that time until the particular call was identified. This would be an extremely lengthy process and would be unreliable.
- 10.6.3. The Commission therefore, decided, to conduct its investigations on the NICE hard-drive system, because it was possible to search it by reference to specific telephone numbers. In order to investigate the matter in that way, the Commission needed to contact solicitors in the Garda Divisions who included criminal law as part of their practice and to obtain their telephone numbers. Harcourt Square, Dublin and Anglesea Street Cork were excluded due to the fact that prisoners were not processed in these Garda Stations. Drogheda Garda Station was also excluded as NICE recordings in this Station were not searchable due to the nature of the different telephone system used in this station. This is referred to in Chapter 5.
- 10.6.4. The Law Society has no database of solicitors who practise criminal law. The database of solicitors consists of all solicitors practising in a given locality without distinguishing different types of practice. It was agreed that the Commission would need to identify relevant telephone numbers by asking for the assistance of the profession.

10.6.5. Following the meeting with the Law Society, the President, Mr John P. Shaw, sent a notice to solicitors by eBulletin on 30 July 2014.<sup>312</sup> This notice urged solicitors to cooperate with the Fennelly Commission. It stated that the Commission would specifically welcome information from any solicitor who:

- Had either actual evidence or suspicion of a telephone conversation between him or her and a client being recorded;
- Had either actual evidence or suspicion of information known only to the solicitor and client coming into the possession of An Garda Síochána, following a telephone conversation conducted in a Garda station;
- Had experience of making calls to and from Garda stations and the procedures that applied;
- Had any awareness or concern that telephone communications within Garda stations were not secure, and could provide the reason for such concern.

10.6.6. Following this notice, a further notice was published in the Law Society eZine in November 2014.<sup>313</sup> It stated that the Commission had requested that the Law Society ask all solicitors who made calls to or from Garda stations between 1995 and 2013 to furnish to the Commission details of all telephone numbers used for such calls. The notice went on to say that the Commission would use these numbers to endeavour to establish:

- Whether any call to or from that number had been recorded; and
- Whether that recorded call had been accessed by any person.

Solicitors were advised that the Commission would not be listening to any recorded telephone conversations and that the telephone numbers would be treated in confidence.

The notice stated:

“Despite media reports that suggest the problem was limited and isolated, the Society shares the view of Government that this is a most serious matter indeed and urges all solicitors to provide assistance to the work of the Fennelly Commission”.

10.6.7. In the January/February 2015 issue of the Law Society Gazette, which is distributed in hard copy to all solicitors on the Law Society Register, a further notice appeared. It was

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<sup>312</sup> [www.gazette.ie](http://www.gazette.ie) Aug/Sept 2014 P11.

<sup>313</sup> Law Society.ie Legal eZine for Members Issue 56: December 2014.

headed “For the Urgent Attention of all Criminal Practitioners”. That notice reiterated the Commission’s request for assistance from all solicitors engaged in criminal law practice in the State. It once again requested that all solicitors, who had made calls to or from Garda stations between 1995 and 2013, furnish to the Commission details of all telephone numbers used for such calls. The Commission would then endeavour to establish whether any calls made to or from the furnished numbers had been recorded and whether they had been accessed by any person.

- 10.6.8. In addition to the notices that were directed specifically to solicitors, the Commission placed a number of notices in the print media inviting any member of the public, including solicitors, to give it information relevant to its Terms of Reference. These notices are dealt with in Chapter 7.

## **10.7 Response to notices from solicitors**

- 10.7.1. Following this engagement with the solicitors’ profession, the Commission received information from 43 firms who practiced criminal law. However, of these, 25 were Dublin based and, as has been outlined in Chapter 6 of this Report, the NICE recording system was never installed in Divisional Stations in the Dublin Metropolitan Area (DMA): all 999 calls were answered and recorded centrally in Command and Control, Harcourt Square, Dublin.
- 10.7.2. The overall response to the several requests for information was regarded by the Commission as poor. Once solicitors based in Dublin were eliminated, the Commission received phone numbers from only 18 solicitors’ firms of relevance.
- 10.7.3. This low level of response calls for comment. With the cooperation of the Law Society, which the Commission greatly appreciates, the Commission was enabled to address directly the entire body of the solicitors’ profession in Ireland. There can be no doubt that the profession was aware of the revelations regarding telephone recording. It had received very wide, not to say sensational, publicity in March 2014. As the President of the Society informed the Commission, the matter had been discussed by both the Criminal Law Committee and the Council of the Society. In the circumstances, the minimal response to the Commission’s notices strongly suggests that there was no significant concern about possible solicitor/client recording among solicitors in criminal practice. If there had been any significant suspicion among practising solicitors that their telephone calls with clients at Garda stations were being recorded, it would be expected that the publicity concerning recording in March and April 2014 drawing attention to

recording would have prompted some, at least, of the profession to communicate with the Commission, the establishment of which was also publicly announced.

- 10.7.4. Some solicitors did contact An Garda Síochána directly and these queries were referred to a ‘helpdesk’, established by An Garda Síochána, to handle any queries that came in following the revelations of telephone recording in March 2014.

## **10.8 Change Management: Telephone-recording helpdesk**

- 10.8.1. Independently of both the Law Society and of the investigation conducted by this Commission, An Garda Síochána, themselves, conducted investigations of instances of suspected telephone recordings that were notified to them.
- 10.8.2. To do this, they established a centralised telephone-recording helpdesk, “The Garda Helpdesk”, which was set up on 25 April 2014. The Garda Helpdesk was managed by the Change Management section of An Garda Síochána and its role was to record and investigate all queries received in relation to possible instances of telephone recording.
- 10.8.3. Once received by the Helpdesk, the query was forwarded to either the Telecommunications Section, ICT (Information and Communication Technology), or the Crime, Policy and Administration Section, Crime and Security, for an appropriate response to be prepared. It was the role of the Helpdesk to record the response and forward it on to the querist. The Helpdesk received a total of 105 queries, 104 of which were forwarded to the Commission. The one outstanding query was dealt with by the Helpdesk and was also the subject of correspondence with the Commission. When the investigation undertaken by An Garda Síochána was complete, the Commission was sent the files.
- 10.8.4. The queries to the Helpdesk were varied. Some were very specific complaints while others were broader and more general in nature. The parties seeking information ranged from individual members of the public and solicitors’ firms to persons who sought information in relation to their own detention.
- 10.8.5. Other documentation that did not form part of the Garda Helpdesk files sent on by An Garda Síochána also came to the attention of the Commission. This comprised documented searches undertaken by Garda technicians responding to requests for information relating to telephone-call recordings of persons detained in Divisional Stations.
- 10.8.6. The actions of An Garda Síochána in responding to Helpdesk inquiries had implications for the searches that were conducted by the Commission. From reviewing the 104 files,

it became clear to the Commission that, in the course of conducting searches for access events, it was possible for members of An Garda Síochána to themselves create a record of an instance of access. Searches conducted by technicians of An Garda Síochána in responding to Garda Helpdesk queries accounted for the majority of the results of access searches conducted by the Commission.

- 10.8.7. Three State Solicitors contacted the Helpdesk seeking information in relation to the recording systems in their respective counties. This was a pre-emptive move, in anticipation of issues that might arise in the course of prosecutions in which they were involved. In two instances, the Garda Helpdesk reported to the inquiring firm that it was impossible to record telephone calls in any of the Garda stations within the area of responsibility of the State Solicitor. The third request related to the Kilkenny/Carlow Division. Confirmation was given by the Helpdesk to the solicitor in question that only 999 calls were recorded and that the designated prisoners' telephone was not recorded. In fact, Kilkenny Garda Station did record all calls into the main line of the station and, therefore, it was not correct to say that only 999 calls were recorded. The Commission searched this Division for telephone-call recordings and the results showed that 284 solicitors' telephone calls were recorded. Only one of these calls was accessed and the Commission is satisfied, following investigation, that that instance of access could not have related to a solicitor/client call.
- 10.8.8. Ten solicitors' firms contacted An Garda Síochána with broad queries seeking all recordings made of their telephone calls to and from Garda stations. Eight of these firms were from the DMA and two from outside the area. These requests were dealt with in a similar manner – a reply was sent by An Garda Síochána, stating that the query could not be dealt with as requested, and that queries should be submitted on a case-by-case basis. Firms were requested to furnish the Helpdesk with the relevant details of the client and his or her detention, as well as any related telephone calls made, while he or she was in custody, in order to further any inquiry. One solicitors' firm requested all telephone-call recordings related to that firm to and from one particular Dublin Garda station. The firm was informed that no recording took place in that particular Garda station. Another solicitors' firm sought all recordings made of their telephone calls in relation to one particular station located outside Dublin. In response, the Garda Helpdesk stated that such a general inquiry would be best dealt with by the Commission. The firm did not make any direct request to the Commission; however, when contacted by the Commission, it forwarded on copies of relevant telephone numbers for input into the Commission's searches. Eight recordings were made of the firm's telephone calls to and from Castlebar Garda Station. No instance of solicitor/client access was found by the Commission.



- 10.8.9. A total of 65 queries were raised by solicitors regarding telephone calls made involving their clients while they were in custody. Of these, 38 related to Garda stations in the Dublin area, where no recording took place. A further 11 queries related to Garda stations outside Dublin in which no recording equipment was installed.
- 10.8.10. Further investigation was warranted in respect of 16 solicitors' queries, which related to Divisional Stations outside the DMA that had recording equipment installed at the time of the query. Of these, 8 queries related to the recording of prisoners who were in custody during the DAT period in Divisional Stations where telephone calls were being recorded. In 5 instances, it was found that it was not possible for a prisoner in the station to make a telephone call that was recorded. There were 2 queries where it was possible for a recorded telephone call to be made. However, no DAT tapes from the period in which the prisoner was in custody existed. One query was regarded as too broad and the Helpdesk sought clarification from the requesting firm in order to narrow the search terms. There was no response to this request and the file was ultimately closed. The firm in question was notified of same.
- 10.8.11. The 8 remaining queries consisted of files that were looked at in further detail by An Garda Síochána in order to ascertain whether recordings of prisoners and access to same had occurred on the NICE Inform system.
- 10.8.12. These searches were conducted by the Divisional Station in question and by members of the Telecommunications Division of An Garda Síochána at Phoenix Park. First, the custody records were checked and it was ascertained whether the prisoner in question had, in fact, made a call to a solicitor while in detention. In the event that custody records indicated that a telephone call had been made, the layout of the station and the identity of the telephone used to make the call made it possible, in some cases, to rule out the possibility that a call between a solicitor and client had been recorded. Following this, if there remained a question regarding a telephone call, the matter was referred on to the Telecommunications Section at Garda HQ and a search was made for recordings, using the time and date of any telephone calls logged in custody records and any relevant telephone numbers used by solicitors in calling or being called from Garda stations. Three such searches were conducted by technicians of An Garda Síochána. No solicitor/client calls were found, although two of these searches showed in the results of the Commission's searches for accessed telephone calls of solicitors.
- 10.8.13. The remaining queries which were dealt with by the Helpdesk consisted of inquiries by members of An Garda Síochána seeking general information as to the extent of recording in Garda stations and how this might affect them.

- 10.8.14. Members of the public also contacted the Helpdesk with similar requests or requests that were specific in time, date and location. Further, there were a number of inquiries from the Garda Síochána Ombudsman Commission or the Garda Bureau of Fraud Investigations. Two of the files consisted of referrals from the Commission to An Garda Síochána where the querist contacted the Commission in the first instance.
- 10.8.15. No instances of solicitor/client calls being deliberately accessed by An Garda Síochána were identified by the Garda Helpdesk.

## **10.9 Gathering telephone numbers by the Commission in order to search the NICE system for solicitors' telephone-call recordings and access to same**

- 10.9.1. The Commission was obliged to make direct contact with solicitors in order to confirm whether they had a criminal practice and whether they were interested in helping the investigation. They could do this by supplying the Commission with any telephone numbers used in contacting, or being contacted by, Garda stations.
- 10.9.2. The Commission used the Law Society Directory for 2014 as a guide to solicitors practising in each county. Out of a total of 1,054 solicitors' firms contacted, 576 stated both that they had a criminal practice and that they were interested in aiding the inquiry. Fifteen firms stated that they had a criminal practice but that they did not wish to engage with the Commission.
- 10.9.3. Solicitors' firms, once identified from the Directory, were contacted by telephone and, if necessary, by email. Solicitors were informed that:
- i. The objective of the Commission was to establish whether recording of solicitors' calls, to and from Garda stations, including solicitor/client calls had, in fact, occurred;
  - ii. It was not the intention of the Commission to listen to any recordings;
  - iii. Once it was established that recording had occurred, the Commission would seek to establish whether any of these recorded calls had been accessed;
  - iv. To this end, solicitors were asked to provide telephone numbers that they would habitually use in contacting Divisional Stations.
- 10.9.4. Over a three-month period, three legal practitioners worked on this project on behalf of the Commission, collecting both landline and mobile telephone numbers from all

relevant Divisions. The project began in mid-February 2015. By the end of May 2015, most telephone numbers had been gathered.

- 10.9.5. Comparison was made with data available relating to the Criminal Legal Aid payments scheme. It was apparent that those solicitors who were most involved in criminal defence work throughout the country had either been contacted by the Commission or had already sent in their relevant telephone numbers.

**List of Divisions, Divisional Stations and total solicitors' telephone numbers gathered**

<b>Region</b>	<b>Division</b>	<b>Divisional HQ</b>	<b>Total solicitors' telephone numbers gathered</b>
Northern	Cavan/Monaghan	Monaghan	73
Western	Clare	Ennis	49
Southern	Cork City	Anglesea Street	N/A
Southern	Cork North	Fermoy	109
Southern	Cork West	Bandon	112
Northern	Donegal	Letterkenny	85
Dublin Metropolitan	DMR	Harcourt Square	N/A
Western	Galway	Mill Street	122
Southern	Kerry	Tralee	89
Eastern	Kildare	Naas	159
South Eastern	Kilkenny/Carlow	Kilkenny	78
Eastern	Laois/Offaly	Portlaoise	44
Southern	Limerick	Henry Street	122
Eastern	Louth	Drogheda	87
Western	Mayo	Castlebar	111
Eastern	Meath	Navan	191
Western	Roscommon/Longford	Roscommon	74
Northern	Sligo/Leitrim	Sligo	63
South Eastern	Tipperary	Thurles	166
South Eastern	Waterford	Waterford	98
Eastern	Westmeath	Mullingar	43
South Eastern	Wexford	Wexford	82
South Eastern	Wicklow	Bray	76

<b>Total</b>	2,033
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### **Conclusion**

- 10.9.6. The Commission eventually succeeded in registering 2,033 telephone numbers from 576 relevant solicitors' firms, inclusive of those received in response to its advertising efforts. This was a significant sample of all the solicitors' firms that could potentially have been involved in making telephone calls to and from Divisional Stations outside Dublin. The numbers from Dublin-based solicitors were, where appropriate, used in searches for areas outside Dublin. The Commission is satisfied that a significant and representative number of solicitors' telephone numbers was collated through the process adopted by it and that, from these numbers, reliable and useful information could be obtained.
- 10.9.7. The Commission is satisfied that the interrogation of the NICE recording system was the most effective and efficient way to investigate whether solicitor/client calls were recorded and /or accessed in Divisional Stations.
- 10.9.8. The Commission is of the view that it is possible to extrapolate, from the results obtained through investigation of the NICE recordings, whether further investigation of the DAT system is necessary or justifiable.

## **10.10 Explanation of databases**

- 10.10.1. An Garda Síochána hold three types of database in relation to telephone-call recordings. These are the "logger", "inserter" and "calls" databases and they are defined by the type of data that they hold in relation to recordings:
- The "logger" database is a simplified database of recordings that contains the metadata relating to a call, consisting of the start time, the end time and the duration of a call. It does not contain any of the telephone numbers used in making the call. This means that conducting a search based on telephone numbers in this database is not possible. All calls are automatically recorded within the "logger" database.
  - The "inserter" database is for call recordings with incomplete data. If a number ID or other detail of a call is incorrect, the call recording is diverted to the inserter database. This database is searchable only on a time and date basis and does not contain telephone numbers.

- The “calls” database is the database where all call recordings with data attached to them are stored and is the one which was of most use to the Commission, since it can be searched by using the solicitors’ telephone numbers which the Commission had collated.
- 10.10.2. The data collected by the “calls” computer programme is between 97% and 98% correct. Some data is missed and that data ends up in the “inserter” database. The Commission did not consider it of value to cross-reference results with any other database, given the high level of reliability of the “calls” database.

### **10.11 Telephone number input into NICE Inform system in Garda HQ, Phoenix Park**

- 10.11.1. Twenty relevant Divisional Stations had to be investigated by the Commission. Any search for recordings had to be conducted on a Divisional basis.
- 10.11.2. When all solicitors’ telephone numbers had been retrieved from the relevant Divisions, the process of inputting them into the NICE inform system, at Garda HQ, Phoenix Park, was put in train. The Commission was seeking, firstly, to establish the extent to which there were any recordings of solicitors’ telephone calls to and from Garda stations, and, secondly, to see if those telephone-call recordings had been subject to access.
- 10.11.3. It has to be emphasised that the search was for recordings of calls made by solicitors to and from Garda stations. The fact that a call from the office of a solicitor was identified did not automatically mean that the solicitor was speaking to a client on that particular call.
- 10.11.4. This process involved searching the NICE Inform system for recordings of particular telephone numbers. Three legal practitioners working for the Commission attended Garda HQ over a period of three months during the summer of 2015 to undertake this task.
- 10.11.5. On the NICE Inform system, the individual telephone numbers were inputted in a way that searched the database of each Divisional Station individually. The search was conducted on the “calls” database, which has been described at paragraph 10.10.1 above, for each Divisional Station.
- 10.11.6. This search was conducted by entering the telephone number into two fields, named “caller in” and “caller out” respectively. These two fields reflected the information that

was collected from telephone lines relating to telephone calls and attached to the respective telephone-call recordings.

10.11.7. Recordings were collated on the NICE system into 86 sections, each of which was individually searched. The 86 sections were data spaces to be filled over time and consisted of approximately one month of data each.

10.11.8. The sections were searched one by one, using all the numbers for any given Division. These numbers were gathered together by the Commission into tranches in advance. The tranches of telephone numbers were searched within each of the sections, to see if any instances of recording existed in a given section.

10.11.9. A sample specimen of the recording results is presented below:

<b>Resource</b>	<b>Start time</b>	<b>Duration</b>	<b>End time</b>	<b>Caller number</b>	<b>Called number</b>	<b>Direction</b>
Waterford - Ext 1234 - CH2	01/01/2012 10:00:00.0	00:00:27.0	01/01/2012 10:00:27.0	087 XXX XXXX	1234	IN
Waterford - Ext 4321 - CH1	02/01/2012 11:00:00.0	00:01:36.0	02/01/2012 11:01:36.0	4321	086 XXX XXXX	OUT

10.11.10. As has already been established, calls into Control Rooms and a small number of Public Offices in these Divisional Stations were recorded. Accordingly, any solicitor ringing the main line or, in some cases, the Public Office of the Garda station could expect that his or her call would be recorded. Recording ceased once the call was transferred to the relevant extension. Therefore, it was to be expected that a significant amount of the telephone numbers that had been collated by the Commission would be shown as having been recorded.

10.11.11. In total, the Commission identified 17,524 recordings from the 2033 numbers that had been collated. The breakdown of these recordings on a Division by Division basis is as follows:

<b>Division</b>	<b>Solicitors' numbers recorded</b>
Cavan/Monaghan	0
Clare	544
Cork North	448
Cork West	1,050
Donegal	270
Galway	272
Kerry	9
Kildare	512
Kilkenny/Carlow	284
Laois/Offaly	126
Limerick	2,628

Mayo	98
Meath	432
Roscommon/Longford	108
Sligo/Leitrim	288
Tipperary	60
Waterford	8277
Westmeath	620
Wexford	845
Wicklow	653
<b>Total</b>	17,524

10.11.12. When comparing the number of recordings found in the Commission's searches with the amount of telephone numbers entered into those searches, four Divisions presented as having an unusually low number of recordings:

<u>Division</u>	<u>Divisional Stations</u>	<u>Number of recordings found</u>
Cavan/Monaghan	Monaghan	0
Kerry	Tralee	9
Mayo	Castlebar	98
Tipperary	Thurles	60



### **Cavan/Monaghan Division**

- 10.11.13. In total, 25 solicitors' firms in the Cavan/Monaghan Division supplied the Commission with 73 numbers. Searches for telephone-call recordings in relation to these were made by the Commission team on 11 August 2015. A second search for recording results was deemed necessary, due to the fact that there were no recording results found for the period between 2008 and 27 November 2013. This second search was conducted on 4 May 2016 but the result was the same – no recordings of any of the solicitors' numbers were found. This prompted the Commission to contact An Garda Síochána in order to ensure that the system in Monaghan was, in fact, searchable, and, if so, to ask why no results were apparent from the searches that the Commission had conducted.
- 10.11.14. The Garda Telecommunications Division in Garda HQ conducted a search of the Monaghan database between 1 January 2008 and 26 January 2010 and found 70,000 recorded calls from all numbers, that is, not solely from the targeted solicitors' numbers sought by the Commission. A sample search was also completed from January 2012 to March 2013, in which over 60,000 recorded calls were found. These results were not reflected in the results of searches conducted by the Commission.

### **Kerry Division**

- 10.11.15. In total, 27 solicitors' firms in the Kerry Division supplied the Commission with 89 telephone numbers. Searches for telephone-call recordings were made by the Commission team on 11 and 12 August 2015. It was found that a total of 9 solicitors' phone calls were recorded in this Division. The Commission approached An Garda Síochána in relation to this low number and Garda technicians could find no problem in relation to this Division when testing the system. When they carried out an analysis on calls made to Tralee Garda Station between 2008 and May 2012, Garda technicians found over 200,000 recorded calls on the Tralee system.

### **Mayo Division**

- 10.11.16. In total, 27 solicitors' firms in the Mayo Division supplied the Commission with 111 telephone numbers. Searches for telephone-call recordings were made by the Commission team on 11 and 12 August 2015. It was found that 98 solicitors' telephone calls had been recorded in this Division. To test these results, in or about March 2016, technicians at Garda HQ, Dublin, searched the database for Castlebar Garda Station for the period between 10 July 2008 and 27 December 2010. 180,000 recorded calls were found. A further search of the period from January to December 2012 was conducted, which identified over 90,000 recorded calls.

### **Tipperary Division**

- 10.11.17. In total, 46 solicitors' firms in the Tipperary Division supplied the Commission with 166 telephone numbers. Searches for telephone-call recordings were made by the Commission team on 11 and 12 August 2015. It was found that a total of 60 solicitors' telephone calls had been recorded in this Division. To test these results, in or about March 2016, technicians at Garda HQ searched the database for Tipperary for the period between 22 August 2008 and 19 August 2009. 210,000 calls were found. A further search of the period from January to December 2012 was conducted and over 150,000 calls were found.
- 10.11.18. To conclude, the Commission has no explanation for the low number of recordings of calls from solicitors' numbers in these four Divisions. Possible explanations are: (i) that the lines on which solicitors called the station did not record the metadata and, therefore, they were not searchable by the Commission; (ii) that solicitors used lines other than lines that were being recorded, although, as the numbers had been provided by solicitors, this seems unlikely; (iii) there is some fault in the system that has not been detected by Telecommunications Section or the Commission.
- 10.11.19. In respect of the remaining 16 Divisions, the number of recordings found, whilst subject to considerable variation in quantity, was deemed to be reliable by the Commission and no further interrogation of these results was considered necessary.

## **10.12 Access Search**

- 10.12.1. The second search to be undertaken by the Commission was an "access search". This means the engagement, in any way, with a call once the recording has been created. Audio could be listened to on the system using three functions – "playback", "save scenario" or "save audio" – all of which are self-explanatory. The purpose of the search was to show whether this happened in relation to any telephone-call recording that matched a solicitor's telephone number.
- 10.12.2. The Commission understands that it is not possible to delete a recording or an access request on the NICE Inform system once it has been created.
- 10.12.3. Technical processes called "scripts" had been written specially for the Commission by NICE, in conjunction with SIGMA Wireless (the company that maintains the NICE system on behalf of An Garda Síochána), in order to enable it to run tests seeking instances of accessed recordings. There were two parts to the script that was created. The first identified all the access events. The results of this were then matched with a second script which identified all voice recordings that related to solicitors' numbers,

thus providing the Commission with a list of accessed telephone-call recordings of solicitors' numbers.

- 10.12.4. The script created for the Commission allowed searches to be made of specific telephone numbers. This facility was not ordinarily available to the members of An Garda Síochána who operated the NICE system in Garda HQ. The Commission understands that searches on the NICE system would normally be based on the estimated time of the call. This required the technician to “trawl” through calls made within a particular time period in order to find a specific call. The problems created by such “trawling” are dealt with from paragraph 10.14 below.
- 10.12.5. Chapter 6 of this Report describes, in detail, the search facilities available in the NICE system. These are Toolbar and NICE Inform. This chapter deals only with searches conducted through the NICE Inform system. Only the NICE Inform system left an audit trail. Any searches conducted by members of An Garda Síochána using the Toolbar system would not have left an audit trail and would not have been searchable by the Commission.
- 10.12.6. The information that was available from the NICE Inform audit trail was as follows:
- The identity of the technician who made the search;
  - The time that a technician logged in to the NICE Inform system;
  - The time any access occurred;
  - The type of function used in creating the access event;
  - The channel from which the accessed recording was made.
- 10.12.7. The results of the script searches were presented in a way that showed information about:
- The recording accessed;
  - The time and date of access;
  - The type of access that occurred;
  - The technician who conducted the access;
  - The computer the technician used;
  - The database from which the recording was extracted;
  - The relevant table, of the 86 tables available, to which the results related.

10.12.8. It was clear from the results of the access searches conducted by the Commission that not all Divisional Stations had access events and, accordingly, those Divisions showing no access events could be excluded from further investigation by the Commission. They are set out below:

<u>Division</u>	<u>Divisional Station</u>	<u>Number of recordings found</u>	<u>Number of access search results found</u>
Clare	Ennis	544	0
Cork North	Fermoy	448	0
Laois/Offaly	Portlaoise	126	0
Roscommon/Longford	Roscommon	108	0
Sligo/Leitrim	Sligo	288	0
Westmeath	Mullingar	620	0
Cavan/Monaghan	Monaghan	0	0
Kerry	Tralee	9	0
Mayo	Castlebar	98	0
Tipperary	Thurles	60	0

<b>Divisional Station</b>	<b>Total number of accessed telephone-call recordings</b>	<b>Communications Room</b>	<b>Public Office</b>	<b>Unascertained</b>

Bandon	8	4	4	0
Bray	1	1	0	0
Galway	2	2	0	0
Kilkenny	1	1	0	0
Letterkenny	4	4	0	0
Limerick	15	14	0	1
Naas	23	23	0	0
Navan	2	2	0	0
Waterford	125	51	74	0
Wexford	64	5	59	0
<b>Total</b>	<b>245</b>	<b>107</b>	<b>137</b>	<b>1</b>

10.12.9. The remaining group comprised those Divisions that showed results in the Commission's searches for access. As can be seen from the table below, there was considerable variation between the Divisions as to the volume of solicitors' telephone numbers that were accessed. The Commission investigated each of these access events and identified whether there was or could be any question of a solicitor/client call being accessed.

10.12.10. In total, 10 Divisions were found to have telephone-call recordings of solicitors' numbers, which had been the subject of some form of access. The lines on which these numbers were recorded were of significance in terms of identifying whether the call was likely to have been a solicitor/client call. The lines on which the calls were made are identified in the above chart.

#### **Analysis of access results**

10.12.11. As previously highlighted in this chapter (paragraph 10.2 above), communications between solicitors and their clients are privileged and the confidentiality of those communications is one of the fundamental tenets of our criminal justice system. Accordingly, the Commission could not itself listen to telephone-call recordings where it was identified that a solicitor's number had been accessed, as to do so would have been to breach the potential confidentiality of that call.

10.12.12. In order to ensure confidentiality was preserved in relation to such calls, the Commission identified the telephone line used for the accessed call and, by matching that information with the investigations that had been conducted in each of the Divisional Stations, it was possible to rule out any possibility of a client being on that particular line. For example, where a telephone call was made or received in the Communications Room of a Garda station, the Commission was satisfied that there were no circumstances in which a prisoner would be in this room, and hence could make or receive a call, in any of the Divisional Stations in question. A total of 107 of the accessed calls were identified as being to or from the Communications Room of a station.

10.12.13. The technicians who gave evidence in respect of the DAT period and whose testimony is dealt with at Chapter 5 of this Report were asked about the geography of the Divisional Stations. They were asked to identify where prisoners would be held in particular Divisional Stations and to indicate which telephone lines were available to prisoners. This information was also used to determine whether a solicitor/client call could have been made from the line in question.

- 10.12.14. In respect of each result of the Commission's access searches, the Commission requested and received custody records from the relevant Divisional Station for the time period indicated by the calls. These custody records were examined and any instance of a solicitor having a client in custody at the time of the call was noted. In relation to a number of the calls, it was possible to establish that, at the time of the call, the solicitor did not have a client in custody and, therefore, the call could not have been a solicitor/client call.
- 10.12.15. By these processes, it was possible to eliminate the vast majority of the accessed calls as not being solicitor/client calls. By and large, these were likely to have been calls from solicitors into the main line or, in some cases, the Public Office of the station, which were then transferred, either to a prisoner or to an investigating Garda, at which point the recording ceased.
- 10.12.16. Of significance was the number of accessed telephone-call recordings that were assigned to telephone numbers outside of the Communications Room. This was a feature in the access results of three Divisional Stations: Bandon, Waterford and Wexford.
- 10.12.17. In total, 8 instances were identified where a prisoner was in custody whose telephone call to his or her solicitor matched results of the Commission's accessed telephone-call recordings and where the Divisional Station had lines recording which could potentially be accessed by prisoners.
- 10.12.18. Each of these instances was examined, in detail, by the Commission and the technician who conducted the search was contacted. In all but one case, the access had been incidental to a search for another call, although this, in itself, calls for comment by the Commission (see paragraph 10.14 below).
- 10.12.19. The Commission used access requests, emails and other documentation to establish the purpose of the search in which the inadvertent access occurred and, therefore, was able to establish, with a high degree of certainty that no deliberate accessing of a solicitor/client call occurred aside from the instances detailed below.

#### **Bandon Divisional Station**

- 10.12.20. Out of 8 accessed telephone-call recordings from Bandon Divisional Station, the Commission's searches showed that there were 4 accessed telephone recordings found, created from the channel listed as "Bandon - FreePhoneCtrlRm - CH6". The Commission is satisfied that this telephone channel is located in the Public Office of Bandon Garda Station. When the custody records were searched, there was no corresponding entry indicating that any prisoner made a telephone call to his or her

solicitor while in custody at the time of any of the 4 telephone-call recordings (all of which referred to outgoing calls) which related to the access results.

#### **Waterford Divisional Station**

- 10.12.21. Out of a total of 125 access events from telephone recordings in Waterford Divisional Station, the Commission's searches showed that 74 were from the channel listed as "Waterford -5340 - CH4", which was located in the Public Office of Waterford Garda Station.
- 10.12.22. A technician based in Waterford Garda Station stated that when the "prisoners' phone" was out of order, it was possible that a prisoner would use the public phone. He gave evidence to the Commission that he had seen prisoners use the phone "*once at least*". A similar account was given by another Garda technician who stated "*it's possible*" that prisoners would have used the public phone. The Regional Sergeant for the Waterford Division stated, however, that he had not come across an instance where a solicitor/client call had taken place on this line and, furthermore, that it was not possible.
- 10.12.23. By examining the custody records in respect of all 74 accessed recordings on the Public Office line, the Commission found that there were three instances where there was a client in custody at the time of accessed telephone calls.
- 10.12.24. These prisoners' calls were investigated by the Commission. In respect of one prisoner, the Commission is satisfied that there were two inadvertent access events, which occurred when technicians were searching for other calls. The Commission has interviewed both of the technicians involved and is satisfied with the explanation given for the apparent access events.
- 10.12.25. A second search was conducted by a Garda technician, which showed two possible solicitor/client telephone-call recordings that were accessed. Following correspondence from the Commission, the technician stated that he had no recollection of why he would have conducted the searches in which two solicitor calls were included but was adamant that he would not have been targeting the solicitor/client calls. He said it was most probably a routine maintenance of the system or a search requested by a superior officer for another call, in the course of which he inadvertently accessed the calls in question. He has no recollection of ever hearing a solicitor/client call in the course of any searches conducted by him.

#### **Wexford Divisional Station**

- 10.12.26. The Commission's access searches produced 64 accessed telephone-call recordings that related to solicitors' telephone numbers in the Wexford Division. There were 54



accessed recordings on channel 5244 and one on 5245. Both these lines were located in the Public Office. It is clear from the Commission's investigations that it was possible that prisoners could use these phones. The one confirmed solicitor/client telephone-call recording arising out of all the Commission's searches, which was found to be accessed, was recorded in Wexford Garda Station on the Public Office telephone channel 5244.

- 10.12.27. The circumstances of this accessed solicitor/client call were that a solicitor who had a client in custody requested that the Director of Public Prosecutions (DPP) ascertain whether any of his calls to his client had been recorded or accessed. The ensuing investigation by An Garda Síochána showed that one call from the prisoner to another solicitor (not the solicitor who had initiated the query) had been made in the Public Office on a line that recorded calls. A technician was instructed to locate the call on the NICE database and, in doing so, the technician had to access and listen to the call, thereby creating the access event that appeared in the Commission's search. This, therefore, was the reason that a record of access exists. It was not for the purpose of listening to the call.
- 10.12.28. Further, the Commission's investigations showed that, in the course of this search, the technician in question accessed 4 other telephone-call recordings that were potentially solicitor/client calls. The Commission is satisfied that these telephone-call recordings were accessed inadvertently in the course of the search as outlined above.

### **10.13 Limitations with the methodology used by the Commission**

- 10.13.1. The Commission was aware that any methodology used to identify whether solicitor/client calls were recorded or accessed could never produce results that were 100% accurate. There were a number of inadequacies in the method employed and it is important to outline these.
- 10.13.2. All of these concerns relate to accurately accounting for the number of solicitors' telephone numbers that were recorded by the NICE system. In relation to identifying whether those numbers were subsequently accessed, which is the important question, the Commission is satisfied that it has captured all such events in the methodology used.
- 10.13.3. The limitations to the methodology adopted are the following:
  - i. The Commission cannot say, with certainty, that it contacted all relevant solicitors within a given Divisional area. Whilst the Law Society Directory for 2014 was a reasonably accurate guide, clearly

many firms would have ceased to exist during the period covered by the investigation, from 2008 until 2013.

- ii. A small number of solicitors' firms declined to assist the Commission when requested to do so.
- iii. There is always the possibility that numbers other than the numbers provided to the Commission were used by individual solicitors within firms to contact Garda stations.
- iv. The Commission had no way of verifying that the software employed by An Garda Síochána identified all the telephone numbers used – it cannot rule out the possibility that some numbers may have been lost. This is due to inconsistencies in the metadata that were collated.

10.13.4. The Commission has come across a number of examples of telephone calls listed in custody records as having been made by prisoners to their solicitors, or which were received from solicitors, that did not produce results in its own telephone-call recording searches.

## **10.14 Trawling**

10.14.1. As mentioned at paragraph 10.12.3 above, the Commission had a script designed for it that allowed searches to be made of telephone numbers. This script was not available to technicians who were engaged in downloading access requests for members of the force.

10.14.2. When conducting a search for a recording of any given telephone call, the technicians of An Garda Síochána were faced with a system that did not accurately record all the data. Therefore, in contrast with the search carried out by the Commission in the course of its enquiries which was based on telephone numbers supplied, technicians would, in most instances, have to trawl through telephone-call recordings to locate that related to a particular request.

10.14.3. This would consist of searching through telephone-call recordings made in or about the time of the recording that was the focus of their search and listening to the recordings one by one, in order to ascertain whether they met the criteria of the requested call. This was, in many instances, the most efficient and comprehensive way for technicians to complete the task.

10.14.4. The implications that trawling has for the maintenance of the privacy of solicitor/client telephone-call recordings are clear. In the course of a legitimate search for a recording, a technician could inadvertently listen to a solicitor/client telephone call or indeed any

other non-999 call. The Commission's investigations would indicate that this did, in fact, occur as outlined in the paragraphs above.

- 10.14.5. Of course, the inadvertent accessing of solicitor/client calls is incidental to the fact that these calls should not have been recorded in the first place.

## **10.15 NICE Toolbar**

- 10.15.1. The NICE Toolbar system, as described in Chapter 6 of this Report, is retained for technicians as a backup, should problems occur with NICE Inform and is accessible by using a generic login and password.
- 10.15.2. Toolbar allows the user to search the local recorder without any audit trail being created. Indeed, if a technician wanted to prevent any record of a search being created, then the Toolbar system could be used to achieve that result.
- 10.15.3. In oral evidence, the Commission asked the various technicians who appeared before it whether they believed it was possible that solicitor/client calls could be recorded in each Garda station. In most Divisional Stations, a dedicated telephone was available to clients in order to make calls to their legal representatives.
- 10.15.4. As outlined in Chapters 5 and 6, the majority of the recorded telephone lines were within the Control Rooms in the Divisional Stations. Therefore, in order for a prisoner to speak to his or her solicitor on a recorded telephone line within such a Garda station, he or she would have to be brought into the Control Room. The Commission is satisfied that this was simply not done. Access to Control Rooms is restricted to Garda personnel and civilians employed by An Garda Síochána. None of the technicians who were asked could recall ever seeing a prisoner or a solicitor enter the Control Room in any of the Garda stations that they worked in.
- 10.15.5. A number of technicians were asked if they could imagine any scenario where a prisoner or a solicitor would be brought into the Control Room. None of those who were asked could think of any reason why this would happen. In fact, one of the technicians commented that the Control Room housed a lot more than just the telephone systems; there would be maps and other documents posted on the walls, as well as the radio system and CCTV screens. Some of this material could relate to Garda operations. Therefore, a member of An Garda Síochána would not bring any non-member of the force into a Control Room.
- 10.15.6. A number of the technicians were also asked whether they had ever come across a recording of a solicitor/client telephone call while working on the recording system.

None of them had. The Commission asked what they would have done if they had come across such a recording. The general response was that the recording of such calls would be inappropriate given the confidential nature of the correspondence between a solicitor and a client.

- 10.15.7. A number of the technicians were also asked if they had ever downloaded a recorded call between a solicitor and a client. None of the technicians asked had done so.
- 10.15.8. In relation to the Divisional Stations, where telephone lines outside of the Control Rooms were recorded, the results of the Commission's analysis of these are discussed above at paragraph 10.12.11.
- 10.15.9. The Commission has not seen any significant evidence that technicians, in fact, availed of the Toolbar facility. The Commission has taken evidence to the effect that, in limited circumstances, it was suspected that technicians were using the Toolbar system rather than NICE Inform. However, the Commission's investigations reveal only one such search that did not appear to have a corresponding record in the audit trail.
- 10.15.10. The issue of the Toolbar facility is raised in this chapter for completeness but the Commission is satisfied, from its investigations, that it was not a significant factor in the issue of solicitor/client recordings. It is important to note, however, that it is technically possible that technicians used Toolbar so as not to leave an audit trail, thus making it impossible for the Commission to totally exclude the possibility that there were access events not revealed by the searches carried out by the Commission.

## **10.16 Term of Reference 1(i)**

- 10.16.1. Paragraph 1(i) of the Terms of Reference of the Commission require it:

“To establish whether any information obtained from the said telephone recording systems by An Garda Síochána was used by it either improperly or unlawfully and, in particular, whether any recordings as may have been made by An Garda Síochána of Solicitor/Client telephone conversations were used for any purpose whatsoever.”

- 10.16.2. The Commission has established that there was a system in place for recording telephone calls into and out of certain Garda stations during the relevant period as stated in its Terms of Reference. However, insofar as it has been possible to establish, there was no deliberate systematic recording of solicitor/client telephone calls.

- 10.16.3. The Commission has identified that, in the course of the recording that did take place, solicitors who rang either the main line or, in some cases, the public phone of Garda stations could expect that their calls would be recorded.
- 10.16.4. The Commission has also established that, in a number of cases, these calls were accessed by An Garda Síochána. However, the Commission has only found one instance of a call between a solicitor and a client being deliberately accessed by An Garda Síochána and that was in response to a request from a defence solicitor to the DPP that a search be conducted to establish whether any call between him and his client had been recorded. All other access events related to inadvertent access in the course of searching for other calls.
- 10.16.5. Accordingly, the Commission is satisfied that no information was obtained from the telephone recording systems by An Garda Síochána which was used either improperly or unlawfully.
- 10.16.6. The Commission is further satisfied that recordings of solicitor/client telephone conversations were not used by An Garda Síochána for any purpose whatsoever.

## **Conclusions**

- 10.1 The Commission emphasises that solicitor/client confidentiality is a constitutional right and a fundamental requirement of fair procedures, and any possibility that this was breached by An Garda Síochána must be regarded as a matter of grave concern.
- 10.2 The Commission notes that, notwithstanding the concern expressed by the Law Society when the issue of the recording of telephone calls in Garda stations first came to public attention in March 2014, the profession itself did not appear to be apprehensive that their telephone calls with clients had, in fact, been recorded or listened to by An Garda Síochána. Though given the opportunity to do so, they did not offer evidence of such practices, or suggest instances in which they suspected that this had taken place. In the event, the profession was correct in this view.
- 10.3 The inquiries undertaken by the Commission, though necessarily incomplete, were comprehensive enough to allow the Commission to reach certain conclusions in relation to whether solicitor/client calls were recorded, accessed and/or used.
- 10.4 The Commission is satisfied that, for the entire period for which telephone recording systems have existed in Garda stations, there was no deliberate decision or intention on the part of An Garda Síochána to use those systems to record calls between solicitors and their clients.
- 10.5 The Commission identified three Garda stations at which solicitor/client calls either were or were likely to have been recorded between 1995 and 2013: Bandon, Waterford and Wexford. In each case, the evidence indicates that these recordings occurred inadvertently, as a result of recording certain specific non-999 lines, for reasons unrelated to the capturing of solicitor/client calls.
- 10.6 The Commission has found no evidence of any recorded solicitor/client call being accessed deliberately for its content. Nor is there any evidence of any such call being downloaded or copied for any purpose.
- 10.7 Where such access occurred, the Commission is satisfied that this was not done for the purpose of listening to the solicitor's call in question but rather, was carried out in the course of searching for other calls. The only known exception to this occurred in the course of a search authorised by the DPP, where a call was accessed and listened to by a Garda technician, not for its content, but simply in order to confirm the existence of the recording.

10.8 None of these conclusions should be taken as an exoneration of the existence of a system that allowed the possibility of recording and accessing solicitor/client calls without the knowledge of the parties concerned. Although it is possible to say that, in general, no abuse of this system occurred, it is not possible absolutely to rule out improper use in any specific case. No such case has been referred to the Commission.

# 11. IMPROPER / UNLAWFUL USE OF RECORDED INFORMATION

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## 11.1 INTRODUCTION

11.1.1 Paragraph 1(i) of the Terms of Reference requires the Commission:

“To establish whether any information obtained from the said telephone recording systems by An Garda Síochána was used by it either improperly or unlawfully and, in particular, whether any recordings as may have been made by An Garda Síochána of Solicitor/Client telephone conversations were used for any purpose whatsoever.”

The particular issue of solicitor/client recordings is dealt with in Chapter 10 of this Report. This chapter is concerned with the more general question of whether the recordings were used improperly or unlawfully.

11.1.2 The “said telephone recording systems” referred to in paragraph 1(i) are any systems to record calls, other than 999 calls, that operated during the period 1 January 1980 to 27 November 2013. The facts established by the Commission in relation to the existence and operation of such recording systems are set out in Chapters 4, 5 and 6 of this Report.

11.1.3 This chapter does not address the lawfulness of the recording systems themselves. That issue is examined in Chapter 9. The concern here is with the use of information derived from the recording systems. Such information could include:

- (i) The content of recorded conversations, and
- (ii) Additional ‘metadata’ recorded on the systems – such as the time, date and duration of calls and the telephone numbers involved.

11.1.4 The Commission has concluded, as set out in Chapter 9, that the existence, operation and use of Garda telephone recording systems to record non-999 calls was not authorised by law. This has clear implications for the propriety and lawfulness of using information obtained from those systems.

11.1.5 The categories of what might constitute improper or unlawful use of recorded information are not closed, but could include the following:



- Using unlawfully recorded information as evidence in prosecutions;
- Using unlawfully recorded information as an aid in criminal investigations;
- Using recorded information to blackmail, threaten or attack the good name and reputation of individuals, including members of the public and members of An Garda Síochána;
- Inappropriate disclosure of information to third parties.

## 11.2 METHODOLOGY

11.2.1 There are two principal difficulties surrounding this aspect of the Commission’s work.

11.2.2 The first is one of scale: the Commission has established that systems that recorded some non-999, as well as 999, calls have been in operation in various places for the entirety of the time period set out in paragraph 1(a) of the Terms of Reference. That being so, the Commission is effectively being asked to investigate and report on any misuse of recorded information over a period of almost 34 years. Admittedly, the Terms of Reference are concerned with “telephone recording systems, to record calls other than 999 calls to the Emergency Call Answering Service...”

11.2.3 The second problem is one of evidence. Although the Commission has access to a large volume of calls recorded between 1996 and 2013, evidence of the misuse of recorded information is unlikely to come from the recordings themselves (unless one were to find a recording in which improper use of another recording is made evident) but must be obtained from other sources. This could include access records kept by An Garda Síochána, investigation files, correspondence, complaints from members of the public, complaints from individual Garda members, investigations by the Garda Síochána Ombudsman Commission (GSOC), internal Garda inquiries and disciplinary hearings.

11.2.4 It is clear that an unlimited investigation of this aspect of the Terms of Reference would take years, if not decades, to complete – assuming it could be completed at all. With that in mind, the Commission must invoke paragraph 2 of its Terms of Reference, which provides:

“The Commission shall exercise discretion in relation to the scope and intensity of the investigation it considers necessary and appropriate, having regard to the general objective of the investigation. In particular, the Commission shall have the discretion to limit its investigation to samples of recordings in the light of what is disclosed as the investigation progresses.”

11.2.5 The “general objective” of the investigation is to report on matters of significant public concern arising from the operation of telephone recording systems in Garda stations.<sup>314</sup>

11.2.6 Whilst it is true that any instance of Garda members misusing recorded information would be of public concern, identifying and investigating every potential instance of misuse over a period of decades is simply not possible. The Commission has, therefore, exercised its discretion and focused on the following questions:

- i. Whether there is evidence to suggest widespread or systematic misuse of recorded information by An Garda Síochána at any given time period or location;
- ii. Whether there is evidence to suggest that such misuse did not or could not have taken place;
- iii. Whether any specific complaints have been made that involve suspected misuse of recorded information, and, if so, whether there is substance to those complaints.

11.2.7 In order for information obtained from the recording of non-999 calls to be used improperly or unlawfully, there are three obvious pre-conditions:

- (i) The information must exist in a retrievable form;
- (ii) The user must know that the information exists; and
- (iii) The user must have access to it.

The Commission now turns to consider these aspects.

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<sup>314</sup> Commission of Investigation (Certain Matters Relative to An Garda Síochána and Other Persons) Order 2014 [S.I. No.192 / 2014].

## 11.3 INFORMATION

### 1980 to 1995

11.3.1 During this period, systems that could have recorded non-999 calls were in operation in the following locations:

- A 24-track recorder at Dublin Castle, recording lines into and out of the Radio Control Room there;
- A 40-track recorder at Harcourt Square, recording lines into and out of the Command and Control Centre there;
- Single-track recorders at Divisional Stations outside the Dublin Metropolitan Area (DMA);
- Single-track recorders at Divisional and District Stations within the DMA.

### Divisional Stations

11.3.2 Single-track recorders, supplied by Standard Elektrik Lorenz (S.E.L), which used standard audio cassettes, were installed in DMA stations between 1983 and 1985. The Commission has found no evidence that they were ever used to record calls of any kind. No tapes or access records have been found. The recorders were installed as units within new radio/telephone consoles also supplied by S.E.L. In many cases, the consoles proved unreliable and ceased to be used within a relatively short period of being installed. The consoles, with the recorders, were removed from DMA stations between 1991 and 1995.

11.3.3 Similar consoles with recorders were installed in Divisional Stations outside the DMA between 1985 and 1986. Although the evidence suggests that the recorders might have allowed the console operator to choose to record a non-999 line or radio channel instead of a 999 line, the Commission has seen no evidence that this was done in practice. In practice, they were used, if at all, only to record 999 calls. The tapes could hold no more than 60 minutes of audio and were generally re-used once full. No tapes from this period have been found. As was the case in the DMA, the consoles and recorders were quite often faulty and ceased to be used altogether in some stations within a short time of being installed.

11.3.4 From the above, the Commission finds it highly unlikely that information from non-999 recordings was available in any Divisional Station during the period prior to 1995.

### Dublin Castle / Harcourt Square

11.3.5 As set out in Chapter 4 of this Report, the Control Rooms at Dublin Castle and Harcourt Square did not generally deal with non-emergency calls from members of the public. There were, nonetheless, a certain number of non-999 lines going into and coming out of the Control Rooms that appear to have been recorded. The intention was to capture emergency-related communications, but it is likely that other, non-emergency related calls were also recorded – including personal calls and private conversations between colleagues.

11.3.6 It is theoretically possible therefore, that information from non-999 calls recorded on these systems could have been obtained and used for improper purposes. However, there are good reasons to believe that this is unlikely to have occurred. In the first place, the tapes used for recording were changed every 24 hours and then re-used on a monthly cycle, so that, in general, recorded information would be erased after 30 days. Secondly, access to recordings was controlled – more will be said on this below. Finally, the evidence before the Commission suggests that, for the most part, only those members of An Garda Síochána who worked in the Control Rooms at Dublin Castle and Harcourt Square were aware that any non-999 lines were recorded.

### 1995 to 2008

11.3.7 During this period, systems capable of recording non-999 calls were in operation in the following locations:

- A 64-channel recorder at Command and Control, Harcourt Square;
- A 24-channel recorder at Command and Control, Anglesea Street, Cork;
- 8-channel recorders at Divisional Stations outside the Dublin Metropolitan Area.

All of these systems used Digital Audio Tapes (DAT) capable of recording up to 320 hours of audio per tape.

11.3.8 The recorder at Harcourt Square was a replacement for the existing system and it appears that the lines already recording were transferred to the new system.

11.3.9 As outlined in Chapter 5, a 24-track recorder was installed in Anglesea Street, Cork, in 1995 as part of a new Communications Centre for Cork City, modelled on Command

and Control, Harcourt Square. Unlike in the case of Harcourt Square, a decision was made, in this case, to record the main station number as well as the 999 lines.

- 11.3.10 Between 1995 and 1997, 8-channel DAT recorders were installed in Divisional Stations outside the DMA. This was the first time that a facility to record multiple lines simultaneously was available in those stations. As detailed in Chapter 5, almost all of those stations recorded the main station number. A small number of stations also recorded certain non-999 lines in locations outside the Control Room, such as the Public Office and the Incident Room.
- 11.3.11 In the absence of a formal policy, retention of recorded information on the DAT systems varied from station to station. In most stations, it appears that recordings were retained indefinitely.
- 11.3.12 From the above, it is clear that recorded information from certain non-999 lines at Harcourt Square, Anglesea Street and Divisional Stations outside the DMA was available, in theory, to members of An Garda Síochána, subject to (i) their knowledge of this fact, and (ii) the ability to gain access to the information. These points are considered further below.

**2008 to 2013**

- 11.3.13 In 2008, the DAT recording systems at Harcourt Square, Anglesea Street and Divisional Stations outside the DMA were replaced with the NICE system. This comprised local hard-disk recorders with a limited storage capacity, combined with a central archive facility for storing and accessing all recorded data on the system.
- 11.3.14 Although the new system could record many more lines than the old DAT recorders at Divisional Stations, the evidence provided to the Commission indicates that, in almost every station, the telephone lines installed on the NICE system mirrored those previously connected to the DAT recorders. In 5 stations, some new lines were added, details of which are contained in Chapter 6.
- 11.3.15 All recorded information, once uploaded to the central archive facility, was retained indefinitely. As with the 1995-2008 period therefore, recorded information from certain non-999 lines was available to members of An Garda Síochána on request, subject to the rules and restrictions on access to the NICE system, which are considered below.

## 11.4 KNOWLEDGE

- 11.4.1 The level of knowledge within An Garda Síochána as to the existence, operation and use of telephone recording systems is dealt with in Chapter 7 of this Report.
- 11.4.2 Although it has not been possible to give a definitive picture of the state of knowledge, at all levels of the organisation, concerning non-999 telephone recording, the Commission is satisfied that a significant proportion of the membership of An Garda Síochána was unaware that any such recording was taking place. This is especially true of the higher ranks. This lack of awareness greatly reduces the likelihood that members were accessing such calls for improper or unlawful purposes.
- 11.4.3 With regard to Command and Control at Dublin Castle (and later Harcourt Square), the evidence before the Commission suggests that very few members, other than those who worked in Command and Control, were aware that some non-999 lines into and out of the Control Room were recorded. The general belief and assumption within the organisation seems to have been that only 999 calls were recorded there.

## 11.5 ACCESS

- 11.5.1 The findings of the Commission in relation to how and by whom recordings were accessed are set out in Chapters 4, 5 and 6. In general terms, the Commission has found that, over the entire period during which non-999 recording was taking place, no Directive or Circular issued from Garda Headquarters (HQ) setting out the policy and rules of the organisation as regards the access and use of recorded calls.

### **1980 to 1995**

- 11.5.2 As stated earlier,<sup>315</sup> it is highly unlikely that any recordings made at Divisional Stations during this period were retained for access.
- 11.5.3 Recordings made at Command and Control in Dublin Castle (and later Harcourt Square) could not be accessed without the assistance of Telecommunications technicians. The evidence suggests that requests were generally dealt with by Telecommunications Sergeants. Accessing calls on the playback machine was a time-consuming business and was unlikely to be undertaken unless the requesting officer could demonstrate a valid operational reason for doing so. The machine itself was located in a room in which other

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<sup>315</sup> See para. 11.3.2-11.3.4.

members were working, thus making it more unlikely that an individual would seek to play back calls on the machine for any improper or unlawful purpose.

### **1995 to 2008**

- 11.5.4 In the absence of a defined organisational policy, technicians in Divisional Stations outside the DMA developed their own local practices in managing recordings. These varied from Division to Division.
- 11.5.5 The Commission has taken evidence from most of the technicians who served at the relevant Divisional Stations and has found that, by and large, they exhibited a high sense of responsibility and a clear understanding that access to recordings should only be granted in response to genuine operational needs. Many technicians insisted that access would only be granted with the approval, express or implied, of the District Superintendent.
- 11.5.6 A similar approach appears to have been taken at Command and Control, Harcourt Square, where access was controlled by the officers in charge of the Control Room, with the assistance of the technicians.
- 11.5.7 It is also important to note that, in most stations where recording took place during this period, the DAT recorder was kept either in a locked Equipment Room (to which only technicians had access) or in the Control Room, where anyone using the machine was likely to be doing so in the presence of other members.

### **2008 to 2013**

- 11.5.8 As detailed in Chapter 6, the policy and practice regarding access to recordings in Divisional Stations outside the DMA continued to vary widely from one station to another during this period.
- 11.5.9 One significant difference in this period is that the audit trails generated by the Inform software application allowed every instance of access to be traced back to the technician responsible. This introduced a further element of security to the system and was a potential deterrent to anyone contemplating accessing a call for improper or unlawful reasons.
- 11.5.10 At training sessions in 2008 and 2010, technicians were told, unequivocally, that Inform was the application to be used when accessing recordings. Audit trails show that most technicians began using Inform in or around November 2008. However, for most of this period, technicians could also access recordings on their local NICE recorder by using

the older Toolbar application, which left no audit trail.<sup>316</sup> For this reason, the possibility that recordings were accessed for improper or unlawful purposes cannot be definitively ruled out.

## **11.6 ALLEGATIONS OF IMPROPER / UNLAWFUL USE**

- 11.6.1 From 26 October 2014 to 2 November 2014, the Commission placed an advertisement in a number of national Sunday and daily newspapers. Members of An Garda Síochána, Garda employees, solicitors and members of the public were asked to contact the Commission with any information relating to the recording of non-999 calls at Garda stations. Information to enable access to an online version of the Commission's Terms of Reference was also included. This is outlined in full at Chapter 7 of this Report.
- 11.6.2 The Commission was contacted by 11 current and former members of An Garda Síochána on foot of the advertisement. Five of these persons reported alleged instances of private phone lines being tapped, something that is not within the Commission's Terms of Reference. Of the remaining 6, 3 provided information as to their awareness of non-999 recording at Garda stations but did not adduce evidence of any improper or unlawful use of such recordings. Two others, having contacted the Commission by telephone, were invited to make written statements but did not do so. One member raised concerns about recording in stations where the Commission is satisfied that no recording took place.
- 11.6.3 Only one solicitors' firm responded to the advertisement, with details of concerns relating to two clients. Neither of the matters raised came within the Terms of Reference of the Commission. The extent to which solicitors' telephone calls may have been recorded and accessed by An Garda Síochána is considered in Chapter 10 of this Report.
- 11.6.4 In total, the Commission was contacted by 37 members of the public with information they believed to be relevant to the Commission's investigations. Of these, 21 raised matters outside the Commission's Terms of Reference. From the remaining 16, the Commission identified 5 contacts that required further investigation. In each case, the Commission found no evidence of the improper or unlawful use of information derived from the recording of non-999 calls at Garda stations.
- 11.6.5 The low level of response from solicitors, members of An Garda Síochána and members of the public to the Commission's request for information indicates that there has not been any significant general public concern with regard to the matter of Garda telephone

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<sup>316</sup> See Chapter 6.5.



recording, even after the fact of recording non-999 calls had come in to the public domain.

- 11.6.6 From late March 2014, when the existence of widespread non-999 recording at Garda stations became publicly known for the first time, An Garda Síochána received a number of queries and complaints from solicitors and members of the public in relation to the possible recording of telephone calls.
- 11.6.7 In April 2014, a dedicated ‘helpdesk’ team was created within An Garda Síochána to investigate all such queries received. The Commission has reviewed the files created by the Garda Helpdesk in response to those queries and, in some cases, has carried out further investigations on its own account.
- 11.6.8 Further details in relation to the Garda Helpdesk files and the investigations carried out can be found in Chapter 10 of this Report. In the present context, the Commission notes that no instances of the improper or unlawful use of recorded information were found as a result of these queries.

## **Conclusions**

- 11.1. It is not possible for the Commission to say that information from Garda telephone recording systems was never used improperly or unlawfully. The mere existence of the recordings means that potential abuse could not be ruled out. The quality of notes kept regarding access to recordings varied significantly from station to station and a large number of occasions on which calls were accessed may have gone unrecorded. Of course, in the event that a Garda member was complicit in accessing a call for an improper or unlawful purpose, he or she would be unlikely to keep a record of that fact.
- 11.2. Nonetheless, the Commission finds it reasonable to conclude, based on the evidence before it, that no widespread or systematic, indeed probably no significant, misuse of information derived from non-999 telephone recordings took place. The principal reasons for this conclusion are as follows:
- 11.3. A significant proportion of the Garda membership, particularly in the higher ranks, appears to have been unaware that recordings of non-999 calls existed. The exact proportion is unknown, but the Commission is satisfied that many members of An Garda Síochána could not have misused the recorded information as they simply did not know it existed.
- 11.4. Access to recordings was controlled by members of the Telecommunications Section and, in many cases, required sanction from a District Superintendent. The Commission has heard evidence from most of the relevant Telecommunications technicians, in particular those who worked in Divisional Stations outside the DMA, and is satisfied that they were conscious of the potential for abuse and, to the best of their abilities, sought to confine access to recordings to cases of operational necessity.
- 11.5. Despite the publicity that was given to the existence of non-999 recording systems in 2014, and the subsequent advertisements by the Commission seeking information from members of An Garda Síochána, solicitors and the public, very few complaints were made to the Commission and no instances of the improper or unlawful use of telephone-call recordings have been found as a result of those complaints.

## 12. INVESTIGATION OF THE DEATH OF MADAME SOPHIE TOSCAN DU PLANTIER – TELEPHONE RECORDINGS

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### 12.1 INTRODUCTION

- 12.1.1 Paragraph 1(m) of its Terms of Reference requires the Commission to investigate and report on tapes discovered in Bandon Garda Station as follows:

“In particular, to identify and review all recordings in the possession of An Garda Síochána emanating from the Garda telephone recording system at Bandon Garda station or otherwise, which relate to the Garda investigation of the death of Sophie Toscan du Plantier and to establish whether those recorded phone calls, and any other acts or events in the course of the said Garda investigation, disclose any evidence of unlawful or improper conduct by members of An Garda Síochána in connection with that investigation.”

The murder of Madame Sophie Toscan du Plantier occurred in December 1996, more than 20 years ago at the time of writing this Report. Nobody has been prosecuted and the investigation is considered by An Garda Síochána to still be active.

- 12.1.2 The Commission, at paragraph 8(2) of its Third Interim Report of November 2015, gave formal notice of its interpretation of paragraph 1(m) as follows:

“Having regard to the fact that the Commission was established to investigate “the operation of Garda Síochána telephone recording systems” and that the matters listed in the lettered sub paragraphs of paragraph 1, including (m) are expressed to be “particular” aspects of that matter, the Commission interprets sub paragraph 1(m) as meaning:

1. The Commission is required to establish whether the recorded calls which it identifies and (in the sense of combined with) other acts or events in the course of the said Garda investigation, disclose evidence of unlawful or improper conduct by members of An Garda Síochána in connection with the Garda investigation into the death of Madame Sophie Toscan du Plantier.

2. The Commission is not required to conduct an investigation of possible unlawful or improper conduct by members of An Garda Síochána in connection with that investigation generally, but is required to do so only where the recorded calls disclose evidence of such unlawful or improper conduct.

3. The Commission is required to establish only whether those recorded calls, in conjunction with such “other acts or events” disclose evidence of unlawful or improper behaviour. It is not required to establish whether such unlawful or improper behaviour in fact took place.”

12.1.3 The focus of the Commission, therefore, is essentially on the contents of the recorded telephone calls from the Garda telephone recording systems at Bandon Garda Station. The Commission is required to determine whether any of those recorded telephone calls, alone or in combination with other acts or events, in the course of the said Garda investigation of the murder of Madame Toscan du Plantier, disclose evidence of unlawful or improper conduct by members of An Garda Síochána.

12.1.4 In order to carry out its investigation for the purposes of paragraph 1(m), the Commission addressed the following tasks:

- c. Identifying and reviewing all surviving recorded telephone calls, emanating from Bandon Garda Station or otherwise, which relate to the Garda investigation into the death of Madame Toscan du Plantier; and
- d. Analysing the identified calls, in conjunction with related documentation held by the Commission, to establish whether they disclose any evidence of unlawful or improper conduct by members of An Garda Síochána in connection with that investigation.

**Preliminary difficulties**

12.1.5 The Commission encountered some difficulties in carrying out its investigation pursuant to paragraph 1(m). The murder of Madame Toscan du Plantier occurred at the end of 1996, which was in excess of 20 years ago. With the passage of time, some of the participants in the phone calls are deceased and some relevant witnesses were unable, due to medical reasons, to engage with the Commission. There were other relevant witnesses whom the Commission was unable to locate, despite its best efforts.

12.1.6 In addition, the tapes on which almost all of the relevant telephone calls were recorded are in the region of 20 years old and can only be played on recorders that are of the same model as the original recorders. Copies of the recordings have been made onto a digital, hard-disk system, which has allowed the Commission to play back recordings without the risk of causing damage or deterioration to the original tapes. However, the quality of the original recordings is often quite poor, with several breaks in audio and instances of interference, all of which has meant that the audio is often quite difficult to decipher, even with the capacity to rewind and replay the digital recordings of the tapes.

**Limitations of available recorded material**

12.1.7 The Commission has been given a very specific and focused task by its Terms of Reference, relating to a defined aspect of the investigation of the murder of Madame Toscan du Plantier. It is important to note that the Commission was not requested to carry out a full investigation of all potential incidents of unlawful or improper conduct during the investigation of the murder. The Commission's investigation is limited by the contents of the recorded telephone calls that are in its possession.

12.1.8 It is also very important to note that the tapes that were provided to the Commission provided only a small and random snapshot of the telephone traffic occurring around the time of their recording. They cannot be considered to be a full record of all relevant telephone calls made during the designated timeframe of the investigation.

12.1.9 With one or two minor exceptions, the recorded calls identified as relevant by the Commission all came from the following telephone lines at Bandon Garda Station:

1. The main telephone number for the station.

Calls to this number were answered by members of An Garda Síochána, working as telephone operators in the Control Room at the station. It is important to note that recording on this line ceased if the call was transferred to another extension – unless that extension itself was recorded separately. For that reason, the vast majority of relevant calls on this line amount to little more than someone ringing the station and asking for a particular Garda member, or asking in general terms to speak with someone about the murder investigation.

2. A telephone line in a room used by the Detective Sergeant responsible for preparing the investigation report on the murder of Madame Toscan du Plantier.

This room was used by the Detective Sergeant between March and September 1997. The circumstances of how this phone came to be

recorded are set out in Chapter 5 of this Report. It is important to note the following: (i) no one, least of all the Detective Sergeant himself, was aware that this line was being recorded; (ii) according to the Telecommunications technician at Bandon Garda Station, there may have been another, unrecorded, phone available for use in that room; and (iii) the quality of the recordings on this line is extremely poor, with frequent audio cessations and sections that are inaudible.

3. A telephone line in the Telecommunications equipment room.

This line was set up at the request of a Detective Garda in order to record calls between himself and Mr B, a civilian who had offered to assist An Garda Síochána in their efforts to investigate Mr Ian Bailey as a suspect for the murder of Madame Toscan du Plantier.

Calls were recorded on this line between 20 May 1997 and 6 June 1997, with the knowledge of the Detective Garda concerned.

4. A telephone line in a room known as “Interview Room No.2”.

This room was close to the Detective Branch Office and was used occasionally by detectives and other members to make telephone calls. The Commission has been unable to establish why this line was recorded, but is satisfied that none of the Garda members involved in the murder investigation were aware that it was being recorded.

The available recorded calls on this line come from tapes which cover periods in March 1997-May 1997, September 1997-October 1997 and November 1997-December 1997. It is likely that the line was also being recorded during July 1997 and August 1997, but no tapes for that period have survived.

5. A telephone line in the office of the Telecommunications technician at Bandon Garda Station.

For reasons which the technician himself is now unable to recall, a line in his own office appears to have been recorded between September 1997 and December 1997. The same line was also recorded from 10 to 21 April 1998 and, most likely, for the entirety of 1998 up to that point, although no tape survives for that period. There was another phone in the technician’s office that was not recorded.

12.1.10 Although the existing recordings from these lines do contain material of relevance to the investigation, it would be misleading to use them as a basis for any general conclusions regarding the Garda investigation of the murder of Madame Toscan du Plantier. Taken together, they constitute no more than a fractional, fragmented and essentially random assemblage of telephone conversations, often unclear or ambiguous in meaning, in contexts that are unstated. In addition, some call recordings involve persons now deceased, as well as individuals whose memories of the matters discussed may have been adversely affected by the passage of nearly 20 years or been tainted by information or impressions acquired in the intervening period.

12.1.11 Without creating an exhaustive list, it is useful to note some of the principal gaps in the recorded information available to the Commission:

- There are no recorded calls available for the first three months of the murder investigation, which is, by any reckoning, the most crucial period.
- Several members of the investigation team used mobile phones. There are no recordings of these calls.
- In Bandon Garda Station, there were other phones used by members of the investigation team that were not recorded – such as the phones in the Detective Branch Office.
- At different times, but particularly in the early stages, the investigation involved members of An Garda Síochána from other stations as well as Bandon. No relevant recordings from those stations have been found. In Bantry Garda Station, where much of the initial investigative work took place, no recording system existed.
- The local detectives investigating the murder were assisted by a team of detectives from the National Bureau of Criminal Investigation (NBCI), based in Dublin. Other than a number of calls to and from recorded lines at Bandon Garda Station, no calls involving these detectives were recorded.
- Aside from a 4-week period between December 2002 and January 2003, the period covered by the available tapes ends in July 1998. This means that no recordings are available for other periods during which significant steps were taken in the investigation. For example, on 22 September 2000, Mr Bailey's partner, Ms Catherine Jules Thomas, was arrested for a second time in connection with the murder investigation. No recorded calls exist in relation to this matter.

- Even within the 1997-1998 period covered by the existing tapes, there are significant gaps which reduce the value of information obtained from the tapes. For instance, no tapes exist for the period 26 June 1997-21 September 1997. As detailed elsewhere in this Chapter, there are recorded calls from June 1997 that give rise to certain concerns regarding the actions and approach of members of the investigation team in compiling the investigation report. Those members are since deceased and the Commission is left with a 3-month gap in recordings between the calls that are of concern and the completion of the investigation report on 29 September 1997. Without that evidence and without the opportunity to question the relevant parties, any conclusions are tenuous and uncertain at best.

12.1.12 The dates covered by the available Digital Audio Tapes (DAT) from Bandon Garda Station are as follows:

- |     |                         |                    |
|-----|-------------------------|--------------------|
| 1.  | 24/03/1997 – 24/04/1997 | (Duration 4 weeks) |
| 2.  | 12/05/1997 – 18/05/1997 | (Duration 1 week)  |
| 3.  | 21/05/1997 – 24/05/1997 | (Duration 4 days)  |
| 4.  | 24/05/1997 – 25/06/1997 | (Duration 4 weeks) |
| 5.  | 22/09/1997 – 24/10/1997 | (Duration 4 weeks) |
| 6.  | 23/10/1997 – 24/11/1997 | (Duration 4 weeks) |
| 7.  | 25/12/1997 – 01/01/1998 | (Duration 1 week)  |
| 8.  | 10/04/1998 – 15/05/1998 | (Duration 5 weeks) |
| 9.  | 16/06/1998 – 21/07/1998 | (Duration 5 weeks) |
| 10. | 19/12/2002 – 20/01/2003 | (Duration 4 weeks) |

12.1.13 The explanation for the existence of only 10 DAT tapes in Bandon Garda Station, a small number in comparison with other stations where recording was occurring, is that there was a severe flood in Bandon Garda Station in December 2009, which resulted in large amounts of equipment and documentation being destroyed. The Commission was told by the Telecommunications technician in Bandon Garda Station, that, while the DAT machine was still in use, he kept the majority of the used DAT tapes locked in his desk drawer. The tapes in this drawer were lost or destroyed in the flood.

12.1.14 The first 4 tapes listed above relate to a period in which most of the initial investigative work had run its course and the focus had shifted to preparing an investigation file for the Director of Public Prosecutions (DPP). From other documentation, it seems clear that Tapes 2, 3 and 4 (covering the period 12 May to 25 June 1996) were set aside for retention because they contained recordings relating to Mr B. It is unlikely that the other



tapes were retained for any purpose related to the investigation of the death of Madame Toscan du Plantier, although, as it turns out, some of them do contain recordings relating to that investigation. The largest number of calls found on any one tape which were deemed relevant to the investigation was 134 calls. These were on the tape which spanned the period from 24 May 1997 to 25 June 1997.

- 12.1.15 There are also tapes that cover periods of time during which the investigation was less active. This is borne out by the fact that fewer relevant calls were identified on these tapes. As few as two or three relevant calls were found on some of the tapes. These tapes are no more than snapshots of short time periods in September 1997/November 1997, December 1997/January 1998, April 1998/May 1998, June 1998/July 1998 and December 2002/January 2003.
- 12.1.16 In total, the Commission identified 297 recorded calls as being relevant to the Toscan du Plantier investigation. Of these, approximately 166 contained no information of substance in relation to the investigation. These were mostly calls to the main station number from journalists or other persons seeking to speak with a member of the investigation team; once the call was transferred to another extension, recording ceased. In other cases, the call ended as the member concerned was not available.
- 12.1.17 The remaining 131 calls were then reviewed by the Commission to determine whether they disclosed evidence of unlawful or improper conduct in connection with the investigation. It is worth repeating that this represented a very small and essentially random sample of communications relating to a particular period of the investigation.
- 12.1.18 Inevitably, the focus of the recorded calls is skewed by the fact that only certain lines were recorded and only for certain periods. As a result, some issues in relation to the investigation receive particular attention, whereas others that might potentially give cause for concern appear sporadically, or not at all.
- 12.1.19 The extent to which the ambit of the Commission's investigation is constrained by the limited nature of the telephone calls can readily be seen when one compares the issues that emerge from the recordings with the issues raised by Mr Ian Bailey and Ms Catherine Jules Thomas in the course of their engagement with the Commission. It is a matter of public knowledge that, since an early stage of the investigation, members of An Garda Síochána have regarded Mr Ian Bailey, a resident of West Cork, as the principal suspect for the murder of Madame Toscan du Plantier. Mr Bailey and his partner Ms Thomas have, over the years, made a number of serious complaints concerning the conduct of the Garda investigation as it related to him.

12.1.20 By letter dated 8 October 2014, the Commission asked Mr Bailey to submit a statement, outlining any information he had of relevance to the Commission’s Terms of Reference. On 14 October 2014, Mr Bailey and Ms Thomas provided the Commission with a statement headed, “*Allegations concerning evidence of unlawful and improper conduct by members of An Garda Síochána (AGS) in connection with the investigation into the death of Mme. Sophie Toscan du Plantier as per subsection M of Terms of Reference*”. The statement listed the following instances of what Mr Bailey and Ms Thomas alleged to be improper or unlawful conduct in this context:

- Wrongful arrest of Mr Bailey and Ms Thomas in 1997 and Mr Bailey once more in 1998;
- Wrongful arrest of Ms Thomas and of her youngest daughter in 2000;
- Physical and verbal abuse of Mr Bailey, including death threats, on the occasion of his first arrest in 1997;
- Manufacture of false evidence “systematically and deliberately” against Mr Bailey, with particular reference to identification evidence given by a Mrs A in 1997 and later retracted by her in 2006;
- A conspiracy on the part of various members of An Garda Síochána to cast Mr Bailey as the killer and Ms Thomas as his accomplice, by telling neighbours and other locals that he was the murderer and that Ms Thomas was shielding him;
- Obtaining of false statements implicating Mr Bailey from a number of known drug dealers in exchange for favourable treatment by An Garda Síochána; and
- Recruiting a Mr B as a police informant and paying him in the form of cash, clothes, alcohol and cannabis, in the hope that he would provide a statement incriminating Mr Bailey.

12.1.21 It should be noted that these are not matters that have been formally investigated by the Commission. However, the Commission is aware that they have been discussed, *inter alia*, in the course of the hearing of the High Court action brought by Mr Bailey.

12.1.22 Of the matters listed above, only two – that relating to Mr B, and the allegation that members of An Garda Síochána had told people he was the killer and that Ms Thomas was shielding him – emerge from the telephone recordings in any substantive sense. The other allegations made by Mr Bailey, though profoundly serious in nature, fall outside the Commission’s Terms of Reference. The Commission, therefore, cannot and does not express any view in relation to any of these serious issues.

- 12.1.23 The Commission is conscious, in particular, of the serious allegations that have been made, not just by Mr Bailey but also by Mrs A herself, to the McAndrew Inquiry in 2006 concerning her involvement with the Garda investigation. In essence, Mrs A has alleged that she was pressurised by members of An Garda Síochána into making statements that contained false information – including, most importantly, saying that Mr Bailey was the person she saw at Kealfadda Bridge on the night of the murder of Madame Toscan du Plantier.
- 12.1.24 The recorded telephone calls reviewed by the Commission include some calls made to and from Mrs A herself; others involve members of An Garda Síochána discussing her involvement with the Toscan du Plantier investigation, and the significance of the information attributed to her. These calls date from the period 1997-1998, and the Commission has not found any evidence in them to suggest that Mrs A was pressurised into giving false information. As stated above, the first significant allegations from Mrs A in that regard were not made until 2006.
- 12.1.25 To investigate these allegations would have required a review of the original investigation and subsequent Garda inquiries on a scale that was not feasible for the Commission to undertake, particularly in light of the fact that its primary task was to investigate the installation, operation and use of Garda telephone recording systems throughout the entire country over a 33-year period.
- 12.1.26 Paragraph 2 of the Terms of Reference states that “The Commission shall exercise discretion in relation to the scope and intensity of the investigation it considers necessary and appropriate, having regard to the general objective of the investigation.” The general objective, as set out in paragraph 1, is to report on “the operation of Garda Síochána telephone recording systems.” In light of this, and taking into account the time and resources available to it, the Commission can only investigate matters relating to the Toscan du Plantier investigation to the extent that they arise from information emanating from Garda telephone recording systems.

**Layout of the chapter**

- 12.1.27 For ease of reference, the Commission has divided this Chapter into the following headings:
- a. Overview of the investigation of the death of Madame Toscan du Plantier;
  - b. The process of identifying and reviewing all relevant telephone calls from Bandon Garda Station or otherwise, which includes:

- i. The work of the Commission in identifying possible relevant telephone recordings;
  - ii. An analysis of the exercise carried out by members of An Garda Síochána who were assigned the task of reviewing the surviving tapes of recorded calls to and from Bandon Garda station for content relating to the investigation of the death of Madame Toscan du Plantier;
  - iii. The Commission's own review of the surviving tapes of recorded calls.
- c. Examination of whether the identified calls disclose evidence of unlawful or improper conduct by members of An Garda Síochána in connection with the investigation of the death of Madame Toscan du Plantier. The matters considered by the Commission under this heading can be categorised as follows:
  - i. Whether the recorded calls disclose evidence, in the case of certain Garda members, of a willingness to contemplate the possibility of falsifying, altering and / or suppressing evidence in connection with the investigation; and whether there is evidence of any such intention being carried out;
  - ii. The actions and approach of certain members of An Garda Síochána in dealing with the victim of an assault allegedly perpetrated near Schull, Co. Cork, on 13 June 1997, and a possible connection between those actions and the investigation into the death of Madame Toscan du Plantier;
  - iii. Whether the recorded calls disclose evidence that investigating members of An Garda Síochána provided illegal drugs and sums of money to a potential witness, in order to secure his assistance in obtaining evidence against Mr Ian Bailey, the principal suspect for the murder of Madame Toscan du Plantier;
  - iv. The potentially improper disclosure of information to third parties, including members of the press, by certain members of An Garda Síochána in connection with the investigation.

## 12.2 INVESTIGATION OF THE DEATH OF MADAME SOPHIE TOSCAN DU PLANTIER

- 12.2.1 Madame Sophie Toscan du Plantier, a French citizen, was murdered at her holiday home in Toormore, near Schull, West Cork, late on the night of 22 or early on the morning of 23 December 1996.
- 12.2.2 The following overview of the Garda investigation into her death is not a complete account of the investigation, but focuses on those aspects that are relevant for the purposes of the Commission’s investigation under paragraph 1(m).
- 12.2.3 Members of An Garda Síochána investigating the murder regarded Mr Ian Bailey, a UK citizen who was living in the area, as a suspect in the murder from late December 1996. Mr Bailey lived approximately 4 kilometres from the scene of the murder.
- 12.2.4 On 11 January 1997, a member of An Garda Síochána at Bandon Garda Station received a telephone call from a woman calling herself “Fiona”. She told the Garda who received the call that, at approximately 3am on the morning of 23 December 1996, while driving from Toormore towards Goleen, she had seen a man at the Kealfadda Bridge. She described the man she had seen and added that he appeared to be *“wiping himself and stumbling along.”* Kealfadda Bridge is some 2.6 kilometres from the scene of the murder.
- 12.2.5 On 20 January 1997, An Garda Síochána, through an appeal on the ‘Crimeline’ television programme, asked “Fiona” to contact them again. On 21 and 24 January 1997, the person who had used the name “Fiona” contacted Bandon Garda Station. However, the woman refused to give her details and said she had nothing further to add. She agreed to come to Bandon Garda Station at a specified time but failed to appear.
- 12.2.6 Members of the investigation team, in an effort to identify “Fiona”, played a tape recording of one of the telephone conversations between members of An Garda Síochána and “Fiona” to a member from Schull Garda Station. Upon hearing the recording of the conversation, that member recognised the voice as belonging to a local woman he knew, a Mrs A.
- 12.2.7 Mrs A, at this point, had already given information to An Garda Síochána in relation to the investigation. On 25 December 1996, she had, by telephone, reported seeing a man on 21 and 22 December 1996 in Schull at times that An Garda Síochána believed were relevant to the investigation. On 17 January 1997, she alerted An Garda Síochána to the

presence of a man in Brosnan's shop in Schull. Mrs A subsequently made a statement to say that the person she identified in Brosnan's shop was the same person she had seen on 21 and 22 December 1996. She had not yet, however, revealed to An Garda Síochána that she was the "Fiona" who had called to report the sighting at Kealfadda Bridge.

- 12.2.8 On 28 January 1997, the member of An Garda Síochána who had identified Mrs A's voice on the recorded call spoke to Mrs A in his home, in the presence of two detectives from Bandon Garda Station. During the course of the conversation, Mrs A confirmed that she had telephoned An Garda Síochána under the alias "Fiona" to inform them of the sighting of a man at Kealfadda Bridge in the early hours of 23 December 1996. Subsequent statements made by Mrs A asserted that the man she had seen at Kealfadda Bridge on 23 December was the same man seen in Schull on 21 and 22 December 1996 and 17 January 1997. She also stated that the person in question was Mr Bailey.
- 12.2.9 Mrs A was reluctant to come forward publicly, due to the fact that, at the time she had allegedly seen a person resembling Mr Bailey at Kealfadda Bridge, she was out, late at night, in a car in the company of a man other than her husband. Mrs A refused to name the man who had been with her in the car.
- 12.2.10 Mr Bailey was arrested on two separate occasions, on suspicion of having committed the murder of Madame Toscan du Plantier. He was first arrested on 10 February 1997 and detained, pursuant to the provisions of s.4 of the Criminal Justice Act 1984. He was arrested for a second time on 27 January 1998, under s. 10 of the Criminal Justice Act 1984, pursuant to an Order of Bandon District Court, granted on 26 January 1998. Members of An Garda Síochána also arrested Mr Bailey's partner, Ms Catherine Jules Thomas, on 10 February 1997, on suspicion of murder contrary to common law, and detained her under s. 4 of the Criminal Justice Act 1984. She was also arrested on 22 September 2000, on suspicion of having committed an offence under s. 7(2) of the Criminal Law Act 1997. On each occasion, Mr Bailey and Ms Thomas were released without charge.
- 12.2.11 The original murder investigation was based in Bantry Garda Station. The local District Officer was in overall charge of the management of the case, assisted by detectives from Cork West Divisional Headquarters in Bandon and Cork City. A team of detectives from the National Bureau of Criminal Investigation (NBCI) was also sent to assist in the investigation. An initial incident room was set up in Bantry Garda station. As the accommodation at Bantry Garda station was poor and not suitable to run an incident room, the incident room was transferred to Bandon Garda station in or around March 1997.

- 12.2.12 A Detective Sergeant from the NBCI was in charge of the Incident Room around the time of the move to Bandon Garda station. He was given the task of completing the investigation file for the attention of the DPP. The original 327-page report was completed and sent to the DPP on 29 September 1997. It recommended that Mr Bailey be charged with the murder of Madame Toscan du Plantier.
- 12.2.13 The report was considered by the Office of the DPP and a train of correspondence ensued over the following months, including requests for An Garda Síochána to provide more information and documentation. Ultimately, the Office of the DPP took the decision that Mr Bailey was not to be charged at that time.
- 12.2.14 In March 2001, a further report was compiled by An Garda Síochána, on the basis of which the DPP was asked to issue a direction that Mr Bailey be charged with murder. The Office of the DPP declined to do so, expressing the view, in a report of November 2001, that “a prosecution against Mr Bailey is not warranted by the evidence.”
- 12.2.15 Further reports were submitted to the Office of the DPP by An Garda Síochána in 2002 and 2005, in which it was made clear that Mr Bailey remained the sole suspect for the murder in the eyes of An Garda Síochána. These reports were duly considered by the Office of the DPP, but the decision not to prosecute Mr Bailey remained unchanged.
- 12.2.16 On 11 October 2005, Mr Bailey submitted a formal letter of complaint to the Garda Commissioner and Minister for Justice, in relation to the behaviour of An Garda Síochána during the investigation of the murder of Madame Toscan du Plantier. It was decided that an internal Garda inquiry, headed by Deputy Commissioner Ray McAndrew, would investigate the complaints made by Mr Bailey and Ms Thomas. The report of the inquiry was submitted to the Garda Commissioner in March 2007. Insofar as it deals with matters that are not related to the telephone recordings, its findings are outside the Terms of Reference for this Commission.
- 12.2.17 In 2008, the entire Garda file in relation to the murder was sent to the French authorities. On 19 February 2010, a judicial authority of the Republic of France issued a European Arrest Warrant, seeking the surrender of Mr Bailey to France for the purpose of prosecution for the murder of Madame Toscan du Plantier. The High Court made an Order directing his surrender but certified a point of law of exceptional public importance for consideration by the Supreme Court. Mr Bailey duly appealed.
- 12.2.18 It was determined as a fact, in each of the judgments delivered by the Supreme Court judges that, in the context of the argument based on s. 42(c) of The European Arrest

Warrant Act 2003, the DPP had formally decided that Mr Bailey would not be prosecuted for the murder.

## **12.3 IDENTIFICATION OF RELEVANT RECORDINGS**

### **The ‘Bailey’ and ‘Thomas’ cases**

- 12.3.1 Mr Ian Bailey instituted proceedings in 2007 against the Commissioner of An Garda Síochána, the Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (Record Number 2007/3424P). His partner, Ms Catherine Jules Thomas, instituted similar proceedings (Record Number 2007/3796P). The Plaintiffs sought damages for unlawful arrest, false imprisonment, conspiracy, assault, battery and trespass to the person, intentional infliction of emotional and psychological harm, harassment, intimidation and terrorising and oppressive behaviour. Mr Bailey’s claim was dismissed. An award of costs was made against him. At the time of writing, Mr. Bailey’s case is under appeal and Ms Thomas’ case is yet to be heard.
- 12.3.2 The High Court (Hedigan J.) made an Order for Discovery of documents in those proceedings. In the course of compliance with that Order, An Garda Síochána found that there were, in Bandon Garda Station, a number of tapes of recordings of telephone calls to and from that station which contained material of potential relevance to the Discovery Order.
- 12.3.3 Over a period of three months from January to April 2014, a hand-picked team of members of An Garda Síochána reviewed the entirety of the recorded calls on these tapes, seeking to identify every call of relevance to the Toscan du Plantier murder investigation. The total number of calls listened to by the Garda team was in excess of 40,000.
- 12.3.4 In order to determine whether it was necessary for the Commission itself to repeat this exercise, a thorough examination was carried out of the review conducted by the Garda team. The Commission examined large volumes of documentation and questioned each member of the Garda review team in detail concerning the methodology, application, oversight and results of their review of the Bandon tapes.

### **Emergence of telephone recordings**

- 12.3.5 In 2013, overall responsibility for co-ordinating the response of An Garda Síochána to requests for documentation arising from the Bailey case was held by Chief Superintendent Tom Hayes, Cork West Division. With the assistance of Detective Inspector Joe Moore, also based in West Cork, he assembled a small team of officers at



an Incident Room in Anglesea Street Garda station, Cork City. The Incident Room team was assigned the task of identifying and collating all documentation in the possession of, or under the power of procurement of, An Garda Síochána that fell within the terms of the Discovery Order. This task initially involved the examination of all documentation in the possession of the Incident Room to ascertain its relevance to any of the categories of Discovery. This included in excess of 40,000 pages of documentation, made up of Garda correspondence, reports, statements, newspaper articles, exhibits, photographs, Garda registers and occurrence books.

- 12.3.6 Three of the team had already been working full time since September 2011 in the Incident Room at Anglesea Street station on ‘mutual assistance’<sup>317</sup> requests from the French authorities in relation to the Toscan du Plantier investigation. As a result, they all had a good working knowledge of the entire investigation file. In the summer of 2013, they were joined by two more officers, both trained Incident Room co-ordinators.
- 12.3.7 In June 2013, the Telecommunications technician at Bandon Garda Station found 6 DAT tapes which, according to their labels, dated back to 1997 and 1998. These tapes were recorded on the DAT recording system, which is the subject of Chapter Five of this Report. In the belief that they could have recordings on them relating to the murder investigation, the technician handed them over to the Incident Room team. On 20 June 2013, he handed a further three tapes to another member of the Incident Room team.
- 12.3.8 On the evidence before it, the Commission is satisfied that the tapes were not listened to, by the technician or anyone else, prior to being handed over to the Incident Room team in June 2013. In a report to the Sergeant in charge of the Incident Room, written on the day the first batch of tapes was handed over, the technician from Bandon station stated:

*“The Bandon recorder is still in my office. However when I powered it up and attempted to play a tape the DAT drive failed to recognise or read the tape.”*

Equally, there is no evidence to suggest that the tapes (which were delivered to the Commission for inspection on its request) were tampered with in any way, other than repair work carried out on them, prior to the review process carried out by the Incident-Room team between January and March 2014.

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<sup>317</sup> A request from a foreign country for assistance in a criminal matter.

### **Review of telephone recordings – An Garda Síochána**

- 12.3.9 On 20 and 21 June 2013, a member of the Incident Room team conducted an initial listening exercise on one of the tapes. He reviewed approximately 400 calls but heard none of relevance to the Toscan du Plantier investigation. After this, the tapes were put aside while the Incident Room focused on dealing with the large volume of paper documentation required to comply with the Discovery Order.
- 12.3.10 Around September 2013, Chief Superintendent Hayes and Detective Inspector Moore approached a Sergeant Joanne O'Brien, with whom they had worked previously, and asked her to take on the task of reviewing the content of the DAT tapes. In evidence to the Commission, both officers said she was chosen for the task because they considered her to be efficient, trustworthy and discreet. Furthermore, at that time, she had no connection to either the Cork West Division or the Toscan du Plantier case.
- 12.3.11 Sergeant O'Brien told the Commission that she believed the only members of An Garda Síochána who were aware of the task that she had been assigned were Detective Inspector Moore, Chief Superintendent Hayes and members of the Incident Room team at Anglesea Street.
- 12.3.12 Sergeant O'Brien commenced listening to the tapes on 5 September 2013. In the course of the listening process, she noted a number of calls that related to the Toscan du Plantier investigation. The fact and content of these calls were reported orally to Detective Inspector Moore on 2 October, who then listened to the calls himself on 5 October 2013. On 18 October 2013, the existence and content of some of these calls were reported to Garda Headquarters by Chief Superintendent Hayes, with consequences that are detailed in the Second Interim Report of the Commission.
- 12.3.13 Except for two occasions on which tapes that had appeared to malfunction were conveyed to the Telecommunications Section, Garda Headquarters (HQ) for examination and repair, Sergeant O'Brien retained custody of the tapes she had been given until 15 January 2014, when she handed them into the Incident Room in order that a comprehensive review of all recorded calls on the tapes could take place. Sergeant O'Brien then joined the existing Incident Room team in conducting this review.
- 12.3.14 Chief Superintendent Hayes told the Commission that, prior to the review process commencing in January 2014, he instructed Detective Inspector Joe Moore to communicate to the listening team that they should take the broadest possible interpretation of relevance to the Toscan du Plantier investigation in considering the recordings. If there was any mention of Madame Toscan du Plantier, or Schull or a murder or "*anything that might sort of raise a flag*", the instruction was that it should be

noted for further assessment as to its relevance. Detective Inspector Moore told the Commission that he gave an oral briefing to the members who were involved in the listening exercise, and he was satisfied that the criteria used to evaluate the information on the tapes were as wide-ranging as possible. He was also sure that the members were fully aware of all the parties involved and, specifically, aware of the persons who were identified in the categories of Discovery. The members who were carrying out the listening exercise were told that recordings containing any mention of the case, the area involved, or any of the parties involved should be fully downloaded to be assessed for Discovery. Chief Superintendent Hayes told the Commission that he instructed his team that “*no stone should be left unturned*” and that, if members had a doubt about any phone call, that call should be included for examination.

- 12.3.15 The Commission questioned every officer who participated in the review process separately and in detail. Each of them confirmed the evidence of Chief Superintendent Hayes and Detective Inspector Moore that they were not confined to the categories of the Discovery Order but were told to employ the widest possible interpretation of relevance in marking calls for consideration. If there was any doubt as to the relevance of a particular call, they were told to err on the side of caution and report it. Further reviews would then be carried out by the Sergeant in charge of the Incident Room and, ultimately, by a member of the legal team acting for An Garda Síochána in the Bailey case.
- 12.3.16 A further 4 members were added to the team reviewing the calls on 7 February 2014, following concerns that the task would not be completed within the time allotted by the High Court for providing Discovery. The 4 new members of the Incident Room team were assigned to listen to Channel 1 of the tapes, as that was the channel that had the greatest amount of traffic, and Channel 2, which was the radio channel. Other channels which had been found to contain the most significant calls in terms of content relating to the Toscan du Plantier investigation, were reserved for review by the existing team members, who had more experience and a more detailed knowledge of the case.
- 12.3.17 The new members of the Incident Room team were briefed by Detective Inspector Moore and also received a briefing document prepared by one of the Incident-Room team members. They were given details on the background to the High Court civil case and the requirements of the High Court Discovery process. Detective Inspector Moore set out, in detail, the 12 categories of Discovery. The new members were also told not to adhere rigidly to the parameters of the Discovery Order, but to adopt an approach that was as wide as possible in assessing the contents of the tapes. If there was any mention of the investigation of the Madame Toscan du Plantier murder, then the call should be ticked as relevant to the investigation. The listening team were also briefed on the fact

that the cases being taken by Mr Bailey and Ms Thomas concerned allegations of misconduct on the part of members of An Garda Síochána. They were told that, if they had any doubts about whether a call was relevant to the investigation, they were to ask for advice.

- 12.3.18 The team were aware of the impending deadline to complete Discovery but the Sergeant in charge told the Commission that he took the view that, although there was pressure on everyone to complete the job, the overriding pressure was to do it right. Although there was a deadline, he considered that an extension could be sought if it could not be met, as, if the job was not done right, it might have to be done again.
- 12.3.19 Because of concerns about preserving the integrity of the tapes, which were almost two decades old and in a fragile condition that had resulted in a number of breakdowns and technical issues, a system had been designed, in conjunction with the Garda Síochána Telecommunications Section, whereby the contents of each tape were recorded and backed up onto the NICE hard-disk system while they were being listened to. In this way, the entire audio content of tapes was copied onto the NICE system, where they could be stored and replayed as required without risking any further damage or deterioration to the tapes themselves.
- 12.3.20 During the exercise of listening to the DAT tapes, in order to analyse whether they contained material relevant to the investigation, the tapes were played, one channel at a time, all the way through, while being simultaneously recorded onto the NICE system. The process was carried out on a shift basis, with 4 DAT machines, each connected to a NICE digital recorder, being used on a rota system of over 20 hours per day. In each shift, 4 members of the team listened to one machine each, using headphones. The two sergeants played a supervisory role or, if there was a member on leave or not working, they would take over the listening task on the spare machine.
- 12.3.21 A member of the team listened to every call on every tape as it was played. Even calls that seemed plainly irrelevant were listened to in their entirety, in case something of relevance was stated at a later point in the conversation, or in case the call was interrupted by another, relevant, call. The process was finally completed on 24 March 2014 at 10pm. Over 40,000 calls were listened to during the process, amounting to approximately 3,080 hours of recorded calls. The calls that were deemed to have a relevance to the investigation were downloaded from the NICE system onto a disk, so that they could be listened to again as part of a secondary review process conducted by the Sergeant in charge with assistance from one other team member.

- 12.3.22 At the outset, the team made notes about every call that they listened to. Following concerns that the taking of unnecessarily detailed notes was slowing down the process of identifying relevant calls, it was decided to create a standard-form log sheet, to be used by all team members, which would include a call numbering system and would be easy to use, transparent and accountable. After about two or three weeks, the column labelled “relevance” on the call-log template was replaced by two columns – one to indicate relevance to the investigation, the other to indicate relevance to the categories in the Discovery Order. The details for each call were initialled by the member who entered it.
- 12.3.23 The completed log sheets were reviewed on a daily basis. Any call marked as relevant to the investigation was then downloaded from the NICE system, indexed and arranged for further assessment in terms of their relevance to the Discovery Order.
- 12.3.24 The members of the Incident Room team made an initial decision about whether or not a call was relevant to the investigation and the Discovery Order. The Sergeant in charge told the Commission that if a call was marked as not relevant after the first listening by a member of the Incident Room team and the member did not express any doubt about whether it was relevant, then it would not be listened to again. The Sergeant expressed confidence in his team and said that they were all aware that they had the responsibility of signing off on each call that they listened to: they were all aware of the seriousness of the exercise. Members of the team were also aware that every decision made in relation to each individual call was traceable to the person who made it and could potentially be the subject of future inspection and review, whether by An Garda Síochána themselves or by some external body such as the High Court in the Bailey case.
- 12.3.25 The Commission was also told that, because of the sensitivity of the task that was being performed, the members who were working in the Incident Room did not discuss the details of the calls that were not related to the murder of Madame Toscan du Plantier. Sergeant O’Brien informed the Commission that there was an undertaking, among those in the room where the listening exercise was taking place, that the issues that arose on the tapes were not discussed between members. Only the individuals who listened to the recordings knew about their contents and strict confidentiality was maintained. This was confirmed by other members of the Incident Room team who appeared before the Commission.
- 12.3.26 On 4 April 2014, Detective Garda David Leslie received a tenth Bandon DAT tape from Inspector Michael McDonnell of Garda Telecommunications in Garda HQ. The tape had been located during an assessment by the Telecommunications Section. Chief Superintendent Hayes was told that the reason the tape was in Garda HQ was because the Telecommunications Section had previously carried out an exercise to estimate the

amount of radio and telephone traffic coming into Bandon Garda Station and had retrieved the tape in question for that purpose. It was established that this tape had a capacity for 32 channels but only 4 were recorded on, from 19 December 2002 to 20 January 2003. The tenth tape was listened to and simultaneously transferred onto the NICE system. This task was completed on 30 April 2014. At that stage, 10 members of An Garda Síochána in the Incident Room had listened to over 45,000 recordings from 10 tapes over a period of about 15 weeks.

- 12.3.27 Detective Garda Leslie told the Commission that the Incident Room team counted that they had assessed 45,106 calls. This number was arrived at by counting the calls on the log sheets. Because incidents of interference, dropped calls (calls in which the person hung up without speaking), echoes and dial tones were counted as separate calls, a significant number of the 45,106 calls were incorrectly described as calls. The members of the Incident Room team did not count how many of the 45,106 recordings were actually calls. The Commission carried out its own exercise to establish precisely how many calls had been listened to.
- 12.3.28 Adding together all of the recordings containing audio from individual telephone calls produced a total of 42,363 calls. A further 5,906 entries on the log sheets kept by the Incident Room related to instances of interference, dropped calls, or simple dial tones.
- 12.3.29 From this total, 282 calls were deemed, by the Garda Incident Room team, to be relevant to the Toscan du Plantier investigation. Expressed as a percentage of the total number of 42,363 calls, that amounts to 0.66%.
- 12.3.30 Both Chief Superintendent Hayes and Detective Inspector Moore expressed full personal confidence in the team that carried out the analysis of the tapes and in the quality and comprehensive nature of the review carried out by them. The members of the team themselves expressed, with confidence and conviction, their belief that every call on the tapes that related, in any way, to the investigation of the death of Madame Toscan du Plantier had been successfully identified.
- 12.3.31 All of the 282 calls, having been downloaded from the NICE system onto a hard drive, were listened to on a number of occasions and assessed for relevance to the categories of Discovery in the High Court Order. These 282 call recordings were subsequently sent to An Garda Síochána's Office of Legal Affairs for assessment by Discovery Counsel. The audio on some of the calls was poor, so Documentary Counsel had asked that they be transcribed before he made a preliminary decision as to whether or not they were

relevant to the investigation of the murder of Madame Toscan du Plantier. Counsel concluded that 123 of these calls were relevant for the purposes of the Discovery Order.

12.3.32 All of the audio calls that had been assessed by Discovery Counsel and deemed to be relevant to Discovery were sent to Gwen Malone, stenographer, for transcription. When the transcripts were returned, the staff in the Incident Room considered that they contained a number of inaccuracies, most likely owing to the extremely poor quality of some recordings, the difficulty of understanding some speakers' accents and the use of colloquial terms and names unfamiliar to the transcribing team. There were also some issues with how parties to calls were identified. The transcripts were assessed and it was decided, with the approval of the Garda Office of Legal Affairs and Counsel for the State in the Bailey case, that all of the transcripts would be assessed against the recorded audio by the Incident Room staff and any inaccuracies corrected. The calls were listened to with the transcripts and, if a word was deemed to be incorrect or misheard, it was replaced. If the word was not discernible, then the transcripts were marked "[inaudible]". Copies of both the initial transcript and the "corrected" transcript were provided to Discovery Counsel, who also had access to copies of the audio recordings.

12.3.33 The Commission received copies of the original transcripts prepared by Gwen Malone and reviewed them in conjunction with the transcripts prepared by the Incident Room team. In addition, when a team from the Commission engaged in its own listening task in relation to calls on Channels 4, 5 and 6, they did so in conjunction with the transcripts. Some words that had been marked as "inaudible" were, in fact, audible but, for the most part, the transcripts were very accurate, even though the sound quality of the recordings was often very poor.

12.3.34 In addition to the telephone calls that were listened to on the DAT tapes, the Garda radio channel, which was typically Channel 3 on the tapes, was also listened to by the Incident Room team. As it proved difficult to log individually all the recordings on this channel, a block recording log was devised, in which periods of recording time rather than individual calls were logged and initialled as having been reviewed. Only one radio recording on the tapes was identified as relevant to the Toscan du Plantier investigation.

**Assessment of Garda review of recordings**

12.3.35 The members of An Garda Síochána who were involved in reviewing the content of the Bandon tapes assured the Commission that, in listening to the tapes, they had applied, in the first instance, a test which seems indistinguishable from the test that the Commission must apply in the first part of its investigation in relation to paragraph 1(m) of its Terms of Reference. The test that they applied was to identify any calls "which related to the Garda investigation into the death of Sophie Toscan du Plantier".

12.3.36 The witnesses from An Garda Síochána who gave evidence to the Commission were convincing in their assurances that their assessment of the calls was satisfactory. The members of the Incident Room team were all certain that they could not, even mistakenly, have missed any relevant calls. The Commission considered it significant that the members of An Garda Síochána working in the Incident Room in Ballincollig Garda Station identified and noted several calls containing evidence of possible improper conduct, in some cases unrelated to the Toscan du Plantier investigation. The Commission considered that the witnesses were credible in their assurances that they would not be reluctant to identify calls that were potentially discreditable to other members of the force. It would be unrealistic, however, to exclude all possibility of human error in an operation of such intensity and covering such a large number of calls, particularly when only a very small percentage (0.66%) turned out to be in any way relevant. The Commission did accept that simple error was unlikely to have led to a Garda overlooking a call that disclosed evidence of significant unlawful or improper conduct.

#### **Review of telephone recordings – The Commission**

12.3.37 Notwithstanding the robust and credible evidence given by the Incident Room team and the officers who oversaw their work, it was decided that the Commission should carry out its own listening operation. The aim of the operation was to determine the reliability of the exercise previously conducted by An Garda Síochána. Given that the total number of calls found on all channels on the DAT tapes exceeded 40,000, and taking account of the length of time it took a team of 10 members of An Garda Síochána to listen to those calls in their entirety, it was decided to confine the exercise to those channels on which the vast majority of calls of significance to the Commission were found.

12.3.38 Of the 282 calls identified by the members of An Garda Síochána in their review process, 170 were identified on Channels 4, 5 or 6. These 170 calls also contained the vast majority of conversations of substance found in relation to the investigation. In contrast, a large number of calls identified on channel 1, the busiest channel overall, which recorded calls to the main station line, contained little in terms of actual discussion and were often just short calls in which various members were sought on the telephone by members of the public.

12.3.39 In addition, the lines recorded on Channels 4, 5 and 6 were ones outside the lines normally recorded in Divisional Garda Stations, according to the evidence collected by the Commission in relation to the recording of telephone calls in Garda stations nationwide. The Commission had also received evidence that Channels 4 and 5 were those used most commonly by the members involved in the investigation of the murder



of Madame Toscan du Plantier. The evidence of the members of An Garda Síochána from the Ballincollig operation also suggested that the lines recorded on these channels appeared to have changed at various times. As a result of all of these factors, it was decided that the staff from the Commission would listen to all calls emanating from Channels 4, 5 and 6 on each of the 10 DAT tapes.

- 12.3.40 Prior to this, the call logs created by the Incident Room team in Ballincollig Garda Station were assessed by the Commission for any evidence of possible error. Any perceived anomalies in the call logs were put to the witnesses who had signed off on them, to clarify any issues that might have arisen. The staff of the Commission then used the call logs, when they were listening to Channels 4, 5 and 6, to satisfy themselves that information given on the call logs matched the audio of the tapes. Over the course of a 4-week period, beginning on 10 June 2016 and ending on 12 July 2016, three members of the Commission staff carried out the listening exercise in the Telecommunications Section at Garda HQ in Phoenix Park.
- 12.3.41 If a Commission staff member decided that a call was relevant to the murder investigation but it had not been identified as such previously, the time and date of the call were noted. Once all of the calls on the designated channels had been listened to, the calls identified by the Commission were downloaded and conveyed to the offices of the Commission for further examination and transcription. In total, 14 calls, of varying degrees of relevance, not previously identified by An Garda Síochána as being relevant to the Toscan du Plantier investigation, were downloaded. In addition to these, it emerged that one call that had been identified by the Incident Room team as being relevant to the murder investigation had not been provided to either the Discovery Counsel in the Bailey case or to the Commission. Following further inquiries, the Commission accepts that the failure to provide that particular call was an oversight rather than a deliberate action.
- 12.3.42 Some of the calls identified by the Commission as relevant, but which had not been identified by the members of the Incident Room, merely contained passing references to the murder inquiry and did not discuss it in any detail. However, other calls appeared to contain more specific or obvious discussions about the investigation and should, in the Commission's view, have been identified by An Garda Síochána as being relevant.
- 12.3.43 While the number of additional calls identified by the Commission is low, when considered in line with the total number of calls on the designated lines, it is not insubstantial when placed alongside the total number of calls (282) previously identified by An Garda Síochána. Some of the calls newly identified by the Commission did disclose evidence of improper or unlawful conduct by An Garda Síochána in relation to

the Toscan du Plantier investigation and have been included in the Commission's investigations. Notwithstanding this, the Commission does not believe that the failure of the Incident Room team to identify these calls was in any way motivated by concerns about their content as regards that investigation. The Commission is further strengthened in this view by the fact that a number of calls containing information of much greater concern were identified by the Incident Room team and disclosed first to the legal team in the Bailey case and then to the Commission.

12.3.44 The Commission called as witnesses and questioned on oath all of the members of An Garda Síochána, including their superior officers, who took part in the listening process in Ballincollig Garda Station. These members of An Garda Síochána gave evidence to the Commission, on oath, in which they expressed themselves as confident, to an extremely high degree (in some cases to the extent of 100%) that they could not have failed to note and record any calls relevant to the Garda investigation of the murder of Madame Sophie Toscan du Plantier.

12.3.45 The Commission was impressed with the quality of the evidence of these members of An Garda Síochána and was and is fully satisfied of their integrity and of their dedication to the onerous task that had been imposed on them. It is particularly striking that these Garda members identified and noted as relevant, for the purposes of Discovery in the Bailey action, a significant number of telephone conversations in which members of the force are heard to make statements or suggestions that were to their discredit. The willingness of those members of An Garda Síochána to identify such calls strongly suggests that the members engaged in the Discovery operation at Ballincollig were not motivated to any degree to conceal evidence that would or might be discreditable to their colleagues or the force in general. The Commission is satisfied that those members of An Garda Síochána did not engage in any covering up of evidence.

12.3.46 In summary, the Commission is satisfied that it has complied, so far as is necessary and appropriate, with the direction given to it, pursuant to the first limb of paragraph 1(m) of its Terms of Reference, namely to "identify and review all recordings in the possession of An Garda Síochána emanating from the Garda telephone recording system at Bandon Garda Station or otherwise, which relate to the Garda investigation into the death of Sophie Toscan du Plantier..."

## **12.4 REVIEW OF TELEPHONE RECORDINGS – EVIDENCE OF UNLAWFUL / IMPROPER CONDUCT**

### **Interpretation of paragraph 1(m)**

12.4.1 It is appropriate at this point to quote once more the interpretation of paragraph 1(m) of the Terms of Reference given by the Commission in its Third Interim Report of November 2015:

“The Commission believes that it is appropriate that it give formal notice of its interpretation of paragraph 1 (m) of its Terms of Reference as follows:

Having regard to the fact that the Commission was established to investigate “the operation of Garda Síochána telephone recording systems” and that the matters listed in the lettered sub paragraphs of paragraph 1, including (m) are expressed to be “particular” aspects of that matter, the Commission interprets sub paragraph 1(m) as meaning:

1. The Commission is required to establish whether the recorded calls which it identifies and (in the sense of combined with) other acts or events in the course of the said Garda investigation, disclose evidence of unlawful or improper conduct by members of An Garda Síochána in connection with the Garda investigation into the death of Madame Sophie Toscan du Plantier.
2. The Commission is not required to conduct an investigation of possible unlawful or improper conduct by members of An Garda Síochána in connection with that investigation generally, but is required to do so only where the recorded calls disclose evidence of such unlawful or improper conduct.
3. The Commission is required to establish only whether those recorded calls, in conjunction with such "other acts or events" disclose evidence of unlawful or improper behaviour. It is not required to establish whether such unlawful or improper behaviour in fact took place.”

12.4.2 As stated previously, this means that the focus of the Commission is essentially on the contents of the recorded telephone calls from the Garda telephone recording systems at Bandon Garda Station. The Commission is required to determine whether any of those recorded telephone calls, alone or in combination with other acts or events in the course of the Garda investigation, discloses evidence of unlawful or improper conduct by members of An Garda Síochána.

**Evidence of unlawful / improper conduct**

12.4.3 Paragraph 1(m) of the Terms of Reference is unusual, in fact probably unique, in requiring the Commission to reach a conclusion, not that any members of An Garda Síochána, in fact, behaved unlawfully or improperly, but that the “recorded phone calls..... disclose any evidence of unlawful or improper conduct”. It has been established, in *Goodman International and others v. Hamilton*, a case that related to the Beef Tribunal, that a Tribunal may be empowered to investigate and report whether named persons have committed a criminal offence. Finlay C.J said that:

“Its finding, whether rejecting an allegation of criminal activity or accepting the proof of an allegation of criminal activity, can form no basis for either the conviction or acquittal of the party concerned on a criminal charge if one were subsequently brought, nor can it form any basis for the punishment by any other authority of that person. It is a simple fact-finding operation, reporting to the legislature.”<sup>318</sup>

However, neither the terms of reference of the Beef Tribunal, nor of any other Tribunal of which the Commission is aware, required a Tribunal (or a Commission of Investigation) to establish whether there was evidence of wrongdoing.

12.4.4 The test of whether evidence of unlawful or improper conduct is disclosed sets a very low threshold for the Commission’s investigation. It requires no more than a *prima facie* showing of misconduct on the face of the transcripts of the telephone calls, or when combined with other acts or events.

12.4.5 Whether any particular words spoken by a member of An Garda Síochána in the course of a recorded phone call disclose evidence of unlawful or improper conduct is essentially a matter for the Commission, which must determine the matter objectively, by listening to the call or reading a transcript of it.

12.4.6 Fundamentally, the task given to the Commission in paragraph 1(m) of its Terms of Reference is a preliminary one. The Commission is asked only to report on the existence of evidence that might warrant further investigation. In the event that such evidence is disclosed, it is not for the Commission to decide what further action, if any, should be taken.

12.4.7 However, the essentially preliminary nature of the Commission’s task does not mean that fair procedures and the constitutional rights of individuals can be ignored. It goes without saying that a finding that any particular member of An Garda Síochána acted unlawfully or improperly in the performance of his or her duty would be, to use the

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<sup>318</sup> *Goodman International and others v. Hamilton* [1992] 2 I.R. 542, at p 588

expression that appears throughout the judgment of Hardiman J. in *O’Callaghan v. Mahon* [2006] 2 I.R. 32, a “very grave” matter. But it is equally clear to the Commission that even a mere finding that there is evidence of such unlawful or improper conduct – without a final determination as to whether the unlawful or improper conduct actually took place – would potentially have devastating consequences for the standing and reputation of such a Garda member in the community.

- 12.4.8 For that reason, it was decided by the Commission that members of An Garda Síochána who could potentially be affected by a finding of the Commission under paragraph 1(m) should, where appropriate, be given the opportunity to attend and give evidence in relation to those telephone recordings in which possible evidence of improper or unlawful behaviour was identified by the Commission. In addition, they were provided with an opportunity to read and make submissions on the relevant sections of the Commission’s draft Final Report prior to its submission to the Taoiseach, as envisaged by s. 34 of the Commissions of Investigation Act 2004.
- 12.4.9 In some cases, it was not possible to hear evidence from relevant individuals, as the persons in question were deceased, or were too ill to attend before the Commission. For this and other reasons, the Commission decided not to name any of the individuals whose reputations are potentially affected by its conclusions in relation to paragraph 1(m) of the Terms of Reference.
- 12.4.10 The Commission is aware that some of the persons referred to in this Chapter of the Report are identifiable from information already in the public domain. Nonetheless, in the interests of fairness and of maintaining a consistent approach, their real names have not been used.
- 12.4.11 One final point needs to be made. As the Commission has already pointed out, the available telephone call evidence represents no more than a small and randomly assembled fragment of the total interactions relating to the investigation of the death of Madame Toscan du Plantier. As a result, the findings of the Commission are confined to specific instances where evidence of misconduct is disclosed. Because of the significant gaps in the available evidence, it is not possible to draw any general conclusions about patterns of behaviour within An Garda Síochána in connection with the Toscan du Plantier investigation; nor would it be fair to do so.
- 12.4.12 The Commission faces the task of investigating the contents of recorded telephone calls which, for the greater part, took place in 1997, though a small number occurred in 1998. Thus, the conversations recorded took place typically some 19 years ago. The participants (except in the case of a small number of calls) were unaware that they were

being recorded. The very existence of these recordings was totally unknown to the majority of the participants until in or about March 2014.

12.4.13 The focus of the Commission’s investigation is on the conversations of a small number of identified members of An Garda Síochána that were recorded. The great bulk of these conversations concerned 5 members of An Garda Síochána, in particular. Of those, two are deceased and two have suffered serious illness. These circumstances have, to a great extent, curtailed the Commission in its ability to fully investigate some aspects of the transcripts as required by paragraph 1(m).

12.4.14 A number of conversations involving persons who were not members of An Garda Síochána were also recorded. The Commission is concerned with those conversations only insofar as they may disclose evidence of misconduct by members of An Garda Síochána. It has no other function, and expresses no view in relation to the conduct of any other person, whether in connection with the Toscan du Plantier investigation or otherwise.

**Guiding principles: Statutory regulations and the Garda Code**

12.4.15 In performing its duty under paragraph 1(m), the Commission will have regard to the provisions of the Garda Síochána (Discipline) Regulations 1989, Statutory Instrument (S.I) No. 94/1989. Regulation 6 of those Regulations provides:

“An act or omission described in the Schedule shall be a breach of discipline and ‘in breach of discipline’ shall be construed accordingly.”

12.4.16 The Commission is not, however, restricted to consideration of those Regulations when considering whether evidence is disclosed of unlawful or improper conduct. The following provisions of the Schedule to the Discipline Regulations are potentially of relevance. They are:

1. “Discreditable conduct, that is to say, conducting himself in a manner which the member knows, or ought to know, would be prejudicial to discipline or reasonably likely to bring discredit on the Garda Síochána.  
.....
5. “Falsehood or prevarication, that is to say, in his capacity as a member—
  - (a) making or procuring the making of—
    - (i) any oral or written statement, or

(ii) any entry in an official document or record, which is, to the member's knowledge, false or misleading, or

(b) With a view to deceiving, destroying or mutilating any official document or record or altering or erasing or adding to any entry therein.

6. Breach of confidence, that is to say, making an unauthorised communication (namely, a communication other than a communication made in the execution of his duty or authorised by the Commissioner) in relation to any information which comes to the member's knowledge in the course of his duty and which was not available to members of the public.”

12.4.17 In addition, the Garda Síochána Code outlines the organisational structures and the procedures to be followed throughout all aspects of policing in the State (see Chapter 2 of this Report). In particular, it sets out the professional and ethical standards that members of An Garda Síochána are expected to observe. The Commission has relied on the version of the Garda Code that was in existence at the time of the events it is investigating.

12.4.18 In relation to confidentiality, Article 7 of the Code of Practice states:

“Article 7 – Maintain Confidentiality in all matters, which refer to the affairs of others, unless there is a legal or compelling public interest requirement to disclose.

The office of Garda affords members of An Garda Síochána access to private and confidential information pertaining to individuals, families and groups in society. The collection, storage and use of such personal data must be carried out in accordance with international and national standards pertaining to citizens’ rights to privacy, family affairs and data protection protocols. Maintaining confidentiality in these matters is a key mechanism in building public trust and maintaining support for public policing. Confidential information must be managed in a manner, which ensures that the human dignity and basic human rights, of the individuals concerned are respected and protected. Breaching confidentiality in this context is a serious breach of professional practice and public trust. Garda policy and enforcement procedures must ensure that all private and personal information, which comes into the Garda domain, shall remain confidential

unless there is a legal or compelling public interest requirement to disclose it.”

12.4.19 The Commission has also had regard to an extract from the section of the Code headed, “Crime: Reporting and Recording”, which deals with the obligation to make reports and notes on the investigation of crime. Under the heading, “Duty to report and record crimes”, the following appears:

“Every crime and offence should be reported because;

- (a) It constitutes an attack on society;
- (b) Criminals should not escape because of non reporting;
- (c) All possible information is required to assist investigations and prevent recurrence;
- (d) The victim should know that the community (The State) abhors such an act or omission.”

Paragraph 3 of the section on An Garda Síochána’s duty to report and record crime is more specific. It reads:

“When the details of any crime or incident have been obtained, the member obtaining the information will, before that tour of duty ends, make a report in writing to the member in charge. In the case of a crime, this onus will be fulfilled only by completion of appropriate crime report forms so that first hand information will be promptly available for computer searches. Nothing excuses the member from this obligation. If it should subsequently be established that a crime did not take place, or the allegation is retracted to the effect by the complainant, the record may be cancelled using the procedure in the *Crime Reporting Manual*.”

**Categories of potential unlawful / improper conduct**

12.4.20 For ease of reference, this section of the Chapter, discussing the identification and consideration of evidence of potentially unlawful or improper conduct by members of An Garda Síochána in connection with the Toscan du Plantier investigation, will be divided into subsections dealing with the following issues, respectively:

- i. Whether the recorded calls disclose evidence, in the case of certain Garda members, of a willingness to contemplate the possibility of falsifying, altering and/or suppressing evidence in connection with the investigation; and whether there is evidence of any such intention being carried out;



- ii. Whether the recorded calls disclose evidence that investigating members of An Garda Síochána provided illegal drugs and sums of money to a potential witness, in order to secure his assistance in obtaining evidence against Mr Ian Bailey, the principal suspect for the murder of Madame Toscan du Plantier;
- iii. The potentially improper disclosure of information to third parties, including members of the press, by certain members of An Garda Síochána in connection with the investigation;
- iv. The actions and approach of certain members of An Garda Síochána in dealing with the victim of an assault perpetrated near Schull, Co. Cork, on 13 June 1997, and a possible connection between those actions and the investigation of the death of Madame Toscan du Plantier.

## **12.5 Potential falsification, alteration or suppression of evidence**

12.5.1 As indicated previously, a significant proportion of the relevant phone recordings identified by the Commission date from the period March 1997- September 1997. During that time, Detective Sergeant Alpha from the NBCI was given the task of preparing an investigation file and report for submission to the DPP. He was assisted in this task by Sergeant Beta. The completed report, with accompanying statements and appendices, was delivered to the Office of the DPP on or about 29 September 1997.

12.5.2 From March until September 1997, Detective Sergeant Alpha worked out of a small room in Bandon Garda Station. Without his knowledge – and apparently without anyone else knowing – a telephone in the room was recorded throughout that time. Not all of these recordings still exist. There are no tapes for the following periods:

- 26 April-11 May (16 days)
- 19-20 May (2 days)
- 26 June-21 September (approximately 3 months)

12.5.3 It should also be noted that the audio quality of recordings on this line was particularly poor, with frequent cessations and sections where the dialogue is inaudible. Nonetheless, despite these limitations, the Commission did identify a number of recorded conversations involving Detective Sergeant Alpha and others that suggested possible

misconduct in relation to certain pieces of evidence acquired during the investigation. These specific issues, together with the findings of the Commission in each case, are set out below under two categories:

- (i) Willingness to contemplate improper modification of evidence; and
- (ii) Willingness to contemplate falsification of evidence.

**Willingness to contemplate improper modification of evidence**

12.5.4 The Commission has examined a number of instances, in the recorded calls, of what appear to be suggestions that items of evidence be modified to coincide with the Garda view of the case.

12.5.5 It should be stated, at the outset, that the Commission is satisfied there is no evidence that any of these suggestions were followed by any actual interference with or modification of evidence. The sole issue, therefore, is whether the calls disclose evidence of a willingness to contemplate engaging in such behaviour.

**Telephone calls, 23 and 25 June 1997**

12.5.6 The first matter of concern was the view taken of a statement made by a Detective Garda Gamma, who was involved in interviewing Ms Jules Thomas during her detention on 10 February 1997. In a handwritten statement dated 11 February 1997, the Detective Garda gave an account of the matters discussed during the interview. He also offered his own view regarding the truthfulness of Ms Thomas' evidence on that occasion, stating:

*“In my opinion she was trying to recollect to the best of her knowledge her movements and those of Ian over that weekend.”*

12.5.7 On the morning of 23 June 1997, Detective Sergeant Alpha telephoned another member of the investigation team, Detective Garda Delta. They discussed the general difficulties facing the Detective Sergeant whilst writing the report. Detective Sergeant Alpha then appears to have raised the subject of the statement made by Detective Garda Gamma regarding Ms Thomas in February 1997, as the following extract shows:

<i>Detective Sergeant Alpha:</i>	<i>Okay, yeah. I need to talk to you about, em, your colleague's statement of evidence. I need him to...but I'll talk to you first...I just want...</i>
<i>Detective Garda Delta:</i>	<i>Yeah.</i>
<i>Detective Sergeant Alpha:</i>	<i>I need to talk about it anyway.</i>
<i>Detective Garda Delta:</i>	<i>The most honest man.</i>

*Detective Sergeant Alpha:* Yeah.  
*Detective Garda Delta:* (laughs)  
*Detective Sergeant Alpha:* (laughs) He has comments in it like “I knew she was making every effort to tell me the truth.” Do you follow?  
*Detective Garda Delta:* Yes.  
*Detective Sergeant Alpha:* I don’t need them, for starters.  
*Detective Garda Delta:* (laughs)  
*Detective Sergeant Alpha:* Fuck it, she wasn’t anyway.

12.5.8 At around 5 pm, in a further telephone conversation between the same officers, Detective Sergeant Alpha stated:

*“Ah fuck it, it’s awful. When I see your friend then, like writing them stupid fucking statements, like I mean... what man... “I believe” he says “that she was doing her best to recall the night in question and being truthful.”*

He continued:

*“Yes, that statement has to get fucking chopped up anyway.”*

12.5.9 Further on in the same conversation, having discussed other, unrelated matters, the following exchange takes place:

*Detective Sergeant Alpha:* And you can start building up your co-partner, if you’re able to do that, or maybe I should just do it meself to –  
*Detective Garda Delta:* Well, the thing about it is this ... it will have to be explained to him like, that that is the way – I mean surely he can see it in hindsight now that Jules is very devious.  
*Detective Sergeant Alpha:* That statement is very damaging to have in there – I mean it’s not – it’s not – it doesn’t do himself any good anyway.  
*Detective Garda Delta:* No.

- 12.5.10 Later that evening at around 10.30 pm, Detective Sergeant Alpha made a telephone call requesting to speak to Detective Garda Gamma “*about the statements*” and was informed that he was not there, to which the Detective Sergeant replied “*Ah, I’ll get him so in a day or two.*” Detective Sergeant Alpha was then put on to Detective Garda Delta and they had a further conversation about Detective Garda Gamma’s statement, in the course of which Detective Sergeant Alpha said “*Like ... if I’m trying to make a play out of these things, to have him, fucking then, turn around and say she was telling me the truth.*”
- 12.5.11 In a recorded conversation on 25 June 1997 with an unidentified member of An Garda Síochána, Detective Sergeant Alpha again referred to his difficulties with the positive opinion of Ms Thomas expressed by Detective Garda Gamma in his statement of 11 February 1997. He said:
- “But you see there are statements here that I have to go back to fill it in, I have to talk to them, one man put in here: ‘I believe she was attempting to tell me the truth and trying to recall’ - you know, yer man interviewing her like, when the evidence clearly shows and everything we were doing that she is anything but, she has been out there working, conniving, twisting.”*
- 12.5.12 The other participant responded by stating, “*That is not fucking evidence.*” Detective Sergeant Alpha then said: “*I know but it is in the statement, it has to be taken fucking out.*”
- 12.5.13 The other participant in the call then discussed how best to approach the Garda who had made the problematic statement and the contents of his statement:
- “Then you have to go, to handle these fellas they get indignant, you have to be careful with them, and so you better get it taken out without hurting feelings type of thing.”*
- 12.5.14 The Commission could not pursue the matter further with Detective Sergeant Alpha, who is deceased, or with Detective Garda Gamma, who was unable to provide evidence due to illness. It is possible that the matter was discussed between the two officers at some stage, but, as there are no recorded calls available for the period 26 June-21 September 1997, this cannot be established one way or the other.
- 12.5.15 The Commission notes that, in other recorded telephone conversations around this time, Detective Sergeant Alpha, who was engaged in preparing the investigation report for the DPP, expressed some concerns about the overall strength of the case being made against Mr Bailey as it then stood. In a telephone call on 17 June 1997, he described it as “*a very 50/50 case against your man and I’m trying to make something of it, you see*”. He went on to state

that “*we have a long ways to go yet.*” He indicated an intention to re-arrest Mr Bailey and stated, “*there might be others to be brought as well yet.*”

- 12.5.16 In another conversation on 18 June 1997, he again described the case as “50/50”. In a call on 19 June, when asked if he was getting anywhere he responded, “*Sometimes I feel, yes,*” before adding:

*“I am not [inaudible] happy now really... I don’t know. I will have to wait and see. At the end of the day it is really one of those ones that will wait until I have a final product.... And see what I have then.”*

- 12.5.17 This apparent concern with the strength of the case being made against Mr Bailey also appeared in the recorded conversation at 5pm on 23 June 1997, in which he suggested that Garda Gamma’s statement would have to be “*chopped*”. This remark emerged from a discussion of how the investigation report was progressing. Detective Sergeant Alpha said, in relation to the report, that he would “*have to convince [himself] first*” before he could convince “*the man in Dublin*” – presumably a reference to the DPP. He went on to say:

*“There is a lot of work in it still... I have an awful lot to get done and I seem to have a lot more to do... I have threads and I am trying to make a fucking jumper.”*

Detective Sergeant Alpha then referred to Garda Gamma’s statement, seemingly as an example of the weakness of some of the material he was working with.

- 12.5.18 The Commission has examined both the typed and handwritten versions of Detective Garda Gamma’s statement and is satisfied that the statement in question was not ‘chopped up’, altered, rewritten or removed from the Garda investigation file. The most telling fact in this regard is that the part that Detective Sergeant Alpha found objectionable – the opinion expressed by Detective Garda Gamma that Ms Thomas was doing her best to be truthful in her evidence – is still in the version of the statement that formed part of the investigation file.

- 12.5.19 Nonetheless, it remains a matter of concern that such action could be suggested or proposed to other members of An Garda Síochána without any objection being made, as, in the view of the Commission, to countenance such proposals, even without further action, would also amount to misconduct. Accordingly, the Commission is satisfied that the several telephone calls in which those suggestions or proposals were made disclose evidence of improper conduct by the members of An Garda Síochána involved.

Telephone call, 30 May 1997

- 12.5.20 An apparent example of a willingness to suppress relevant evidence comes from a recorded conversation between Detective Sergeant Alpha and Sergeant Beta, who was assisting Detective Sergeant Alpha in preparing the investigation file for the DPP.
- 12.5.21 The conversation concerned two statements made by a witness. In his second statement, the witness had said that he recalled encountering Mr Bailey in a pub 4 or 5 times over the course of the evening on 22 December 1997. However, in his first statement, he was recorded as saying that he remembered “*from talking to [a named person]*” that Mr Bailey and Ms Thomas were in the pub that night. In discussing this with Detective Sergeant Alpha, Sergeant Beta expressed annoyance at this apparent difference, stating that “[*it undermines the whole thing*”. He asked the question: “*I will take that out so to fuck will I?*” Following a break in the recorded audio, he could then be heard saying: “*The only thing is the opening line of his statement is: ‘further to my previous statement’...what can we do?*” He continued: “*I’ll leave it there for the moment and we can talk about it later maybe.*” Sergeant Beta then asks Detective Sergeant Alpha whether he would consider taking a further statement from the witness, asking “*would it look a bit funny?*”
- 12.5.22 There are particular difficulties in interpreting this recorded conversation. In the first place, both parties are deceased. Secondly, the recording itself is of extremely poor quality. Detective Sergeant Alpha’s contributions to the conversation are almost entirely inaudible, and Sergeant Beta’s remarks are interrupted on 11 separate occasions by breaks in the recorded audio, ranging in length from 3 to 11 seconds. Nonetheless, the recording appears to disclose evidence of a willingness on the part of Sergeant Beta to contemplate removing the first statement of the witness from the group of statements to be sent to the DPP as part of the investigation file. However, having raised this possibility, he immediately pointed out that this could not be done if the second statement was to remain in the file, as it contained, within it, a reference to the first statement.
- 12.5.23 In summary, this call discloses evidence of improper conduct insofar as it shows a willingness on the part of Sergeant Beta to consider providing a statement to the DPP as part of a case against Mr Bailey, whilst concealing the existence of an earlier and apparently contradictory statement by the same witness.
- 12.5.24 It is important to note that Sergeant Beta did no more than suggest this as a possible course of action. He did not act upon it. The Commission has established that both statements were in fact provided to the Office of the DPP, along with the Investigation Report in September 1997.

**Willingness to contemplate falsification of evidence**

12.5.25 In the recorded telephone calls available to the Commission, there are two instances where members of An Garda Síochána appeared willing to contemplate allowing or encouraging certain persons to make false allegations or to give false evidence. Both cases related to assaults alleged to have been carried out by the husband of Mrs A. Although the alleged assaults themselves were not related to the murder of Madame Toscan du Plantier, there was a potential connection with the murder investigation in that Mrs A's status as an important witness for the investigation may have influenced the behaviour of Garda members in relation to the assault allegations.

Telephone call, 18 April 1997

12.5.26 The first instance of possible misconduct in relation to an alleged assault comes from a recorded telephone call on 18 April 1997 between a Detective Garda Delta and a Garda Epsilon. In the course of the conversation, reference was made to an assault alleged to have been carried out by a Mr A on a Mr C, on the night of 13 April 1997. The details of the incident and the Commission's investigation of other instances of potential misconduct by members of An Garda Síochána in connection with it are set out below.

12.5.27 On the face of it, the alleged assault on Mr C had nothing to do with the investigation into the death of Madame Toscan du Plantier. However, there was some evidence in the recorded telephone calls to suggest that the approach taken by members of An Garda Síochána in relation to the assault may have been influenced by the fact that Mr A, the person believed to have committed the assault, was the husband of Mrs A, someone who had provided potentially useful statements for the murder investigation and from whom it was hoped to obtain further useful information. Because of this potential connection, the Commission was required to investigate the matter under paragraph 1(m) of its Terms of Reference.

12.5.28 In the recorded conversation of 18 April 1997, in the context of discussing the likelihood of Mr C making a formal complaint of assault against Mr A in a few days' time, Detective Garda Delta asked Garda Epsilon: *'There would be no point in A making an old statement first, I suppose.'* Garda Epsilon's response was: *"Sure we can always pre-date it if it comes to it, like, you know."* Detective Garda Delta said: *"Exactly, yeah."* Garda Epsilon said: *"No problem at all."*

12.5.29 Detective Garda Delta was here suggesting that a statement be taken from Mr A, the alleged perpetrator of the assault, in advance of the taking of a statement from the complainant, which, Detective Garda Delta agreed in evidence, would be a reversal of the normal order of things. The norm is that a statement is made by the complainant, the alleged victim of a crime. Only then can the details be fairly put to the suspect.

However, it is clear that Detective Garda Delta was concerned that Mr A be given an opportunity, in the first instance, to make allegations against Mr C. He was not, apparently, concerned that an assault had allegedly been committed against Mr C and that he wished to make a statement of complaint about it.

- 12.5.30 Detective Garda Delta told the Commission that what he was suggesting was that Mr and Mrs A would make a statement in relation to the alleged assault but include in it any previous incidents relating to Mr C. He felt that, given the fact that the assault was alleged to have occurred on property of Mr and Mrs A, it would be logical to take a statement from them first rather than the complainant, Mr C. He distanced himself from his comment of “*exactly, yeah*” which, he said, was a figure of speech. He said that what he interpreted Garda Epsilon to mean by “*pre-dating it*” was that “*it could mean pre-dating the complaint.*” He said that he did not give it much thought.
- 12.5.31 On the face of it, this is not what the exchange between the two members of An Garda Síochána meant. To “*pre-date*” any document is to place a date on it which is earlier than its true date. That has the effect of falsifying the record. It was the statement (to be possibly taken from Mr A) which Garda Epsilon suggested should be pre-dated. It makes no sense to speak of pre-dating the complaint. Garda Epsilon’s proposal in the transcript was that something should be done, implicitly in the future: “*we can always pre-date it...*” It does not refer to something already done, namely the making of the complaint by Mr A.
- 12.5.32 Garda Epsilon explained to the Commission that this statement had “*come out totally wrong in the conversation*” stating, that he “*was on about the complaint.*” Garda Epsilon stated that “*under no circumstances did it ever enter into my head to pre-date a statement to take facts that happened before that night into account.*” He pointed out that, “*even if [he had been] going to take a statement off of Mr and Mrs A, [he] ..... could never trust Mr and Mrs A that if things went wrong for them that they’d say, sure, you can’t believe a word that Garda Epsilon says, sure didn’t he pre-date a statement for us.*” He did, however, assert that pre-dating a statement was something that he would never have done and pointed out, quite correctly, that it did not take place.
- 12.5.33 Nonetheless, the Commission finds that this recorded conversation discloses evidence of improper conduct, in the form of an expressed willingness on the part of members of An Garda Síochána to have a witness statement pre-dated.
- 12.5.34 Towards the end of the same telephone conversation, in the course of discussing actions that were open to Mr and Mrs A, in the event that Mr C were to make a complaint, the following exchange takes place:



**Detective Garda Delta:** *And you can always say that sure he drew a punch and missed as you drew back, you know what I mean.*

**Garda Epsilon:** *Yeah.*

**Detective Garda Delta:** *He's a man of the world, he knows what to say and do.*

**Garda Epsilon:** *Oh yeah.*

**Detective Garda Delta:** *What?*

**Garda Epsilon:** *Oh, we'll cover him alright.*

12.5.35 This is oddly worded. It appears to be a suggestion about what Mr A might say in defence to a complaint of assault. The suggestion is that “you,” meaning Mr A, “*can always say...*”, not that he had said it or that he would say it. No statement had, of course, been taken from Mr A. It had not been suggested by Mrs A, when she had reported the incident, that Mr C had attempted to hit Mr A first.

12.5.36 Detective Garda Delta said, in evidence, that this is what Mr A had told him. He said he was:

*“certain that he did say that he had a run in with him anyway and that your man had run off and he had ran after him and that he threw a punch, that the other tried to get away or something and threw a punch or something to that and then a fight broke out then.”*

Detective Garda Delta later added that he, in fact, “*didn't know whether that was the truth or not or whether they were just saying that to cover themselves too, you know.*”

12.5.37 The suggested version of events might possibly have provided an arguable basis for a defence of self-defence, which was, as will be shown, not suggested when Detective Garda Delta said to Mrs A, later that evening in another recorded telephone call: “[Mr A] *was wrong to hit him....*”

12.5.38 Garda Epsilon gave evidence accepting that it appeared that Detective Garda Delta was suggesting inventing an allegation that Mr. C had thrown the first punch but indicated that, to his knowledge, it did not, in fact, happen that way and that neither Mr nor Mrs A had ever suggested that it did, a point upon which his and Detective Garda Delta's accounts differ. It seems extremely likely that, if Mr C had, as Detective Garda Delta suggested, thrown the first punch, either Mr or Mrs A, or both of them, would have said this on the night in question, or afterwards, to Garda Epsilon, who was the Garda

investigating the incident. In any event, notwithstanding his evidence to the Commission that Mr C did not throw the first punch, in the recorded conversation above, Garda Epsilon did not seek to correct or contradict Detective Garda Delta; rather, he appeared to assent to the latter's proposal.

- 12.5.39 It needs to be said at this point that, in the event, it was found to be unnecessary to take any statement from Mr A as Garda Epsilon was able to persuade Mr C not to pursue his assault complaint. Thus the question of pre-dating such a statement or inserting into it a possibly untrue allegation that Mr C threw the first punch never arose. What is disturbing, however, is that suggestions could be made between two members of An Garda Síochána, without objection, that evidence could be slanted or falsified in these ways.

Telephone call, 29 October 1997

- 12.5.40 The second instance of potential misconduct arises from a recorded conversation between Detective Garda Delta and Mrs A on 29 October 1997. During the course of the conversation, they discussed the possibility that a complaint of assault might be made against her husband by a person who had, on occasion, acted as a babysitter for the A children. The following exchange took place:

**Detective Garda Delta:** *No, no, no, but fucking going to the guards, they will in their bollix, ha.*

**Mrs A:** *Oh, I know she is all mouth.*

**Detective Garda Delta:** *She's only ha? Do you know, put it this way, Mrs A, you could also say we will go to the guards. When you were babysitting that you assaulted [a named child]. Ha?*

**Mrs A:** *Yeah.*

**Detective Garda Delta:** *D'you know what I mean? Be easy for [the named child] to say -- or, you know, that he got a belt. Ha?*

**Mrs A:** *Yeah.*

- 12.5.41 On the face of it, this appears to be a suggestion that Mr and Mrs A could seek to dissuade the person concerned from making a complaint of assault against Mr A by threatening to make their own complaint, alleging that the person in question previously assaulted one of the children of Mr and Mrs A.

- 12.5.42 The Commission has been unable to establish whether the suggestion made by Detective Garda Delta had a basis in fact, or whether he was suggesting that Mr and Mrs A invent a

spurious assault claim. In evidence to the Commission, Detective Garda Delta said that Mr and Mrs A had previously alleged to him that the babysitter “*was slapping the children*” but that they were reluctant to make any complaint “*because they were neighbours*”. Detective Garda Delta went on to say that “*there is no way*” he would have made the suggestion to Mrs A “*unless I had some knowledge... that something did happen*”.

12.5.43 Detective Garda Delta was asked by the Commission why, in particular, he had said “*it would be easy for [the named child] to say that he got a belt*”. Detective Garda Delta told the Commission that he had said this in order to overcome what he perceived as a general reluctance on the part of Mr and Mrs A to make statements of complaint, by assuring them that it would be an easy matter for the child in question to make a statement if he or she wanted to do so. He reiterated that there was no way he would have made the suggestion unless Mrs A had first mentioned to him that the child had, in fact, been assaulted.

12.5.44 In circumstances where it is not possible to establish whether or not Mrs A told Detective Garda Delta on a previous occasion about an alleged assault by the babysitter, the telephone call cannot be said to disclose evidence of improper or unlawful conduct on the part of Detective Garda Delta.

12.5.45 Nonetheless, there are aspects of concern here. In particular, the Commission notes the apparent similarities with the approach taken by Detective Garda Delta in relation to the other allegation of assault by Mr A – that involving Mr C in April 1997. As reported above, in that case, Detective Garda Delta appeared to encourage Garda Epsilon in his efforts to dissuade Mr C from making a complaint against Mr A. He also suggested, in that instance, that Mr A could counter any complaint of assault by stating that he was assaulted first – something which appears to have no basis in fact, although Detective Garda Delta claimed to have been told by Mr and Mrs A that it was true.

## **12.6 Alleged provision of drugs and money to a witness**

12.6.1 Among the calls recorded at Bandon Garda Station in early 1997 is a group of calls related to a Mr B. Mr B was a British national, residing in the West Cork area.

12.6.2 The relevant recorded telephone calls consist principally of 7 calls made between Mr B and Detective Garda Delta between 20 May 1997 and 4 June 1997. In addition, Detective Garda Delta, with the assistance of the Telecommunications technician at Bandon Garda Station, recorded a conversation with Mr B during the course of a car journey on 22 May 1997 from Skibbereen to Schull. This conversation was closely

related to the events mentioned and was contemporaneous with the other telephone calls. In the view of the Commission, it falls within the description “any other acts or events in the course of the said Garda investigation” in paragraph 1(m) of the Terms of Reference and, therefore, falls for consideration under that paragraph.

- 12.6.3 An Garda Síochána engaged in these contacts with Mr B because they were led to believe, in early 1997, that Mr B had had conversations with Mr Ian Bailey, in which the latter had made statements suggesting his involvement in the murder of Madame Toscan du Plantier. Detective Garda Delta had a number of telephone conversations with Mr B, in which he encouraged the latter to conduct further conversations with Mr Bailey. The objective was to facilitate Mr Bailey in making admissions concerning the murder which would be recorded by Mr B in a statement or statements to An Garda Síochána.
- 12.6.4 Some of the recorded calls in which Mr B is mentioned or involved, appear to suggest that he asked members of An Garda Síochána to provide him with quantities of illegal drugs and / or large sums of money in return for his cooperation with the investigation of the death of Madame Toscan du Plantier. The Commission, therefore, sought to investigate whether these conversations, when combined with other acts or events in connection with the murder investigation, disclosed evidence of improper or unlawful behaviour by members of An Garda Síochána.
- 12.6.5 As stated previously, it is important to remember that the Commission is not charged with the task of investigating the entirety of the Toscan du Plantier murder inquiry. For the Commission to have power to investigate and report on an allegation of misconduct by An Garda Síochána in connection with the investigation, there must be a sufficient nexus between that allegation and the content of the available telephone recordings.

#### **Background to recordings**

- 12.6.6 The relationship between Mr B and members of An Garda Síochána commenced around February 1997, when Mr B contacted a local Garda station and offered to assist the police with their investigation of Mr Ian Bailey as a suspect for the murder of Madame Toscan du Plantier.
- 12.6.7 Between February 1997 and June 1997, almost all of Mr B’s contact with An Garda Síochána was through two particular members: Detective Garda Delta and Detective Garda Gamma. In evidence to the Commission, Detective Garda Delta said that Detective Garda Gamma had most dealings with Mr B. Detective Garda Gamma was unable to give evidence to the Commission, due to illness.

- 12.6.8 As reported in Chapter 5, in or around 2 May 1997, Detective Garda Delta asked the Telecommunications technician at Bandon Garda Station to provide him with a facility to record telephone conversations between himself and Mr B. Detective Garda Delta told the Commission that he asked for this because he had become suspicious of Mr B's motives for engaging with An Garda Síochána in relation to the murder investigation.
- 12.6.9 It would appear from Detective Garda Delta's evidence to the Commission that, from February 1997 to April 1997, members of An Garda Síochána were inclined to believe that Mr B was genuine in his efforts to assist the investigation. However, Detective Garda Delta said that, on or about 11 April 1997, he became concerned by some aspects of Mr B's behaviour at a meeting with him and began to suspect that Mr B's motives for engaging with the investigation team were not *bona fide*. Detective Garda Delta and the other members of the investigation team essentially "*lost confidence*" in Mr B as a potential witness.
- 12.6.10 Nonetheless, Detective Garda Delta continued to communicate with and meet Mr B after this point. He told the Commission that, notwithstanding his concerns about the trustworthiness of Mr B, he had been directed by senior members of the investigation team to maintain contact with him until such time as background checks on Mr B in England were completed. On the evidence before the Commission, it appears that Mr B was also assisting An Garda Síochána with information in relation to local drug activity around this time.
- 12.6.11 According to Detective Garda Delta, at a meeting in late April 1997, Mr B expressed confidence that he could persuade Mr Bailey to make admissions of guilt in relation to the murder of Madame Toscan du Plantier. He said that, if he was successful, he wanted IR£4,000 from An Garda Síochána before he would make a statement. Detective Garda Delta told the Commission that there was never any question of An Garda Síochána entertaining Mr B's request. He brought the matter to the attention of the officers supervising the investigation, who refused to countenance the making of such a payment. He duly conveyed this refusal to Mr B.
- 12.6.12 It was following this incident that Detective Garda Delta conceived the idea of having his telephone conversations with Mr B recorded. When asked, Detective Garda Delta told the Commission that he wanted to record the calls primarily for his own protection – as a record of his dealings with Mr B. In particular, he was concerned about the possibility that Mr B might record the conversations himself and then edit them so as to present Detective Garda Delta in a discreditable light.

- 12.6.13 Despite the refusal of his request for IR£4,000, Mr B continued to engage with Detective Garda Delta and to give the impression that he still intended to try to procure admissions of guilt from Mr Bailey in connection with the murder of Madame Toscan du Plantier. This willingness to continue, in the absence of any promise of payment, increased Detective Garda Delta's suspicion that Mr B was now acting in the interests of Mr Bailey rather than those of An Garda Síochána and was attempting to compromise the Garda investigation in some way.
- 12.6.14 On or around 28 May 1997, Mr B gave a recorded interview to Mr Bailey. A transcript of this recording has been provided to the Commission. In it, Mr B alleged that two members of An Garda Síochána gave him "*a vast amount of cannabis*" and this was given "*as payment for helping them.*" Mr B also alleged that a sum of IR£4,000 would be available if he made a statement stating that Mr Bailey "*owned up to me to have committed the murder of Sophie du Plantier.*"
- 12.6.15 In response to Detective Garda Delta's request for a telephone recording facility, the technician at Bandon Garda Station gave him access to a recorded line in the Telecommunications equipment room at Bandon Station. It is on this line that most of the significant conversations with Mr B that are available to the Commission were recorded, between 20 May 1997 and 4 June 1997.
- 12.6.16 It is important to note that the available telephone recordings do not represent the totality of the contact between Mr B and Detective Garda Delta. Some of the calls that are available refer to other calls and conversations that are not in the possession of the Commission. According to Detective Garda Delta, there were other calls made between 6 May 1997 and 20 May 1997, for which no recordings have been found. There may also have been calls made to and from Detective Garda Delta's mobile phone that were not recorded and Mr B may have had telephone conversations with Detective Garda Gamma. Any such calls were not recorded.
- 12.6.17 Of the recorded calls that are available, the Commission notes that every conversation between Detective Garda Delta and Mr B took place in circumstances where Detective Garda Delta knew they were being recorded, but Mr B did not.
- 12.6.18 There is also a small number of recorded calls in which Detective Garda Delta discussed Mr B with other members of An Garda Síochána. Detective Garda Delta was not aware that these calls were being recorded. He remained unaware of their existence, until they emerged as part of the discovered material in the Bailey case in 2014.

Telephone recordings – mention of drugs

- 12.6.19 The Commission has considered the question of whether the recorded telephone calls, in conjunction with other available evidence, disclose evidence of improper behaviour by members of An Garda Síochána in supplying drugs to Mr B, as he has alleged.

Telephone conversation, 20 May 1997

- 12.6.20 Central to the issue of whether the recorded conversations disclose evidence that Mr B was supplied drugs is whether the word “*stuff*”, when used in the recorded telephone calls, referred to drugs. Detective Garda Delta’s evidence is that “*stuff*” refers to an array of items such as clothes and money, but that it referred to drugs only where he and Mr B were discussing drug activity in the area of West Cork. Detective Garda Delta was asked by the Commission about one particular reference to “*stuff*” in a phone conversation on 20 May 1997 at 8.10pm. The prelude to the following extract was a discussion about a possible meeting with Mr. Bailey in the coming days:

*Detective Garda Delta:* Did he mention anything, Mr B, about it, any specifics?

*Mr B:* No, no, he didn't say anything on the phone really. He said it would be good if you could sort of like bring some other stuff up as well, you know.

*Detective Garda Delta:* Yes.

*Mr B:* That’s all you know he didn’t sorta like go into details or anything, you know.

*Detective Garda Delta:* Is that right, yeah.

*Mr B:* He just sounded like he wanted to sit down.

*Detective Garda Delta:* Right.

*Mr B:* Have a chat, have a smoke or whatever you know.

*Detective Garda Delta:* Right, right, right.

- 12.6.21 The Commission investigated this transcript, in particular, because the use of the word “*stuff*” in this context required explanation, in the sense that Mr B appeared to be telling

Detective Garda Delta that Mr Bailey would like some “*stuff*”, which is the only time such an express request appears in the transcripts. No further detail or explanation is given in the conversation and the subject is not discussed again. Detective Garda Delta acknowledged what Mr B said – saying things like “*Yeah*” and “*Right*” – but there is no clear indication that Detective Garda Delta understood this as a request from Mr B for drugs to give to Mr Bailey. More importantly, there is nothing in the conversation to suggest that he or any other member of An Garda Síochána did undertake to provide drugs to Mr B.

- 12.6.22 In evidence to the Commission, Detective Garda Delta expressed the opinion that “*it could have been anything, I don’t know, he wasn’t specific but I was suspecting that he was looking for something.*” When pressed as to why he did not explore the matter any further, Detective Garda Delta replied:

*“because I didn’t go into specifics with him. I thought it was the murder he was referring to and he went on then about this and I didn’t go into anything further with him in relation to it you know.”*

In the final analysis, this conversation does not disclose evidence of improper or unlawful conduct by Detective Garda Delta. There is no evidence to suggest he agreed to supply Mr B with any drugs (under the guise of “*stuff*”) or that he was even aware that this was what Mr B was referring to.

Recorded conversation, 22 May 1997

- 12.6.23 Two days after the telephone conversation reported above, Detective Garda Delta, accompanied by the Telecommunications technician from Bandon Garda Station, drove Mr B to Mr Bailey’s home. At Detective Garda Delta’s request, the technician recorded the conversation in the car during the journey. The quality of this recording, made with a small, handheld tape recorder in a concealed position against a background of engine noise, is very poor.

- 12.6.24 In the course of the conversation, the following exchange takes place:

*Detective Garda Delta:*

*In case you go to pub tonight... I have a bit of money there you know, a little bit of stuff, you know, I’ve a bit –I’ve got a few smokes as well for you.”*

*Mr B:*

*Have you got some hash?*

*Detective Garda Delta:*

*I have cash, I’ve cash and I have something in a- and I have a few*



*smokes here in the - you know, you said you were starved, were you.*

- 12.6.25 In 2015, in the course of giving evidence in the High Court, during the case brought by Mr Bailey against the Garda Commissioner and others, Mr B claimed that this reference to “*a little bit of stuff*” related to drugs given to him by An Garda Síochána during that journey. In evidence to the Commission, Detective Garda Delta said that this was a reference to cigarettes and plug tobacco which he had purchased in a shop before they met Mr B that evening. This was supported in evidence by the Telecommunications technician. Apart from Mr B’s evidence, the Commission has seen nothing to support the allegation that he was given drugs in the course of the car journey on 22 May 1997.
- 12.6.26 In the absence of any other evidence, the use of the word “*stuff*” in this context is too vague to amount to evidence that drugs were provided to Mr B by members of An Garda Síochána.
- 12.6.27 Perhaps the more telling point is this: the conversation in the car with Mr B on 22 July 1997 was recorded by the Telecommunications technician, at the request of Detective Garda Delta. They did not tell Mr B that they were recording him. In those circumstances, it is not credible to suggest that Detective Garda Delta would provide Mr B with illegal drugs during the course of a journey in which he was also recording their conversation. To do so would have been to risk Mr B saying something on tape that would show he had been supplied with drugs by members of An Garda Síochána.
- 12.6.28 For the above reasons, the Commission is satisfied that the references to “*stuff*” and “*smokes*” in this context disclose no evidence of improper or unlawful conduct.
- 12.6.29 A question remains as to why Mr B asked the question about “*hash*” at this point. On the face of it, it seems remarkable that Mr B, who, later in the conversation, admitted to using cannabis himself and claimed to know where it could be acquired locally, would ask two members of An Garda Síochána for drugs, apparently without reservation. It is made more remarkable by the fact that, although he knew Detective Garda Delta, he had never met the technician from Bandon Station before. Indeed, towards the end of the recorded conversation, he asked to speak to Detective Garda Delta privately, saying to the technician: “*I don’t know you, you might be Drug Squad or something like that.*”
- 12.6.30 One possible explanation is that Mr B’s question was intended as a joke, rather than as a serious request. The Commission was provided with a transcript of the recording prepared by the technician from Bandon on an unknown date between 22 May 1997 and

27 August 1997. Immediately following Mr B's question about hash, the technician added a note in brackets: "*Lighting a cigarette and laughing*".

- 12.6.31 The Commission was also provided with an audio copy of the recording and, on listening to it, found no evidence of any audible laughter. This was accepted by Detective Garda Delta. When the Commission pressed the Telecommunications technician on the matter, he said he was "*not sure if the laughing is audible on the tape*" and "*that if somebody kind of gives a little—you know something under their breath, whatever, it might not be audible on the tape and especially when you had such a poor quality audio.*" He also suggested that the contents of the transcript were, in part, an account of what he remembered hearing himself as well as what was audible on the tape.
- 12.6.32 It was pointed out to the Telecommunications technician that the transcript should have been a true recording of the contents of the tape and nothing more. He replied that "*maybe that was fresh in my mind, I don't know...it may have come from my recollection of the time he laughed.*"
- 12.6.33 In the view of the Commission, the evidence does not support a conclusion that Mr B was joking when he made his request about hash.
- 12.6.34 Another possible explanation is that Mr B asked the question as a follow-up to the telephone conversation of 20 May 1997, in which he indicated that Ian Bailey had asked him to bring "*some other stuff*" with him on his next visit. Mr B may have hoped or expected that Detective Garda Delta would provide him with cannabis to bring to Mr Bailey. As indicated above, Mr B himself has gone further and alleged that he was supplied with cannabis on this and other occasions.
- 12.6.35 A third possible explanation for Mr B's question is that it was an attempt to lure Detective Garda Delta into saying or doing something improper that could be used against him in the future. This is the explanation offered by Detective Garda Delta himself, who told the Commission that he was surprised that Mr B had asked him for drugs but that he just moved on from it as he believed it was a ruse orchestrated by Mr Bailey in order "*to trap*" him. With regard to Mr B he stated:

*"He was trying to set me up and I was trying to set him up. So the thing, is I knew from the conversations leading up to... this thing about Mr Bailey is relaxed now, Mr Bailey is ready to talk, this is our last chance, this type of talk. I had been suspicious of him and I wouldn't ask [the technician from Bandon] to be coming with me and taping otherwise... Obviously he [Mr B] just wanted... to try and glean something out of me to set me up."*

12.6.36 Detective Garda Delta said he suspected, at the time, that Mr B was also secretly attempting to record the conversation in the car, although the Commission has seen no evidence that this was, in fact, the case.

12.6.37 As the transcript of the conversation in the car indicates, when Mr B asked his question, Detective Garda Delta did not take the opportunity to deny, firmly and unequivocally, that he had brought hash for him. Nonetheless, his response to the question is negative by implication and does not, in itself, disclose evidence of improper conduct.

Telephone conversation, 23 May 1997

12.6.38 On the day following the car journey referred to above, Detective Garda Delta contacted the Telecommunications technician through an internal line at Bandon Garda Station, which he was not aware was being recorded. They discussed the fact that Detective Garda Delta had not succeeded in reaching Mr B by telephone. Detective Garda Delta went on to voice a suspicion that Mr B had not gone to visit Mr Bailey on the previous night, as intended, and that he was avoiding contact with Detective Garda Delta as a result.

12.6.39 Detective Garda Delta went on to state::

*“All he wanted was to get me to give him a slab of fucking you know what...go to the fucking paper...and he’d collect his few grand and he’d collect and fuck off.”*

12.6.40 Detective Garda Delta acknowledged to the Commission that “*the slab of you know what*” was a reference to cannabis. He explained the passage as a statement of his belief that Mr B had asked for hash in the car in order to trap him, perhaps by taking a photograph of any drugs received then trying to sell the photograph to a newspaper.

12.6.41 As with the other extracts from recorded conversations referred to above, this call does not disclose evidence of improper or unlawful conduct by any member of An Garda Síochána. It does no more than confirm that Detective Garda Delta believed Mr B was trying to get him to supply cannabis, so that he could then sell evidence of this fact to a newspaper.

12.6.42 More generally, in all the recorded calls available to it, the Commission has seen no evidence that Detective Garda Delta encouraged any belief or expectation of Mr B that drugs would be provided to him. Nor is there anything in the recorded calls to suggest that drugs of any kind were, in fact, provided.

- 12.6.43 The most that can be said from the recorded conversations is that they disclose evidence that Mr B had, possibly on more than one occasion, asked or suggested that drugs be supplied to him. They do not disclose evidence of any improper or unlawful response to such requests by members of An Garda Síochána.
- 12.6.44 From the documentation provided to it, the Commission is aware of another specific allegation that, on or about 13 May 1997, Mr B was given a quantity of cannabis by members of An Garda Síochána. This allegation was investigated and reported on by the McAndrew Garda inquiry in 2006. Evidence in relation to the incident was also given in 2015, during the course of the civil case brought by Mr Bailey against the Garda Commissioner and others.
- 12.6.45 The recorded telephone calls in the possession of the Commission make no mention of this alleged incident and disclose no evidence in relation to it. Accordingly, the matter falls outside paragraph 1(m) of the Terms of Reference.

**Telephone recordings – mention of money**

- 12.6.46 Another matter investigated by the Commission was the alleged provision of money by members of An Garda Síochána to Mr B. Mr B alleged, in the statement that he permitted Mr Bailey to record on 27 May 1997, that members of An Garda Síochána had already paid him large sums of money (IR£500 to IR£600) and had agreed to pay him much more (IR£5,000), if he could make a statement detailing a confession of murder by Mr Bailey.
- 12.6.47 The relevant members of An Garda Síochána, however, have responded that this idea belonged to Mr B, who requested the sum of IR£4,000 if he should elicit such a confession from Mr Bailey. As stated earlier, Detective Garda Delta told the Commission, in evidence, that this request from Mr B was rejected by the officers in charge of the Incident Room for the Toscan du Plantier investigation and that he conveyed this refusal to Mr B.
- 12.6.48 There is no dispute that Mr B did receive modest sums of money from An Garda Síochána for “socialising”. Both Detective Garda Delta and Detective Garda Gamma gave him, what were described as, “*social monies*”. Mr B also received clothes from Detective Garda Gamma and the evidence given to the Commission by Detective Garda Delta was that Detective Garda Gamma would have claimed the money back through official channels. Detective Garda Delta accepted that he himself had given Mr B money, cigarettes and tobacco and said that Detective Garda Gamma would have

claimed the money back for that also, as there was no point in two people putting in separate claims.

- 12.6.49 Detective Garda Delta stated that the claims were made through official channels and said that there was paperwork in relation to this. He said:

*“We do the same with every other informant, you’d pay him yourself and you’d claim it back, you’d send a report in to your Chief Superintendent and you’d outline a brief report on the circumstances and you would be reimbursed.”*

Mr B, according to evidence received by the Commission, became an informant in or around 11 April 1997, when he assisted An Garda Síochána in relation to drug activity in the area.

- 12.6.50 The Commission requested documentation in relation to Mr B being registered as an informant and was told that the Incident Room in Bandon Garda Station is not in possession of any documentation / receipts / records relating to payments made or items provided to Mr B. The Commission is, however, in possession of a receipt for clothing purchased by Detective Garda Gamma. The Secret Service Book<sup>319</sup> was examined by the Incident Room on behalf of the Commission and it was found that it does contain payments made to Detective Garda Gamma and Detective Garda Delta but it does not confirm to which informant these payments were made.
- 12.6.51 Nonetheless, the Commission is satisfied, from all the evidence it has received, that small sums of money and articles of clothing were supplied to Mr B and that this was appropriately done and reimbursed as a normal expense. The Commission does not see any evidence of improper conduct in this respect.

Telephone conversation, 23 May 1997

- 12.6.52 Money is further raised as an issue in a recorded phone call between Detective Garda Delta and Mr B on the evening of 23 May 1997. Detective Garda Delta had tried numerous times to contact Mr B after the meeting with Mr Bailey on 22 May 1997. This phone call was the first contact they had thereafter. Detective Garda Delta inquired about the details of the meeting between Mr B and Mr Bailey, to which Mr B responded: *“I don’t know, I am not saying anything, Delta, at this moment”*. When asked why, Mr B said:

*“Because I want something out of this.”*

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<sup>319</sup> Record of dealings with informants and respective Gardaí.

12.6.53 Detective Garda Delta did not press the matter any further, despite his knowledge that the call was being recorded. He told the Commission:

*“I supposed he’d be looking for money again, to make a statement he’d probably be looking for money. That’s what I just wanted to draw out of him, he said he wanted something, he wasn’t going to get any something because at that stage you were taping a witness that you didn’t trust, so he wasn’t going to be very credible in this situation.”*

12.6.54 When it was suggested that this was another example of Mr. B making an unusual request to a member of An Garda Síochána, Detective Garda Delta replied:

*“I didn’t elaborate on it, I didn’t say you’re getting or you’re not getting. I just moved on from it and left him hanging that was it.”*

He added:

*“I didn’t offer him anything, I didn’t say anything back to him, well, now, if you have anything useful there’s something here for you, that wasn’t to him either, I just cut it off at that stage.”*

Telephone Conversation, 25 May 1997

12.6.55 In a recorded telephone conversation on 25 May 1997, Detective Garda Delta again telephoned Mr B. The call focused on setting up another meeting between Mr B and Detective Garda Delta and his partner, Detective Garda Gamma. At one point in the conversation, Detective Garda Delta inquired:

*“Right, tell me, Mr B, the only thing is you’re probably looking for something big, monetary wise for making a statement, would you?”*

Mr B replied, *“I would like some help, yeah.”* Detective Garda Delta then responded by saying:

*“Sure, listen, I won’t do anything until I see the other person, so... I’ll give you a ring as soon as I speak to him, you know.”*

Detective Garda Delta told the Commission, in evidence, that the “*other person*” referred to by him was Detective Garda Gamma.

12.6.56 Detective Garda Delta was questioned as to why he had initiated the discussion about money in this conversation, by inviting Mr B to confirm that he was looking for “something big, monetary wise” for making a statement. Detective Garda Delta explained his motivation as follows:

*“Well, I knew at this stage that we were more or less running out of time with this, you know. All I can say is, I can put this into context when it is put in front of you, and it is nearly 20 years ago, all I can say is that I think when I said that I was trying to draw him out, like he might say back, ‘well, you refused me the money the last time’, you know, we’ll say when he looked for £4,000 and we told him no; that he might say something in that context and it would corroborate, I’d have it on record if he ever made a complaint or Mr. Bailey made a complaint that there was money given to him, I’d have a record on a tape that, you know, you were refused it.”*

12.6.57 Detective Garda Delta was questioned as to why he did not tell Mr B there and then that no large payment of money would be possible, as, on his own evidence, he had said as much to him on the previous occasion when Mr B had asked for IR£4,000, in the event that he procured a confession from Mr Bailey. He responded:

*“It was a matter of record anyway inside with the investigation that he was refused it... So I didn’t see any need to elaborate on it any further.”*

12.6.58 Detective Garda Delta told the Commission that he did speak to Detective Garda Gamma about it, as he had told Mr B he would, but there was no further outcome from it. A final meeting with Mr B took place on 7 June 1997 “...and that was the end of it.”

12.6.59 The incongruity of Detective Garda Delta’s position can be seen from the fact that he was fully aware that, once the necessity arose to record Mr B in secret, any evidence obtained would be of little or no assistance should the matter come to trial. As he explained to the Commission:

*“We’d have to disclose the fact that we were recording conversations from the station, so that would mean that you wouldn’t be trusting your witness and anything that you would get subsequent would be of no use in any criminal trials or any evidence.”*

12.6.60 Detective Garda Delta was further questioned about the reasons for continuing to engage with Mr B after he had become suspicious of him. Detective Garda Delta re-iterated that he had done so on the instructions of his superiors, who had asked him to maintain

contact with Mr B, pending background checks with the Police in England. These checks were being carried out to see if any link existed between Mr B and Mr Bailey from their time in England. Detective Garda Delta also indicated that, although the likelihood of obtaining usable evidence from Mr B was very small, he was still interested in seeing what information Mr B was claiming to have obtained from his visit to Mr Bailey on 22 May 1997. He told the Commission:

*“Well I hadn't abandoned him completely. What I am saying is this, is that, it would be interesting to see ... what he would come back with, you know... I knew that it would probably be a falsity, but it would be interesting to see how he did get on, just to see, you know, just to see.”*

- 12.6.61 The Commission has found no evidence to suggest that Mr B was given large sums of money at any stage in the investigation. Accordingly, no evidence of improper or unlawful conduct is disclosed in this respect.

## **12.7 Disclosure of confidential information**

### **Background**

- 12.7.1 It is to be expected that members of An Garda Síochána engaged in the investigation of crime would behave with discretion and bring to their work a high level of respect for the often extremely confidential and sensitive nature of the information they obtain. The Commission has taken careful note of the specific rules that governed the behaviour of An Garda Síochána at the time of the murder inquiry, in the period covered by the recorded telephone calls, in particular around the year 1997.
- 12.7.2 Those provisions made it a breach of discipline for a member of An Garda Síochána to disclose information, not available to the public, except where the disclosure took place in the course of execution of the Garda's duty or where the disclosure was authorised by the Garda Commissioner. The Commission is concerned with identifying any examples of unauthorised communications identified amongst the telephone calls that relate to the investigation of the murder of Madame Toscan du Plantier.
- 12.7.3 In essence, members of An Garda Síochána should not disclose private and confidential information, unless there is a legal or compelling public-interest requirement to do so. These stipulations must be borne in mind when considering any disclosure of confidential information present in the recorded telephone calls.



- 12.7.4 The Commission also notes the provisions of s.62 of the Garda Síochána Act 2005, which makes it an offence for a member or employee of An Garda Síochána to disclose information obtained in the course of duty, "...if the person knows the disclosure of that information is likely to have a harmful effect." Although this provision was not in existence at the time of the behaviour being examined under paragraph 1(m), the Commission considers the concept of "harmful effect" to be useful in the context of examining the impropriety of disclosures made in connection with the Toscan du Plantier investigation.
- 12.7.5 In summary, at the time of the investigation of the death of Madame Toscan du Plantier, issues in relation to privacy and confidentiality were provided for, both by Statutory Instrument and by the Garda Code, a copy of which was given to each member. However, in order to determine whether there is evidence of unlawful or improper behaviour, such as is required by paragraph 1(m), in any recorded telephone calls in relation to these issues, it is necessary to examine each potential instance.
- 12.7.6 The Commission has been compelled to note that a number of the members of An Garda Síochána whose telephone calls were recorded are now deceased. Thus, it is not possible for those members to put forward an explanation or justification for such disclosure. To that extent, the Commission is concerned that it cannot fully observe the rules of natural justice. On the other hand, the Commission notes that it is required only to report on whether evidence of improper behaviour is "disclosed". It does not determine whether there has in fact been improper conduct by the member concerned. Furthermore, for this and other reasons, each Garda member concerned has been assigned a pseudonym to protect his or her identity.

**Evidence of improper / unlawful disclosures of information**

**Telephone calls, June 1997**

- 12.7.7 Over the course of one week in June 1997, the following telephone calls were recorded between Detective Sergeant Alpha and a number of people, all of them civilians, in which he discussed the Toscan du Plantier murder investigation to various degrees:
- a. On 18 June 1997, at 9:23pm, Detective Sergeant Alpha spoke with an unidentified female civilian, possibly a family member of a colleague. When asked if he was any closer to a conclusion in the murder investigation, Detective Sergeant Alpha said: "*it's a very tricky one, a complicated one to try and put it together and bring it together.*" Later he said: "*Yeah, it's real cryptic and then we're up against it, he didn't leave us too much to go on.*" He responded to a suggestion that if he, Ian Bailey, is not caught he would kill again by stating "*Ah it's*

*frightening. Well, I don't want to give him that opportunity if I can help it, but the people he's living with, certainly shielding him I think, so.*" *Prima facie*, Detective Sergeant Alpha thus engaged in discussing confidential matters concerning the murder investigation, in circumstances where there was no professional reason to do so. He expressed views about the strength of the case and expressed the opinion that members of Mr Bailey's family were shielding him. In the view of the Commission, this telephone call discloses evidence of improper conduct by Detective Sergeant Alpha.

- b. On 19 June 1997, at 11am, Detective Sergeant Alpha commenced a long conversation with a journalist who had called on behalf of a United Kingdom publication. From the beginning and, for the most part, throughout, Detective Sergeant Alpha insisted that the murder investigation was still live and ongoing and that he could not discuss it. However, speaking "*off the record*", Detective Sergeant Alpha, while not giving out many specific investigative details about the case, discussed Ian Bailey's interaction with the press and expressed the opinion that he was attempting to create an argument for himself that, due to the negative press publicity, it would be impossible for him to get a fair trial. In this respect, Detective Sergeant Alpha likened him to a named, notorious criminal, whom he said had attempted to manipulate the press in a similar way on another occasion. He also disclosed to the journalist that Mr Bailey was not under surveillance at the time. In the view of the Commission, it was not appropriate for Detective Sergeant Alpha to discuss the murder investigation with the journalist in this manner and this telephone call discloses evidence of improper conduct by Detective Sergeant Alpha.
- c. On 23 June 1997, at 9:03pm, Detective Sergeant Alpha called a family member from Bandon Garda Station. At one point in the conversation, Detective Sergeant Alpha was asked about the investigation of the murder of Madame Toscan du Plantier. He disclosed that it is a "*very tricky case*" and that "*this [meaning Mr Ian Bailey] is a cunning bastard which makes it a lot harder.*" He was then asked if there was not enough evidence against "*him*", to which Detective Sergeant Alpha responded "*I didn't say that, I just said he's a cunning bastard. And that makes it a lot harder.*" Although little detail was disclosed by Detective Sergeant Alpha, it was not appropriate, in the view of the Commission, for Detective Sergeant

Alpha to discuss the murder investigation, and particularly a suspect in it, in this manner. There was no professional reason for him to do so. Thus, in the view of the Commission, this telephone call also discloses evidence of improper conduct by Detective Sergeant Alpha.

- d. On 24 June 1997, at 12:43pm, Detective Sergeant Alpha spoke with another civilian, this time an employee of the Office of the Revenue Commissioners in a conversation that, for the most part, concerned an unrelated matter. Detective Sergeant Alpha was asked about the murder case. He disclosed that there had been no progress in the case but that *“he’s meaning Mr Ian Bailey fucking playing some game at the minute. Oh I’m telling you now he’s some steps ahead of us at this stage, I would think, he’s that cute.”* He further informed the civilian that *“he has a temper threshold then that, like, he’d snap like that”* and that he had *“beaten the one he’s living with, sure, he’s beaten her to a pulp a few times.”* He stated that *“in England, we reckon he’s done it as well.”* Detective Sergeant Alpha also disclosed that he believed *“sex was the fucking motive”* and that *“she did a runner if he got near her, you see, and that was it and he caught her.”* In this instance, Detective Sergeant Alpha disclosed sensitive and confidential information to a civilian to whom he had no professional reason to disclose it. This, in the view of the Commission, was not appropriate. It discloses evidence of improper conduct by Detective Sergeant Alpha.
- e. On 24 June 1997, at 12:07pm, Detective Sergeant Alpha called a local TD in West Cork to discuss a letter of complaint that the TD had received from Mr Bailey and Ms Thomas, pertaining to their treatment by An Garda Síochána in relation to the murder investigation. Detective Sergeant Alpha informed the TD that *“hopefully his re-arrest is imminent but it is not as imminent as he thinks it is.”* The TD in question is not a member of An Garda Síochána and there was no professional reason for Detective Sergeant Alpha to disclose this information. In the view of the Commission, it was not appropriate for Detective Sergeant Alpha to disclose the fact that Mr. Bailey was to be re-arrested to a member of the Dáil in such a manner. Thus, in the view of the Commission, this telephone call also discloses evidence of improper conduct by Detective Sergeant Alpha.

- f. On 24 June 1997, Detective Sergeant Alpha spoke to a family member on two occasions, at 4:59pm and 9:32pm. The substance of both calls was personal in nature but, during both calls, Detective Sergeant Alpha discussed the murder investigation. In the first call, he merely disclosed that the case was “*probably the most difficult one I’ve ever done*” and that he only had “*threads to make a jumper.*” In the second call, however, Detective Sergeant Alpha stated as follows:

*“your man is playing an unbelievable game. He has now got to witnesses before we have got to them, believe it or not. He has copped on how we are asking anyone that he had any discussion with and we have now discovered that there are at least two witnesses approached that shut up and wouldn’t talk to us because he’d been to them. There’s a frightening game going on here. He’s making all kinds of allegations against us to the TDs and things like that...looking for inquiries into it – making out we’re making him to be the killer.”*

In the view of the Commission, it was not appropriate for Detective Sergeant Alpha to disclose information in relation to the murder investigation, in a situation where there was no professional reason to do so. Thus, in the view of the Commission, this telephone call also discloses evidence of improper conduct by Detective Sergeant Alpha.

- 12.7.8 It should perhaps be re-emphasised at this point that, as Detective Sergeant Alpha is deceased, it is not possible to put forward any potential explanatory or extenuating circumstance or reason for his engaging in those telephone conversations. On a *prima facie* basis, these disclosures appear to be inappropriate but there may have been background information, of which the Commission is not aware, that gave justifiable cause for him to have made them.

Telephone call, 3 April 1997

- 12.7.9 In addition to the above instances of apparently improper disclosures made by Detective Sergeant Alpha, the Commission has also considered apparent instances of improper disclosure by Detective Garda Delta in the course of a recorded conversation with Mrs A on 3 April 1997. As indicated previously, Mrs A had given important evidence to the murder investigation and Detective Garda Delta had been asked by his superiors to engage with Mrs A, in the hope that she might disclose further information of benefit to the investigation.

- 12.7.10 As Detective Garda Delta was alive and willing to give evidence in relation to this matter, the Commission was able to explore the context of these disclosures in detail, in a manner that was not possible for those made by Detective Sergeant Alpha above.
- 12.7.11 The origins of the call appear to lie in an encounter between Mrs A and a Mr C, during which she informed the latter that her husband suspected him of “*prowling*” around their house late at night.<sup>320</sup> According to Mrs A, Mr C threatened to kill her in the course of that conversation. She phoned Bandon Garda Station, seeking to report the matter either to Detective Garda Delta or another named Garda member. Detective Garda Delta was not there at the time, but was informed later of the substance of Mrs A’s call and phoned her back. This call was recorded.
- 12.7.12 In view of the circumstances, Detective Garda Delta was acting in the course of his duty when he made the telephone call to Mrs A on 3 April 1997. That was because of his expressed task of maintaining good relations with Mrs A, in order to obtain further information from her of potential benefit to the murder investigation. He had no function in respect of the specific allegations Mrs A had made against Mr C.
- 12.7.13 In the course of this conversation, Detective Garda Delta disclosed personal and confidential information about Mr C to Mrs A. Most, if not all, of the information appears to have been obtained by Detective Garda Delta from other members of An Garda Síochána, although, as will be seen below, Detective Garda Delta claimed that he had received some of the information from Mrs A herself on a previous occasion.
- 12.7.14 It is a remarkable feature of this recorded telephone call that, from the outset, Detective Garda Delta repeatedly betrayed unremitting animus against Mr C. He used various obscenities in referring to him: “*that bollox,*” “*that prick,*” “*that fucker,*” “*fucking abnormal.*” He said that Mr C was at the “*same thing*”, meaning ‘prowling’, at Castlefreke, which is near Rosscarbery in West Cork. In evidence, Detective Garda Delta stated that the language used in relation to Mr C was used in the context that there had been allegations against him of prowling and of threatening Mrs A. It is of note that, in written responses to the Commission, neither Garda Lambda nor Sergeant Omicron had any recollection of any allegation relating to behaviour of the same kind in Castlefreke. Garda Lambda, in particular, offered that he “*had no recollection whatsoever of Mr C residing in Castlefreke or being involved in alleged prowling in that area.*”

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<sup>320</sup> It should be noted that, 10 days after this telephone call, on the night of 13 April 1997, Mrs A’s husband is alleged to have assaulted Mr C near their house. The response of An Garda Síochána to that alleged assault is dealt with in this Chapter.

- 12.7.15 Returning to the telephone call, Detective Garda Delta said to Mrs A that “*there is another side to him*”, that “*he is telling lies to everybody about his profession*”, that “*he goes around from address to address*”, that “*there is warrants for him all over the country*”, that “*there is one warrant for debt...in Dublin, I think it is for failing to pay up to yer one that he left*”, and that he “*is acting peculiar in many ways*”. He also cast doubt on the authenticity of some unspecified cards that Mr C appears to have been selling to local businesses.
- 12.7.16 When asked by the Commission, Detective Garda Delta could not explain what he had meant when he said that there was “*another side*” to Mr C, but offered that, if he had heard anything in relation to prior incidents of ‘prowling’ in another area, he had made no inquiries himself, but that he would have acquired that information, most likely, from Garda Lambda, who was based in Schull Station, or his Sergeant, Omicron. He told the Commission that it was his belief that Garda Lambda had been to visit Mr C in relation to informal complaints made by Mr and Mrs A. The Commission has asked An Garda Síochána for any documentation regarding Mr C and nothing relating to complaints made by Mr and Mrs A against Mr C has been forthcoming. If any complaints had been made against Mr C for ‘prowling’ or other unlawful activity, no note or report was made.
- 12.7.17 In his letter to the Commission, Garda Lambda stated that he recalled visiting Mr C on an informal basis and warning him to stay away from the “A” family and their property. His recollection was that Mr C, without any admission of wrongdoing, agreed that he would keep away from them. Further, Garda Lambda stated that, upon his arrival in the area, a background check would have been done by An Garda Síochána on Mr C and that any details of note arising from this check would have been passed on to Detective Garda Delta, with whom he was in regular contact, as a result of his involvement in the murder investigation. He did not state whether this was done on his own initiative or in response to a request from Detective Garda Delta.
- 12.7.18 In relation to Detective Garda Delta’s assertion of there being “*warrants for him [Mr C] all over the country*”, an apparent example of disclosure of confidential information about one civilian to another, he told the Commission that this information had come from Mrs A herself, at an earlier date. Detective Garda Delta alleged that Mrs A had told him that Mr C regularly visited her in her shop and that, on one occasion, he had told her that the Toscan du Plantier murder investigation was troublesome to him, as warrants in relation to him might surface as a result of An Garda Síochána making routine inquiries about locals.

- 12.7.19 It is clear, however, that not all the information about warrants had come from Mr C himself *via* Mrs A. Garda Lambda, in his letter to the Commission, stated that he had passed on information “*in relation to warrants, road traffic offences and Mr C selling scratch cards in the area without a permit*” to Detective Garda Delta.
- 12.7.20 Similarly Sergeant Omicron, in his letter to the Commission, stated that he recalled visiting Mr C’s home in an attempt to execute certain warrants. He said that he had no memory of other events being discussed but could not say that they were not. He stated that he “*may well have had a conversation with Detective Garda Delta about Mr. C but I do not have notes and truly do not recall any such situation.*”
- 12.7.21 Indeed, Detective Garda Delta himself spoke about contacting a Garda in Rosscarbery, County Cork, and explained, in evidence, that he meant to have the warrants sent on to Schull to have them executed. He said, in evidence, that he had rung Rosscarbery or asked the guards to ring Rosscarbery to check on the warrants. He also told Mrs A that there were warrants all “*over the country*” for Mr C. He said that they had been sent down from Dublin and added: “*there is one for debt all right you know in Dublin, I think it is for failing to pay up to yer one he left.*” In these passages, Detective Garda Delta was making assertions himself on the telephone and did not speak as if he was relying on information provided by Mrs A. The last reference is to what is described as a warrant “*for debt*”, which would be a civil matter. Detective Garda Delta was unable to explain what role, if any, An Garda Síochána would have in respect of matters of civil debt. It is also notable that Detective Garda Delta was here informing Mrs A about a warrant in relation to a debt which he said was owing to “*yer one he left*”, This was clearly a matter concerning Mr C’s private life.
- 12.7.22 In evidence, Detective Garda Delta explained that he did not consider that he had been doing anything contrary to regulations by just “*filling Mrs A in*” on what she was dealing with. She was reporting ‘prowling’. He had no difficulty informing Mrs A of details of prior behaviour of a similar nature in relation to the man against whom she was making these allegations. He cited a difference between this situation and one in which he, hypothetically, might disclose information to someone on the street which, he accepted, would be wrong.
- 12.7.23 Detective Garda Delta accepted that he had been “*a small bit more liberal than [he] should*” have been. He was more open with Mrs A than in his normal interactions with a witness because, at that time, his main function, according to him, was to try to find out the name of the man who had accompanied Mrs A in the early hours of 23 December 1996, when, as he claimed, she had made a sighting of importance to the murder investigation.

- 12.7.24 Detective Garda Delta expressed concern to Mrs A that “*any fella that is acting that way can be...you never know when they snap like*”. He advised her to tell Mr C that she has “*reported to the Guards on a number of occasions that there is a prowler in the back of the house....*” He advised her at length about how to approach Mr C. It is notable that Mrs A merely said that “*there was somebody outside the house*” and that “*Mr A assumed it was you....*” Detective Garda Delta did not question her in any way about the identification of Mr C. This is somewhat unusual as, in evidence to the Commission, Detective Garda Delta stated that he was not entirely sure whether the incidents had happened at all.
- 12.7.25 In a separate part of the same conversation, Detective Garda Delta raised the possibility that people would say, in the event of these allegations surfacing around Schull, that An Garda Síochána should consider “*that fella*”, again, meaning Mr C, in relation to the murder. He then told Mrs A that Mr C was not a suspect. This, he informed Mrs A, was because An Garda Síochána had “*placed a call from the coin box he [Mr C] made to his old mot in Dublin*” and that the timing of this call “*would rule him out.*”
- 12.7.26 The Commission asked Detective Garda Delta what his motivation had been for making these disclosures. He said that he had disclosed this information in the course of his duty as he was trying to coax information from Mrs A, in relation to the identity of her companion on the night of 23 December 1996. Detective Garda Delta maintained, in evidence, that he believed that Mr C was the person accompanying Mrs A that night and that he thus hoped, by discussing Mr C in relation to the murder investigation, to coax her into revealing information. He felt that, if he had asked Mrs A straight out if Mr C had been her companion, she would not have given him a straight answer. In this regard, Detective Garda Delta differentiated between telling Mrs A about Mr C’s previous history in relation to ‘prowling’ and debt etc., which he described as an example of him being “*more liberal than he should have been*”, and disclosing details in relation to Mr C’s status as a suspect in the murder investigation, which he insisted was done in pursuance of his duties in the murder investigation. Detective Garda Delta’s evidence was, however, unclear about when he came to suspect Mr C as having been Mrs A’s companion on the night of 23 December. He said, in evidence, that it was much later that he had this suspicion. At the time of these phone calls, Mrs A had said that she was with a person other than Mr A. Detective Garda Delta interviewed Mr C in relation to the matter only in 2002. At another point, Detective Garda Delta said that he used to see Mr C’s car outside the café operated by Mr and Mrs A and that he had got suspicious. On a consideration of Detective Garda Delta’s evidence, it does not seem to the Commission that Detective Garda Delta had any real suspicion that Mr C had been Mrs A’s companion until sometime approaching 2002.



- 12.7.27 In these circumstances, the suspicion that Mr C had been Mrs A's companion on the night in question cannot provide any justification for Detective Garda Delta's provision of extensive confidential information to Mrs A about Mr C. In any event, the disclosures were highly questionable, in particular those relating to Mr C's relationship with his former partner. Asked to justify his revelation to Mrs A of the fact of Mr C having been ruled out of suspicion of the murder, Detective Garda Delta suggested that he had been trying to "*endear*" himself to her, his goal being to find out who had been with her on the night of the murder. The Commission is satisfied that the disclosure of this information to Mrs A was, at least *prima facie*, an improper disclosure of confidential information and does not seem to be capable of being excused by the speculative possibility of Mrs A being persuaded in some indirect way to reveal a name which she had resolutely refused to disclose.
- 12.7.28 In summary, Detective Garda Delta, in speaking to Mrs A, engaged in prolonged extreme vituperation, amounting to a diatribe against Mr C. He denigrated Mr C's character and reputation, using several obscene and derogatory expressions. This amounted to a sustained attack on the character of Mr C. In the view of the Commission, it is not proper for a member of An Garda Síochána, without the clearest justification, to speak in such terms to one civilian about another. The wide range of allegations of misbehaviour and dishonesty made against Mr C and the extreme and unqualified language used were inappropriate for a member of An Garda Síochána, acting in the course of his duty.
- 12.7.29 Detective Garda Delta does not appear to have had any, or any sufficient, evidence justifying him in adopting such a uniformly hostile attitude to Mr C. Insofar as it was said that there had been a threat to Mrs A, Detective Garda Delta clearly did not take that seriously. Insofar as it was being alleged that Mr C had been watching or 'prowling' outside the house of Mr and Mrs A, Mrs A could go no further than to say that "*there was somebody outside the house the other night ....and Mr. A assumes it was you*" [meaning Mr C]. Detective Garda Delta, in the view of the Commission, produced no realistic justification for his hostile attitude to Mr C.
- 12.7.30 Detective Garda Delta was not professionally responsible for investigating any allegations made against Mr C. As he told the Commission, his interest lay in the effect of Mr C's alleged behaviour on Mrs A and the potential consequences for her ongoing cooperation in the Toscan du Plantier murder investigation. He took no steps to investigate or confirm the truth of the allegations he made to Mrs A about Mr C. At best, he had heard them, by word of mouth, from Garda colleagues at Schull.

12.7.31 The Commission considers that, in speaking as he did, based on very limited information and without carrying out any investigation of his own, Detective Garda Delta behaved recklessly in the way he spoke about Mr C.

## **12.8 Actions in relation to an assault near Schull, 13 June 1997**

### **Background**

12.8.1 Amongst the recorded calls reviewed by the Commission were a number of calls from April 1997 that mentioned an assault on a Mr C. The assault was alleged to have been perpetrated by the husband of Mrs A, a woman who was considered by An Garda Síochána to be a significant witness in the investigation of the death of Madame Toscan du Plantier.

12.8.2 On first analysis, the Commission identified the following issues of potential concern:

- Members of An Garda Síochána appeared to have put undue pressure on Mr C not to make a formal complaint in relation to the assault carried out upon him;
- Some of the recorded conversations appeared to suggest that this was done in order to ensure Mrs A's continued cooperation with An Garda Síochána as a witness in their investigation of the death of Madame Toscan du Plantier;
- Members of An Garda Síochána seemed to have adopted and maintained a hostile and prejudiced approach towards Mr C, both before and after the assault;
- Members of An Garda Síochána appeared to have considered advising Mr A to give false evidence in relation to the assault;
- Information apparently confidential to An Garda Síochána concerning Mr C's personal history was shared by a member of An Garda Síochána with Mrs A.

12.8.3 In all, there are 4 recorded calls that mention Mr C:

- A call from Detective Garda Delta to Mrs A on 3 April 1997, 10 days prior to the assault;
- A call from Detective Garda Delta to Garda Epsilon on 18 April, 5 days after the assault;

- A call from Detective Garda Delta to Garda Epsilon on 22 April, following a meeting between Mr C and Garda Epsilon at Schull Garda Station;
- A call from Detective Garda Delta to Mrs A on 22 April, made shortly after the previous call to Garda Epsilon.

12.8.4 The issues in relation to (i) an apparent willingness to advocate the falsification of evidence and (ii) potentially improper disclosures of information are dealt with elsewhere in this Chapter under those respective headings. This section is concerned with the remaining matters and, in particular, with the steps taken by members of An Garda Síochána to dissuade Mr C from pursuing a complaint of assault.

12.8.5 By way of background, it should be noted that Detective Garda Delta first came to know Mr and Mrs A around the end of January 1997, through his role as a member of the investigation team regarding the death of Madame Toscan du Plantier. As explained earlier in this Chapter, Mrs A had made a statement about seeing a man near Kealfadda Bridge on the night of the murder and had also told An Garda Síochána that someone was with her when she made this sighting. She refused all requests to disclose the identity of her companion. Detective Garda Delta told the Commission that he was given the task of obtaining the name of this person. His means of doing so was to establish and maintain friendly communication with Mrs A, in the hope that she might eventually disclose information that could lead to the identification of this potential witness.

12.8.6 Garda Epsilon also knew Mr and Mrs A, as he had been involved previously in the successful recovery of stolen property belonging to them. He told the Commission, in evidence, that he had not met Mr C prior to the alleged assault on 13 June 1997. Garda Epsilon was not a member of the team investigating the death of Madame Toscan du Plantier, but he told the Commission that he was aware, in general terms, that Mrs A had given a statement to the investigation team regarding a sighting near Kealfadda Bridge.

12.8.7 Detective Garda Delta said, in evidence, that he was unsure as to whether he had previously met Mr C. He suggested that he might have met him in or around January 1997, in the company of another Garda member, when Mr C had been asked to make a statement accounting for where he had been on the night of the murder of Madame Toscan du Plantier. He had not, however, met him otherwise and did not meet him until he interviewed him in Dublin in 2002.

**Assault on Mr C – Garda response**

12.8.8 In the early morning of 13 April 1997, members of An Garda Síochána in Bantry Garda Station received two telephone calls in quick succession, reporting an alleged assault,

said to have taken place in Crewe Bay, Schull. These calls were not recorded, as there were no recording facilities at that station, but they were noted in the station's Occurrence Book<sup>321</sup> as follows:

- a. At 1:30 am, a named individual telephoned to report that "*his neighbour had called to his house*" and that he had "*been badly assaulted and requires a doctor*". The neighbour was Mr C. The informant did not know who had assaulted him. There are also the following notes made in the Occurrence Book: "*Passed to Schull Doctor on the way*" and "*Injured party brought to Bantry Hospital by E55.*<sup>322</sup> *Will call to Schull Station tomorrow.*"
- b. At 1:40 am, Mrs A telephoned Bantry Garda Station. Her report was noted as follows:

*"When herself and her husband were returning home from a night out, they found a prowler around the house. They have reported this matter to the Gardaí at Schull and to the Gardaí at Bandon. When her husband found him coming out of her driveway, he lost the head and beat him up. Over the past couple of weeks underwear has gone missing off the line. And C has threatened her."*

12.8.9 The Occurrence Book is the only piece of documentation that has been found in relation to the alleged assault on Mr C. The account of events that follows comes almost entirely from Garda Epsilon, who gave evidence before the Commission. Two other Garda members who accompanied Garda Epsilon to the scene were unable to recall any aspect of the matter.

12.8.10 For the most part, Garda Epsilon was confident in his ability to recall the events around the assault and his role in investigating it. However, this confidence must be set against the fact that he was being asked to recall details of an incident that had taken place almost 20 years ago, an incident for which he had taken no notes to aid his memory, and one which, on his version of events, amounted to a dispute between neighbours that he was able to resolve without further incident. As far as the Commission is aware, no one else has questioned Garda Epsilon about this matter in the two decades since it took place.

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<sup>321</sup> Book that records activity in the station on a day to day basis.

<sup>322</sup> E55 was the code name for the Bantry Station patrol car.

- 12.8.11 Two members of An Garda Síochána were dispatched to the scene in the Bantry Station patrol car (E55). On their way through Ballydehob, they met Garda Epsilon, who was on foot patrol there. According to Garda Epsilon, the two members from Bantry informed him of the reported assault and asked him for directions to Crewe Bay. Rather than giving directions, he offered to accompany them to the scene. On arrival at the scene, Garda Epsilon, being both the local and the most senior member amongst those present, took responsibility for the investigation of the assault. As he put it, in evidence to the Commission, he *“took on the case”*.
- 12.8.12 Garda Epsilon told the Commission that, when they arrived at the scene, he spoke to Mr and Mrs A. They informed him that, having returned home earlier than expected on that evening, they had found their neighbour, Mr C, running away from their house and towards his own. Mr A had then chased him and had assaulted him or, in Mrs A’s words, *“beat him up”*.
- 12.8.13 Mr and Mrs A, by way of background, told Garda Epsilon that, on a previous occasion, underwear had gone missing from their washing line and that they suspected Mr C to have been the culprit. This was a matter of which Garda Epsilon had no prior knowledge. On that evening, however, he recalled Mr and Mrs A telling him that they wished to make a complaint against Mr C in relation to underwear going missing and his prowling around the house, because it was frightening to them and to their children.
- 12.8.14 Garda Epsilon told the Commission that he took no statement from Mr and Mrs A on that night. He explained that, normally, in the case of an incident involving neighbours or friends, it had always been his approach to leave things to settle for a couple of days and to then talk to the people involved. He stated that his desire was to try and *“sort things out rather than go to court”*. He said that he *“was trying to fix a problem between two neighbours rather than it going into a court...”* Whatever about that explanation, Garda Epsilon took no notes either of the account that had been given to him about the alleged assault by Mr A on Mr C or their complaints against Mr C.
- 12.8.15 The Occurrence Book, referred to above, noted that Mr C was taken to hospital that night in the Bantry patrol car, E55. Given Garda Epsilon’s evidence that the officers in the patrol car had to ask him for directions to the scene, it must be assumed that they brought Mr C back sometime after arriving at Crewe Bay with Garda Epsilon. Garda Epsilon has no recollection of meeting Mr C on the night of the assault or of bringing him to hospital in the patrol car. However, he is clear in his evidence that he chose not to take any statement from Mr C on the night. Nor did he ask his colleagues to do so.

- 12.8.16 Before leaving the scene, Garda Epsilon told Mr and Mrs A that he would need to speak to Mr C and that he would be in touch. Garda Epsilon did not go to the hospital that night to check on Mr C's condition and did not offer any further explanation for this, other than his decision to let the situation settle down. He should have been aware that Mr C had been taken to hospital by his colleagues in the Bantry patrol car, but he told the Commission that he was not. He said that he spoke to Mr C the following day on the telephone. He believed that, as well as talking to Mr and Mrs A on the night of the assault, he must also have spoken to the neighbour who first reported the matter to An Garda Síochána, but he does not, at this point in time, have any recollection of what was said. He told the Commission that he took no notes in relation to any aspect of his visit to Crewe Bay on that night.
- 12.8.17 In the "*Result*" section of the Occurrence Book entry made at 1.40am, concerning Mrs A's reporting of the incident, it was noted "*Garda Epsilon Ballydehob has details, will inform Sgt I/C Schull tomorrow*". Sergeant Omicron was the Sergeant in charge of Schull Garda Station at the time and, in a letter to the Commission, he noted that he had "*no recollection of having a conversation with Garda Epsilon about Mr. C.*"
- 12.8.18 Garda Epsilon himself, in his evidence to the Commission, said that he had made no report, either orally or in written form, to the Sergeant in charge or anyone else in relation to this incident, although, in the recorded call from 18 April 1997, he expresses an intention to "*have his facts got*" from Sergeant Omicron about Mr C in advance of his coming in to make a complaint about the assault. This suggests that a discussion may have taken place between Garda Epsilon and Sergeant Omicron about Mr C at some point following the assault, although neither party recalls it now, some 20 years later.
- 12.8.19 Detective Garda Delta, in evidence, informed the Commission that he first learned of the assault on the following day, 14 April 1997. He said that he had called, looking for Mrs A, to discuss interviewing another person suspected of having been her companion on the night of the murder. There is no recording of this call. She informed him of the assault she said had been committed by her husband. When questioned further, he said that it might have been Mr A who reported the assault to him, he simply could not recall. He believes he was told that, as Mr and Mrs A pulled into their house, they saw a person running from it and Mr A, who was the passenger in the car, ran after the person, at which point a fight broke out and Mr A had "*beaten up*" Mr C.
- 12.8.20 On 18 April 1997, five days after the alleged assault by Mr A on Mr C, Detective Garda Delta called Garda Epsilon. At that point in time, Garda Epsilon had yet to see Mr C, at all, since the alleged assault. Garda Epsilon told the Commission that, given the lapse of time, he could not recall whether the reason for that was Mr C failing to come into him

or that he may have been “*letting things cool down*”. He added that, in a situation between neighbours such as this one, he preferred to take statements from people when they had had a chance to calm down.

- 12.8.21 Mr C contacted Garda Epsilon on Monday, 14 April 1997. However, Garda Epsilon told him that he was going to be off duty and that he could contact him in a few days. Asked by the Commission to comment on this delay, Garda Epsilon said in evidence several times that he “*might have been letting things cool down*”. He said that, if Mr C had thought it was urgent, he could have gone to Bantry Garda Station or to Schull Garda Station and made his complaint to the duty officer there.
- 12.8.22 Both Detective Garda Delta and Garda Epsilon gave evidence that there was no contact between them in relation to the assault, at any time, prior to 18 April 1997, when Detective Garda Delta telephoned Schull Garda Station, in order to speak to Garda Epsilon. However, internal evidence in the recording of that call discloses that both men had spoken to Mrs A in separate calls earlier that day. Mrs A had apparently phoned Garda Epsilon that same day, 18 April, to ask whether he had any news. She had then made Detective Garda Delta aware of this call. He said that she had phoned him to tell him “*that your man was coming in*”. It will be recalled that Detective Garda Delta was based in Bandon and was concerned with the Toscan du Plantier murder investigation. He had no professional responsibility for the investigation of the alleged assault on Mr C. Nonetheless, he telephoned Garda Epsilon, having previously discussed the matter with Mrs A.
- 12.8.23 It is of interest to note what Garda Epsilon said to Detective Garda Delta, about taking a statement from Mr C in the telephone call of 18 April. He said: “*your man is talking about coming in on Tuesday. He was in yesterday looking for me, but I wasn't here.....He wanted to come in and make a statement like. You know.*” He added: “*But sure we'll fucking play him along and see where he goes anyway on it.*” Referring again to the stated wish of Mr C to visit Garda Epsilon, Detective Garda Delta intervened to suggest that Mr C was “*an awful bollix.*” Garda Epsilon said: “*I said no; ...I said I'm off until Tuesday, simple as that.....And I am not entertaining you until Tuesday.....Because when I'm off, I'm off as the fella says - that's what I said to him.*” He then added: “*You know, but I mean like that fucking bollix, like, you know...*”
- 12.8.24 This was not the first recorded call in which Detective Garda Delta used hostile and abusive language in discussing Mr C. In a conversation with Mrs A on 3 April (some 10 days prior to the alleged assault), he described Mr C in similar derogatory terms and made several allegations against him, the content of which has been considered

elsewhere in this Chapter.<sup>323</sup> It is striking that, in this conversation, Garda Epsilon adopted a similar tone – displaying, from the outset, an unwillingness to facilitate Mr C in making a complaint, and then echoing and agreeing with the obscene terms used by Detective Garda Delta in relation to Mr C.

- 12.8.25 It is not clear why both of these officers chose to adopt such an attitude of apparent hostility towards Mr C. What is clear from their conversation on 18 April is a marked difference in their approach towards Mr A – the man whom they believed to have assaulted Mr C. Mr C, the victim of the alleged assault, received no sympathy and little or no assistance in making his complaint. At a minimum, it seems clear that Garda Epsilon was less than accommodating to Mr C’s wish to make a statement of complaint about the assault. By contrast, Mr A, the alleged perpetrator of the assault was not subjected to any corresponding opprobrium. In fact, towards the end of the conversation, both men indicated a certain sympathy for Mr A, suggesting that he is “*gone into a bit of a downer*” after the incident, and referring to him as a “*poor devil*”.
- 12.8.26 The Commission questioned Garda Epsilon closely in relation to his assertion in the telephone call that they, members of An Garda Síochána, would “*fucking play him along and see where he goes anyway*” and as to why, when he knew that Mr C was the victim of an alleged serious assault, Garda Epsilon would wish to play Mr C along. Garda Epsilon said that he had not meant to “*play him along*” but rather “*to get the whole story as regards what happened that night.*” He emphasised that this was a telephone call made by one policeman to another and that they were just “*talking away*”. As a result, he said, he was not minding what he was saying “*as regards the proper way of actually saying things*” and, additionally, he did not realise the call was being recorded. He said that he would not “*play someone along*”, other than “*to get or to drag the whole story out*” as to what actually happened.
- 12.8.27 This passage seems to be a suggestion that, although Garda Epsilon had twice used the expression, “*play him along*”, he did not mean it. He laid emphasis on the fact that he did not realise that he was being recorded. While the latter fact might explain the use of unguarded language, it does not explain the use of language which suggests that a Garda will not take a complainant’s statement fairly and objectively, but rather will engage in some unspecified but implicitly hostile process of “*playing him along*”.
- 12.8.28 Detective Garda Delta claimed that he was unsure exactly what Garda Epsilon had meant by the statement that he would “*play him along*”. He suggested that it could mean that “*maybe, we’ll see what he has to say, it could mean that.*” The Commission put it to Detective Garda Delta that it did not sound as though that is what Garda Epsilon meant.

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<sup>323</sup> See para 12.7.9 et seq below.



Detective Garda Delta admitted that it did not and suggested that *“it sounds like as if he is going to play him along, talk to him and see, play him along, put it back a bit, roll it back some bit, you know.”* When pressed further, he stated *“you could put it into any kind of context, maybe we’ll see what he has to say, we’ll play him along and see. Maybe we might put him off, maybe we’ll have a chat with him, see what he says, you know, it could mean that”*. It seems likely, given the ordinary meaning of the words used, that what Garda Epsilon was, in essence, suggesting was that he wished to delay and potentially dissuade Mr C from making a statement complaining of assault.

12.8.29 Further on in the conversation, Garda Epsilon appeared to move away from the idea of ‘playing Mr C along’ towards a position of active opposition. Following an apparent suggestion from Detective Garda Delta that, if Mr and Mrs A were to make statements in relation to their allegations regarding Mr C, this fact could be used by Garda Epsilon in his discussion with Mr C, Garda Epsilon interrupted to say, *“oh, don’t worry, I’ll fucking push it over upon him...”* to which Detective Garda Delta replied, *“you know yourself.”*

12.8.30 Detective Garda Delta stated that he took this statement to mean that Garda Epsilon would *“push the blame over on him”*, meaning Mr C. He pointed out, however, that his preceding statement in relation to Mr and Mrs A reporting their allegations regarding Mr C *“would be putting on paper the set of circumstances that were [there] in reality, that there were incidents leading up to this and that he should be aware of it.”*

12.8.31 Garda Epsilon was asked what he had meant by his statement. He responded that it meant:

*“that I will push the whole thing – now, not the whole thing over on him now, but I will push it over that he was assaulted by Mr A but that the reason Mr A was giving for assaulting him was because of the prowling and the underwear going missing and that he lost his temper. It wasn’t just a one, it wasn’t, that the actual whole scenario would be put to him. You know, okay, Mr A lost his temper, Mr A hit him, Mr A beat him but that wouldn’t have happened if Mr C hadn’t been doing what he’d been doing to Mr and Mrs A”*.

12.8.32 It was pointed out by the Commission that the above version of events pre-supposed that Mr and Mrs A’s version of events was the truthful one and that, even if it were, the alleged behaviour partaken in by Mr C would not constitute a legal defence to a charge of assault. Garda Epsilon then told the Commission that, when Mr C did eventually see Garda Epsilon on 22 April 1997, all of these ‘facts’ were put to him and Mr C had *“no*

*problem*” afterward with not pursuing his complaint. Garda Epsilon stated that he was not being intimidatory towards Mr C, merely that he was putting the facts to him. He stated that he did not believe that he had acted improperly and that he was trying to fix a problem between two neighbours rather than see it going to court. He agreed, when the proposition was put to him by the Commission, that he saw himself as a peace maker.

- 12.8.33 The Commission pressed Garda Epsilon as to why, when he had all the details needed in relation to a charge of assault against Mr A, the scales seemed balanced against Mr C in his recorded conversations with Detective Garda Delta. Garda Epsilon then said that Mr C, during the course of their conversation in Ballydehob Garda Station on 22 April 1997, had admitted to taking underwear on previous occasions prior to the assault, and had also admitted that he was in the vicinity of the house of Mr and Mrs A on the evening of the assault itself, although Garda Epsilon’s suggestion that Mr C had said he was not suggests that there was some dispute about this issue. When asked whether he had taken any notes of these admissions, Garda Epsilon admitted that he had not, but he accepted that he should have. Garda Epsilon alleged that, although Mr C had been persuaded not to pursue his complaint of assault, he left the Garda station happy that Mr and Mrs A were not taking a case against him.
- 12.8.34 The revelation of Mr C’s alleged admissions to Garda Epsilon came as a surprise to the Commission as, not only was this fact not recorded in any way by Garda Epsilon at the time, but it was not mentioned by him to Detective Garda Delta in their next telephone conversation of 22 April 1997, despite its significance. In fact, in that telephone call, Garda Epsilon had told Detective Garda Delta what he had said to Mr C as being “*we have a sighting of you at the house, I said, leaving the house, you maintain you weren’t but Mr and Mrs A maintain you were*” [Emphasis added]. The words underlined here would appear to suggest that no such admission was made by Mr C, although it is possible that he did make such an admission at a later point in their meeting. When pressed on this matter, Garda Epsilon said that he could not remember why he had not told Detective Garda Delta this information but maintained that he, Mr C, had definitely admitted being at the house on the night he was assaulted. The Commission has been unable to contact Mr C. Thus, it has no evidence from him about any of these matters.
- 12.8.35 Although there is evidence to suggest that Garda Epsilon had already decided on his approach regarding Mr C, in advance of discussing the matter with Detective Garda Delta, the evidence clearly indicates that Detective Garda Delta favoured the same approach. To that end, he offered suggestions in the course of the conversation on 18 April as to steps that could be taken to advance the cause of Mr and Mrs A and put increasing pressure on Mr C not to pursue the assault claim. Some of these proposals

suggest a willingness to contemplate altering or even fabricating evidence. They are considered under a separate sub-heading below.

- 12.8.36 The third of the 4 recorded telephone calls relating to these events took place on 22 April 1997, when Detective Garda Delta again pursued his interest in the matter of Mr C. He called Garda Epsilon shortly after Mr C's visit to Ballydehob Garda Station. Garda Epsilon outlined to Detective Garda Delta how Mr C had come into him that morning. He said that he had "*come in very hot*", but that he had spoken to him for over an hour, during which time, Garda Epsilon had outlined to Mr C that Mr and Mrs A had potential actions they could take against Mr C, in the event that he persisted with his complaint of assault. Garda Epsilon told Mr C that he was "*talking all off the record now*" and offered to "*mediate between the both parties...and we'll straighten it all out now and get fucking finished with it.*"
- 12.8.37 The outcome of the meeting between Mr C and Garda Epsilon was that Mr C was persuaded not to pursue his complaint of assault against Mr A. Garda Epsilon told Detective Garda Delta that he had told Mr C that Mr and Mrs A had a potential IR£20,000 claim against him, whereas the most Mr C could hope to get from them in relation to the assault would be IR£3,000. He said that, should the assault complaint go to the DPP, An Garda Síochána would also take action against him for 'prowling', trespassing and intimidation of the children of Mr and Mrs A. Garda Epsilon also pointed out that there were two of the As and only one of him, giving the impression that this disparity might count for something when it came to giving evidence about these matters in court.
- 12.8.38 When asked about the figures mentioned by him to Mr C, Garda Epsilon described it as "*banter*" and said that he had no basis at all for the figures suggested. He said he was "*trying to talk down the impact of the assault, you know, just trying to put everything up on the table – not the facts, the facts of what happened but that was just banter as regards if there went on then to be a further civil case. I didn't know what the courts would do.*" The figure cited was "*a figure off the top of my head.*"
- 12.8.39 The Commission questioned Garda Epsilon as to the propriety of putting matters that had not yet been investigated to Mr C in definite terms, in an effort to dissuade him from pursuing a complaint against Mr A. Garda Epsilon offered that, in his view, it was inevitable that, if Mr C pursued his complaint, Mr and Mrs A would formalise theirs against him. In effect, this was a denial of any impropriety; the fact that the allegations against Mr C had not been formally investigated at that point was, in his view, irrelevant. Indeed, no formal complaint had even been made by Mr and Mrs A.

- 12.8.40 Detective Garda Delta told the Commission that he believed that it was appropriate for Garda Epsilon to inform Mr C of what he was facing. He thought Mr C's frame of mind might change when everything was put to him. He added, however, that he did not know whether the previous incidents had actually happened or not. He said the complaints, if made, were made informally and they should have been recorded in a statement but, for whatever reason, that was not done.
- 12.8.41 The general tone of the conversation on 22 April 1997 confirms that Detective Garda Delta approved of the actions taken by Garda Epsilon and of the result achieved – that Mr C was pressing no charges against Mr A.
- 12.8.42 Detective Garda Delta's reason for concerning himself with the alleged assault on Mr C is demonstrated by the fact that, having been informed of the outcome by Garda Epsilon, he immediately proceeded to make a number of references, some of them cryptic, to Mrs A, specifically: *"Oh that's great. I'll tell you... you see where I'm kind of caught...is that it took her three months...to name who was with her....And there was fierce pressure. She's the woman at Kealfadda Bridge..."* He then added: *"I'll tell you the story now because you've been kind of good that way in fairness."* He then gave Garda Epsilon, who was not involved in the Toscan du Plantier murder investigation, a number of pieces of information about Mrs A's previous private life and about aspects of the murder investigation. He included the following remark: *"She has identified Bailey as a hundred per cent as washing himself in the water."* This was, as Detective Garda Delta agreed in evidence, untrue. There was never any suggestion that Mrs A had seen Mr Bailey washing himself in the water.
- 12.8.43 Detective Garda Delta, significantly, ended the call by saying: *"Thanks a million."*
- 12.8.44 The last of the telephone calls referring to Mr C also occurred on 22 April 1997, in the immediate aftermath of the conversation between Detective Garda Delta and Garda Epsilon. Detective Garda Delta telephoned Mr and Mrs A within minutes of speaking to Garda Epsilon about the outcome of his meeting with Mr C. He commenced by saying to Mrs A: *"I was telling you there on Sunday I wrote out to Epsilon, like you know, what to say and do, you know, with your man."* He said that Mr C had come in to Garda Epsilon that morning and continued: *"And [he] had his notes ready."* All this was, as Detective Garda Delta agreed in evidence, untrue. He had not written to Garda Epsilon. Garda Epsilon had no notes and had not told Detective Garda Delta that he had. The most he had said was that he would *"have his facts got"* from Sergeant Omicron in advance of his meeting with Mr C.

12.8.45 Detective Garda Delta sought to explain these false statements by reference to his wish to maintain his relationship with Mrs A in the context of his ongoing efforts to find the identity of the person she was with at Kealfadda Bridge on the night of the murder. It is not acceptable, however, for a member of An Garda Síochána to tell direct and deliberate untruths. The content of these statements made it clear that Detective Garda Delta wished to claim credit for obtaining the cooperation of Garda Epsilon in persuading Mr C not to pursue his complaint of assault.

12.8.46 Detective Garda Delta informed Mr and Mrs A about the arrangement that had been made by Garda Epsilon. He said: *“C isn’t making no statement and he’s pressing no charges and he doesn’t want any money or nothing like that.”* He gave Mrs A the following account:

*“It was explained to him his position is quite clear and about kids being intimidated. And a prowler around the house, and there’s two to one in relation to identification and he denied it to the guards, which is a mean thing to fucking do, or that there was stuff being taken and he was liable to arrest and be prosecuted for criminal charges and..”*

He continued:

*“No Mr. A was wrong as well. Oh yes, he emphasised that too. But the thing about it is this, on a 50/50 basis, okay, he was wrong to hit him but if it came to – if you wanted to take it out of 100 percent, the thing about it is this, he’s 70 percent wrong or 60 percent wrong and he could be screwed as well himself in a major way. And after an hour talking and Epsilon said what I said, he said he wasn’t going to make no statement in view of what he was told.”*

Mrs A intervened at one point to say: *“But he did go in to make a statement.”* She had known of this from her call to Garda Epsilon on 18 April. Thus, what she was now being told by Detective Garda Delta was new to her.

12.8.47 The proposition that Garda Epsilon had acted under the influence or instruction of Detective Garda Delta was put to Garda Epsilon by the Commission. He dismissed it out of hand. He claimed that the manner in which the matter was handled was his decision totally. He argued that if he was going to handle it another way, i.e. to formally investigate the matter immediately rather than attempt to make peace between the parties, he would have taken statements on the night of the assault, but he did not do this. He did not speak to Detective Garda Delta on the night of the assault or in the

ensuing days up to 18 April and this, he argued, showed that his actions were not influenced by Detective Garda Delta.

- 12.8.48 Detective Garda Delta also rejected the suggestion that he had advised or instructed Garda Epsilon as to how to handle the situation – even though this is precisely what he had claimed in his conversation with Mrs A on 22 April 1997. In evidence to the Commission, he claimed that it was a decision made by Garda Epsilon himself. He did, however, state to the Commission that he had:

*“no compunction in saying that it suited me fine, then, you know, he used those words himself, we’ll push it over on him. I didn’t ask him to say any words like that but if he wanted to do that, well, if that was the end of the matter it might make my job easier in relation to the case I was investigating, and that was the murder.”*

- 12.8.49 Detective Garda Delta explained the reason for the falsehoods he had told to Mrs A was that his main task was to discover the identity of Mrs A’s companion on 23 December 1996 and, therefore, he wished to present this situation to Mr and Mrs A, as though he had been the person responsible for causing Mr C not to pursue his complaint of assault.

- 12.8.50 Detective Garda Delta also outlined the situation to Mr A, in the telephone call of 22 April 1997. At one point, while outlining what Garda Epsilon had told Mr C, he said to Mr A: *“you knew all this, I went through it the last night like this, and all this.”* This sentence may be alluding to another telephone call, which was not recorded, or a meeting between Mr and Mrs A and Detective Garda Delta in relation to the incident. There was no mention by Mr A of any self-defence angle, something that would surely have been raised by Mr A if he had felt it relevant to his defence.

## **Conclusions**

- 12.1 In relation to the categories of potential improper or unlawful conduct identified from the available telephone recordings and related documentation, the Commission draws the following conclusions.

### Willingness to modify / falsify evidence

- 12.2 It is of serious concern that, in the small sample of recorded calls available to the Commission, evidence is disclosed that members of An Garda Síochána involved in the investigation, including the officer responsible for preparing the report for the Office of the Director of Public Prosecutions, were prepared to contemplate altering, modifying or suppressing evidence that did not assist them in furthering their belief that Mr Bailey murdered Madame Toscan du Plantier.
- 12.3 Following an investigation of the content of these telephone conversations, the Commission has found no evidence that any of the suggestions posited by Detective Sergeant Alpha and considered by other members of An Garda Síochána, in relation to the alteration, modification, destruction or suppression of evidence in connection with the murder investigation, were actually carried out.
- 12.4 Similarly, the Commission has found no evidence that the suggestions made by Detective Garda Delta in relation to assaults allegedly carried out by Mr A against Mr C and another person were pursued any further.
- 12.5 The Commission has found that the suggestion by Garda Epsilon, which was not contested by Detective Garda Delta, that a statement relating to a serious assault could be pre-dated, discloses evidence of improper conduct.
- 12.6 The Commission is also satisfied that any act by members of An Garda Síochána, in the course of their duty, which consisted of suggesting or discussing the suppression, modification or alteration of any evidence, could, in itself, amount to improper conduct.

### Alleged provision of drugs and money to a witness

- 12.7 The Commission has examined the relationship between Mr B and the members of An Garda Síochána, as disclosed in a number of telephone calls recorded at Bandon Garda Station in 1997 and one closely connected, contemporaneous, tape recording.

- 12.8 The Commission is satisfied that Mr B expressly or impliedly made requests, recorded in telephone calls, to members of An Garda Síochána for the supply of drugs, either to facilitate or in consideration of his assistance in the Garda investigation. While the Garda members in those calls did not expressly reject such requests, there is no evidence that they agreed expressly or impliedly to supply drugs to Mr B.
- 12.9 Mr B also made it clear that he would require to be paid a large sum of money in consideration of his assistance to the Garda investigation. However, there is no evidence that any member of An Garda Síochána expressly or impliedly offered to pay substantial sums of money to Mr B in return for his making a statement incriminating Mr Ian Bailey in the murder.
- 12.10 Almost all of the relevant telephone calls were recorded with the knowledge of the Garda officers concerned but not of Mr B. This feature makes it improbable that the members of An Garda Síochána involved would say anything likely to provide evidence of misconduct against themselves.
- 12.11 The Commission concludes that the recorded telephone conversations with Mr B do not disclose any evidence of unlawful or improper conduct by members of An Garda Síochána.

#### Disclosure of confidential information

- 12.12 The Commission found a number of telephone calls from June 1997 in which Detective Sergeant Alpha discussed confidential matters relating to the murder investigation with various civilians, including, on one occasion, a journalist. As Detective Sergeant Alpha is deceased, it is not possible to put forward any potential explanatory or extenuating circumstances or reason for his engaging in those telephone conversations. On a *prima facie* basis, these disclosures appear to be inappropriate.
- 12.13 The Commission also found, in a telephone call from April 1997, evidence of the inappropriate disclosure of confidential information by Detective Garda Delta to Mrs A, a witness in the murder investigation.

#### Actions in relation to an assault near Schull, 13 June 1997

- 12.14 In the view of the Commission, the recorded telephone calls, combined with other available evidence in relation to this matter, disclose evidence of improper conduct by members of An Garda Síochána in the following respects:



- A failure to take notes, statements or otherwise investigate an alleged assault on a Mr C by a Mr A;
- A stated intention, subsequently carried out, to dissuade Mr C from making a formal complaint in relation to the assault;
- The employment of misleading and, in some cases, untrue information in order to persuade Mr C not to pursue his complaint; and
- Adopting an attitude of hostility towards Mr C, the victim of the alleged assault.

12.15 There is also some evidence to suggest that these actions may have been motivated by a concern to protect and maintain good relations with Mrs A, who was considered to be an important witness in relation to the investigation of the death of Madame Toscan du Plantier. This is denied by the two Garda members involved, Garda Epsilon and Detective Garda Delta.

## **13 RECOMENDATIONS AND OTHER MATTERS OF CONCERN**

### **13.1 Introduction**

13.1.1 Paragraph 1(q) of the Terms of Reference requires the Commission:

“To report on any other matters of concern arising from its investigation of recordings to and from Garda Stations and to make any further recommendations as it sees fit”.

The Commission is satisfied that the following issues arising from its investigation should be addressed under paragraph 1(q).

### **13.2 The lawful authorisation of telephone recording at Garda stations**

13.2.1 As a result of this investigation, and the view that it has taken on the lawfulness of the telephone recording systems as operated by An Garda Síochána between 1980 and 2013, the Commission believes that careful consideration should be given to the enactment of legislation to regulate the recording of 999 and other emergency-related calls to and from Garda stations in a manner that will safeguard the rights of individuals, whilst also preserving the clear public benefits that accrue from the recording of such calls.

13.2.2 Although the Terms of Reference for the Commission are limited, in effect, to the investigation of non-999 telephone recording systems, the Commission has noted that the recording of 999 calls has been carried out for many years without express statutory authorisation.

13.2.3 This is not to conclude that the recording of such calls is or has been unlawful; it is arguable, for instance, that a person who rings 999 in order to contact An Garda Síochána can be presumed to have consented to the call being recorded. It may also be the case that a power to record such calls could be implied as being incidental to the functions of An Garda Síochána as set out in section 7 of the Garda Síochána Act 2005, in particular the functions of protecting life and property, preventing crime and bringing criminals to justice. It is not appropriate for the Commission to draw any definitive conclusions as to whether 999 recording is authorised by law, and it does not do so.

13.2.4 As set out in Chapter 9, the Commission has reached the view that the systems as operated by An Garda Síochána to record and retain non-999 calls were not authorised by law. This is not to suggest that the recording and retention of non-999 calls could never be lawful. However, because of the potential implications for the privacy rights of individuals, the Commission recommends that any such recording should be given express statutory authority.

- 13.2.5 As the rest of the Report makes clear, there are a number of important reasons why the State should consider legislating to facilitate the recording, not just of 999 calls, but of emergency-related communications to and from Garda stations generally. As the work of the Commission has made clear, the operational benefits which accrue from recording 999 calls apply equally to other emergency-related communications to and from Garda Stations. The Commission is also aware that changes in communications technology are likely to bring about changes to the way in which An Garda Síochána receive and respond to emergency messages. To take one example, the Commission is aware that for some years, An Garda Síochána have been examining the feasibility of creating one or more dedicated call centres that would become the first point of contact between An Garda Síochána and the public, nationwide, for both emergency and non-emergency situations.
- 13.2.6 The historical findings of the Commission on the operation of Garda telephone recording systems, the concerns and issues raised regarding the lawfulness of recording calls at Garda stations, advancements in communications and recording technology, and the possible restructuring of points of contact between An Garda Síochána and the public; these are all matters that will require thoughtful consideration in advance of any legislative action on the issue of emergency call recording.
- 13.2.7 From its investigation into Garda telephone recording systems as installed and operated over the last four decades, the Commission would draw attention to the following points that it believes warrant consideration:
- (i) In many areas of the country, a significant proportion of emergency calls are made, not to the 999 number, but to the main number of the local station. There are clear benefits for the organisation and for the general public in having such calls recorded:
    - It would preserve a record of information that could be vital to any ensuing Garda investigation. The Commission has heard evidence from Garda technicians of specific instances where information that proved crucial to the success of a criminal investigation came from emergency calls made to the main station number.
    - It would assist An Garda Síochána in the investigation of any complaints made by callers regarding the handling of their emergency call;
    - The knowledge that the main station line was being recorded should have a positive effect on the manner in which calls are responded to by An Garda Síochána

- (ii) 999 lines at Garda stations are incoming only – it is not possible to make outgoing calls on such lines. This is done to keep the lines free for incoming emergency calls. However, there are occasions when it is necessary for An Garda Síochána to call the person who rang a 999 line. This could happen if the 999 call was unexpectedly cut off, or if An Garda Síochána needed to clarify information received, or to obtain further information. It would clearly be of great operational value if such calls could be recorded.
- (iii) Historically, one of the justifications advanced for recording the main station number was that bomb threats (both genuine and hoax calls) often came in on such lines. More recently, the Commission has heard evidence from technicians working in certain stations that calls threatening members of An Garda Síochána and their families, as well as threats to witnesses assisting An Garda Síochána in their investigations, are still frequently made to the main station number. Having an audio recording of such calls could be of significant use to Gardaí seeking to identify those responsible.

13.2.8 The Commission is conscious that the obvious benefits to recording certain kinds of calls to and from Garda stations must be balanced against the general right of individuals to have the privacy and confidentiality of their communications with An Garda Síochána respected. In the view of the Commission, this has implications in three distinct areas:

- (i) The legislative framework to be adopted,
- (ii) The technology used to record and retain calls, and
- (iii) The practices and procedures adopted by An Garda Síochána to manage and use the recorded information.

### **13.3 Legislation**

13.3.1 In terms of legislation, it is clear that any express power conferred on An Garda Síochána to record calls must be limited by appropriate safeguards. The principles derived from data protection law clearly apply here: An Garda Síochána can only be empowered to record calls and to use the recorded information for legitimate policing objectives, bearing in mind their statutory function as set out in the Garda Síochána Act, 2005. They should not be permitted to retain that information indefinitely, as was the practice between 1995 and 2013, but only for as long as can reasonably be justified in pursuance of defined policing objectives.

- 13.3.2 The right of the public to know what is being recorded, for how long the recordings are retained, and by whom and in what circumstances they may be accessed, must also be considered. This should include consideration of whether it is appropriate to preface the answering of calls to Garda stations with an automatic message indicating that the call is recorded. Though this might seem appropriate at first glance, it is possible that such a message might discourage callers from making calls in emergency situations, with the result that valuable information could be lost.

## **13.4 Technology**

- 13.4.1 On the technical side, it is clear that advances in recording and communications technology may allow future telephone recording systems to be more discriminatory in the types of calls that are recorded. As chapter 9 of this Report makes clear, one of the issues with the recording that took place in Garda stations between 1995 and 2013 was that it was indiscriminate: in order to capture certain kinds of emergency call, a large volume of non-emergency calls were also recorded. This was, in part, because the available technology did not allow telephone operators the opportunity to distinguish between calls that should be recorded and calls that should not. It may be that advances in technology can restore that choice to the Garda members answering telephone calls in a manner that still ensures that all emergency-related calls are still captured.
- 13.4.2 For instance, one could envisage a situation in which the last 5 or 10 minutes of audio on a given line is recorded continuously and then erased. If a telephone operator, having answered a call, becomes aware that it is an emergency matter where recording is appropriate, he or she could press a button and the entirety of the call would thereby be recorded and saved, including the part of the call that may have preceded the pressing of the button.
- 13.4.3 At a more general level, whatever system is used to record and store emergency calls could also be programmed to delete all such recordings after a defined period – be it one month, six months, or a year – unless a positive action is taken to retain a specific recording in connection with a specific investigation.

## **13.5 Garda practice and procedure**

- 13.5.1 The Commission is aware that, although technology could reduce the extent to which calls that should not be recorded are captured and retained, it cannot eliminate entirely the possibility of misuse. For this reason, it is essential that An Garda Síochána adopt and implement robust procedures for monitoring the use of any telephone recording system operated by the organisation.

13.5.2 As the Commission has made clear in this Report, the widespread recording of non-emergency calls that took place in particular between 1995 and 2013 can be attributed, ultimately, to the following factors:

- (i) A failure on the part of An Garda Síochána to adopt and enforce a formal policy on the recording of telephone calls, their retention, access and use; and
- (ii) Further failures of oversight and communication that resulted in unlawful additions to the recording systems going unnoticed and unchecked.

13.5.3 As an organisation charged with providing policing and security services for the State, An Garda Síochána necessarily record and retain a great deal of confidential and sensitive information. It is essential that such information be protected from improper use and exploitation through appropriate legal, technological and procedural safeguards.

## **13.6 Legislative reform and the offence of interception**

13.6.1 During the course of its investigation of paragraph 1(g) of the Terms of Reference, which required the Commission to examine whether the Garda telephone recording systems were authorised by law, the Commission considered in detail the law governing the offence of interception of telecommunications messages provided under s.98 of the Postal and Telecommunications Services Act, 1983.<sup>324</sup>

13.6.2 As reported in Chapter 9 of this Report, the Commission is of the view that the statutory definition of interception first enacted under s. 98 of the 1983 Act may well have been fundamentally defective. The Commission is also of the view that prior to the introduction of the offence of interception under the 1983 Act, the statutory prohibition of the practice of what is commonly referred to as “telephone tapping” is likely to merely have extended to the interception of postal packets, rather than telephone calls, a statutory prohibition which survived on the statute book without material amendment from 1710, long before the invention of the telephone.

13.6.3 Section 98 was amended in due course by s.13 of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993. The 1993 Act made a number of important changes to the definition of interception, including an explicit limitation of the offence to telecommunications messages intercepted during “the course of transmission”. This formulation of the criminal offence of “interception” remains in force. The Commission is satisfied that the offence is limited to the interception of

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<sup>324</sup> See Section 4, Chapter 9 of the Final Report

telecommunications messages in “real time”. In particular, the Commission is satisfied that it does not prohibit the access of stored telecommunications messages.

- 13.6.4 The offence of interception currently in force under s.98 of the 1983 Act, as amended, is closely aligned to that which existed in the United Kingdom under s. 1 of the Interception Act, 1985. However, the latter offence has since been repealed and replaced by the Regulation of Investigatory Powers Act, 2000 (RIPA Act, 2000), as amended recently by the Investigatory Powers Act, 2016.
- 13.6.5 The Commission does not possess any function in the sphere of legislative reform and does not express a concluded opinion of this matter. However, arising from its investigation of paragraph 1(g) of the Terms of Reference there are clear grounds for concern that s.98 of the 1983 Act is in urgent need of re-examination with a view towards reform.
- 13.6.6 An example of the potential problems raised by s.98 in its current formulation, is provided by the recent decision of the Court of Appeal of England and Wales in *Coulson v Regina*<sup>325</sup> where the appellant journalists of News International, appealed against their convictions on a point of law concerning whether the offence captured the interception of mobile telephone voicemail messages. The Court of Appeal dismissed the appeal on the basis that s. 2(7) of the RIPA Act, 2000 extended the statutory meaning of transmission to include the period when the transmission system stored a communication in such a manner as to enable an intended recipient to have access to it, whether or not it had previously been received by the intended recipient.
- 13.6.7 In contrast to the clarity provided by the RIPA Act, in the Irish context an uncertainty would arise, as the phrase, “the course of transmission” is not defined in the 1983 Act, as amended. The phrase has not been the subject of any detailed consideration by the Irish Courts in this context. In the view of the Commission, it is likely that it would be given a strict interpretation.
- 13.6.8 The legislative landscape is further complicated by the European Union law principle providing for the confidentiality of communications, which was transposed into Irish law under SI 336/ 2011 European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011. Regulation 5 prohibits:

“Without prejudice to section 98 of the Act of 1983...listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned”.

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<sup>325</sup> *Coulson v Regina* [2013] EWCA Crim 1026

- 13.6.9 It must be acknowledged the statutory prohibition under Regulation 5, unlike s. 98 of the 1983 Act, does not create a criminal offence. The Commission is satisfied there are also grounds for concern regarding whether the offence, as defined in 1993, is sufficient to deal with developments in modern communications systems and technology, particularly the growth of the internet-based communications systems.
- 13.6.10 The Commission recommends that a review take place of the offence of interception with particular consideration given to whether s.98 of the 1983 Act is in need of amendment.

## **13.7 The retention of historic telephone recordings by An Garda Síochána**

### **Scope of the Terms of Reference**

- 13.7.1 As detailed in Chapters 5 and 6 of this Report, more than 3,000 tapes from the DAT recording systems operated by An Garda Síochána still exist. They contain a mix of 999 calls, non-999 calls and Garda radio messages, all recorded on dates between 1995 and 2008.
- 13.7.2 From 2008 until 27 November 2013, 999 and certain non-999 calls continued to be recorded on the NICE system. At the time of writing, these recordings are retained at the stations where they were recorded. Backup copies of the recordings also exist on the central archive for the NICE system.
- 13.7.3 Although the question of what should be done with these recordings is not addressed explicitly in the Terms of Reference, the Commission is satisfied that it is appropriate to address some of the complex issues arising from this question under paragraph 1(q) of the Terms of Reference.

### **Background**

- 13.7.4 In its Second Interim Report on paragraphs 1(n) and (o) of its Terms of Reference, the Commission reported in some detail on the consideration given by An Garda Síochána and the Office of the Attorney General to the issue of whether the telephone recordings should be retained or destroyed. It is worth noting the following by way of background:
- (i) Former Garda Commissioner Callinan, having ordered in November 2013 that the practice of recording non-999 calls should cease, also gave instructions that an inventory of all the outstanding recordings collated at that time were to be compiled, as advised by the Attorney General's Office.
  - (ii) Commissioner Callinan sought the advices of Ms Ruth Fitz Gerald, a legal advisor from the Office of the Attorney General, regarding the



appropriate steps to be taken with the recordings. The former Garda Commissioner did not think there was any reason for retaining the recordings (other than those related to discovery of documents in the Bailey litigation) and did not wish to do so. His concern was whether there was anything which would prevent him directing that the recordings be destroyed;<sup>326</sup>

- (iii) Mr Ken Ruane, Head of Legal Affairs in An Garda Síochána, was of the view that in the event the general recording issue was to become public, An Garda Síochána would be better to preserve rather than destroy the tapes. He consulted the then Data Protection Commissioner, Mr Billy Hawkes.
- (iv) The Data Protection Commissioner, informed Mr Ruane by telephone that it did not appear that the Gardaí had lawful grounds for retaining the tapes. The Data Protection Commissioner emphasised this advice was based on the information available to him at that time. The Data Protection Commissioner considered that in the event that it was decided to destroy the recordings, consent would have to be obtained from the Director of the National Archives, in order to ensure consideration of any obligations under the National Archives Act 1986;
- (v) The Office of the Attorney General was concerned that the advice of the Data Protection Commissioner could potentially lead to the destruction of the tapes and that such action could prejudice the rights of persons whose convictions might conceivably be set aside based on material revealed from the tapes, in consideration of what was described as the "innocence at stake" principle;<sup>327</sup>
- (vi) The Attorney General gave a firm instruction that no tapes were to be destroyed, in case they had evidential value or, indeed could prove someone's innocence.<sup>328</sup>
- (vii) All extant recordings, both on DAT tapes and on the NICE system, have been retained pending the conclusion of the work of this Commission of Investigation.

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<sup>326</sup> Interim Report on 1(n) and (o) at page 46 paragraph 8.7

<sup>327</sup> Interim Report on 1(n) and (o) at paragraph 2.3, page 151

<sup>328</sup> Interim Report on 1(n) and (o) at paragraph 22.4, page 148, 29.7 at page 175

## 13.8 Issues for Consideration

- 13.8.1 The recordings retained by An Garda Síochána include 999 and non-999 calls. It is reasonable to conclude that some of the non-999 recordings will have related to matters of an emergency nature. Equally, some of the 999 recordings will not have been of an emergency nature. There is no means through which the nature of an individual recording can be ascertained without downloading and listening to the call in question.
- 13.8.2 It is worth noting that many, if not most of the non-999 recordings will have captured telephone conversations involving individuals who were unaware that they were being recorded. An unknown percentage of these calls will have been of a private and personal nature, some entirely unrelated to policing matters. From its review of recordings from Bandon Garda Station, carried out in relation to paragraph 1(m) of the Terms of Reference, the Commission is aware of particular instances where such calls have been recorded, with the inevitable consequence that sensitive information relevant to individual members of the force and others has been captured and retained.
- 13.8.3 The Commission is also aware that, in the course of the work carried out by An Garda Síochána to identify recordings of relevance to the case of *Bailey v The Commissioner of An Garda Síochána & Ors.* (bearing High Court Record Number 2007/3424P), written notes or additional duplicate recordings have been made from original telephone recordings. Some of these notes and recordings include private and personal information that is wholly unrelated to the issues in the *Bailey* proceedings, or indeed to the investigation of the death of Madame Sophie Toscan du Plantier. The specific problems associated with the potential destruction of material relevant to the *Bailey* case, and the related proceedings initiated by Ms Jules Thomas, are considered further below. The point to be made here is that any decision to provide for the destruction of historic non-999 recordings should also provide for the destruction of all ancillary and consequential recorded information.
- 13.8.4 The Commission is satisfied that the operation of these systems to record, store and allow access to non-999 calls, was unlawful. The vast majority of these recordings continue to be retained without any statutory basis and for no justifiable purpose. It would appear to the Commission that there are powerful arguments in favour of the destruction of all extant, non-999 recordings in those circumstances. The suggested countervailing consideration, namely that there might possibly be material in some recordings which is potentially relevant to the guilt or innocence of an individual, appears to the Commission to be entirely speculative. It has to be remembered that, if any such calls exist, they form an indistinguishable part of a vast volume of calls recorded indiscriminately over a period of at least eighteen years from 1995 to 2013.

- 13.8.5 As detailed in Chapter 11 of the Report, the Commission finds it reasonable to conclude, based on the evidence before it, that no widespread or systematic, indeed probably no significant, misuse of information derived from non-999 telephone recordings has taken place. However, the continued retention of such recordings means that a potential for abuse still exists. Although the DAT recordings are now stored securely in Garda Headquarters and the possibility of someone accessing those recordings for improper purposes is remote, the safest way to eliminate the possibility of abuse would be to destroy the recordings. The same logic applies to the historic recordings retained on the NICE system.
- 13.8.6 The Commission understands that the proceedings in *Bailey v The Commissioner of An Garda Síochána & Ors.* (bearing High Court Record Number 2007/3424P) remain pending, as the decision of the High Court is currently under appeal to the Court of Appeal. The High Court proceedings brought by Ms Jules Thomas, entitled *Thomas v The Commissioner of An Garda Síochána & Ors.* (bearing High Court Record Number 2007/3796P) have yet to be determined. The discovery obligations placed on An Garda Síochána in those legal proceedings must be considered carefully prior to any consideration of the destruction of the telephone recordings. It appears to the Commission that the orders for discovery made by the High Court must take precedence in the case of any consideration of the destruction of recordings.
- 13.8.7 The issues raised by the former Data Protection Commissioner regarding the potential for data protection requests and the requirement that consent be obtained from the Director of the National Archives, in order to ensure consideration of any obligations under the National Archives Act 1986, must also be considered prior to any proposed destruction of the recordings.
- 13.8.8 It is important to place the seriousness of the storage of the calls in context. As reported under Chapter 9, the Privacy and Electronic Communications Regulations, 2011,<sup>329</sup> transposed into Irish law the principle of confidentiality of communications laid down in Directive 2002/58/EC. That principle has recently been considered and interpreted by the Court of Justice in *Tele2 and Watson*<sup>330</sup> where the Court of Justice of the European Union held that legislation providing for general and indiscriminate data retention was incompatible with Directive 2002/58/EC (transposed into Irish law by the Privacy Regulations) and the Charter of Fundamental Rights of the European Union. It is important to note that, in *Tele 2 and Watson*, the Court considered legislation which provided for the retention of traffic and location data, not legislation which provided for

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<sup>329</sup> SI 336/2011, “European Communities (Electronic Communications Networks and Services) Privacy and Electronic Communications Regulations, hereinafter referred to as the “privacy regulations” for ease of reference

<sup>330</sup> Joined Cases C-203/15 *Tele2 Sverige AB v Post-och Telestyrelsen* and C-698/15 *Secretary of State for the Home Department v Watson and others* (hereinafter ‘*Tele2 and Watson*’).

retention of recordings of the content of telecommunications data. The Court made reference to the data at issue in *Tele 2 and Watson* in the following terms:

“The data which providers of electronic communications services must therefore retain makes it possible to trace and identify the source of a communication and its destination, to identify the date, time, duration and type of a communication, to identify users’ communication equipment, and to establish the location of mobile communication equipment. That data includes, inter alia, the name and address of the subscriber or registered user, the telephone number of the caller, the number called and an IP address for internet services...

that data, taken as a whole, is liable to allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as everyday habits, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them”.<sup>331</sup>

13.8.9 The Court held that the general and indiscriminate retention of traffic and location was unlawful:

“Even if such legislation does not permit retention of the content of a communication and is not, therefore, such as to affect adversely the essence of those rights...” (emphasis added)

13.8.10 Thus, in marked contrast to the retention of traffic and location data, the retention by An Garda Síochána of the recordings of telephone communications involves the retention of the content of communications, which adversely affects the very essence of the fundamental right to privacy and to the protection of personal data enshrined under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. Therefore, the Commission is satisfied the retention of the content of such communications should be viewed with the utmost seriousness in considering whether the recordings should be destroyed.

13.8.11 The Commission is satisfied that the retention or storage of the unlawfully recorded telephone calls is prohibited. The obverse of retention or storage is destruction. Expressed otherwise, An Garda Síochána can discontinue the unlawful retention only by destroying the recorded material.

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<sup>331</sup> *Tele 2 and Watson* at paragraphs 97 – 99.

- 13.8.12 In light of the countervailing obligations outlined, it might be considered, in due course, that legislation is required in order to authorise the destruction of the telephone recordings. The implications for lawful Court Orders, such as the discovery orders made by the High Court in Mr Bailey's action, together with the application of the National Archives Act, must be considered.
- 13.8.13 The Commission recommends, subject to any Court Order or other lawful authority or legal obligation, including the obligation to make discovery, that early consideration be given to the destruction of all unlawfully recorded information derived from the Garda telephone recording systems, whether in audio, written or other form.
- 13.8.14 The Commission limits itself to stating that, as a matter of principle, recordings which have been unlawfully made, cannot be lawfully retained in the absence of statutory authority. This principle extends to incidental or consequential copies and manuscript notes of the content of calls. The Commission has no function to propose the detailed terms of any legislation. It recognises that there are some countervailing considerations, notably the obligation to comply with Court Orders. There may be others. In some cases, it may be necessary to obtain rulings from the Courts.

## Summary of Garda Telephone Recording Systems

Alarm bells sounded in Government Buildings in March 2014, when it was reported that An Garda Síochána had, for many years, been recording non-999 telephone calls at Garda stations.

The Taoiseach, on the evening of 24 March, having been briefed by the Attorney General, caused the gravity of the matter to be conveyed to the Garda Commissioner, who concluded that he was expected to consider his position. He did so and announced his retirement.

The Commissioner had, several months previously, on his own initiative, caused the recording to stop immediately he learned of its existence. He had also formally reported the matter in writing to the Department of Justice on 10 March. Through mishap, this fact was unknown to the Taoiseach, the Attorney General or the Minister for Justice until after the events of 24 March.

If it had been, the events which precipitated the Garda Commissioner's retirement would not have taken place.

These culminating events exemplify a history of Garda telephone recording which had been beset from its beginnings by misunderstanding, poor communication, imperfect information and a sequence of errors rather than any conspiracy.

Systems for recording of telephone calls by An Garda Síochána had existed prior to 1995 in the Dublin Metropolitan Area (DMA), and were essentially related to or incidental to the recording of 999 or emergency calls. There was a limited and, as it turned out, ineffective system which recorded one 999 line in approximately 18 Divisional Stations outside the DMA.

The more general practice of recording the main telephone line to Divisional Garda Stations began in late 1995 with the installation of newly acquired DAT tape systems, which were capable of recording up to eight channels.

Three important features of these systems were:

- They were only in Divisional Stations outside the DMA: there were no such systems in Divisional Stations in the DMA;
- They concerned only 18 Divisional Stations, later increased to 21;
- The recording of the main station line ceased once the call was transferred to an extension.

Nonetheless, these systems were installed in the period from 1995 to 1997. They were not authorised by law. An Garda Síochána had no statutory power to operate them. They also infringed personal privacy rights guaranteed by the Constitution and international instruments.

A most surprising finding of the Commission is that there was almost total ignorance at the highest level of the force of the existence of any systems which recorded non-999 lines as strikingly demonstrated by former Commissioner Callinan's instant decision to stop them when he learned of them in 2013.

It was the unanimous view of all former Garda Commissioners heard by the Commission that commencing recording of non-999 lines in the 1990s represented an important change of Garda policy, which should have been adopted at a high level. Yet, none of them knew that it was happening. The Commission has been unable to identify anyone in senior Garda Management who knew the policy reason behind such expanded recording.

Because senior Garda management simply did not know that these new systems were being purchased, no rules or directives were adopted governing elementary matters such as which lines were to be recorded, who, if anyone could authorise the recording of additional lines, notices to the public or others of the fact of recording, the periods for which recorded material should be retained and under what conditions, whether recordings should then be destroyed and who could authorise access to or copying of recording. In the unfortunate absence of any such guidance, it fell to the Telecommunications technicians at each Divisional Station to devise rules or procedures.

The choice of which telephone lines were to be recorded on the DAT systems, when installed, was not made at Commissioner or equivalent level. It was made in the Telecommunications Section. The selected lines included one called the 'Telephone Attendant Offset Console,' which was, in fact the normal main public telephone line to each station. The officer who approved recording on this line did not know this. He believed that it was associated with the recording of 999 calls. He told the Commission that he would not have approved the recording if he had properly understood that a line used for non-999 calls was involved. Thus he approved it in error. He did not report to Garda Management: there was no need to. This was a crucial decision. Recording on that line continued, in the selected stations, from 1995 until it was stopped, on the instructions of the Garda Commissioner, on 27 November 2013.

Not surprisingly, given the absence of any policy guidance, additional lines, such as to the Public Office or, in one case, an Incident Room, came to be recorded.

The Commission is most surprised to find an almost total absence of consideration of the legal implications of recording at any stage in its history. The institutional memory of An Garda Síochána did not apparently include any consciousness of the scandal of unlawful telephone tapping which had erupted in 1983 and which had led to the resignation of a Garda Commissioner and Deputy Commissioner. The most likely explanation for this serious omission is that the senior ranks of the force were, at all material times, entirely unaware that the telephone recording was taking place.

A further significant history of mischance in the story centres on Bandon Garda Station.

The DAT recording system was installed in Bandon Garda Station in December 1995. Madame Sophie Toscan du Plantier was brutally murdered near Schull, Co Cork on 23 December 1996. An incident room related to the murder investigation was opened in Bandon Garda Station early in 1997. For reasons, which, after thorough investigation, remain obscure and unexplained, two lines came to be

recorded which were not among the lines approved in the Telecommunications Section in 1996. They were situated in rooms used by Gardaí involved in the du Plantier murder investigation. It was never intended that they be recorded. Gardaí in Bandon did not know that their telephone conversations were being recorded.

The recording of telephone calls at Divisional Stations continued uninterrupted from 1995 -1997 through the period of the changeover to the NICE system in 2008 up to 2013. Local technicians provided access to recordings from time to time at the request of operational Gardaí for operational reasons. They acted properly and responsibly. The Commission has found no evidence that they did or were asked to provide access to recordings of a private or personal kind. No question ever arose of Gardaí seeking access to recordings of solicitor/ client calls.

No information about these procedures appears ever to have percolated to the senior members of the force.

In 2007, Mr Ian Bailey commenced an action against An Garda Síochána (Ian Bailey v Commissioner of An Garda Síochána, the Minister for Justice, Equality and Law reform, Ireland and the Attorney General (2007/3424P)).

In November 2009, Bandon Garda Station was flooded. A large volume of documentation and almost all the retained DAT tapes were destroyed. Crucially, and, for no known reason, a small, but very significant, number survived.

The High Court made an order for discovery of documents against An Garda Síochána in the Bailey High Court action. In June 2013, the technician at Bandon reported that he had a small number of DAT tapes in his possession which might contain material relevant to the action. At first, he found six tapes which had been “put aside and forgotten about.” Ultimately there were ten.

A Garda Sergeant listened to some of these tapes in September 2013 and reported that there were three recorded conversations which were unhelpful to An Garda Síochána in the defence of the Bailey action and, more generally, potentially embarrassing and damaging to the force. The Chief Superintendent in Bandon brought the matter to the attention of senior management at Garda Headquarters on or about 17 to 18 October 2013. This prompted the Deputy Commissioner, Ms Nóirín O’Sullivan, to institute more general inquiries about telephone recording at Garda Stations. It was this initiative by the then Deputy Commissioner, arising from the report from Bandon, which led to the revelation of the existence of general systems of recording non-999 calls in Garda stations.

Thus, it was first reported to senior management that Divisional Garda Stations were recording non-999 calls. The Garda Commissioner, Mr Martin Callinan, gave immediate instructions that it was to stop.

A key underlying fact is that An Garda Síochána purchased the DAT tape systems commencing in 1995 without adopting or enunciating any policy about the recording of telephone calls at Garda stations. The Chief Superintendent in the Telecommunications Section mistakenly decided on the lines to be recorded, not realising that he was authorising the recording of non-999 lines. Senior management of An



Garda Síochána were unaware that such recording was taking place at any time between 1995 and 2013. To compound matters, lines were connected for recording certain lines at Bandon Garda station which should not have been recorded even under the policy mistakenly approved in 1996. Gardaí engaged in the investigation of the murder of Madame Sophie Toscan du Plantier were, without their knowledge, recorded on these lines. It was the emergence of that fact, combined with the contents of some of these recorded calls, that ultimately brought the matter to the attention of Garda Headquarters, the Garda Commissioner, the Attorney General and, finally, the Taoiseach.

In spite of poor communication and even blunders and of the underlying lack of lawful authority, this is not a history of anything approaching deliberate abuse of power. The senior ranks of An Garda Síochána were unaware of the recording. The users of the system were the Telecommunications technicians in the Divisional Stations who, reasonably believing that their superiors would have attended to such matters, were unaware of any unlawfulness. They acted, on the whole, responsibly and conscientiously. There was no Garda system of snooping, spying or intrusion into private life and certainly not of listening to solicitor/client calls.

It remains the case, however, that An Garda Síochána is unlawfully in possession of a very large volume of recorded material. Most of it is, no doubt, entirely innocuous. However, the Commission is aware that it necessarily includes an unknown and unknowable quantity of sometimes sensitive information about the private lives of individuals, including members of An Garda Síochána.

# Appendix 1



STATUTORY INSTRUMENTS.

**S.I. No. 192 of 2014**



COMMISSION OF INVESTIGATION (CERTAIN MATTERS RELATIVE  
TO AN GARDA SÍOCHÁNA AND OTHER PERSONS) ORDER 2014

COMMISSION OF INVESTIGATION (CERTAIN MATTERS RELATIVE TO AN GARDA SÍOCLÁNA AND OTHER PERSONS) ORDER 2014

WHEREAS pursuant to section 3(1) of the Commissions of Investigation Act 2004 (No. 23 of 2004) the Taoiseach, with the approval of the Minister for Public Expenditure and Reform, made a proposal to the Government for the establishment of a commission to investigate the matters specified in Article 3 of the following Order and to make any reports required under that Act in relation to its investigation;

AND WHEREAS the Government by decision made on 15 April 2014 considered those matters to be of significant public concern;

AND WHEREAS a draft of the following Order has been laid before each House of the Oireachtas, together with a statement of the reasons for establishing the commission, and a resolution approving that draft has been passed by each such House;

NOW, the Government, in exercise of the powers conferred on them by section 3 of the Commissions of Investigation Act 2004 (No. 23 of 2004), hereby order as follows:

1. This Order may be cited as the Commission of Investigation (Certain Matters relative to An Garda Síochána and other persons) Order 2014.

2. In this Order "Act" means the Commissions of Investigation Act 2004 (No. 23 of 2004).

3. A commission is hereby established to—

- (a) investigate the matters, which are considered by the Government to be of significant public concern, referred to in the terms of reference (the text of which is, for convenience of reference, set out in the Schedule) of the commission, and
- (b) make any reports required under the Act in relation to its investigation.

4. The Taoiseach is specified as the Minister of the Government responsible for overseeing administrative matters relating to the establishment of the commission, for receiving its reports and for performing any other functions given to him under the Act.

*Notice of the making of this Statutory Instrument was published in "Iris Oifigiúil" of 6th May, 2014.*

## SCHEDULE

TERMS OF REFERENCE FOR COMMISSION OF INVESTIGATION REGARDING CERTAIN  
MATTERS RELATIVE TO AN GARDA SÍOCHÁNA AND OTHER PERSONS

1. The Commission is directed to investigate and to make a report to the Taoiseach in accordance with the provisions of Section 32 of the Commissions of Investigation Act, 2004 (No. 23 of 2004) on the operation of Garda Síochána telephone recording systems and on the following matters in particular:

- (a) To identify all Garda Stations in which telephone recording systems, to record calls other than 999 calls to the Emergency Call Answering Service, were installed and/or operated by An Garda Síochána between 1st January 1980 and 27th November 2013 and to establish an inventory of those Garda Stations so identified to include:
  - (i) the date of initial installation, where such installation occurred at a date between 1st January 1980 and 27th November 2013;
  - (ii) to report whether any such installations were already in existence on the 1st January 1980;
  - (iii) the duration for which telephone recording systems continued in operation in each such Garda Station;
  - (iv) the date on which telephone recording systems were terminated or removed from each such Garda Station.
- (b) To establish the immediate circumstances surrounding the installation of telephone recording systems operated by An Garda Síochána at the said Garda Stations referred to at (a) above and to establish what authorisation was sought or obtained by An Garda Síochána for such installation and, including the funding, installation, maintenance and / or upgrading of those telephone recording systems, to include the public procurement procedure followed in 1996 and further in relation to the installation of the NICE recorder system in 2008.
- (c) To establish how the said telephone recording systems operated by An Garda Síochána were managed and to establish what use (if any), was made by An Garda Síochána of any information collated by the said telephone recording systems.
- (d) To identify the organisation and structures in place for the installation, operation and management of the said telephone recording systems and in the storage, access, analysis and use of any information obtained from them.
- (e) To investigate and report on the level of knowledge of the existence, operation and use of the said telephone recording systems within An Garda Síochána.

- (f) To investigate and report on the level of knowledge of the existence, operation and use of the said telephone recording systems within the Office of the Minister for Justice and Equality, the Department of Justice and Equality, the Office of the Attorney General, the Chief State Solicitor's Office, the Office of the Director of Public Prosecutions, the Office of the Data Protection Commissioner and the Garda Síochána Ombudsman Commission.
- (g) To establish whether the installation, operation and use of the said telephone recording systems was authorised by law.
- (h) To establish whether any telephone conversations between solicitors and their clients were recorded by the said telephone recording systems.
- (i) To establish whether any information obtained from the said telephone recording systems by An Garda Síochána was used by it either improperly or unlawfully and, in particular, whether any recordings as may have been made by An Garda Síochána of Solicitor / Client telephone conversations were used for any purpose whatsoever.
- (j) To establish where the recorded information obtained from the telephone recording systems operated by An Garda Síochána was stored since the creation of same and to establish how such information was accessed and analysed by An Garda Síochána.
- (k) To establish whether any of the recorded information has been destroyed.
- (l) To establish any instances during the relevant period where the Office of the Director of Public Prosecutions made use of the data and information produced by the said telephone recording systems for any purpose.
- (m) In particular, to identify and review all recordings in the possession of An Garda Síochána emanating from the Garda telephone recording system at Buncion Garda Station or otherwise, which relate to the Garda investigation into the death of Sophie Toscan du Planier and to establish whether those recorded phone calls, and any other acts or events in the course of the said Garda investigation, disclose any evidence of unlawful or improper conduct by members of An Garda Síochána in connection with that investigation.
- (n) To investigate and report on the furnishing to the Minister of a letter dated 10th March 2014 sent by the former Garda Commissioner, Mr. Martin Callinan, to the Secretary General of the Department of Justice and Equality.
- (o) To investigate and report on the sequence of events leading up to the retirement of the former Garda Commissioner Mr. Martin Callinan on the 25th March 2014.


(p) In the event that any matter arises from the Report of the Inspector of Prisons Judge Michael Reilly pursuant to section 31 of the Prisons Act 2007 into all the circumstances surrounding the recording of telephone conversations between prisoners and their solicitors, which appears to require further investigation in the public interest the Commission may investigate and report on same.

(q) To report on any other matters of concern arising from its investigation of recordings to and from Garda Stations and to make any further recommendations as it sees fit.

2. The Commission shall exercise discretion in relation to the scope and intensity of the investigation it considers necessary and appropriate, having regard to the general objective of the investigation. In particular, the Commission shall have the discretion to decide to limit its investigation to samples of recordings in the light of what is disclosed as the investigation progresses.

3. The Government has appointed the Honourable Mr. Justice Nial Fennelly, Judge of the Supreme Court, to act as the Sole Member of the Commission of Investigation.

4. The Commission of Investigation is directed to conduct the task assigned to it under these Terms of Reference and to report to the Government no later than the 31st December 2014, subject to section 6(6) of the Commissions of Investigation Act, 2004.

 GIVEN under the Official Seal of the Government,  
30 April 2014.

ENDA KENNY,  
Taoiseach.

BATHÉ ÁTHA CLATH  
ARNA FHOILSIÚ AG OIFIG AN ISOLÁTHAIR  
Le ceannach díreach ó  
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## **Appendix 2**

An Coimisiún Imscrúdúcháin  
(Nithe Áirithe i dtaobh an Gharda  
Siochána agus daoine eile)



Commission of Investigation  
(Certain Matters relative to An Garda  
Siochána and other persons)

**The Hon. Mr. Justice Nial Fennelly Sole Member**

Bunaíodh an Coimisiún Imscrúdúcháin (Nithe Áirithe i dtaobh an Gharda Siochána agus daoine eile) – Coimisiún Fennelly chun feidhmiú chórais taifeadta telfoíon i Stáisiún Gardaí ar fud an Stáit a fhiosrú. Ón 1ú Eanáir 1980 go dtí an 27ú Samhain 2013 an tréimhse a bhain le hábhar don Choimisiún.

Tá Téarmaí Tagartha Choimisiún Fennelly le fáil ag <http://www.irishstatutebook.ie/pdf/2014/en.st.2014.0192.pdf>.

Tá Coimisiún Fennelly ag iarraidh ar aon duine sa phobal agus go háirithe ar fhostaithe reatha nó tarfhostaithe de chuid an Gharda Siochána, a bhfuil eolas nó fianaise acu den chleachtas glaonna telfoíon, seachas glaonna 999, a tháifeadh i Stáisiún Gardaí, teagmháil a dhéanamh leis.

Is mian le Coimisiún Fennelly closteáil freisin ó aon Aturnae a bhfuil amhras air/uirthi, a bhfuil eolas nó fianaise aige/aici gur táifeadh glaonna idir é/i agus claint a bhí á gcoimeád ag Gardaí.

Is féidir teagmháil a dhéanamh le Coimisiún Fennelly ag:

An Chéad Urlár, Teach Fhatche Stiabhna, Ardán Phort an Iarla, Baile Átha Cliath 2

Tel: 01 6629151

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The Commission of Investigation (Certain Matters relative to An Garda Siochána and other persons) – the Fennelly Commission, was established to investigate the operation of Garda Siochána telephone recording systems in Garda Stations throughout the State. The relevant period for the Commission is the 1st January 1980 until 27th November 2013.

The Terms of Reference of the Fennelly Commission are available at <http://www.irishstatutebook.ie/pdf/2014/en.st.2014.0192.pdf>.

The Fennelly Commission invites any member of the public and particularly any past or present member or employee of An Garda Siochána with knowledge or evidence of the practice of recording of telephone calls other than 999 calls at Garda Stations to contact it.

The Fennelly Commission also wishes to hear from any Solicitor who has suspicion, knowledge or evidence of their phone calls to or from clients in Garda custody being recorded.

The Fennelly Commission may be contacted at:

First Floor, St Stephen's Green House, Earlsfort Terrace, Dublin 2

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# Appendix 5A

## Appendix 5A

### Summary of Divisional Garda Stations where the DAT recorder was installed and telephone lines within the Control Room were recorded

#### Laois/Offaly Division – Portlaoise

- 5.5.1 The Commission was unable to establish the exact date on which the DAT recorder was installed in Portlaoise Garda Station. However, documentary evidence suggests that it occurred between 5 February and 7 March 1996. One of the technicians from Portlaoise Garda Station confirmed in evidence to the Commission that the installation occurred in February 1996. As with Bandon, it appears that this installation took place ahead of a nationwide rollout of the system in order to field test the equipment.
- 5.5.2 On 10 April 1996, the Regional Telecommunications Sergeant forwarded a report to the Inspector, Telecommunications Planning, Garda Headquarters, stating the DAT recorder had been installed in Portlaoise for “*a few weeks*”.
- 5.5.3 In the same report, the Regional Telecommunications Sergeant confirmed the following circuits as recording on the machine:
- Channel 1 – switchboard
  - Channel 2 – spare channel
  - Channel 3 – 999 line
  - Channel 4 – private wire to Army at Prison
  - Channel 5 – private wire to Prison
  - Channel 6 – spare channel
  - Channel 7 – Radio Channels 3 & 4
  - Channel 8 – Radio Channels 1 & 2
- 5.5.4 A further report, dated 25 February 1997, confirms that the DAT recorder was installed in the Control Room at Portlaoise Garda Station and was then moved to the Equipment Room “on the instructions of the local Superintendent” because of the noise from the machine. This occurred in a number of stations due to the noise of the recording machine when in operation.
- 5.5.5 In 2004 a new regional technical sergeant was stationed in Portlaoise. It is his belief that at this time the switchboard was no longer recording as a new digital telephone system had been installed in the late 1990’s which could not be connected to the analog DAT recorder. A digital to analog converter was purchased by the technician in order to

connect the switchboard to the DAT recorder but the converter was not installed in Portlaoise and was instead sent to another Divisional Station.

- 6.5.2 The Equipment Room was a locked room on the ground floor of the Garda Station in Portlaoise. Access to the Equipment Room was restricted to the technicians and the Telecommunications Sergeant for the Eastern Region who was stationed in Portlaoise Garda Station.

**Tipperary Division – Thurles**

- 5.5.6 A Dictaphone Customer Engineering Work Ticket made available to the Commission confirms that the DAT recorder was installed in Thurles Garda Station on 24 November 1996.

- 5.5.7 The Telecommunications Sergeant for the South Eastern Region was stationed in Thurles at this time. He confirmed in evidence that he was present for the installation of the DAT recorder and his signature is present on the Dictaphone Customer Engineering Work Ticket.

- 5.5.8 There was only one 999 telephone line in Thurles at this time. This was connected to the system. The Telephone Attendant Console and the radio channels were also connected. There were no private wires in Thurles at this time.

- 5.5.9 The system was installed in the Equipment Room, which was a locked room within the Control Room.

**Cavan / Monaghan Division – Monaghan**

- 5.5.10 A Dictaphone Customer Engineering Work Ticket made available to the Commission confirms that the DAT recorder was installed in the Control Room in Monaghan Garda Station on 4 December 1996.

- 5.5.11 Two technicians were stationed in Monaghan Garda Station at this time. Both of them gave evidence to the Commission. Both technicians recall making available the circuits that were to be connected to the DAT system to the Dictaphone engineer. They recall the following circuits as being connected:

- The 999 telephone line,
- The Telephone Attendant Console
- The radio channels

5.5.12 There were no private-wire telephone lines in Monaghan at this time. On 10 December 1996, the Regional Telecommunications Sergeant in Monaghan reported to the Sergeant in Charge of the station that the system had been installed. He confirmed that, *“in addition to the recording of 999 traffic, the equipment also records all radio traffic and the telephone switchboard”*.

5.5.13 Following complaints about noise from the cooling fans at the back of the recorder, the Sergeant in Charge arranged to have the unit moved so that the fans faced into the Equipment Room but the front panel remained accessible from the Control Room. This work was completed on 9 December 1996.

**Sligo/Leitrim Division – Sligo**

5.5.14 The Commission received a copy of an undated, handwritten note from one of the technicians stationed in Sligo in 1996. It read *“Dictaphone installed into Sligo on the 18/12/1996”*. In evidence to the Commission, the technician confirmed that this was his handwriting.

5.5.15 The technician could not recall the installation in detail but he stated that he would probably have assisted in the process, although the actual installation was carried out by the engineer from Dictaphone Ltd.

5.5.16 At this time in Sligo there were three 999 emergency telephone lines. All 3 lines were located in the Control Room in Sligo together with two main operator telephone lines. According to the technician, the following circuits were connected to the recorder:

- Three 999 telephone lines
- Two ‘main operator’ telephone lines (lines on which the main station number was answered.)
- Two radio channels.

5.5.17 The technician did not recall seeing any documents about the installation at the time but stated that the circuits that were added to the recorder were done so pursuant to instructions from the Regional Telecommunications Sergeant.

5.5.18 There is no evidence that any other lines were added to the DAT recorder during the entire period it was in use. In January 2008, a Garda member working in the Incident Room at the station applied to have the direct telephone lines into the Incident Room recorded. The written application was approved by the Chief Superintendent of the Division, but the lines were not connected to the DAT recorder at that time because the recorder had become faulty. When the NICE system replaced the DAT system in July

2008, the Incident Room lines were connected. The decision to record these lines is examined further in Chapter 6 below.

### **Clare Division – Ennis**

5.5.19 The Commission was unable to establish an exact date on which the DAT recorder was installed in Ennis Garda Station. However, the technician from Ennis Station confirmed in evidence to the Commission that the installation occurred in late 1996.

5.5.20 The technician recalled connecting the following circuits to the DAT recorder:

- 999 telephone line
- Telephone Attendant Offset Console
- Overflow telephone lines from the main telephone attendant offset console
- Radio channels

5.5.21 There were no private wire lines in Ennis Garda Station at this time.

5.5.22 The DAT recorder was installed in the Equipment Room in Ennis Garda Station. This was a room located off the Control Room. The technician recalled that the fan of the machine was very noisy and therefore he was instructed to install it in the Equipment Room. The technician was the only person with access to the Equipment Room.

### **Louth / Meath Division – Drogheda**

5.5.23 The DAT recorder was installed in Drogheda Garda Station on 10 January 1997. The technician stationed in Drogheda at the time could not recall the installation of the machine itself but he was able to detail the process that he thought would have taken place.

5.5.24 Drogheda Garda Station had a new and different telephone and radio system from any of the other Divisional Garda Stations. A DA3000 ICCS (Integrated Command and Control System) was installed in Drogheda. This was done on a pilot basis, with the intention that each Division would ultimately have the same system installed. However, the system was never rolled out to the other Divisions.

5.5.25 The DA3000 was a computerised system. A telephone call was answered by touching the screen. If a radio call came through the system, a foot pedal was pressed in order to transmit the radio call. There were two operators monitoring the system. It was not possible to record the operator console or the main switch due to the touch screen

system. Therefore, the technicians permanently set the main switch to “night service”, which diverted the calls to 4 extensions on the PABX.

5.5.26 An assessment of the DA3000 was carried out in or around October 1997. Its report includes reference to the recording of telephone and radio calls. The following is noted:

“...the knowledge that all conversations over the telephone and radio would be recorded caused a little apprehension. However, within a short space of time, DCR operators felt it was advantageous as if one were accused of being rude, impolite or saying anything controversial, these accusations could be totally refuted by referring to the recording. Operators are aware of the recording and hence they are careful of what they say. The feeling now is that this system serves to protect Gardaí against unjustified complaints.”

5.5.27 In an undated, typed letter, which appears to have been written in or around August 1998, an application was made by the technician to have the DAT recorder upgraded to a 16-channel recorder. He outlined the following as being currently connected to the recorder:

- Four PABX extensions on which outgoing calls could not be made
- 999/1
- 999/2
- Operator screen 2
- Operator screen 3

5.5.28 The operator screens 2 and 3 recorded radio and telephone audio simultaneously to the same channel and it was, therefore, very difficult to recover individual radio transmissions.

#### **Carlow / Kildare Division – Naas**

5.5.29 The Commission was unable to establish an exact date on which the DAT recorder was installed in Naas Garda Station.

5.5.30 On 12 February 1997, a report was sent to the Regional Telecommunications Sergeant who had responsibility for the Carlow / Kildare Division. It is clear from the report that the DAT recorder was installed in the Control Room in Naas before 10 February 1997.

5.5.31 It is not clear, however, what telephone lines were installed on the machine at this time. There was no technician stationed in Naas when the DAT recorder was installed. Naas Garda Station was somewhat unique in that the main telephone operator assigned to the



Garda Station was blind. In order to facilitate this member in the performance of his duties, an independent system off the PABX was set up for him to use. In general, this operator was responsible for answering the main telephone line into the Garda Station. This telephone line was not recorded as it was a digital telephone line.

5.5.32 In 2000, a new technician was stationed in Naas. He gave evidence to the Commission and confirmed that, from 2000 to 2004, the main station telephone line was not recorded in Naas and the only telephone circuits being recorded were the 999 lines. A further change in personnel took place in 2004 and the technician confirmed in evidence to the Commission that he did not add or remove any telephone lines to or from the DAT recorder. He simply inherited the system from his predecessor. He also confirmed that, to the best of his recollection, the main station telephone line was not being recorded at this time.

#### **Donegal Division – Letterkenny**

5.5.33 The DAT recorder was installed in Letterkenny Garda Station on or around 6 March 1997. The technician stationed in Letterkenny at the time of installation provided a copy of a letter, date-stamped 6 March 1997, that he had written to his Regional Telecommunications Sergeant confirming the installation.

5.5.34 The letter confirmed that the unit had been installed in the Equipment Room “*pending renovations to the Communications Suite*”. In evidence, the technician stated that he had no instructions regarding where the machine should be installed. He, therefore, left the cable long enough to migrate the unit anywhere in the “Communications Suite”. He also recalled receiving an instruction from his Regional Telecommunications Sergeant to source the circuits that were to be connected to the unit.

5.5.35 The letter listed the following circuits as being connected to the machine:

- M84 LHS
- M84 RHS
- 999 DEL
- EMS 80C OP. SET

5.5.36 The M84 LHS (left hand side) and RHS (right hand side) are the 4 radio channels. The 999 line is the emergency telephone line and the EMS 80C OP. SET is the main station telephone number.

### **Mayo Division – Castlebar**

5.5.37 The Commission believes that the DAT recorder was installed in Castlebar Garda Station on 10 March 1997. While the technician stationed in Castlebar at this time thought that the DAT recorder might have been installed in or around October 1996, a written record from Sligo Garda Station indicates that it was installed on 10 March 1997.

5.5.38 In evidence, the technician also stated that, to the best of his recollection, the only circuits connected to the DAT recorder in Castlebar were the following:

- The 999 telephone lines
- The Telephone Attendant Console
- A private wire to the Fire Atation
- A number of radio channels

### **Roscommon / East Galway Division – Roscommon**

5.5.39 The DAT recorder was installed in Roscommon Garda Station on 13 March 1997. Although there was a technician assigned to Roscommon Garda Station at this time, she received guidance and assistance from her colleagues in Sligo Garda Station. In evidence to the Commission, she recalled the technicians from Sligo coming to Roscommon to help with the installation.

5.5.40 The technician recalled being told which telephone lines were being installed on the machine. The telephone lines recorded were:

- One 999 telephone line
- Telephone Attendant Offset Console
- Four radio channels

### **Longford / Westmeath Division – Mullingar**

5.5.41 A Dictaphone Customer Engineering Work Docket made available to the Commission confirms that the DAT recorder was installed in Mullingar Garda Station on 6 May 1997.

5.5.42 A handwritten note also made available to the Commission details the “recommended layout” of the circuits that were to be connected to the Dictaphone machine on installation. The following circuits are listed on the handwritten note:

- Channel 1 – 999
- Channel 2 – 999

- Channel 3 – Radio Channel 1& 2
- Channel 4 – Radio Channel 3&4
- Channel 5 – Computer query line
- Channel 6 – Main extension in the DCR
- Channel 7 – Reserved for events
- Channel 8 – Reserved for events

5.5.43 Channels 1 to 4 above are self explanatory. Channel 6 was the main station telephone line. Channel 5 was an extension made available to members of An Garda Síochána only in order to check the location of members in Garda squad cars. It was not an advertised line. It allowed members to check car availability without having to go through the main station telephone line.

#### **Kerry Division – Tralee**

5.5.44 The Commission was unable to establish an exact date on which the DAT recorder was installed in Tralee Garda Station. However, from diary entries provided by one of the technicians stationed in Tralee Garda Station at the time of installation, the Commission can surmise that the machine was installed prior to 27 December 1996.

5.5.45 The DAT recorder was initially installed in the Equipment Room in Tralee Garda Station and this room was left open for people to enter and exit if they needed to use the machine. The Equipment Room was located beside the Control Room and both were on the first floor of the building. The Control Room was subsequently refurbished and, at this time, the technician built a cabinet for the DAT recorder. This was installed into the wall between the Equipment Room and the Control Room, with the back of the machine sitting in the Equipment Room.

5.5.46 The technician recalled the following circuits being connected to the DAT recorder:

- The 999 telephone line
- Private wires to the Hospital, Ambulance Control and the Fire Station

5.5.47 The Telephone Attendant Console was also connected to the DAT recorder at some stage. However, the technician was unsure if this was connected on installation. Connecting this circuit required a “Digital to Analogue Converter” because the DAT recorder could only record analogue audio and the Telephone Attendant Console in Tralee was a digital circuit.

#### **Limerick Division – Henry Street, Limerick City**

5.5.48 The Commission was unable to establish an exact date on which the DAT recorder was installed in Henry Street Garda Station. An entry in the Telecoms Store Ledger, dated 8 January 1998, states that an order was placed for the supply, installation and commissioning of a DAT recorder in Henry Street Garda Station. The model number is different from that which was installed in the other 16 Divisional Garda Stations. It remains unclear why Limerick was not included in the original rollout of the system.

5.5.49 The telephone lines connected to the DAT recorder in Henry Street Garda Station in Limerick were the following:

- 999 lines
- Telephone Attendant Offset Console
- Private wires to the Fire Station and Ambulance Control
- Four Radio Channels

#### **Cork North Division – Fermoy**

5.5.50 As noted at the outset, Fermoy Garda Station became a Divisional Garda Headquarters Station in or around 1998. With the setting up of the new Division, a new Divisional Control Room was established at Fermoy Garda Station.

5.5.51 As part of this new arrangement, from the beginning of 1999, all 999 calls for the Cork North Division were to be answered in Fermoy. An application was made on 11 November 1998 to the Telecommunications Section in Garda Headquarters for the installation of telephone recording equipment to record all 999 calls handled in Fermoy Garda Station.

5.5.52 The application was approved and a DAT recorder was installed in Fermoy Garda Station on 30 March 1999. The technician present for the installation provided the Commission with a diary entry confirming that he met with an employee from Dictaphone and installed the machine.

5.5.53 In evidence to the Commission, the technician stated that he could not recall any instruction as to what should be installed on the recorder but, from his experience as a technician, it was “the *norm*” that all Divisional Station 999 lines and radio channels were recorded. At the time of installation, there was no radio console in Fermoy. However, over time, the technician obtained a number of old radio consoles, from which he rebuilt one and installed it on the system.

5.5.54 The following telephone lines were connected to the DAT recorder in Fermoy Garda Station:

- 999 line (from 1999 onwards)
- Radio channels (connected on 22 August 2001)

5.5.55 The main station telephone line was not recorded in Fermoy at this time.

## **Appendix 5b**

## Appendix 5B

### Summary of what the Commission has found in relation to the processing of access requests at each Divisional Station outside the DMA.

#### Cork West Division – Bandon

- 5.5.1 When the DAT recorder was installed in Bandon Garda Station, it was located in the Control Room and all Control Room staff had direct access to the instant playback facility on the machine, which stored recordings for up to 13 or 14 days. This was password protected but the password was generic: it was available to all members.
- 5.5.2 As time progressed, however, the DAT recorder was relocated to the Equipment Room and the Control Room operators tended to ask the technician to perform the playback function for them. In the technician's opinion, this was simply due to lack of practice with the operation of the machine.
- 5.5.3 While members of An Garda Síochána had access to the Equipment Room where the DAT recorder was installed, a separate access code for the machine was available to the technician only, so that he could perform other functions on the recorder including downloading or copying a recorded call. The operators could only use the playback function and could not remove a tape from the DAT recorder. A tape could only be ejected from the machine with the second password.
- 5.5.4 The technician did not recall keeping records of the various requests. Requests to play back a call without copying it were generally made verbally and, where this occurred, no paperwork relating to such requests existed. Any requests that were made in writing are no longer available as they were destroyed when Bandon Garda Station was flooded in 2009, as noted at paragraph 5.5.111 of Chapter 5.

#### Laois / Offaly Division – Portlaoise

- 5.5.5 The DAT recorder was initially installed in the Control Room at Portlaoise Garda Station but was subsequently moved to the Equipment Room due to the noise of the machine. Access to the room was restricted to the Regional Telecommunications Sergeant and the two technicians stationed in Portlaoise. Initially, there was only one key available for the room and it was kept in the technician's office.
- 5.5.6 For a brief period, the operators in the Control Room were able to access the playback facility themselves. However, when this was no longer possible, the operators would ask the technicians to play back the recorded call for them.

- 5.5.7 The technicians also received requests for copies of recorded calls from investigating members of An Garda Síochána. Sometimes the request would come through the Regional Telecommunications Sergeant and sometimes the investigating member would approach the technicians directly. There was no set format in place and both written and verbal requests could be made.
- 5.5.8 The technicians had a call logbook, which they used on a daily basis to note of anything that they considered to be of particular importance. On occasion, they would note a request and what had to be done to fulfil it. Copies of all relevant entries in the logbook were forwarded to the Commission for examination.
- 5.5.9 The logbook entries relate to telephone recordings from 2003 to 2008. 5 entries from this logbook did not indicate on which telephone line the recorded calls were received. According to the Regional Technical Sergeant who was stationed in Portlaoise from 2004 the main switch was no longer recording during this period and therefore all entries must relate to 999 telephone recordings.

**Tipperary Division – Thurles**

- 5.5.10 The DAT recorder was installed in the Equipment Room at Thurles Garda Station and, therefore, there was limited access to the machine. The workstation for the recorder was located in the technicians’ office and was not accessible to any other member.
- 5.5.11 At Thurles Station, the majority of requests received by the technicians were for instant playback of a call that had just been received. Therefore, the majority of the requests were verbal, with very few being in written form.. If a call needed to be copied onto a tape for a requesting member this could be done.
- 5.5.12 One of the technicians stationed in Thurles during the early period of the DAT system employed a different system from the other technicians regarding requests made to him for copies of recorded calls. He would locate the relevant call and prepare the machine to make a copy of the recording but would then ask the member seeking the recording to press the record button. In his view, this meant that the member requesting the call was then responsible for the recording, and for making any Statements of Evidence that might be required in relation to it. The technician told the Commission that he did this so as to avoid having any involvement in the process beyond the purely technical aspect of locating the call. This member transferred from Thurles in 1998 and his approach was not adopted by any other member.
- 5.5.13 A total of 30 written records from 1996 to 2007 were made available to the Commission. The technicians compiled a list of requests that they retrieved from old Job Book



requests and from old computerised records. Some of the entries detail who made the request to the technicians. Six refer to a search for recorded dedicated 999 calls. Two entries refer to a search for radio calls. Others refer to reviewing of DAT tapes for named members of An Garda Síochána. One states that a DAT tape was being held for a member. Other entries refer to obtaining calls from the Dictaphone machine. Again, it is impossible to identify from the records what use, if any, was made of the recorded calls in the various investigations.

**Cavan/Monaghan Division – Monaghan**

- 5.5.14 All Garda members in Monaghan Garda Station who had access to the Control Room could access the DAT recorder. Initially, only the technicians and the Regional Telecommunications Sergeant had access to the machine. However, there was a generic password for the machine and anyone who knew the password could use the system.
- 5.5.15 In relation to requests for access to a recording, there was no local policy in place at the time. Any member of An Garda Síochána could request playback or ask for a recording of a call relating to an investigation and the technicians would then play back or copy the call for him or her. There was no need to make the request in writing.
- 5.5.16 The technicians provided the Commission with all of the records that they had kept in relation to requests from members of An Garda Síochána. They also provided the Commission with the faults-logbooks kept by them in which they recorded all of the work that they completed on the DAT recording system e.g. changing of tapes and any repairs done.
- 5.5.17 For the duration of the DAT system, very few requests were recorded. A total of 16 written records were identified by the Commission. One of these refers to the recording of a call on the dedicated 999 telephone line. However, it is clear from supporting documentation that some of the other entries, which do not identify the calls as having been received on the dedicated 999 line, relate to calls received on such lines. Statements of Evidence regarding the downloading of the calls were made available in two cases. Neither of the technicians, however, ever appeared in Court to give evidence relating to calls they downloaded.

**Sligo / Leitrim Division – Sligo**

- 5.5.18 The DAT recorder was installed in the Control Room in Sligo Garda Station. Any member of staff with access to the Control Room could access the machine. Control Room operators could play back a call on the Instant Playback Module (IPM) without the assistance of a technician.

- 5.5.19 The technicians, however, took responsibility for making any copy of a recording required by a member of An Garda Síochána. Initially, such requests would have been communicated verbally. The Regional Telecommunications Sergeant stationed in Sligo instructed his technical staff not to perform any of these functions without first informing him. This was a safeguard that he developed and in respect of which he had not received any instruction.
- 5.5.20 Requests for call recordings in relation to serious incidents were often made in writing. Where this occurred, the Regional Telecommunications Sergeant would play back or download a recorded call for whoever requested it, whether a Detective Sergeant or Detective Inspector. The Regional Telecommunications Sergeant would generally seek confirmation from the Superintendent in relation to any request received.
- 5.5.21 The technicians did keep records of “Dictaphone Service Calls” and these records were made available to the Commission. These mainly relate to the routine maintenance performed on the machine. However, a number of entries include requests from members of An Garda Síochána for playback and copies of recordings.
- 5.5.22 A total of 51 entries relate to searches performed for recorded calls. The entries are short and often refer to playback only, with no indication that a copy of a call was made. Some entries refer only to the search and do not indicate the results of it. From 2005 onwards, the technicians kept a slightly more detailed log of requests, identifying the member of An Garda Síochána who made the request. However, again, the full details of the calls or the investigations to which they relate are not logged. It cannot be established whether the recorded calls were received on dedicated 999 calls or not. The action performed in relation to the recordings is also not identifiable.

**Clare Division – Ennis**

- 5.5.23 The DAT recorder was located in the Equipment Room in Ennis Garda Station and the technician stated in evidence that he was the only person with access to that room.
- 5.5.24 In relation to requests for access to recordings, the technician did not have any particular system in place. Some requests were made verbally over the telephone and others were written down on a piece of paper and placed under the door of the Equipment Room, if the technician was unavailable. The technician did not receive many requests but he believes that they would have come through a Sergeant. He could recall only one instance in which he had made a copy of a recording for an investigation. He appeared in Court in relation to this case and provided a Statement of Evidence. The calls in this case were received on a dedicated 999 line.

5.5.25 Occasionally, the operator in the Control Room would ask to listen back to a call on the IPM if the call was dropped or if the operator needed to clarify details from it.

5.5.26 The technician did not keep any other records of requests relating to the DAT recorder.

#### **Wexford Division – Wexford**

5.5.27 The DAT recorder at Wexford Garda Station was installed in the Equipment Room, which was connected to the Communications Room. Only Telecommunications staff had access to that room.

5.5.28 The technician stationed in Wexford recalled his Regional Telecommunications Sergeant advising him to keep a diary for accountability purposes including details of any work that he completed. He kept a number of diaries and entered the details of any requests that were sent to him including requests relating to the DAT recorder.

5.5.29 The technician received requests either verbally or in written form. The written requests generally comprised a job number from an incident book created for an investigation.

5.5.30 The technician provided his original personal diaries to enable the Commission to verify the entries. Only 6 entries relate to non-999 recorded calls. Two refer to the forwarding of a DAT tape to his superiors. Of particular note is the first entry which states that the tape was sent to the Chief Superintendent, Crime and Security, which indicates that this individual knew that the recording system was in place.

5.5.31 Two entries refer to the playing of recorded calls for members of An Garda Síochána. One entry refers to the copying of a call to a new cassette tape from Dictaphone. The final entry refers to the checking of an alarm call.

#### **Louth / Meath Division – Drogheda**

5.5.32 The DAT recorder was initially installed in Drogheda Garda Station within the Control Room. It was moved, in 1999, into the Equipment Room, which was a locked room with a key-coded door. The technicians were the only Garda members with access to this room.

5.5.33 Drogheda was the first Division to put its technicians on shift work in order to ensure that there was a technician on duty at all times. As a result, the technicians recalled receiving a verbal direction from a member of the Divisional Office in Drogheda stating that they were solely responsible for the *“installation and replacement of DAT tapes and for the playback and copying of recordings”*.

- 5.5.34 In general, those seeking a recording of a call were Detectives investigating incidents or Garda members involved in an Incident Room.
- 5.5.35 The technicians maintained records of all of the activity that they performed on the DAT recorder from 1997 to 2008 in call-fault logs. A total of 87 entries are made in the logs. The technicians noted the date, time, location and District, the fault reported and the repair details. The technicians noted, under the heading “fault reported”, any request for the playback or downloading of a recorded call. They also included details of the member who made the request. There is no indication as to whether the requests relate to calls received on the dedicated 999 line or on the main station telephone line. A large number of the entries simply state “Dictaphone query” without any further details.
- 5.5.36 There is only one formal written request available. The request was to obtain a transcript of a call made to Drogheda Garda Station to produce in Court. The request was made by a Garda member to the Sergeant in Charge in Drogheda Garda Station, who forwarded the request to the technician.
- 5.5.37 One of the technicians also provided Statements of Evidence that were on file. Two of these related to the DAT period. One was a download of a call to Ambulance Control and the other was a call recording on a dedicated 999 line. The technician was not requested to attend Court in relation to either matter.

**Carlow / Kildare Division – Naas**

- 5.5.38 The DAT recorder was installed in the Control Room in Naas Garda Station. It is not clear whether Garda members, other than the technician, could access and play back recordings.
- 5.5.39 No records of access to the DAT recorder in Naas Garda Station were provided to the Commission. However, given that the only lines that were connected to the DAT system were the dedicated 999 lines and those relating to radio traffic, there were, necessarily, no requests for non-999 calls.

**Waterford Division – Waterford**

- 5.5.40 The technician stationed in Waterford in 1996 told the Commission in evidence that all requests for playback or download of a call came from a Detective Sergeant or a member of a higher rank. He kept a note in his personal diary of any requests that were made to him. The Commission was provided with photocopies of all relevant diary entries.

- 5.5.41 The technician said they would ask the person requesting access to a recorded call if he or she had a legitimate reason for requesting it.
- 5.5.42 All copies of recordings were made upstairs in the Equipment Room. Access to this room was restricted to Telecommunications staff and the Sergeant in Charge of the station.
- 5.5.43 The majority of diary entries regarding access requests relate to searches for 999 calls. Two references are made to the playback and recording of calls but the entries do not state whether these calls were 999 calls. Another entry states that the technician searched for calls but the date on the machine was incorrect. A further entry states that the technician searched for recorded calls but the calls for that day were corrupted, while the last relevant entry states that the recording could not be carried out due to a fault.

**Donegal Division – Letterkenny**

- 5.5.44 As noted at paragraph 5.5.201 of Chapter 5, the technician in Letterkenny sought clarification and direction from Garda HQ through his Regional Telecommunications Sergeant following the installation of the DAT machine but received no reply. In relation to access, in particular, he queried whether more secure access levels were to be implemented, such that non-technicians could search and play back calls on the IPM but only technicians could carry out other functions. In evidence to the Commission, he explained that all of the DAT machines had a default password, which was the same for each unit across the various Divisions. Since the password was generic, he was concerned that this password could be used by anyone who had access to the machine. Eight operational members and one Sergeant were working in the Control Room in Letterkenny at this time. In his letter, the technician expressed his view that the DAT recorder should be moved into the Control Room to allow members to use the instant IPM and then a second password should be applied so that members could only access this instant playback facility. This was to avoid any technical interruption to the machine such as the ejection of a tape, formatting of a tape through error or switching off of the recorder completely.
- 5.5.45 The technician never moved the DAT recorder into the Control Room because he never received a reply to his query. Instead, the machine remained in the locked Equipment Room for the duration of its service. The Sergeant in Charge of the station and the technician were the only two members with keys to access the room.
- 5.5.46 Access requests could come to the technician from any Garda member and he would then perform the action necessary to comply with the request. Sometimes members would seek to listen back to a call to clarify details. He did not require that a request be

made in writing. The Sergeant in Charge could also receive a request and the technician would perform the task requested. The technician did not recall making copies of tapes for Court but did provide the Commission with one Statement of Evidence in relation to which an audio recording had been provided to the local Superintendent. He believed that most of the requests during this period were for instant playback only.

- 5.5.47 In more recent years, the technicians in Letterkenny developed a system whereby a form known as a “Media Project Record” was filled out if access to a recording or a copy of a recording was required for an investigation. This system was not in place during the DAT period and no records of requests for access prior to 2008 were available to the Commission.

#### **Mayo Division – Castlebar**

- 5.5.48 The DAT recorder was installed initially in the wall of the Control Room in Castlebar Garda Station.

- 5.5.49 The Regional Telecommunications Sergeant at Castlebar Station put a tiered password system in place. This comprised an administrative password, available only to him, and a user password, which was provided to the two technicians stationed there and allowed them to perform various functions on the machine, including the downloading of calls and removal of tapes. The Regional Telecommunications Sergeant and one of the technicians recalled the operators also having password access to the machine in order to utilise the playback facility.

- 5.5.50 Although the operators had access to the playback function, the technicians would sometimes receive requests from the Control Room staff to replay a call if they had trouble hearing it or if they had failed to gather all of the information from the original call. They would replay a recording of the call but would not download it. They would not keep records of this interaction.

- 5.5.51 If a member of An Garda Síochána, aside from Control Room staff, was seeking to playback a recording of a call or to download a call, the request would come to the technicians from the Sergeant in Charge of the station. No written records relating to the DAT period were available to the Commission. This is explained by a relocation of personnel, whose records were not kept in Castlebar Station.

#### **Roscommon / East Galway Division – Roscommon**

- 5.5.52 The DAT recorder in Roscommon Garda Station was located in the locked Equipment Room adjacent to the Control Room. The technician and the Sergeant in Charge were the only people with keys to the room; thus access to the machine was restricted. There

was no general access to the machine and the password was not known within the station.

5.5.53 The technician at Roscommon Station did not recall receiving many requests to play back or copy calls. She did recall receiving a few requests from the Sergeant in Charge to replay 999 calls and, perhaps on occasion, to follow up on a complaint regarding the response of an operator. If such a situation occurred, she would play the recording back in the presence of the Sergeant in Charge.

5.5.54 These requests, however, were not made in written form and she did not keep any record of the request or the outcome.

#### **Galway West Division – Mill Street, Galway City**

5.5.55 The DAT recorder was installed in the Equipment Room in Mill Street Garda Station. The technician was the only member with access to the room.

5.5.56 During the DAT period, many of the requests for a copy of a recorded call came from the Incident Room. This involved a single piece of paper with a job number on it being sent to the technician providing details of what was required. If, for example, the request was for a copy of a recording, he would download the call onto a DAT tape and return the DAT tape, together with the piece of paper, to the Exhibits Officer in the Incident Room. In those circumstances, the written record was returned to the Incident Room.

5.5.57 Requests could also be made verbally for copies of recorded calls. These requests were generally made by Detectives in conjunction with a Sergeant.

5.5.58 The technician did not keep any records of requests for access to recorded calls made to him from members of An Garda Síochána.

#### **Longford / Westmeath Division – Mullingar**

5.5.59 The DAT recorder was installed in the Control Room in Mullingar and, therefore, was accessible to all members working within the Control Room. However, there was a password on the machine, which was not generally known. The technician stationed at Mullingar gave evidence that he was the only member who operated the recorder, including the playback facility.

5.5.60 Generally the requests received by him were to replay a recording of a call. He would then ask the requesting member to explain why he or she wanted to hear the call and, if it was for a legitimate reason, he would comply with the request.

5.5.61 The technician did not keep any records of requests for access to the recordings made to him.

**Kerry Division – Tralee**

5.5.62 The DAT recorder in Tralee Garda Station was password protected and access was restricted to the technician there.

5.5.63 The technician stationed in Tralee stated that, as far as he could recall, he rarely used the DAT recorder and, to the best of his recollection, he received no more than two requests for copies of recordings during his entire career. He stated that the machine did not enter members' consciousness and, therefore, was not used.

5.5.64 The technician stated that he might have kept notes of requests for playback in the personal notebook where he recorded his daily activities. However, on his retirement from An Garda Síochána in 2012, he destroyed all Garda correspondence in his possession. He stated that this was done in the normal course of clearing out his personal documentation on his retirement, which included the shredding of the books kept by him as a record of his actions.

**Limerick Division – Henry Street, Limerick City**

5.5.65 The Regional Telecommunications Sergeant with responsibility for the Limerick Region recalled that a Jobs Book was opened for every investigation. One of the first jobs created in the Jobs Book was to obtain a copy of any related emergency call. A form would be sent to the technician to download the 999 or emergency call in relation to the incident. The person in charge of the Jobs Book would generally be a Sergeant or a Detective but, from the technician's point of view, that person was performing the job in the Jobs Book under the authority of the District Superintendent, who maintained formal control over all investigations carried out in his District.

5.5.66 Requests also came to the technicians from Superintendents investigating complaints made by members of the public who were unhappy with the response they had received when they contacted the Garda Station by telephone.

5.5.67 The technicians used a faults logbook in the Control Room to record all matters in relation to the DAT recorder. Copies of all work performed by them were provided to the Commission. However, access requests for copies of recordings or playback of recordings only date from 2008 onwards and do not cover the DAT period.

5.5.68 One retired member who was stationed in Limerick at this time did not have any written records. However, he stated in evidence that he appeared on a regular basis in various



courts to give evidence relating to recorded calls. There was never any query raised in relation to the audio evidence he presented in Court.

**Cork North Division – Fermoy**

- 5.5.69 The DAT recorder at Fermoy Garda Station was installed in the Equipment Room, which was locked. Only the technician and the Sergeant in Charge of the Garda Station had access to this room and the technician was the only person who accessed the DAT machine.
- 5.5.70 When the workstation was installed, it was placed in the Control Room and the operators had access to that computer in order to play back recorded calls if the technician was unavailable. However, if the operators required a copy of a recorded call, they would make a request to the technician who would then provide the copy.
- 5.5.71 The technician kept a diary and noted any work that he performed in relation to the DAT recorder. From 2004 until 2008, there was only one instance when he was asked to make a copy of a recorded call. This request was made verbally and by the Sergeant in Charge of the station.
- 5.5.72 The technician did receive a number of requests to play back recordings.

# Appendix 5C

## Appendix 5C

### **Summary of what the Commission has found in relation to the destruction of DAT tapes Louth / Meath Division – Drogheda – 472 tapes recovered**

- 5.5.1 As noted at paragraph 5.1.24 of Appendix 5A to Chapter 5, the telephone system in Drogheda was different from that in the other Divisional Stations. The configuration of the DA3000 system required the tape to be changed on a weekly rather than a monthly basis. This is unique to Drogheda Garda Station. The technicians attached to the station during this period changed the tape, as a routine, every Sunday morning.
- 5.5.2 In the technicians' experience, there was no issue regarding the availability of new blank tapes. To procure them, they would travel to the Stores Section in Garda HQ, fill out a requisition form and receive the tapes. However, from time to time, if they ran out of tapes before having the chance to go to Garda HQ, they would reuse an old tape. Where this occurred, they would choose the oldest tape in terms of date, reformat it (thereby erasing any existing recordings) and reuse it.
- 5.5.3 The technicians were aware of the instruction that tapes should be kept for one month and had received a copy of that instruction in Drogheda Garda Station. However, they maintained that there was never any instruction received by them to destroy the tapes and there was no facility provided to them to do so. The tapes could be wiped of the information but, in order to do this, the DAT machine had to be taken out of service so that they could be formatted.
- 5.5.4 The technicians were also conscious that, in the case of investigations, officers would often come to them requesting information 6 weeks after a call. If they had destroyed the tapes after one month, information required for an investigation could have been lost. They decided, therefore, to keep the tapes in a locked press until they were told differently.

### **Sligo/Leitrim Division – Sligo – 314 tapes recovered**

- 5.5.5 In Sligo Garda Station, the technicians were not aware of the instruction from Chief Superintendent Cussen to retain the tapes for one month or until the conclusion of an investigation.
- 5.5.6 The technicians there created their own system in relation to changing and retaining the tapes. The DAT system had two tape decks. When changing the tapes, the technicians would change both tapes at the same time and retain both. This was not a requirement of

the system but it was the preferred method of the Sligo technicians. They then entered the dates on which they had changed the tapes into a logbook.

- 5.5.7 The technicians in Sligo did not reuse tapes in general; they always had spare new tapes. While they acknowledged that a tape might have been reused on a rare occasion, they could not recall it happening. Given the number of tapes returned, it is unlikely that this happened on a regular basis. They kept all of the tapes that they used until they were asked to return them to Garda HQ in 2013.

**Longford/Westmeath Division – Mullingar – 296 tapes recovered**

- 5.5.8 The technician stationed in Mullingar did not recall seeing the instruction from Chief Superintendent Cussen and only became aware of it in or around March 2014, when searches were being conducted for material. At that time, a Regional Telecommunications Sergeant forwarded him a copy of this document, which had been found in Portlaoise Garda Station during searches for relevant material.

- 5.5.9 The technician was certain that he had not been made aware verbally of the policy to retain the tapes for one month only. In practical terms, in his opinion, this was unworkable, as most investigations would take 3 or 4 months to complete. Requests for a copy of a recording could be received as long as 3 months after an incident. In his view, one month was not a sufficiently long period to keep the tapes in those circumstances.

- 5.5.10 In any event, the technician, with no knowledge of any policy, retained all of the tapes that were operational. He never received any direction to dispose of them and, in the absence of such direction, he was not happy to dispose of what he deemed “*official records*”. He did not recall ever reusing any of the tapes. Sometimes a tape would become faulty or would break and he disposed of those tapes.

- 5.5.11 The tapes were stored in their original boxes and put into cardboard boxes in the technician’s storeroom.

**Cavan/Monaghan Division – Monaghan – 227 tapes recovered**

- 5.5.12 In Monaghan Garda Station, initially, the tapes were stored for about one month by the two technicians stationed there. They would reuse the tapes as necessary. They did not have a particular monthly schedule but they changed the tapes when required.

- 5.5.13 Monaghan Garda Station was unique in the sense that a Garda officer who was not a technician was appointed “custodian of the tapes” in 1997. This was done in order to allow the technicians more time to deal with more pressing technical issues.

**Laois/Offaly Division – Portlaoise – 216 tapes recovered**

- 5.5.14 The technician stationed in Portlaoise was not aware of the instruction given by Chief Superintendent Cussen in 1996. However, during the search for copies of documents to provide to the Commission, a copy of the document was found in Portlaoise Garda Station.
- 5.5.15 In any event, the system in Portlaoise was such that the tapes were kept for one month in a cabinet in the Telecommunications Section. They were then reformatted and reused. Access to the cabinet was restricted to Telecommunications personnel.
- 5.5.16 This practice of reformatting and reusing tapes changed at some stage. The technician could not recall when this change occurred or the exact reason for the change. He did recall that the general belief at the time was that tapes should not be destroyed. He could not recall where the instruction came from or who provided the instruction but, at some point, he was told that the tapes were now to be held indefinitely.
- 5.5.17 The station in Portlaoise was renovated in or around 2012 or 2013 and at this stage the DAT tapes were placed in boxes and sent to the Divisional Station in Naas, where they were put into a locked storage room.

**Tipperary Division – Thurles – 185 tapes recovered**

- 5.5.18 The technician stationed in Tipperary in 1996 did not recall ever seeing the instruction from Chief Superintendent Cussen. However, he developed his own policy regarding the tapes, which was to similar effect: retaining the tapes for 30 days. He told the Commission he adopted this practice as it was similar to that used for the storage of videotapes of CCTV footage.
- 5.5.19 Two tapes recorded simultaneously in the DAT recorder. In the other Divisions, this meant that there were two identical copies of the recordings and the two tapes were changed at the same time. In Thurles, however, the technician staggered the tapes and one tape was changed every fortnight. When the tape in the top deck finished recording, the tape in the bottom deck would begin recording. His rationale for this was that the inbuilt Instant Playback Module (IPM) also recorded the call and had the ability to keep the recording for approximately two weeks. Therefore, for a period of two weeks, there were two copies of each call available. After the two-week period, only the recording on the tape was available. This was then kept for one month.

5.5.20 From 1998 onwards, a new technician was stationed in Tipperary. He continued the practice that had been in place before his arrival and the DAT tapes were kept in his office at Thurles Garda Station. They were kept in a wooden cabinet. The cabinet itself was not locked but the door to the office had a key code and was locked. This technician was not aware of any policy in relation to the retention or storage of the tapes.

**Clare Division – Ennis – 165 tapes recovered**

5.5.21 The instruction from Chief Superintendent Cussen was received by the technician at Ennis Garda Station. As per the instruction, the technician kept the tapes for one month unless they were required for an investigation. He did not receive any instruction on how to dispose of the tapes and, therefore, he kept them.

5.5.22 The tapes were stored in a locked drawer in the Equipment Room under the DAT machine itself. They were dated and numbered.

5.5.23 There were a number of power cuts and power surges in Ennis Garda Station. If a power cut or surge occurred, the DAT recorder would crash and an alarm would sound. The technician could not restart the recording without reformatting the tape. If the tape was reformatted, then the content of the tape was wiped.

5.5.24 The technician also recalled that, on a number of occasions, the machine stopped and the tapes would not play as a result of the stoppage. As these tapes were unplayable, any recorded material on them was lost.

**Wexford Division – Wexford – 142 tapes recovered**

5.5.25 The technician was not aware of the instruction from Chief Superintendent Cussen to retain the tapes for one month or until the conclusion of an investigation. He did not know of any policy in relation to what was to be done or not done with the tapes from the DAT recorder.

5.5.26 There was no secure cabinet in Wexford Garda Station. The tapes were kept in a box, which was kept in a locked storage room.

5.5.27 In general, the tapes were not reused. However, from time to time, if the technician had no more new tapes, he might reuse a tape, though this was a rare occurrence.

**Roscommon/East Galway Division – Roscommon – 135 tapes recovered**

5.5.28 In general, the technician stationed in Roscommon did not reuse the tapes unless no new tape was available.

5.5.29 The technician never destroyed any tapes but kept them in a cabinet in the Equipment Room. She retained the tapes in case something occurred that gave rise to a request for access to a recording.

**Waterford Division – Waterford – 134 tapes recovered**

5.5.30 The technician stationed in Waterford did not recall any policy in relation to the retention or destruction of tapes. He told the Commission that, to the best of his knowledge, no such policy existed.

5.5.31 Power failures occurred in Waterford Station on a regular basis. When a power failure occurred, the DAT recorder stopped functioning. While the tape itself would then still contain recordings, they did not match up with dates and times and were, therefore, unusable. For this reason, any time the machine stopped, the technician would withdraw the tapes from it and write “corrupted” on them. However, he still kept the tapes and did not destroy any of them.

5.5.32 The technician said he would have reused uncorrupted tapes initially if no new tapes were available in Waterford Station. However, in general, he did not have a policy of destroying the tapes. He never deliberately destroyed any tapes and was not asked by anyone to destroy any of them. The number of tapes returned to Garda HQ corresponds with this assertion, particularly given that the DAT machine was out of service for a considerable period in 1997 and 1998, as noted at paragraph 5.5.171 of Chapter 5.

5.5.33 The tapes were kept indefinitely in a locked steel press in the Equipment Room. The Equipment Room was also locked and access was restricted to Telecommunication staff and the Sergeant in Charge.

**Carlow/Kildare Division – Naas – 120 tapes recovered**

5.5.34 At Naas Garda Station, the technician who had responsibility for the system from 2004 onwards followed the practices that were in place before he arrived there. He had a routine at the start of every month of checking on the DAT recorder and changing the tapes at that point.

5.5.35 In general, the tapes were not reused. However, if a tape became faulty for any reason while recording he would remove it, rewind it and start recording on it again. This meant that the initial recordings were lost. As a general rule, however, he did not destroy any tapes that were not faulty.

- 5.5.36 The tapes were archived. The technician would write the date directly onto each tape as each had a white label..
- 5.5.37 The tapes were kept in the technician's workshop, which was a separate building from the main Garda Station. He had a "lockup" in the workshop and this is where he stored the tapes.

**Limerick Division – Henry Street – 109 tapes recovered**

- 5.5.38 The technician stationed in Limerick at the time did not recall seeing the instruction from Chief Superintendent Cussen. As noted previously, Limerick did not have a DAT recorder installed until sometime in 1998. However, the technician developed his own, similar policy regarding the tapes, which was, in essence, the policy already used for CCTV videotape storage.
- 5.5.39 While, generally, in the other Divisions, the two DAT drives in the machines were set to record at the same time and both tapes were changed together on a monthly basis, the technician in Limerick, like the technician in Thurles, rotated the tapes differently. He staggered the tapes and changed just one of them each fortnight. When the tape in the top deck finished recording, the tape in the bottom deck would begin recording. His rationale for this was that the inbuilt IPM also recorded the call and had the ability to keep the recording for approximately two weeks. Therefore, for a period of two weeks, two copies of each call were available. After the two-week period, only the recording on the tape was available. This was then kept for one month.
- 5.5.40 The tapes were retained for one month and then reused. If a tape was required for an investigation, it was retained until the investigation was completed. The tapes were reused approximately 3 times and then they were replaced.

**Mayo Division – Castlebar – 97 tapes recovered**

- 5.5.41 The technician stationed in Castlebar did not recall whether or not he ever received a copy of the instruction from Chief Superintendent Cussen. No copy of this document was provided to the Commission from the files in Castlebar.
- 5.5.42 The technician stated in evidence that there was no instruction to destroy the tapes after any period. The tapes were labelled, stored and rotated for reuse sequentially. If a tape was required for an investigation, it was marked and put aside.



5.5.43 The technician was not aware if any tapes were ever destroyed but he did accept that sometimes tapes would deteriorate if they had been reused.

**Cork North Division – Fermoy – 95 tapes recovered**

5.5.44 The technician in Fermoy Garda Station was unaware of any policy existing in relation to the retention or storage of the DAT tapes. He was not aware of the instruction from Chief Superintendent Cussen to keep the tapes for one month unless subject to an investigation. There was no copy of this document on file in Fermoy Garda Station. As noted previously, Fermoy did not become a Divisional Station until 1998 and a DAT recorder was not installed until March 1999, about two and a half years after the original instruction was sent to the other Divisional Stations.

5.5.45 If a tape stopped, the technician would remove it from the system and label it with its start date and finish date. He would then take one of the oldest tapes from the cabinet, reformat it, put it into the machine and start to record again.

5.5.46 The technician explained that, during the changing of the tapes, recording continued on the system's hard drive. When the tape was inserted, the material on the hard drive was transferred to the tape. Therefore, no recordings were lost during the changing of the tapes.

5.5.47 The technician who was stationed in Fermoy from 2004 onwards did not destroy any tapes. He would archive them, mark them with the date and put them in storage. If the tape had been reused, he would write the new date on the tape. The cabinet in which they were stored was an old unused gun safe, which could be locked. The gun safe was kept in the Equipment Room in Fermoy Garda Station which was also locked. The technician and the Sergeant in Charge in Waterford both had keys to this room. The tapes remained in this gun safe until they were returned to Garda HQ in December 2013.

**Galway West Division – Mill Street – 55 tapes recovered**

5.5.48 The technician in Galway was unaware of the existence of any policy in relation to the retention or storage of the DAT tapes.

5.5.49 The tapes in Galway Garda Station tended to reach full capacity after two weeks. The technician would change them at this time. He would keep them for a number of months, generally about six months, and if he did not receive any request for a recording he would then assume that it was safe to reuse that particular tape and record over the old material.

**Donegal Division – Letterkenny – 33 tapes recovered**

- 5.5.50 The technician stationed in Letterkenny wrote to his Regional Telecommunications Sergeant seeking clarification or direction on a number of issues, including maintenance procedures such as changing of tapes. He expected that his query would be forwarded to Garda HQ for clarification but, in the event, he received no reply.
- 5.5.51 The letterkenny technician was aware of the instruction from Chief Superintendent Cussen regarding the storage of tapes in a secure cabinet for one month unless subject to an investigation, when tapes should be stored until the completion of the investigation. He was able to provide a copy of the instruction to the Commission which was recovered from a file in Letterkenny Garda Station.
- 5.5.52 The tapes in Letterkenny Garda Station were reformatted and reused after a period of one month. Any tape not reused was stored in a secure service storage cabinet in the Equipment Room.

**Cork West Division – Bandon – 10 tapes recovered**

- 5.5.53 The Commission has been told that significant amounts of documentation, together with virtually all the DAT cassettes then retained in Bandon Garda Station, were destroyed as a result of a flood on 20 November 2009. The Commission wrote to Chief Superintendent Tom Hayes seeking all “reports, memoranda and documents of any kind relating to that flood as well as a statement outlining the reasons for the belief that tapes were destroyed in that flood, how many tapes were destroyed, where had they been located etc.”
- 5.5.54 A report on the flood damage was sent from the Superintendent in Bandon to the Assistant Commissioner of the Southern Region on 23 November 2009. It states that floodwaters rose to between 3 and 4 feet inside the ground floor of the station. Extensive damage was caused to the station and property situated at ground level.
- 5.5.55 A subsequent report from the Superintendent to the Chief Superintendent in Bandon notes that, “as a result of the flooding, the entire ground floor area of the station was evacuated and all of the files, furniture and equipment have been removed.” The Superintendent informed the Chief Superintendent that, “*at this stage, it is not known the extent of the loss of files, etc. but I can assure you that great work was done in ensuring that exhibits and interview tapes in regard to recent high profile cases have been saved. Members are currently sifting through the files, wet and dry, with a view to saving as many as possible*”.

- 5.5.56 The Telecommunications store and the technician's office were located on the ground floor of the Garda Station. Both rooms were affected by the floodwaters.
- 5.5.57 On 18 October 2015, the technician from Bandon reported to the Superintendent in Bandon on his recollection of the flood damage and the DAT tapes. The majority of the DAT tapes were relocated to his office from their original secure location in the old radio Equipment Room. They were stored in a locked drawer under the technician's desk. When the station was flooded, the technician's office was completely flooded, with the water level rising to the top of the desk. In the aftermath of the flooding, several skips arrived and any damaged property was removed and disposed of. This included the office desk. The key for the drawers to the desk had previously broken and was never replaced. He assumes that the contents of the drawers were disposed of without the drawers being opened. He did not recall being present when the material was being disposed of.
- 5.5.58 In or around May / June 2013, in response to a general request made that all Garda members in Bandon Garda Station provide any material that might relate to the Discovery process in a particular civil action, the technician from Bandon conducted a search of his office and discovered 6 DAT tapes, which dated back to 1997. The technician brought the existence of the DAT tapes to the attention of the Incident Room staff and delivered the 6 tapes to them on 11 June 2013. On 20 June, the technician provided the Incident Room personnel with a further 3 DAT tapes that he had discovered in his office. One of the tapes was clearly broken and was forwarded to the Garda Telecommunications Section in July 2013 to be repaired.
- 5.5.59 On 4 April 2014, a tenth tape was discovered in Garda HQ in the Telecommunications Section. This tape had been sent to the Project Management Section in Garda HQ many years previously. As part of the pre-rollout of the new Tetra Radio System, the Project Management Section had gathered tapes containing radio recordings from every Division.
- 5.5.60 On 25 May 2014, the technician at Bandon responded to a list of questions posed to him by the Detective Inspector in Bandon Garda Station. He was asked to explain why the Bandon tapes were preserved separately from those that were lost in the flood. He was unable to recall any specific reason for these tapes being preserved. He stated that, in general, if any tape had a recording on it relevant to a live investigation, it was good practice to put it aside and retain it.

**Kerry Division – Tralee – 0 tapes recovered**

5.5.61 No tapes were recovered from Tralee Garda Station. The technician from Tralee gave oral evidence that all of the tapes were destroyed in an incinerator which was next door to his office. He would use the tapes, record over them three times and then destroy the tapes. Although he never received an instruction to destroy the tapes, he considered that the inference to be drawn from the instruction to retain the tapes for one month was that they should be destroyed after that one-month period.