

**REPORT OF DESIGNATED JUDGE MADE PURSUANT TO SECTION 8(2) OF  
THE INTERCEPTION OF POSTAL PACKETS AND TELECOMMUNICATIONS  
MESSAGES (REGULATION) ACT, 1993**

**AND**

**SECTION 12(1)(C) OF THE COMMUNICATIONS (RETENTION OF DATA) ACT,  
2011.**

1. I am the designated judge for the purposes of the above Acts, and this report is furnished in the exercise of my statutory duties of keeping the operation of the legislation under review and of ascertaining whether its provisions are being complied with, by way of report to An Taoiseach, pursuant to s. 8(2) of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 (“the 1993 Act”), as amended by the Communications (Retention of Data) Act 2011 (“the 2011 Act”).
2. On the 22 June 2018, I attended at the Headquarters of An Garda Síochána, Phoenix Park, Dublin 8.
3. Later on the same day I attended at the Headquarters of the Defence Forces, McKee Barracks, Black Horse Avenue, Dublin 7.
4. Later again on that same day I attended at the office of the Revenue Commissioners at Ashtown Gate, Navan Road, Dublin 15. Revenue is a modest user of the powers under the legislation.
5. I attended at the offices of the Department of Justice and Equality on 26 June 2018.
6. As neither the Garda Síochána Ombudsman Commission (“GSOC”) nor the Competition and Consumer Protective Commission (“CCPC”) exercised any of the relevant powers in the period, I spoke to the nominated office by telephone in each case on 27 June 2018.

7. The CCPC informed me that consideration was given on one occasion to the use of the statutory powers, but on legal advice, the powers under the Acts were not availed of. The approach of the authorised officer was proportionate and meticulous in the circumstances.
8. At each location I met with officers and personnel responsible for the operation of the Acts. I examined computer records and hard copy files relating to the exercise of their functions by the respective officers.
9. I confirm that all documents and records which I requested were furnished to me without demur and questions answered to my satisfaction.
10. I am satisfied that the relevant persons responsible for the exercise of the powers under the Acts understood the nature and purpose of the functions with which they are entrusted, and that a critical filtering process is engaged with regard to the exercise of those functions. I am satisfied also that these persons exercised their functions in a manner that respected the privacy of the individuals concerned and that the exercise of the legislation was a proportionate response to the operation of the relevant legislative powers, which in my view were exercised reasonably and in circumstances where the exercise of those powers was relevant to an investigation.
11. I am also satisfied that any collateral intrusion into the privacy of others was respected.
12. I noted in particular the scrutiny with which applications were processed and I formed the view that the operation of the legislation was not formulaic.
13. My random sample of files confirmed this view.
14. I am satisfied that in each case there has been no unexplained increase in the number of warrants or an overzealous use of the powers in the Acts.
15. I did observe an increased number of warrants in respect of so-called "unknown" telephone numbers and this was adequately explained to my satisfaction as arising from the

fact that a practice has evolved amongst the subjects of warrants by which they routinely change phones and phone numbers.

16. Two matters require specific comment. I furnished a separate report dated 31 May 2017 to An Taoiseach in regard to the issue of allegation regarding the issue of warrants which did not satisfy the legislative criteria and I considered that although the issue was of some vintage the involvement of the designated judge was justified having regard to the fact that the matter had become one of public interest. I was satisfied following my investigation that there was no breach of procedures in that matter.

17. A concern arose in late 2017, following a report in the Irish Times and Irish Examiner newspapers, that Alan Kelly TD had raised a query that his telephone might have been intercepted. That matter was referred by the Minister for Justice and Equality directly to me and I discussed the matter at some length at that time with the relevant bodies.

18. I communicated my oral view at that stage that no breach of the legislation had occurred.

19. For the purpose of the preparation of this report I further interrogated the relevant persons regarding the suggestion that the telephone of Mr. Kelly might have been intercepted.

20. As a result of my investigation I am satisfied that no request for the interception of Mr. Kelly's telephone was made.

21. I personally conducted a search on the electronic database in the Department of Justice from 1993 to date using the search terms "Kelly", "Alan", and "Alan Kelly" and I am satisfied from those records that no warrant issued in respect of Mr. Kelly.

22. I also wish to point to the fact that some general concern was raised by the relevant bodies of the desirability of putting in place structures to deal with mistakes that might occur in the process, and to deal with the recommendations of the Murray Report.

23. It is a general view that the Act of 1993 is somewhat out of date having regard to data protection legislation, the difficulties posed by encrypted platforms, and that the changes in the


landscape in regard to privacy and data protection law in particular, and the changes in technology require to be dealt with to ensure a more effective and proportionate response to the balancing of the public and private interest in the exercise of the interception function.

24. As regards data retention legislation, whilst I want to note that the procedural and substantive guarantees provided for by the 2011 Act are properly observed and the relevant powers are exercised by the relevant officers in a sensitive and prudent manner, I must note that there is urgency in respect of the revision of the substantive provisions of the 2011 Act, as already suggested in the Murray Report.

25. In 2014, giving its judgment in the Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd. v. Minister for Communications, Marine and Natural Resources* ECLI:EU:C:2014:238, the Court of Justice of the European Union (“CJEU”) found that Directive 2006/24/EC on the Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Services or of Public Communications Networks (“the Data Retention Directive”), which was transposed into Irish law by the 2011 Act, is invalid.

26. In the 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*, the CJEU gave some more insights in relation to the compliance with privacy and data protection rights of national data retention legislation.

27. I must stress that the designated judge is in a somewhat difficult position in regard to the 2011 Act as a result of these determinations regarding the substantive foundation of the legislation.



**Ms. Justice Marie Baker**

**28<sup>th</sup> June, 2018**