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An Coiste um Dhlí agus Ceart

Tuarascáil maidir leis an nGrinnscrúdú Réamhreachtach ar Scéim Ghinearálta Bhille an Gharda Síochána (Cumhachtaí)

Meitheamh 2022

Joint Committee on Justice

Report on Pre-Legislative Scrutiny of the General Scheme of the Garda Síochána (Powers) Bill

June 2022

33/JC/21

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CATHAOIRLEACH'S FOREWORD

In June 2021, the Minister for Justice forwarded the General Scheme of the Garda Síochána (Powers) Bill to the Joint Committee on Justice in accordance with Standing Orders for the purpose of pre-legislative scrutiny of the General Scheme.

The Committee agreed to undertake pre-legislative scrutiny and has sought to scrutinise the proposed legislation and provide recommendations on areas where it believes change or amendments are warranted.

The Committee welcomes the introduction of this legislation, which aims to codify the powers held by An Garda Síochána (AGS), which is currently spread across several pieces of legislation, while ensuring that fundamental human rights of accused persons and citizens are respected.

Among the Heads identified by the Committee and witnesses for further examination include access to legal representation (Head 42); the practice of stop and search and related data protection concerns (Head 12); the proposals for applications for search warrant in urgent circumstances (Head 21); and powers under search warrant (Head 16).

The Committee has made these recommendations in the hope that they will assist the Minister for Justice in improving this important piece of legislation.

I would like to express my appreciation to all the witnesses for their contributions and to the Members of the Committee for their work on this subject. I hope that this report will help to inform the legislative process and make a valuable contribution to the forthcoming legislation.

James Lawless TD (FF) [Cathaoirleach]
June 2022

COMMITTEE MEMBERSHIP

Deputies

James Lawless TD (FF) [Cathaoirleach]

Jennifer Carroll MacNeill TD (FG) [Leas-chathaoirleach]

Patrick Costello TD (GP)

Michael Creed TD (FG)

Pa Daly TD (SF)

Brendan Howlin TD (LAB)

Martin Kenny TD (SF)

Thomas Pringle TD
(IND)

Niamh Smyth TD
(FF)

Senators

Robbie Gallagher
(FF)

Vincent P. Martin
(GP)

Michael McDowell
(IND)

Lynn Ruane
(IND)

Barry Ward
(FG)

Notes:
1. Deputies nominated by the Dáil Committee of Selection and appointed by Order of the Dáil on 3rd September 2020.
2. Senators nominated by the Seanad Committee of Selection and appointed by Order of the Seanad on 25th September 2020.
3. Deputy James O'Connor discharged and Deputy Niamh Smyth nominated to serve in his stead by the Fifth Report of the Dáil Committee of Selection as agreed by Dáil Éireann on 19th November 2020.

COMMITTEE RECOMMENDATIONS

The following recommendations were made by the Committee in relation to the topic:

1. The Committee recommends that the purpose of Head 42 be made clearer and that the Head be amended so that it is clear that the provision will not disrupt an individual's right to legal counsel. In particular 42(6) represents an undue attack on citizens legal representation. There are numerous authorities under both the European Convention on Human Rights and the Irish Constitution where it has been held that the right to legal representation whilst being investigated and interviewed is a fundamental right.

2. The Committee recommends that ethnicity should be recorded during stop and searches, in order to build a comprehensive data set of the ethnicity of people searched by an Garda Síochána (AGS).

3. The Committee recommends that the record of a search conducted under Head 12 should be in line with GDPR and with data retention legislation.

4. The Committee recommends that the Codes of Practice should be accompanied by a data protection impact assessment and that these codes should be transparent and available for the public to access.

5. The Committee recommends that the provision under Head 21 for senior Garda members to approve search warrants in urgent circumstances be removed and that it be clarified that only judges may grant search warrants to members of AGS.

6. The Committee recommends that Head 16 be amended to provide more limited circumstances in which Gardaí can compel individuals to provide their phones and personal data to Gardaí as part of a search warrant.

7. The Committee recommends that Head 43 (4) should be amended so that it is made clear that an individual under the age of 18 cannot waive their right to legal counsel.

8. The Committee recommends that consideration be given to introducing further provisions under Head 6, including the possibility of sanctions, where illegal searches are undertaken to ensure that Gardaí are aware of and compliant with their obligations to safeguard the fundamental rights of citizens. Consideration should also be given to a strengthening of the exclusionary rule in relation to illegally obtained evidence.

9. The Committee recommends that that Codes of Conduct under Heads 22 and 33 should include public consultation.

10. In parallel to the Committee's Recommendation of judicial oversight of all warrants (in Recommendation 5), the Committee recommends that extension of detention periods should ideally be done with judicial oversight. In line with the recommendations in many Reports from this Committee, additional resources be allocated to the Judiciary to enable this to provide this oversight.

CHAPTER 1 - Introduction

This is the report on Pre-Legislative scrutiny of the General Scheme of the Garda Síochána (Powers) Bill, which aims to consolidate and modernise police powers.[1]

Purpose of the Bill

The General Scheme of the Bill aims to consolidate the legislation in relation to policing powers, in order to create a system that is straightforward for Gardaí to use and is transparent in terms of the powers available to Gardaí and the rights of individuals in those circumstances.

Among the measures the General Scheme intends to create include, putting the Garda caution on a statutory basis; introducing the right for the accused to have their lawyer present during interviews; providing An Garda Síochána (AGS) and other bodies, who are carrying out a search warrant, with the power to require an individual to provide them with their passwords to access electronic devices; and introducing a requirement to make a written record of a stop and search.

Procedural basis for scrutiny

Pre-legislative consideration was conducted in accordance with Standing Order 173, which provides that the General Scheme of all Bills shall be given to the Committee empowered to consider Bills published by the member of Government.

[1] gov.ie - Garda powers to be modernised and updated under new Bill from Minister Humphreys (www.gov.ie)

Engagement with Stakeholders

The Joint Committee on Justice invited submissions from stakeholders on the General Scheme of the Garda Síochána (Powers) Bill.

On 8th December 2021, the Committee held a public engagement with several of these stakeholders, as laid out in the table below:

Table 1: List of public engagements with Stakeholders

Organisation	Witnesses
Ms. Clare Daly, MEP	Ms. Clare Daly, MEP
The Data Protection Commission (DPC)	Mr. Dale Sunderland, Deputy Commissioner Mr. Gary Russell, Assistant Commissioner
The Policing Authority	Mr. Bob Collins, Chairperson Ms. Helen Hall, Chief Executive
Department of Justice	Ms. Rachel Woods, Assistant Secretary, Criminal Justice Legislation Ms. Sarah Sheppard, Assistant Principal Officer, Criminal Justice Legislation

The primary focus of these meeting was to allow for an engagement between the Members and stakeholders to discuss possible areas of the General Scheme which may need to be amended.

This report summarises the engagements and the key points considered by the Committee when drafting the recommendations set out in this report.

A link to the full transcript of the engagement can be found here.

CHAPTER 2 - Summary of Evidence

In the course of the public hearing, a number of important points were raised. A summary of the main areas discussed in evidence to the Committee follows.

1. Access to legal representation (Head 42)

Members raised several serious concerns regarding the current formulation of Head 42. It was recommended that significant amendments be made to this Head and some Members recommended that this Head be removed entirely.

Much of the commentary surrounding this Head focused on Head 42 (6) and the phrasing of a solicitor being 'unduly disruptive' during an interview. Some Members disagreed with the tone of this subsection or the suggestion that lawyers are intending to be disruptive during interviews with clients. They did not believe that there are significant instances where solicitors are speaking over Gardaí and in fact, argued that solicitors they had spoken to found that they had very little opportunity to intervene during questioning. They pointed out that often the solicitor is put sitting behind the detained person, is not able to make eye contact with them and can only communicate legal advice to their clients in front of Gardaí, which is a difficult situation for a solicitor.

They said that they found it hard to imagine a situation in which a lawyer may be disruptive enough to warrant a decision by Gardaí to remove them completely from the interview.

Questions were raised about whether this Head as formulated is unconstitutional, as it was stated this would deny an individual of their right to legal counsel. Members questioned the benefit of Head 42 as it stands and requested that the Department of Justice could clarify the purpose behind Head 42.

In response, the Department clarified that Head 42 is the first time in legislation where it is stated that a legal representative can attend interviews, which had been

the practice for years but was not set out in legislation. Acknowledging comments made by Members and in relation to Head 42 (6), the Department stated that this section aims to address situations in which a solicitor may be talking over an individual, preventing the interview from being recorded properly.

They pointed out that An Garda Síochána (AGS) follow Codes of Practice, as do the Bar Council, in relation to the limited situations in which a solicitor should be excluded, if they are being deliberately obstructive during an interview process and that the Department had included this provision in the General Scheme at the request of AGS to do so.

The provision was not intended to exclude legal representatives, which would be a clear breach of jurisprudence.

The Department welcomed discussion around this Head and stated that this provision may change during the drafting process if the Head does not convey the purposes it is intended to.

Among the other points made in relation to Head 42 include:

- **Head 42 (1)**

It was asserted that the phrase stating that a custody officer shall “cause a legal representative to be notified ... as soon as practicable” could allow for a Garda to inform a solicitor that the detained person never asked for a solicitor, or that the detained person asked for a solicitor the first time but not again.

- **Head 42 (2)**

It was argued that this Head as currently phrased appears to exclude the time from when a detained person asks for a legal representative until the consultation between them is concluded from the detention period. This may allow a Garda to tell a detained person that consulting with their solicitor will extend their period of detention.

- **Head 42 (4)**

The phrase “If a legal representative cannot be contacted within a reasonable timeframe” may make it more difficult for a detained person to have the opportunity to ask for another legal representative. It may allow Gardaí more power to select solicitors that they may prefer to represent detained persons.

- **Head 42 (8)**

Members commented on Head 42 (8) which codifies the right of an individual to receive legal advice out of earshot of Gardaí. They stated that, as this provision does not stipulate that the consultation has to be out of visual range of Gardaí, in situations where a Garda may be able to lip-read or a sign language interpreter is required, the confidentiality of the consultation would be compromised.

It was argued that a detainee should be allowed consult with their legal advisor in a private room if they wished. Furthermore, witnesses pointed out that the right to meet a solicitor in private has been legislated for in European courts and also means a right to consult out of sight of police officials.

2. Stop and Search (Head 12)

Members raised several issues relating to Head 12 of the General Scheme.

Members questioned the general usefulness of stop and search as a practice, considering the detrimental impact that it can have on communities and community-policing relations. They asked witnesses whether this practice should be encouraged or discouraged based on statistical data from the UK which demonstrated that only 1% of stop and searches carried out end in arrests. They questioned whether statistics were available on how many search warrants are applied for and how many refused annually.

In response, witnesses from the Policing Authority agreed with the figures cited by Members and stated that there is little evidence to suggest that stop and search practices are an effective policing mechanism. They welcomed that this provision would be legislated for within the General Scheme as it will provide the opportunity to set limits to its powers.

However, the Authority underlined that the General Scheme should use this opportunity to ensure that stop and searches will record the nature and extent of stop and search instances, alongside recording the age, gender and ethnic indicators of those who are stopped and searched.

They highlighted that international research demonstrates the bias that is inherent in the selection process of stop and searches by police forces and that it must be assumed that the same occurs in Ireland. The Authority pointed out that An Garda Síochána (AGS) is the only agency that can perform stop and search and thus, are the only agency that have the ability to record such data. They emphasised that a lack of comprehensive ethnic data prevents an accurate assessment being made as to the level of bias that may influence members of AGS when carrying out these stop and searches.

Members agreed with recommendations that ethnic background be recorded in terms of stop and search and suggested that geographic and socioeconomic data should also be recorded, in order to have a map indicating the areas of towns or cities where people who are stopped and searched are from.

3. Data protection concerns within the General Scheme

Questions were raised surrounding the data protection concerns within the General Scheme. Witnesses stressed that the role of the DPC in navigating any data protection concerns within the proposed legislation is vital. It was pointed out that Head 12 must strike a balance in terms of competing data protection concerns. For example, this Head allows a record of stop and search to be destroyed after a certain period of time, which could be problematic in terms of transparency and accountability, however, GDPR also provides that people have a right for data belonging to them not to be retained indefinitely.

Questions were also raised regarding the collection and retention of data during a stop and search under Head 12. It was pointed out that while collecting such data may be made more complicated by the need to respect GDPR, it should not be used as a reason not to collect such data.

Members questioned on what basis it might be unlawful to collect disaggregated data during a stop and search or detention of an individual.

In response, the DPC clarified that such data can be collected, but it is a question of how this data is collected and how specific and clear the legislation will be. It was pointed out that under the *Data Protection Act 2018*, any legislation that will be enacted, which involves the processing of personal data for law enforcement purposes must specify the objective and purposes of the processing of personal data. This legislation must also meet standards of clarity, precision and foreseeability.

Therefore, in order for Head 12 to gather further data on ethnicity of those stopped, it would be important that the Head would be clear as to the reason this data will be collected and for what purpose it will be used. The legislation should provide a framework within which the purpose of this data collection is specified, so that any data gathered outside the remit of the framework would be classified as unlawful.

They added that the Codes of Practice will be important in this regard as they will dictate what data will be collected, how the data will be stored and retained, and how

a balance is going to be struck between an individual's right for his or her data to be protected and the legitimate uses to which they may be put.

The DPC recommended that legislation itself could contain the specific purposes for which the data will be gathered, while the Codes of Practice could address the method through which this will be achieved, allowing both elements together to provide the framework through which this data will be collected in a compliant manner.

The DPC recommended that the Department, the Oireachtas and AGS consider all elements of the powers granted to AGS that necessitate personal data being processed and include provisions to address this in the legislation or in the Codes of Practice.

They also recommended that the Codes of Practice should be accompanied by a data protection impact assessment and that these Codes should be transparent and made available for the public to access.

Members acknowledged the importance of data protection concerns being addressed throughout the General Scheme and questioned if the DPC's concerns had been raised with the Department at an earlier stage of the General Scheme's drafting.

The DPC responded that there is a statutory obligation under the GDPR and law enforcement directive that the DPC must be consulted on proposed legislation. They stated that the process of engaging with the Department has already begun and that usually they would provide their feedback on a General Scheme once the draft heads are prepared.

4. Application for search warrant in urgent circumstances (Head 21)

Members raised several of their concerns regarding Head 21.

Members asserted that they do not believe this Head can be justified, as they do not think there are any situations in which a District Court judge, peace commissioner or other suitable body could not be found to issue these warrants.

They argued that this Head puts Gardaí of particular ranks under pressure, as they may be expected to find reasons to justify actions taken by other Gardaí after they had approved search warrants for them. It was argued that judges would be hesitant to admit such warrants during a criminal trial and that it would be better for Gardaí to request a separate authority to approve these warrants aside from themselves.

Members questioned witnesses as to whether they considered there were circumstances where they thought a Garda of the rank of chief superintendent or higher could issue a search.

In response, witnesses highlighted that judges are on call over weekends and during the night. It was argued that judges are used to being contacted at all hours requesting urgent search warrants and that this avenue should be explored before calling upon a superintendent to issue a warrant. Several witnesses pointed out that the increased use of technology during the pandemic means that judges are now more accessible than previously and provides even less justification for members of AGS to be granted these powers.

The Policing Authority argued that their concerns with this Head did not stem from a fear of Garda members abusing the powers bestowed on them, but rather from a concern with bestowing powers on Garda members for which they are not specifically trained to use and that this puts Garda members in a difficult position.

They pointed out that the Law Reform Commission had recommended that search warrants should only be issued by the courts. They recommended that the provision be removed, and that if it was kept that only a Garda of the rank of chief superintendent should be allowed to grant them and that AGS should be required to publish on a quarterly basis and by division, the number of such warrants that were issued.

Members also highlighted that Ireland has a low number of judges per population, with 3 judges per 100,000 compared to the EU average of 21 per 100,000. It was argued that the funding of additional judges should be increased, but that the current low number of judges should not be used as an excuse to undermine citizens' rights through use of the powers under Head 21.

5. Powers under search warrant (Head 16)

Head 16 provides members of AGS, who are carrying out a search warrant, with the power to require an individual to provide them with their passwords to access electronic devices. Witnesses pointed out that this would grant them access to private information and passwords, which appears to breach data protection norms and fundamental rights.

It was pointed out that under the provision mobile phones can be counted as a 'computer' and it can be seized or the information within can be accessed, however, many people use their phone to store personal and sensitive data. An example was provided that if someone committed a minor offence like stealing a bar of chocolate, this could result in them being arrested for up to 24 hours. Under this provision, their phone, which may have private photos of family members or deceased relatives, could be accessed by Garda members during their period of detainment.

Witnesses pointed out that the Head as phrased is not clear as to whether a search warrant that is made in the name of a particular individual can only be carried out if the individual in question also attends, which they argued would be unnecessarily restrictive.

6. Questioning of an accused person prior to legal advice (Head 43)

Questions were raised surrounding the provisions under Head 43(4) and whether this would allow an individual under 18 to waive their right to legal representation.

The Policing Authority expressed their concerns with the possibility that someone under 18 may waive their right to legal representation, as it was argued they may not fully appreciate the situation in and the value and protection of legal advice in such a situation. An individual may also wish to leave custody as fast as possible and could believe that waiving their right to legal advice would help them to achieve this.

In response, the Department clarified that the General Scheme does not provide for people under the age of 18 to waive their right to legal advice.

The Authority highlighted their reluctance for any individual to be questioned prior to legal advice being available to them. It was acknowledged that some situations may warrant this, however, it was argued that these situations should be limited, otherwise it would undermine the benefit of Head 42 and the fact that it puts into statute the right to have legal representation while questioned.

7. Other suggested measures to strengthen the Garda Síochána (Powers) Bill

- **Positive elements of the General Scheme**

While critical of certain heads within the General Scheme, witnesses welcomed other provisions.

The introduction of the legislation in general was welcomed as it will codify the powers held by AGS, which was a recommendation from the Commission on the Future of Policing in Ireland (CoFPI).

It was commented that Head 42 marks the first statute that will provide an individual in custody with a right to legal representation (see Point 1).

In addition, the Policing Authority highlighted the positive and strong presence of the human rights of individuals within the General Scheme.

Witnesses and Members discussed other possible measures that could be included in the legislation to ensure that it is a robust and effective piece of legislation.

Among the measures suggested by witnesses include:

- **Obligation to respect fundamental rights (Head 6)**

Members raised questions surrounding Head 6 and the consequences of the breach of rights. They acknowledged that while there should be consequences to discourage Gardaí from undertaking illegal searches, however, they were conscious that if penalties or specific sanctions are laid down for a Garda who breaks rules, the unintended consequence might to discourage Gardaí from conducting searches.

Witnesses stated that while the General Scheme includes a general obligation to protect fundamental rights, it should go further and contain a provision for what happens if fundamental rights are not respected and a specific offence and penalty

should be introduced. They argued that it is important that such safeguards are put in place to ensure that Gardaí are compliant with their fundamental-rights obligations.

- **Arrest without warrant by member of the Garda Síochána (Head 23) and Arrest without warrant by other persons (Head 25)**

Deputies raised serious concerns in relation to Heads 23 (Arrest without warrant by member of the Garda Síochána) and 25 (Arrest without warrant by other persons).

The power of arrest for “an offence” in Head 23 needs far more clarification, as it currently could be said to cover a number of minor offences.

In the view of members, Head 25 could provide powers to bouncers and security guards far and above what they currently enjoy which could give rise to problems.

CHAPTER 3 - Summary of Submissions

This note summarises the key issues raised in the submissions received.

The Committee received submissions from the following Stakeholders.

- Data Protection Commission (DPC)
- Policing Authority
- Irish Council for Civil Liberties (ICCL)
- Mr. Mick Wallace MEP and Ms. Clare Daly MEP
- Dr. Vicky Conway

This briefing will focus on key issues identified in the submissions by

- Data Protection Commission (DPC)
- Policing Authority
- Mr. Mick Wallace MEP and Ms. Clare Daly MEP
- Dr. Vicky Conway

These submissions highlighted in particular, issues surrounding the powers of stop and search (Head 9) and the powers for search warrants (Head 16), further details that should be included when making a record of a search (Head 12) and issues in Head 42 surrounding the role of a solicitor and the broad scope that is currently provided to remove a solicitor from interviews.

1. Power to stop and search for possession of prescribed articles (Head 9)

The submissions highlighted the following key points, which will be discussed further below.

- *Stop and search powers can impact negatively on policing community relations and are a breach of privacy.*
- *Provision should be included that Gardaí will not exercise powers of stop and search in a discriminatory way.*
- *Head 9(2) should provide guidance on how to appropriately conduct intimate searches and should be mindful of searches involving suspects of the opposite gender, those with disabilities, and those with mental health issues among other factors.*
- *Head 9(6) paragraph F should be removed or amended to prevent against warrantless searches by Gardaí.*

Stakeholders highlighted their concerns with stop and search powers. It was stated that evidence has demonstrated that stop and search results in minimal charges and convictions but that these powers impact negatively on policing community relations and are a breach of privacy. It was recommended that these powers should be exercised cautiously, in a necessary and proportionate manner and should be subject to appropriate accountability measures.

Dr. Conway recommended that stop and search powers be terminated as they pose more disadvantages than advantages. However, if this were not possible, she made several recommendations for how to ensure these powers are utilised more reasonably**.** She argued that legislation should state that only factors surrounding possession of a weapon should be considered when deciding to conduct a stop and search, and that factors like age, gender, ethnicity, clothing among other factors should not influence this decision. She argued that there is too much discretion in terms of what might be considered a reasonable length of time to detain someone under this head and that guidance on appropriate time limits for detainment should be applied.

It was also recommended that this Head contain a specific provision providing that Gardaí will not exercise their powers of stop and search in a discriminatory way, particularly given the frequency of discriminatory stop and search practices internationally. This provision is important in terms of fundamental rights and to maintain public legitimacy in AGS.

It was highlighted that Head 9(2) must consider the need to protect an individual's privacy and it was noted that this Head does not provide guidance on what to do if an intimate search must be carried out. Submissions recommended that if this is required, a suspect should be arrested and brought to a Garda station for the search to be carried out and that clothing and outer clothing should not be removed in public. This Head should mandate that an individual's privacy must be respected when conducting a search and Gardaí should be particularly mindful when involving searches where the Garda member and suspect are different genders; searches involving those with disabilities; searches involving those with mental health issues; searches involving those whose first language isn't English; and to be mindful of religious dress, where relevant.

They suggested that these issues could be addressed in a Code of Practice under Head 13.

Other stakeholders stated that the current phrasing of 'relevant article' in Head 9(6) is too broad and places a responsibility on the Garda who stops an individual to ascertain the intention of a member of the public regarding this 'relevant article'. Submissions highlighted that Head 9(6)(6) paragraph F and the explanatory note listing 'computer hacking equipment' could, in theory, apply to a smartphone and allow AGS members extensive powers of warrantless search**.** It was recommended that paragraph F be removed or that a tighter definition of 'computer hacking equipment' be provided in the definitions section.

2. Record to be made of a search (Head 12)

The submissions highlighted the following key points, which will be discussed further below.

- *Subject to GDPR, records should include the ethnicity of the person stopped, to monitor non-discrimination in the application of Head 12.*
- *Records should include the names of Garda members present during the search, to ensure accountability.*
- *Reason for the collection and the use of the resulting data must be clearly described in the proposed Bill.*

Submissions recommended that statistics on the use of police stop and search powers should be published and highlighted that these records should also include additional details such as ethnicity of the person searched, to ensure equality and non-discrimination and to ascertain the impact of how this policy may impact on minority communities**.** Submissions highlighted a 2019 report examining Ireland, by the United Nations Committee on the Elimination of Racial Discrimination, which underlined the lack of statistics on racial profiling, the lack of legislation in this area and the lack of an independent complaints' mechanism regarding racial profiling incidents. It was acknowledged that any recommendation to record ethnicity must carry an appropriate legal basis and comply with GDPR requirements. Submissions recommended that explicit provisions in legislation could assist in creating a firmer legal basis under Article 6 of the GDPR. Other submissions pointed out that gathering such information for the above purposes can be seen as justifiable and may not breach GDPR.

The names of the Garda member conducting the search and other Gardaí present should also be recorded to ensure transparency and accountability in interactions and to facilitate any investigations arising if a complaint about said interaction is lodged. It was recommended that accessing these records should be automatic and should not be subject to a prior written request.

Stakeholders recommended that the DPC be consulted on relevant areas of Head 12, such as those pertaining to Codes of Practice. They should also be consulted regarding Head 12(5), to assist in finding a balance between maintaining records for enough time to ensure accountability or for statistical purposes, while safeguarding the right to privacy and ensuring that personal data is not kept indefinitely. It was also suggested that the destruction period for records should be stipulated in legislation, rather than in the codes of practice.

The DPC recommended that this Head should not be used to justify requesting personal data that AGS would not be entitled to by way of statute. The DPC also highlighted that the reason for the collection of the data and the scope of its use must be clearly described in the legislation.

3. Powers under search warrant (Head 16)

The submissions highlighted the following key points, which will be discussed further below.

- *Powers granted under Head 16 seem expansive.*
- *Insufficient protections against arbitrary exercise of these powers.*
- *Lack of precise rules as to the circumstances in which authorities can exercise these powers.*
- *Gardaí not mandated to separate relevant data from non-relevant data and the Codes of Practice will not be legally enforceable to mandate this.*

The DPC highlighted that the powers given under Head 16 seem expansive and the proposed legislation does not set out clear and precise rules as to the circumstances in which authorities can exercise these powers to request passwords and encryption keys. Stakeholders argued that this Head also does not protect against arbitrary use of powers and that it appears to provide Gardaí with an indiscriminate right to request passwords for electronic devices, with no stipulation as the seriousness of a situation that may warrant this or a need to judicial oversight to be sought first.

The DPC argued that the proposed legislation requires more clarity, precision and foreseeability to guide on the exact circumstances in which these powers can be exercised and to ensure that they are used in a proportionate and necessary manner.

In addition, it was argued that Head 16 poses a clear interference with an individual's right to a private life and transgresses consideration of human rights standards and that it will also interfere with an individual's right to data protection and transgresses European data protection norms.

It was commented that Head 16 does not possess adequate safeguards regarding sensitive information, such as information from journalists or public representatives, which may be in breach of the European Convention on Human Rights. There is also no provision for those subject to a demand for their passwords or access to their electronic devices to consult with a solicitor.

Of particular concern to stakeholders, was the fact that Head 16 also does not mandate Gardaí to attempt to separate data that may be evidence of a crime from other non-relevant data. This may result in Gardaí collecting a 'dump' of all data on an individual's electronic devices and could potentially expose the private and sensitive data of other individuals unconnected with this crime to the Garda members investigating this evidence. While a Code of Practice is intended to outline the processes and procedures of how to handle non-relevant material, it was highlighted that these will not be legally enforceable as it lacks a statutory footing.

It was recommended that subsection v of Head 16 should be removed entirely.

4. Application for search warrant in urgent circumstances (Head 21)

The submissions highlighted the following key points, which will be discussed further below.

- *Submissions highlighted their concerns with this Head and with the lack of evidence to justify its introduction.*
- *Some submissions recommended that this Head should be removed and the granting of search warrants should stay within the remit of the judiciary.*
- *If maintained, it was argued that greater safeguards under this Head are necessary, including strong internal oversight within AGS and retrospective judicial oversight.*

Stakeholders raised several concerns with Head 21. It was pointed out that the exclusion of judicial oversight permitted under this Head results in a weakening of citizens' rights and a weakening in oversight of this realm of policing. Submissions highlighted that they believe no evidence has been offered within the General Scheme as to why these powers are necessary for AGS and that currently, AGS appears to have sufficient time to contact judges regarding urgent search warrant applications.

It was stated that if this Head of the General Scheme is maintained, under the condition that it is only used in rare and exceptional circumstances, then the accompanying safeguards must be tightened.

Submissions suggested that, given the gravity of the powers involved, consideration should be given to allowing a member higher than the rank of superintendent to authorise these warrants. Internal oversight within AGS must also be strengthened to ensure oversight of the issuance of warrants and retrospective judicial oversight and reporting by AGS should also accompany this. It was argued that the retrospective recording of grounds for issuing a warrant under Head 21(6) is not an adequate safeguard and should be limited to adequate recording at the time the warrant was issued. Finally, given the potential for the misuse of this provision, it was recommended that disciplinary action should, at a minimum, result from the unjustifiable issuing of a warrant under this provision.

In arguments calling for the removal of Head 21, stakeholders highlighted that a report from the Law Reform Commission in 2015 did not recommend providing a member of AGS at superintendent level or higher the power to grant a search warrant. In addition, they believe that based on the LRC's report findings, the proliferation of remote working among the judiciary

better enables judges to deal with applications for a search warrant in urgent circumstances and lessens further the need for AGS members to be granted these powers.

5. Code of Practice on arrest (Head 33)

While the introduction of Codes of Practice for Head 33 was welcomed by stakeholders, several recommendations were made for how to improve these Codes, which are listed below.

- It was pointed out that the Scheme states that the Code of Practice will be drafted by the Commissioner but that it would be more appropriate for the Department of Justice to draft these as they would be given effect by way of a statutory instrument.
- It was recommended that a clear statement should be provided on the gathering of data to be published, as Ireland possesses no data on the annual number of people arrested or a geographical breakdown of where these arrests occur. This hinders the ability to plan for the needs of these individuals and to understand the demographics of those being processed through the criminal justice system and to try to prevent discrimination.
- The standards of interpreters should also be clarified under these Codes, as their role, employer and qualifications can be unclear.
- Submissions highlighted that the provision of medical support in Garda stations should be re-addressed under the Codes, and it was recommended that doctors and mental health staff should be retained in detention centres. It was pointed out that under the current system, GPs are contacted when there are medical issues, however this lacks transparency and wastes time waiting for the GP to arrive.
- Under Head 21(2) references are made to the Codes safeguarding children and 'vulnerable' persons. Submissions recommended that the term 'vulnerable' be defined and used consistently over the term 'impairment' and that sufficient detail needs to be provided under the Codes for these individuals.
- It was also recommended that Gardaí receive adequate training to ensure that arrests are undertaken in compliance with Human Rights standards and with Codes of Ethics.
- It was highlighted that Head 21(6-8), which allows for an amendment or revocation of these Codes of Practice, should ensure that any new development of Codes will include the same process of stakeholder consultation during their development, so that the views of key stakeholders are not weakened or omitted in any amended Codes.
- Submissions recommended that this Head be linked back to Head 5 to require that the Codes be statutory and be laid before the Houses of the Oireachtas by the Minister.

6. Access to legal representation (Head 42)

The submissions highlighted the following key points, which will be discussed further below.

- *Too much scope provided to allow a legal representative to be removed from interview.*
- *Head should be accompanied by a limiting criteria, high threshold and the requirement for an evidence base in order to remove a solicitor from interview.*
- *Role of a solicitor should be clarified and a consistent system introduced on how solicitors should be contacted.*

Stakeholders highlighted their concerns with subsection 6 and 7 of this Head, which they believe could allow Gardaí to remove a legal representative based on vague and subjective criteria of being disruptive. Use of this provision could breach an individual's constitutional right of access to a legal representative and right to a fair trial and goes against the principles of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. It was stressed that this provision should only exist and be utilised when there is a significant risk to security.

If this provision is maintained it was recommended that it be accompanied by limiting criteria and a high threshold, with any Garda using this provision required to submit an evidence base. Some submissions recommended that subsections 6-8 of this Head should be removed entirely.

Stakeholders recommended that providing greater clarity on the role of a solicitor and what they are entitled to do would limit the current amount of discretion with which a solicitor can be removed. For example, under the Head as currently phrased, it could be argued that a solicitor who advises their client to give no comment may be prejudicing an interview, even though this is within the right of the accused to remain silent. In the case of professional misconduct by a legal representative occurring, it was recommended that a report be made to the legal regulatory body for evaluation, rather than removing a legal representative from an interview.

Dr. Conway welcomed the legal provision for the right to access a solicitor and that this solicitor may be present during interview. She commented that many additional details are required, which can be addressed in the Codes of Practice, which will take the form of statutory

instruments. For example, there are currently two sets of guidelines from the Law Society and an Garda Síochána (AGS) addressing the role of solicitors, however this role and guidelines on what solicitors are entitled to do must be stated clearly. This includes guidance on the information that the solicitor is entitled to; the length and privacy of consultations; the safety of solicitors; and their right to engage interpreters to ensure confidentiality.

In addition, stakeholders argued that the requirement that a consultation should take place in front of Gardaí under Head 42(8) breaches the right of privacy under the European Convention of Human Rights. It was recommended instead that a call bell could be inserted into the consultation to protect a solicitor. In addition, a streamlined system should be introduced on how solicitors should be contacted to ensure consistency across Garda stations and to remove discretion from Gardaí when providing this information. Some submissions highlighted that it had been alleged that there had been improper practice in contacting solicitors and some situations where solicitors were contacted on a witnesses' behalf that were known to be less inclined to attend interviews or intervene in interviews.

APPENDICES

APPENDIX 1 - ORDERS OF REFERENCE OF THE COMMITTEE

Standing Orders 94, 95 and 96 – scope of activity and powers of Select Committees and functions of Departmental Select Committees

Scope and context of activities of Select Committees.

94.(1) The Dáil may appoint a Select Committee to consider and, if so permitted, to take evidence upon any Bill, Estimate or matter, and to report its opinion for the information and assistance of the Dáil. Such motion shall specifically state the orders of reference of the Committee, define the powers devolved upon it, fix the number of members to serve on it, state the quorum, and may appoint a date upon which the Committee shall report back to the Dáil.

(2) It shall be an instruction to each Select Committee that—

(*a*)it may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders;

(*b*) such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil;

(*c*) it shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Order 125(1)[2]; and

(*d*) it shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—

(i) a member of the Government or a Minister of State, or

(ii) the principal office-holder of a State body within the responsibility of a Government Department or

(iii) the principal office-holder of a non-State body which is partly funded by the State,

Provided that the Committee may appeal any such request made to the Ceann Comhairle, whose decision shall be final.

(3) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to

[2] Retained pending review of the Joint Committee on Public Petitions

consider a Bill on any given day, unless the Dáil, after due notice to the Business Committee by a Chairman of one of the Select Committees concerned, waives this instruction.

Functions of Departmental Select Committees.

95. (1) The Dáil may appoint a Departmental Select Committee to consider and, unless otherwise provided for in these Standing Orders or by order, to report to the Dáil on any matter relating to—

(*a*) legislation, policy, governance, expenditure and administration of—

(i) a Government Department, and

(ii) State bodies within the responsibility of such Department, and

(*b*) the performance of a non-State body in relation to an agreement for the provision of services that it has entered into with any such Government Department or State body.

(2) A Select Committee appointed pursuant to this Standing Order shall also consider such other matters which—

(a) stand referred to the Committee by virtue of these Standing Orders or statute law, or

(b) shall be referred to the Committee by order of the Dáil.

(3) The principal purpose of Committee consideration of matters of policy, governance, expenditure and administration under paragraph (1) shall be—

(*a*) for the accountability of the relevant Minister or Minister of State, and

(b) to assess the performance of the relevant Government Department or of a State body within the responsibility of the relevant Department, in delivering public services while achieving intended outcomes, including value for money.

(4) A Select Committee appointed pursuant to this Standing Order shall not consider any matter relating to accounts audited by, or reports of, the Comptroller and Auditor General unless the Committee of Public Accounts—

(a) consents to such consideration, or

(b) has reported on such accounts or reports.

(5) A Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Seanad Éireann to be and act as a Joint Committee for the purposes of paragraph (1) and such other purposes as may be specified in these Standing Orders or by order of the Dáil: provided that the Joint Committee shall not consider—

(a) the Committee Stage of a Bill,

(b) Estimates for Public Services, or

(c) a proposal contained in a motion for the approval of an international agreement involving a charge upon public funds referred to the Committee by order of the Dáil.

(6) Any report that the Joint Committee proposes to make shall, on adoption by the Joint Committee, be made to both Houses of the Oireachtas.

(7) The Chairman of the Select Committee appointed pursuant to this Standing Order shall also be Chairman of the Joint Committee.

(8) Where a Select Committee proposes to consider—

(a) EU draft legislative acts standing referred to the Select Committee under Standing Order 133, including the compliance of such acts with the principle of subsidiarity,

(b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,

(c) non-legislative documents published by any EU institution in relation to EU policy matters, or

(d) matters listed for consideration on the agenda for meetings of the relevant Council (of Ministers) of the European Union and the outcome of such meetings, the following may be notified accordingly and shall have the right to attend and take part in such consideration without having a right to move motions or amendments or the right to vote:

(i) members of the European Parliament elected from constituencies in Ireland,

(ii) members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and

(iii) at the invitation of the Committee, other members of the European Parliament.

(9) A Select Committee appointed pursuant to this Standing Order may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department consider—

(*a*) such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and

(*b*) such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select: Provided that the provisions of Standing Order 130 apply where the Select Committee has not considered

the Ombudsman report, or a portion or portions thereof, within two months (excluding Christmas, Easter or summer recess periods) of the report being laid before either or both Houses of the Oireachtas.[3]

3 Retained pending review of the Joint Committee on Public Petitions.

Powers of Select Committees.

96. Unless the Dáil shall otherwise order, a Committee appointed pursuant to these Standing Orders shall have the following powers:

(1) power to invite and receive oral and written evidence and to print and publish from time to time—

(a) minutes of such evidence as was heard in public, and

(b) such evidence in writing as the Committee thinks fit;

(2) power to appoint sub-Committees and to refer to such sub-Committees any matter comprehended by its orders of reference and to delegate any of its powers to such sub-Committees, including power to report directly to the Dáil;

(3) power to draft recommendations for legislative change and for new legislation;

(4) in relation to any statutory instrument, including those laid or laid in draft before either or both Houses of the Oireachtas, power to—

(*a*) require any Government Department or other instrument-making authority concerned to—

(i) submit a memorandum to the Select Committee explaining the statutory
Instrument, or

(ii) attend a meeting of the Select Committee to explain any such statutory instrument: Provided that the authority concerned may decline to attend for reasons given in writing to the Select Committee, which may report thereon to the Dáil,
and

(*b*) recommend, where it considers that such action is warranted, that the instrument should be annulled or amended;

(5) power to require that a member of the Government or Minister of State shall attend before the Select Committee to discuss—

(a) policy, or

(*b*) proposed primary or secondary legislation (prior to such legislation being published),

for which he or she is officially responsible: Provided that a member of the Government or Minister of State may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil: and provided further that a member of the Government or Minister of State may

request to attend a meeting of the Select Committee to enable him or her to discuss such policy or proposed legislation;

(6) power to require that a member of the Government or Minister of State shall attend before the Select Committee and provide, in private session if so requested by the attendee, oral briefings in advance of meetings of the relevant EC Council (of Ministers) of the European Union to enable the Select Committee to make known its views: Provided that the Committee may also require such attendance following such meetings;

(7) power to require that the Chairperson designate of a body or agency under the aegis of a Department shall, prior to his or her appointment, attend before the Select Committee to discuss his or her strategic priorities for the role;

(8) power to require that a member of the Government or Minister of State who is officially

responsible for the implementation of an Act shall attend before a Select Committee in relation to the consideration of a report under Standing Order 197;

(9) subject to any constraints otherwise prescribed by law, power to require that principal office-holders of a—

(*a*) State body within the responsibility of a Government Department or

(*b*) non-State body which is partly funded by the State,
shall attend meetings of the Select Committee, as appropriate, to discuss issues for which they are officially responsible: Provided that such an office-holder may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil;
and

(10) power to—

(*a*) engage the services of persons with specialist or technical knowledge, to assist it or any of its sub-Committees in considering particular matters; and

(b) undertake travel;

Provided that the powers under this paragraph are subject to such recommendations as may be made by the Working Group of Committee Chairmen under Standing Order 120(4)(*a*).'

APPENDIX 2 - LIST OF STAKEHOLDERS AND SUBMISSIONS

- Data Protection Commission
- The Policing Authority
- Irish Council for Civil Liberties (ICCL)
- Dr. Vicky Conway
- Ms. Clare Daly, MEP and Mr. Mick Wallace, MEP.

[Submissions are available in the online version of the Committee's Report, which will be accessible at https://www.oireachtas.ie/en/committees/33/justice/].

PWB_01

Written Submission Concerning the General Scheme of the Garda Síochána (Powers) Bill. Following Invitation from the Oireachtas Justice Committee.

1. The Data Protection Commission (DPC) welcomes the opportunity to provide a written submission to the Committee concerning the General Scheme of the Garda Síochána (Powers) Bill (the Bill). While the Bill gives rise to a broad range of issues from both a policy and legal perspective, the DPC limits its observations to matters relating to the processing of personal data and the requirements of data protection law.

Part 1 – Preliminary and General

2. **Head 2** provides definitions to be used throughout the Bill. It is noted that the list of definitions is not complete at the time of writing. It is difficult to provide full and informed observations without complete definitions of relevant terms in the Bill.

3. **Head 5** provides Regulation making powers. Regulations for elements of this Bill will be important in assisting AGS to uphold the data protection rights of individuals when exercising the powers contained within the Bill.

Part 2 – Protection of Fundamental Rights

4. **Head 7** provides that a member of AGS exercising any power in the Bill shall inform a parent or guardian of the use of that power before, or as soon as practicable, after the power was used. AGS should be aware of the child's data protection rights and right to privacy and have measures in place to ensure that the required information is provided to the correct person only. The DPC would consider Regulations essential for the purpose of this Head, in order to provide safeguards for children in relation to, inter alia, their data protection rights.

5. **Head 8** provides that a member of AGS can take whatever steps deemed necessary to safeguard the rights of a person of "impaired capacity". Any guidelines issued under this provision should also ensure that data protection rights are protected.

Part 3 – Stop and Search

6. **Head 12** provides that a member of AGS carrying out a search under **Heads 9** or **10** shall make a record of the search. It is noted that the record shall contain the following information:
    1. Name, address and date of birth of the person searched (where known)
    2. Time and date of search
    3. Reason for the search
    4. The power used to conduct the search
    5. The outcome of the search
    6. Other information required by a Code of Practice to be written

7. It is noted that the requirement to record name, address and date of birth is *where known*. It will be important to ensure that this Head is not used to justify demanding personal data that AGS is not entitled to by way of statute. The DPC would recommend that **Heads 9, 10** and **12** are linked to the **Head 67** power to require provision of name, address and date of birth explicitly within the Heads or in the Code of Practice, in order to inform the public of circumstances where giving their name, address and data of birth would not be required.

8. It is also noted that the location of the search is not mentioned in the Head. Including such a provision may assist members of the public when seeking a copy of the search record as provided for in **Head 12(3)** where they have not provided identifying information at the time of the search

9. The DPC notes from the press release accompanying the Bill, that the stated reason for the collection of this search record data is to allow for the assessment of the effectiveness and use of the search powers in the Bill[1]. However, the reasons for the collection of the data and the scope of use are not given in the Bill.

10. If the data are to be collected for the purpose of assessing the effectiveness of the use of powers in the Bill, this collection of data may fall under GDPR. Article 5(1)(b) GDPR outlines that "personal data collected shall collected for specified, explicit and legitimate

[1] https://www.gov.ie/en/press-release/6ed9f-garda-powers-to-be-modernised-and-updated-under-new-bill-from-minister-humphreys/

purposes, and not further processed in a manner that is incompatible with those purposes". The other data protection principles would also apply. Therefore, the DPC would expect the reason for the collection and the use of the resulting data captured would be described in the resulting Act.

11. The DPC notes that **Head 13** provides for a Code of Practice for searches carried out under **Heads 9** and **10**. The DPC is available for consultation on the data protection aspects of the implementation of **Head 12** that may be addressed in such a Code of Practice.

Part 4 – Search of Premises

12. **Head 16** provides the powers available to a member of AGS, a designated officer of the Office of the Director of Cooperate Enforcement, or an authorised officer of the Competition and Consumer Protection Commission, when conducting a search pursuant to a search warrant. Such persons executing the warrant must be named upon it.

13. Such powers include the power to require any person on a premises at the time the warrant is executed to provide passwords and encryption keys to computers (including mobile phones).

14. The DPC understands the nature of investigations and the seeking of evidence. The DPC acknowledges that the power to require passwords only relates to searches carried out pursuant to a search warrant, and not to searches carried out pursuant to **Heads 9** and **10**. However, the powers described are expansive.

15. The Law Enforcement Directive requires that where processing of personal data is based on Member State Law, that Member State Law must regulate the processing. In addition to specifying the objectives of processing, the personal data to be processed and the purposes of the processing, the Member State Law must also meet the standards of clarity, precision and foreseeability as required by the case-law of the Court of Justice and the European Court of Human Rights. This requires that the Member State Law must afford adequate legal protection against arbitrariness and bring clarity to the scope of any discretion conferred on public authorities by that law.

16. These requirements derive not only from legislation but from the fundamental rights to privacy and data protection guaranteed under Articles 7 and 8 of the Charter of Fundamental Rights and Article 8 of the European Convention on Human Rights. The Court of Justice of the European Union held in Case C-362/14 Schrems v Data Protection Commissioner, EU:C:2015:650 (at paragraph 91) that:

    i. *As regards the level of protection of fundamental rights and freedoms that is guaranteed within the European Union, EU legislation involving interference with the fundamental rights guaranteed by Articles 7 and 8 of the Charter must, according to the Court's settled case-law, lay down clear and precise rules governing the scope and application of a measure and imposing minimum safeguards, so that the persons whose personal data is concerned have sufficient guarantees enabling their data to be effectively protected against the risk of abuse and against any unlawful access and use of that data. The need for such safeguards is all the greater where personal data is subjected to automatic processing and where there is a significant risk of unlawful access to that data (judgment in Digital Rights Ireland and Others, C-293/12 and C-594/12, EU:C:2014:238, paragraphs 54 and 55 and the case-law cited).*

17. These principles have been reaffirmed in the Court of Justice's judgment of 6 October 2020 in Joined Cases C-511/18, C-512/18 and C-520/18, Quadrature du Net (at paragraph 132) and its judgment of 2 March 2021 in Case C-746/18, Prokatuur (paragraph 48) where the Court stated that, in order to satisfy the requirement of proportionality:

    ii. *.....the legislation must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards, so that the persons whose personal data is affected have sufficient guarantees that data will be effectively protected against the risk of abuse. That legislation must be legally binding under domestic law and, in particular, must indicate in what circumstances and under which conditions a measure providing for the processing of such data may be adopted, thereby ensuring that the interference is limited to what is strictly necessary.*

18. The expansive nature of **Head 16** does not appear to set out sufficiently clear and precise rules regarding the requirement to provide passwords and encryption keys. Furthermore, there does not appear to be any provision to protect against arbitrary or indiscriminate interferences with the right to data protection in respect of the use of this power. The DPC would expect more clarity, precision and foreseeability in the Bill as to the circumstances in which and the conditions on which the authorities can exercise such envisaged powers concerning passwords and encryption keys in order to ensure that the powers are limited to what is necessary..

19. The DPC notes the provisions in **Head 19** regarding the potential seizing of *privileged material*. The DPC would expect the Code of Practice in **Head 22** to describe, in detail, the procedure to be undertaken by the person executing the warrant when privilege is claimed or inferred. Such provisions are particularly relevant when using powers under **Head 16** to examine computers and require passwords.

20. **Head 22** provides for a Code of Practice for search warrants. The DPC notes that safeguards for children and procedures for dealing with privileged information are included. The DPC would recommend that the issues raised in this submission are also considered in this context.

Part 6 – Persons in Garda Custody

21. **Head 51** provides the power to take photographs, fingerprints and palm prints of an arrested person. This is a power already contained in section 6 of the Criminal Justice Act, 1984, the retention of which is outlined in section 103 of the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014. It is unclear if this Bill will repeal these sections. The DPC recommends that the Bill either references the previous sections or includes reasons for retention and circumstances for destruction. Such provisions may be required to comply with the provisions of Part 5 of the Data protection Act and Article 8 of the Law Enforcement Directive (LED).

22. The DPC notes that **Head 64** provides for a Code of Practice for custody and detention, including, but not limited to the retention, disclosure and destruction of the custody record at **Head 50**. The DPC would also recommend that such a Code of Practice include specific provisions for the type of equipment, security, retention and provision of the

digital recording of interviews conducted with reference to **Head 60**, and related matters pursuant to **Head 61**.

Data Protection Commission

July 2021

AN TÚDARÁS PÓILÍNEACHTA
POLICING AUTHORITY

Policing Authority Submission to the Joint Oireachtas Committee on Justice

Garda Síochána (Powers) Bill

5 August 2021

Policing Authority submission to the Joint Oireachtas Committee on Justice on the Garda Síochána (Powers) Bill

1. Introduction

1. The Authority welcomes the opportunity to make this submission to the Joint Oireachtas Committee on Justice, on the General Scheme of the Garda Síochána (Powers) Bill (the Bill). It is noted at the outset that the codification of powers presents a once in generation opportunity to carry out a more comprehensive and holistic assessment of the legislative provisions, rather than simply a mechanistic approach to consolidating existing powers.
2. The Authority made a number of submissions to the Department of Justice at earlier stages of the legislative process and it welcomes the fact that many of the observations it provided have been adopted in the latest iteration of this Bill.
3. It must be stressed that these powers allow for a significant infringement on the rights and liberties of the public and should be subject to significant scrutiny in their formulation, and ongoing oversight of their use by, the Garda Síochána and its personnel must be subject to public account. Additionally, the use of police powers represent heightened risks for the more vulnerable in society. These two themes are reflected in the observations on individual heads in section 2 below.

2. Observations on Individual Heads

Head	Authority comment
Part 1 – Preliminary and General	
Heads 1-4	No comments
Head 5 Regulations	In previously providing observations in earlier stages of the development of this Bill, the Authority outlined the requirement for Codes of Practice to capture those necessary requirements in exercising powers which may not be suitable for inclusion in primary legislation. The Authority welcomes the inclusion of Codes of Practice and provides observations on codes specified under the relevant heads of this Bill. While Head 5 seems to be clear that Codes of Practice are Statutory, it would be important to link the Codes of Practice referred to throughout the Bill to Head 5 to ensure that there is clarity about their status as statutory codes.
Part 2 - Protection of Fundamental Rights	
Head 6 Obligation to respect fundamental rights	- The Authority generally welcomes the inclusion of this head, but further consideration should be given to its wording. Under subhead (1) “due regard” may be strengthened with the word “protect”. Furthermore the removal of “only when necessary to achieve a legitimate objective, when provided for by law” and “proportionate to the objective to be achieved” from previous drafts would appear to be a regression. - Subhead (2) makes reference to “inhuman or degrading treatment” but should

Head	Authority comment
	also include reference to "torture" and definitions of these should be included.
Head 7 Protection of the rights of children	Particular consideration must be given to children due to their heightened vulnerability and bearing in mind their physical, emotional, mental and intellectual maturity. Similar is true for vulnerable adults. While this head and Head 8 make provision for this, as do the Codes of Practice, such considerations are not as pervasive throughout the Bill as might be optimal for safeguarding these individuals.
Head 8 Protection of the rights of persons with impaired capacity	The Authority welcomes the possibility to include protections for persons with impaired capacity. However, subhead (2) should be further developed to include consultation with key stakeholders, including the Authority, in developing the guidelines, similar to the process employed in developing Codes of Practice elsewhere in the Bill.
Part 3 - Stop and Search	
Head 9 Power to stop and search for possession of prescribed articles	- In its observations at previous stages of the legislative process, the Authority noted that the evidence of effectiveness of stop and search powers is limited and they have the potential to negatively impact society and relations between the Garda Síochána and communities. They need to be cautiously exercised in a necessary and proportionate manner and must be subject to appropriate accountability mechanisms. - Under subhead (2) due regard needs to be given to the protection of a person's privacy. In its previous submission, the Authority noted the lack of detail on intimate searches, and that if a more intimate search is required, an arrest should be carried out if required and the suspect brought to a Garda station where the search can be carried out. Further, particular attention should be given to searches involving gender differences between the Garda member and suspect, persons with disabilities, persons with mental health issues, persons whose first language is not English or Irish, and children. Religious dress may also be a consideration. The specifics of this requirement may be suitable for inclusion in a Code of Practice under Head 13.
Head 10	No comments
Head 11 - Right to be informed of the reason for a search	The steps introduced in this head are welcome. However, in addition to the information provided, there should be an obligation on garda members to inform the person being searched that a record will be created and be accessible to the person, as provided for under Head 12.
Head 12 – Record to be made of a search	- In addition to those details recorded of the person being searched, the record should also include the name of the garda member conducting the search and the names of any other members present. This would be of benefit in ensuring transparency and accountability in interactions and facilitate investigations in complaints processes.

Head	Authority comment
	- The accessibility of a record under subhead (3) should be automatic and not subject to the submission of a written request. - There is an opportunity under this head and in the recording of other uses of police powers, which has not been capitalised upon, to pave the way for accurate recording of ethnicity, which will allow for oversight of and ensure equality and non-discrimination. Furthermore, in the context of a changing Ireland, a complete understanding of how legislation or policy can affect various sectors within the population requires such reporting. - In the 2019 'Concluding Observations' of its examination of Ireland, the United Nations Committee on the Elimination of Racial Discrimination expressed: *"concern about the reportedly high incidence of racial profiling by the Gardaí (the police) targeted at people of African descent, Travellers and Roma and the disproportionately high representation of these ethnic minority groups in the prison system. It is also concerned about the absence of legislation proscribing racial profiling, the absence of independent complaint mechanisms dealing with racial profiling and the lack of statistics on racial profiling. The Committee regrets the lack of detailed information on legislative, disciplinary or other measures taken by the State party to prevent, prohibit and monitor ethnic profiling by the police force"*. - The Authority understands that the Garda Síochána needs to identify an appropriate legal basis to record ethnicity and to ensure compliance with General Data Protection Regulations (GDPR), which afford additional protections to such sensitive personal data. Express provision in legislation may assist in creating a firmer legal basis under Article 6 of the GDPR.
Head 13 - Code of Practice on searches	- The Authority welcomes the provision for introducing Codes of Practice in relation to the use of stop and search powers and welcomes that its earlier observations were adopted in this regard. - An element which might be included in the Code is the provision of training for garda personnel, to ensure that stop and search is carried out in a manner which is compliant with Human Rights and the Code of Ethics. - The involvement of key stakeholders as consultees in the development of this Code is welcomed, however Subheads (7) to (9) provide for amendment or revocation of this Code without explicit provision for the same consultative process. This may allow for the views of key stakeholders to be diluted or excluded and it should be clarified that they are statutory codes and the same process should apply for change or revocation. - It would seem important to link the Code of Practice back to Head 5 which seems to clearly require the Codes to be statutory and laid before the Oireachtas by the Minister.

Policing Authority submission to the Joint Oireachtas Committee on Justice on the Garda Síochána (Powers) Bill

Head	Authority comment
Part 4 – Search of premises	
Heads 14 to 17	No comments
Head 18 – Right to be informed of search	- Under subhead (1) provision is made to show a copy of the warrant to the occupier of the place named in the warrant. In the interests of transparency, it is recommended that the occupier should be given a copy at the time of exercising the warrant rather than solely shown it. - The occupier should also be provided with details on the grounds for issuing the warrant and the relevant details on the warrant should be clear and understandable. - Furthermore, the occupier should be provided with adequate time to read the warrant in advance of the search being carried out, provided there is no risk to the investigation or risk of the search being compromised.
Heads 19 and 20	No comments
Head 21 – Application for search warrant in urgent circumstances	- This head allows for the issuance of a warrant by a superintendent or higher rank in the case of urgent circumstances, excluding judicial oversight in the warrants process. It represents a weakening of both citizens' rights and weakening of oversight of this area of policing. There has been no evidence provided for the requirement for this provision and it would appear that the Garda Síochána presently have timely access to judges for search warrants to be granted, while maintaining sufficient oversight. If it is accepted that the rationale for such provision is for rare and exceptional circumstances, the provisions in this head are not sufficiently prescriptive and do not contain sufficient safeguards and controls. - In the event that such a provision is retained, given the exceptional nature of such a warrant, it might be considered if a rank higher than superintendent may be considered for the authorisation of such a warrant. Furthermore, provision should be included for greater oversight of the issuance of such warrants, through strong internal oversight within the Garda Síochána and, at a minimum, retrospective judicial oversight and reporting by the Garda Síochána. - The retrospective recording of the grounds for issuing a warrant under this provision in subhead (6) is not an adequate control and should be limited to accurate and adequate recording at the time of issuing the warrant. - While it is accepted that disciplinary action may be provided for in the relevant Code of Practice under Head 22, given the scope for misuse of this provision, disciplinary action at a minimum should be specified for unjustifiable issuing of warrant under this provision.
Head 22 Code of Practice on search warrants	- The Authority welcomes the provision for introducing Codes of Practice in relation to the use of search warrants and welcomes that its earlier observations were adopted in this regard.

Head	Authority comment
	- Under subhead (2) there is reference to the Code having safeguards for children and "vulnerable" persons. Vulnerability is not defined in the Bill and appears to have been left out in favour of the term "impairment". For the purposes of consistency, this may require amendment. - An element which might be included in the Code is the provision of training for garda personnel, to ensure that arrests are carried out in a manner which is compliant with Human Rights and the Code of Ethics. - The involvement of key stakeholders as consultees in the development of this Code is welcomed, however Subheads (6) to (8) provide for amendment or revocation of this Code without explicit provision for the same consultative process. This may allow for the views of key stakeholders to be diluted or excluded and it should be clarified that they are statutory codes and the same process should apply for change or revocation. - It would seem important to link the Code of Practice back to Head 5 which seems to clearly require the Codes to be statutory and laid before the Oireachtas by the Minister.
Part 5 – Arrest	
Head 23 to 32	No comments
Head 33 Code of Practice on arrest	- The Authority welcomes the provision for introducing Codes of Practice in relation to the use of arrest powers and welcomes that its earlier observations were adopted in this regard. However in common with other proposed Codes of Practice in the Bill there are a number of issues worthy of further consideration. - Under subhead (2) there is reference to the Code having safeguards for children and "vulnerable" persons. As per observations on previous heads, vulnerability is not defined in the Bill and appears to have been left out in favour of the term "impairment". For the purposes of consistency, this may require amending. - An element which might be included in the Code is the provision of training for garda personnel, to ensure that arrests are carried out in a manner which is compliant with Human Rights and the Code of Ethics. - The involvement of key stakeholders as consultees in the development of this Code is welcomed. However Subheads (6) to (8) provide for amendment or revocation of this Code without explicit provision for the same consultative process. This may allow for the views of key stakeholders to be diluted or excluded and it should be clarified that they are statutory codes and the same process should apply for change or revocation. - It would seem important to link the Code of Practice back to Head 5 which seems to clearly require the Codes to be statutory and laid before the Oireachtas by the Minister.

Head	Authority comment
Part 6 – Persons in Garda Custody	
Head 34	No comments
Head 35 Custody Officer	In previous iterations of the Bill, the term "member in charge" was used. The Authority has noted the importance of the role of "member in charge" in previous commentary in relation to this Bill and other areas of its oversight work. The use of the term Custody Officer does not diminish this importance, as this person will be responsible for safeguarding those held in garda facilities. As per its previous submission, it is the Authority's view that this role should be restricted to a minimum rank, should have specific training requirements, including the need for Continuous Professional Development (CPD) and should be held accountable for performing their function of protecting the rights of the detainee.
Head 36 to 39	No comments
Head 40 Access to Medical Attention	- Subhead (1) of this head only provides for a member of the Garda Síochána to determine if medical assistance is required. There may be benefit to extending this to third parties including solicitors and relatives. There may also be benefit in extending this to relevant professionals who may be present in the context of increased multi-agency work which is anticipated through Policing Service for the Future reforms. - The current rigidity of subhead (2) would appear to undermine the determination of a medical professional in assessing whether a person in garda custody is fit for questioning. It is conceivable that a detainee would be ill or otherwise impaired and not require hospitalisation but that their illness or impairment would extend beyond a fixed time period, and that continuing to question such an individual may affect their ability to participate in an interview and would not be in the interests of their welfare. - In the context of mental health, criteria as to what constitutes fitness for questioning should also be established to ensure the welfare of those held in garda custody. Each case should be evaluated by medical professionals with sufficient training in mental health issues, and in the context of the length and conditions of detention and interview and the nature of the questioning. Provisions regarding fitness to be tried contained under Section 4 of the Criminal Law (Insanity) Act 2006 may be a suitable example for developing similar criteria for fitness to be questioned.
Head 41	No comments
Head 42 Access to Legal Representation	- The provisions under subhead (6) and (7) are deeply concerning as they effectively provide a member of the Garda Síochána to exclude a legal representative based on subjective criteria. It effectively removes a person's choice as to which legal representative they wish to have represent them.

Head	Authority comment
	- If such a provision is to be retained, it should be accompanied by very strict and limiting criteria, with a high threshold and with a requirement for an evidence base on the part of a garda member using this provision. In the event of alleged professional misconduct of legal representatives by garda members, a report should be made to the relevant legal regulatory body for professional evaluation, but such an allegation should not be used as justification for removing a legal representative from an interview. This provision should only exist and legal representatives should only be removed where there is a significant risk to security.
Heads 43 to 58	No comments
Head 59 Custody Record	As per previous observations on recording, provision should be included for the recording of ethnicity.
Heads 60 to 63	No comments
Head 64 Code of Practice on custody and detention	- The Authority welcomes the provision for introducing Codes of Practice in relation to the custody and detention and welcomes that its earlier observations were adopted in this regard. - An element which might be included in the Code is the provision of training for garda personnel, to ensure that stop and search is carried out in a manner which is compliant with Human Rights and the Code of Ethics. - There is an absence of explicit mention of the particular safeguards to apply when the person is a child or a person with impaired capacity, despite these being present in other Codes of Practice in this Bill. Consideration should be given to specifying the need for such particular safeguards under this head. - The involvement of key stakeholders as consultees in the development of this Code is welcomed, however Subheads (9) to (11) provide for amendment or revocation of this Code without explicit provision for the same consultative process. This may allow for the views of key stakeholders to be diluted or excluded and it should be clarified that they are statutory codes and the same process should apply for change or revocation. - It would seem important to link the Code of Practice back to Head 5 which seems to clearly require the Codes to be statutory and laid before the Oireachtas by the Minister.
Head 65 to 68	No comments

PWB_03(1)

Irish Council for Civil Liberties

ICCL Submission on the General Scheme of the Garda Síochána (Powers) Bill

August 2021

Executive Summary

ICCL welcomes the codification of the powers of search, arrest and detention in this Bill. The Bill offers the opportunity to provide much needed clarity, consistency and transparency regarding the scope and use of these powers by An Garda Síochána. It also offers the opportunity to ensure that police powers in Ireland conform strictly to human rights law and standards, in particular on the rights to liberty and freedom of movement, privacy, bodily integrity, equality and non-discrimination, and the right to a fair trial. It is well established by human rights law that interferences with these rights must be prescribed by law, necessary in a democratic society and proportionate to a legitimate aim. We welcome the many references to human rights and the requirement for necessity and proportionality in the exercise of police powers throughout the Bill.

However, ICCL urges government to ensure that the opportunity to ensure the exercise of police powers in this country conforms with the highest standards of human rights law is not missed. We recommend that the scope and use of powers are as limited as possible to achieve criminal justice aims and we recommend that the Bill contains more robust safeguards to protect all individuals against disproportionate interferences in their fundamental rights.

Our submission outlines our concerns on a Head to Head basis, as summarized below:

On **Head 2** we recommend the amendment of the definition of 'reasonable suspicion' to reflect relevant case law, in particular to include that the grounds, when judged objectively, are fair and reasonable.

On **Head 6**, we recommend amending the provision on the obligation to respect fundamental rights to make it more meaningful by setting out in detail how it will be implemented, such as by providing for human rights training for all members of AGS.

On **Head 7 and 8**, we recommend that the legal and policy framework should provide more clarity on the exercise of police powers in relation to children and more safeguards for persons with impaired capacity generally. And we recommend wider consultation when developing guidelines and regulations under these Heads.

On **Head 11, 12 and 13** in relation to search powers, we recommend that gender, ethnicity and other protected characteristics are included in the record of stop and searches, as well as the geographic location of where the search is taking place. We

recommend the provision of additional information, a requirement of consent where there is no arrest, and specific limitations on the scope of a search.

On **Head 14 and 15**, we recommend that judicial approval should always be sought for the search of a premises and we recommend the removal of the provision that a superintendent can issue a search warrant. We recommend adding additional safeguards, in line with the ECHR, to protect journalists' freedom of expression in respect of the issuing of and use of search warrants, in particular in the context of the right to keep sources anonymous.

On **Head 16**, we strongly recommend the removal of the power to compel a password as part of powers that can be exercised under the general search warrant provision. We recommend that AGS members should be required to seek a separate warrant to seek permission to look into a person's device or obtain data from a phone company to track a device. We underline the dangers underpinning this provision in light of ongoing failures by AGS to conform with data protection law, as identified by the Data Protection Commission, and in light of developing technology that can capture a person's most intimate private life, such as Alexa and Siri technology.

Under **Head 19,** we recommend the removal of the provision that privileged material can be seized provided that this is done by means whereby the confidentiality of the material can be maintained pending the determination by the court of the issue as to whether the material is privileged material. We consider this would potentially constitute an unbalanced and far-reaching power that is unnecessary and could be a disproportionate interference with the right to privacy.

Under **Head 23 to 28,** ICCL expresses its opposition to the creation of a power of arrest without warrant for non-serious offences. ICCL recommends maintaining the current position that the power of arrest without warrant should only apply to serious offences.

We recommend narrowing the definition of the breach of the peace to ensure clarity and accessibility, referencing penalties, and distinguishing between serious and minor breaches of the peace.

Under **Head 35**, we believe it should be specified that the custody officer role should be carried out by someone of a minimum rank to reflect the importance of this role, and there should be specific training for the role.

Under **Head 38-47**, among others, we recommend the removal of the provision allowing for police questioning of an accused person prior to legal advice; the removal

of restrictions on access to a lawyer during police questioning; guarantees that access to a legal representative is facilitated in private; and the removal of the possibility for extending detention periods beyond 24 hours as a 24 hour limit for detention is appropriate for the vast majority of crimes.

Under **Head 61** we recommend better oversight of garda detention, including the ratification of the UN Optional Protocol to the Convention against Torture.

Under **Head 65**, we call for more safeguards around the use of lethal force and call on government to remove the provision introducing a general offence for obstruction and, alternatively, we call for the penalty for this new offence to be appropriate and reasonable.

Under **Head 68**, we strongly recommend the removal of the provision relating to the admissibility of evidence. We consider that questions of admissibility should remain firmly with the Courts.

Finally, we recommend a periodic review of the Act should be enshrined within the legislation.

Introduction

1. ICCL welcomes the opportunity to make a submission on the Garda Síochána (Powers) Bill, published on 14 June 2021.[1] ICCL previously made a submission to the Department of Justice and Equality on the codification of police powers of arrest, search, and detention in May 2020. ICCL reiterates its belief that codifying these powers in statute will provide much needed clarity, consistency and transparency regarding the scope and use of these powers. Legislating in this area also represents an opportunity to ensure that police powers are in line with Ireland's human rights obligations.

2. This submission sets out the relevant legal framework and then examines each part of the Bill. The Bill is divided into seven parts - Preliminary and General; Protection of Fundamental Rights; Stop and Search; Search of Premises; Arrest; Persons in Garda Custody; and Miscellaneous Provisions. Then it examines provisions for codes of practice and highlights the need to incorporate a periodic review of the Bill. Finally, it makes recommendations to strengthen safeguards in the Bill and the Bill generally.

Relevant Legal Framework

3. There is a need for a human rights-based approach to policing. ICCL has consistently called for this.[2] The Commission on the Future of Policing in Ireland's (CoFPI) highlighted that "Human rights are the foundation and purpose of policing."[3] The State is required to ensure that the actions of An Garda Síochána (AGS) comply with human rights law and standards, which are protected by the Irish Constitution, the European Convention on Human Rights (ECHR), the European Charter of Fundamental Rights and Freedoms and the UN human rights treaties that Ireland has ratified. AGS has a statutory duty to promote equality, eliminate discrimination, and protect the human rights of members, staff, and the persons to whom they provide services.[4]

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[1] This submission was written by ICCL policy officer Elizabeth Carthy with additional input from ICCL Head of Legal and Policy Doireann Ansbro, ICCL policy officer Olga Cronin and ICCL fellow Gemma McLoughlin-Burke.

[2] See for example, Alyson Kilpatrick, ICCL, *A Human Rights Based Approach to Policing in Ireland*, 2018.

[3] Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland*, 18 September 2018.

[4] Irish Human Rights and Equality Commission Act 2014, section 42.

4. Where a Garda exercises the power of search, arrest or detention they are interfering with an individual's rights, including the right to liberty and freedom of movement, right to privacy, right to bodily integrity, right to equality/non-discrimination, and the procedural rights that form part of the right to a fair trial. It is well established by human rights law that interferences with these rights must be prescribed by law, necessary in a democratic society and proportionate to a legitimate aim. There is a need to include specific safeguards in the exercise of these police powers to ensure compliance with human rights law.

Part 1 of the Bill: Preliminary and General

5. This part contains some preliminary and general provisions, including setting out relevant definitions.

Head 2

6. Head 2(2) contains a definition of reasonable suspicion. ICCL previously recommended that a statutory definition of reasonable suspicion should be included in this legislation as an important safeguard, in particular in the context of the power of search. The Bill defines reasonable suspicion as: "a person reasonably suspects something at a relevant time if he or she, acting in good faith, has grounds at the time for the suspicion and those grounds, when judged objectively, are reasonable."[5] The explanatory note highlights that this definition has been included "for the purpose of clarity" and is "intended to reflect the current case law". The Supreme Court has provided guidance on reasonable suspicion highlighting different principles, including that "The reasonable cause to suspect must be **fair and reasonable** and **honestly held** on the basis of information available to a member of An Garda Síochána at the relevant time".[6] ICCL welcomes the inclusion of a definition of reasonable suspicion in the Bill. However, ICCL considers that this definition should be amended to include that the grounds, when judged objectively, are **fair** and reasonable.

Recommendation:

[5] Garda Síochána (Powers) Bill, Head 2(2).

[6] *DPP (O'Mahony) v. O'Driscoll* [2010] IESC 42.

- Amend the definition of reasonable suspicion to include that the grounds, when judged objectively are fair and reasonable.

Part 2 of the Bill: Protection of Fundamental Rights

7. This part includes important provisions in relation to the protection of fundamental rights, including provisions on the protection of the rights of children and protection of the rights of persons with impaired capacity.

Head 6

8. Head 6 sets out an obligation to respect fundamental rights in exercising powers under this Bill.[7] This is an important and welcome provision. As ICCL has previously noted, the exercise of police powers necessarily entails a consideration of human rights.[8] ICCL also recommended that this Bill should include detailed references to human rights law and standards. The State is required to ensure that the actions of AGS comply with human rights law and standards[9] and AGS has the obligation to actively prevent discrimination and ensure equality of treatment to all individuals it interacts with.[10] Thus, ICCL recommends that this provision be made more meaningful by setting out more detail on how the provision will be implemented. This could be done by providing for training for members of AGS as to the appropriate human rights standards that apply when policing.

Head 7

9. Head 7 provides for the protection of the rights of the child. Child specific safeguards are welcome. Ireland has not opted into the EU directive on procedural safeguards for children, however, it represents an important benchmark in this area. The proposed safeguards include the notification of an "appropriate person" that "the power is to be, or has been, exercised in respect of the child", the recording of the fact that the power has been exercised in respect of a child and its circumstances, and the taking of any necessary and

[7] Garda Síochána (Powers) Bill, Head 6.

[8] ICCL, *Submission to the Department of Justice on the codification of police powers*, May 2020, p. 2.

[9] As protected by the Irish Constitution, the European Convention on Human Rights, (ECHR) the European Charter of Fundamental Rights and Freedoms and the UN human rights treaties that Ireland has ratified.

[10] Irish Human Rights and Equality Commission Act 2014, section 42.

appropriate measures to protect the rights of the child.[11] The Bill states that the Minister may make regulations prescribing measures to protect the rights of the child and any other measures or actions that AGS may take to safeguard children.

10. This provision complements section 58 of the Children Act 2001 which provides for the notification of an arrest of a child to their parent or guardian or another person reasonably named by the child. An appropriate person is defined similarly in this Bill as a parent or guardian of the child or where a parent or guardian cannot be contacted, "another adult reasonably named by the child."[12] In relation to the police questioning of children, article 61 of the Children Act 2001 provides that this cannot be done unless in the presence of a parent or guardian (including another adult reasonably named by the child) or in their absence, another adult (not a member of AGS) nominated by the member in charge of the station.

11. Research recently conducted by Ursula Kilkelly and Louise Forde on children's rights during police questioning highlighted that there needs to be clarification as to who constitutes an "appropriate adult" under section 61. Kilkelly and Forde recommended that "an independent, trained and Garda Síochána vetted panel of adults be established to support children without parental support during police questioning."[13] ICCL considers that this Bill offers an opportunity to implemented their call to develop the legal and policy framework to address the issue of parents, guardians and "other" or "appropriate" adults.

Head 8

12. *Head 8 provides for the protection of the rights of persons with impaired capacity*: The inclusion of a provision on the protection of the rights of persons with impaired capacity is also a positive step. This provision outlines that where a member of AGS "knows or suspects that the person in respect of whom the power is being, or is to be, exercised is a person with impaired capacity the member may take any measures which they deem necessary and

[11] Garda Síochána (Powers) Bill, Head 7(1).

[12] *Ibid*. Head 7(4).

[13] Ursula Kilkelly and Louise Forde, *Children's Rights and Police Questioning: A Qualitative Study of Children's Experiences of being interviewed by the Garda Síochána*, 2020, p. 48.

appropriate to protect the rights of the relevant person that the person may not be capable of taking himself or herself".[14]

13. ICCL considers that this provision gives undue discretion to Gardaí as to the measures they may deem necessary and appropriate. ICCL recommends that this be amended to "any reasonable measures" to curtail this discretion.

14. It also sets out that the Garda Commissioner, with the consent of the Minister, may issue guidelines for the treatment of persons with impaired capacity. It is unclear why this Head refers to guidelines and the previous Head in relation to children refers to regulations. ICCL recommends that the procedures and protections for dealing with both children and persons with impaired capacity should be put on a statutory footing, instead of being side-lined as "guidelines" or "regulations." If the powers are to have a statutory basis, the protections and safeguards which are balanced against these powers should also have one. Safeguarding children and persons in vulnerable situations is too important to leave to regulations. There is also a legal implication if these procedures are not put on a statutory footing as evidence which is illegally obtained will be assessed by a Court as to whether it is admissible. Evidence which is obtained in breach of a regulation or guideline is not so assessed.

15. In addition, prior to submitting the procedures and protections for dealing with both children and persons with impaired capacity, under Part 2, the Garda Commissioner should have to consult with the following about the content of the procedures and protections: (a) the Policing Authority; (b) the Irish Human Rights and Equality Commission, (c) the Mental Health Commission, (d) Ombudsman for Children.

***Recommendations*:**

- Update the provision on the obligation to respect fundamental rights in exercising power to make it more meaningful by setting out detail as to how it will be implemented, such as by providing for human rights training for all members of AGS.

[14] Garda Síochána (Powers) Bill, Head 8(1).

- Amend the provision in relation to the protection of persons with impaired capacity to "any reasonable measures" which the Garda deems necessary and appropriate to protect the rights of the relevant person that the person may not be capable of taking himself or herself.
- Develop the legal and policy framework to address the issue of parents, guardians and "other" or "appropriate" adults in the context of this Bill to provide clarity on the exercise of police powers in relation to children generally.
- Clarify specific safeguards that may be taken when exercising powers in respect of persons with impaired capacity.
- Ensure that the safeguards and protections in relation to procedures for dealing with children and persons with impaired capacity are put on a statutory footing.
- Before creating procedures and protections, the Garda Commissioner should have to consult with: (a) the Policing Authority; (b) the Irish Human Rights and Equality Commission, (c) the Mental Health Commission, and (d) Ombudsman for Children.

Part 3 of the Bill: Stop and Search

Head 9

16. This part provides for a stop and search power for possession of prescribed articles and a power to search vehicles and persons in vehicles for evidence of an offence. While the Bill provides for some safeguards, ICCL has identified some areas of concern. A search of a person is one of the most invasive experiences an individual can be subjected to and in recognition of this there is a need for strong safeguards.

Head 11

17. *Right to be informed of the reason for a search:* The Bill also provides for a right to be informed of the reason for a search.[15] The member of AGS conducting the search has to inform the person being searched that they/their vehicle is about to be searched; the reason or reasons for the search; and the legal basis for the search. This is somewhat in line with ICCLs previous recommendation that:

[15] Garda Síochána (Powers) Bill, Head 11.

"The legislation should provide a requirement that any person who is the subject of a search must be informed of the reason they are being searched and what gave rise to the reasonable suspicion grounding it. This is in line with the right to information and with the High Court decision of *DPP v. Rooney.*[16] The person being searched must be informed of any penal consequence of failing to comply."[17]

18. ICCL reiterates this recommendation and highlights that information on the penal consequence of failing to comply should be provided.

19. *Lack of requirement of consent to be searched:* The Bill does not include a requirement of consent to be searched. ICCL reiterates its previous recommendation that there be a requirement of informed consent to be searched where there has been no arrest as it is an important safeguard against abuse of the power to search. Further:

"A requirement of consent would mitigate the risk to due process rights, including the risk that a Garda may examine items found, such as wallets and mobile phones, looking for evidence that might be later used in a criminal prosecution for the offence under suspicion or any other offence. Any such evidence found would not normally be admissible by virtue of the fact that the arrest-type formalities were not followed".[18]

20. Thus, ICCL recommends that a requirement of consent to be searched where no arrest has been carried out.

Head 12

21. *Record to be made of a search carried out under Head 9 or 10:* The Bill provides that a record of all searches must be kept. This record will contain the name, address, and date of birth of the person, the time and date of the search, the reason of the search, the power under which the search was conducted, the outcome of the search and such other information as is provided

[16] [1992] 2 IR 7.

[17] ICCL, *Submission to the Department of Justice on the codification of police powers*, May 2020, p. 6. See *DPP (Ryan) v. Mulligan* [2009] 1 IR 794; *DPP (Sheehan) v. Galligan* (Unreported, High Court, 2 November 1995).

[18] Dermot Walsh, *Criminal Procedure*, (2nd ed, Round Hall, 2016), para 8-62.

for in the Code of Practice. The record does not include gender, ethnicity or other protected characteristics. It also does not include the geographic location of where the search is taking place. Recording this type of data is important in order to identify patterns and trends in the use of this power. Omitting the recording of protected characteristics and geographic location is a gap that should be remedied in the bill. While this information might be included in the Code of Practice, given the importance of recording this information, ICCL recommends that it is included in the Bill.

22. *Anonymised data at electoral district level*: The Bill should provide for the anonymisation of the record of search data, save for protected characteristics and geographic data at an Electoral Division level, and publish this aggregated data bi-annually.

23. *Consultation with Data Protection Commission:* The Garda Commissioner should consult with the Data Protection Commission in respect of the anonymisation of this data, and the publication of the same.

Head 13

24. *Need for limitations on the scope of a search:* The Bill does not provide for limitations on the scope of a search, instead this is to be addressed in a Code of Practice, as outlined in Head 13. ICCL previously recommended that the scope and limits of a stop and search should be included in the legislation and highlighted that this would be "undoubtedly more effective than having the limitations simply set out in codes of practice. Evidence in subsequent trials can be excluded if personal searches are unlawful, but evidence flowing from a search carried out in breach of a code of practice can (and usually is) admitted in court on a discretionary basis". [19] ICCL reiterate its previous recommendation in relation to limits, they should "include the duration or length of the stop, the level of intimacy permitted and safeguards triggered by the search".

25. It is also important that the bill clearly distinguish the powers to stop and search from powers of arrest. The scope of the power to search under the stop and search power should be far more restricted than the search powers

[19] ICCL, *Submission to the Department of Justice on the codification of police powers*, May 2020, p. 10.

permissible when the person is arrested and detained, in terms of length and intimacy.

26. Alternatively, if government decides to proceed on the basis of a code of practice, to ensure the most rights-respecting codes of practice are created, Head 13 should include that the Mental Health Commission and Ombudsman for Children be consulted along with the Policing Authority, the Garda Síochána Inspectorate, and Irish Human Rights and Equality Commission.

Recommendations:

- Include gender, ethnicity and other protected characteristics in the record of stop and searches and include the geographic location of where the search is taking place.
- This part of the Bill should provide for the anonymisation of the record of searches data, save for protected characteristics and geographic data at an Electoral Division level, and publish this aggregated data bi-annually.
- The Garda Commissioner should consult with the Data Protection Commission in respect of the anonymisation of this data, and the publication of the same.
- Include information on the penal consequence of failing to comply within the right to be informed of the reason for a search.
- Include a requirement of consent to be searched when there has been no arrest.
- Provide for specific limitations on the scope of a search, including in relation to safeguards.
- The Mental Health Commission and Ombudsman for Children should be consulted in respect of the code of practice on searches.

Part 4 of the Bill: Search of Premises

27. This part provides for a general search warrant power and powers under search warrants.

Head 14

28. Head 14 sets out that a member of AGS, an authorised officer of the Competition and Consumer Protection Commission or a designated officer of the

Office of the Director of Corporate Enforcement may apply for a search warrant.

Head 15

29. *Head 15* provides for a general search warrant provision, as recommended by the Law Reform Commission (LRC). As ICCL previously noted: "The current system underpinning search warrants is complex and vague. This lack of precision and clarity is problematic from a rights perspective. ICCL agrees with the LRC that a standard search warrant power is necessary."[20]

30. ICCL considers it positive that a search warrant must be issued by a judicial authority. However, we not that Head 15(6) is not in line with the LRC's recommendation that an urgent application should be made to the High Court. ICCL would question whether such an application would be appropriate at the District Court level and urge government to provide clarification on why LRC's recommendation was departed from in this instance.

31. *However, t*he provisions under Head 15 fail to take into account a recent High Court case concerning a journalist who refused to give AGS the password to his phone, and the comments made by Mr Justice Garrett Simmons, who warned: "*The interpretation of the legislative provisions governing search warrants contended for by both parties has the consequence that there is, arguably, no statutory procedure prescribed under domestic law whereby the right to protection of journalistic sources is attended with legal procedural safeguards commensurate with the importance of the principle at stake. This might well represent a breach of the European Convention on Human Rights.*"[21] A District Court judge who has to consider an application for a search warrant, under this Head, should have to consider additional legal procedural safeguards in respect of journalists and publishers who have a constitutional right to protect their sources but who may find themselves subjected to a search.

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[20] ICCL, *Submission to the Department of Justice on the codification of police powers*, May 2020, p. 13.

[21] *Emmett Corcoran Oncor Ventures Limited T/A "The Democrat" v Commissioner of An Garda Siochana, Director of Public Prosecutions*, [2021] IEHC 11, par 22. Accessible here: <https://www.courts.ie/acc/alfresco/c1afcb9f-46e8-4a6c-9c6a-e8c1b0709ae8/2021_IEHC_11.pdf/pdf#view=fitH> See also: Baker, N. *Judge warns about 'potential deficiency' in law in case involving journalist's mobile*, Irish Examiner, January 4, 2021. Accessible here: <https://www.irishexaminer.com/news/courtandcrime/arid-40200825.html>

32. As previously held by the European Court of Human Rights in the case of a journalist in Latvia who reported on items provided by an anonymous source and whose home was subsequently searched with the authorities seizing a personal laptop, an external hard drive, a memory card and four flash drives:

"The Court considers that any search involving the seizure of data storage devices such as laptops, external hard drives, memory cards and flash drives belonging to a journalist raises a question of the journalist's freedom of expression including source protection and that the access to the information contained therein must be protected by sufficient and adequate safeguards against abuse."

33. The Court held that while the interference with the journalist's Article 10 rights (Freedom of expression and right to send and receive information) was prescribed by law and that it was aimed at preventing disorder or crime and protecting the rights of others, the authorities' reason for the search were neither relevant nor sufficient[22]. ICCL urges government to ensure that sufficient and adequate safeguards are in place to protect journalists' freedom of expression.

Head 16

34. *Powers under search warrant, including compelling a password:* The Bill sets out the powers that can be exercised under a search warrant, which include to enter, at any reasonable time or times, within the validity period of the warrant, the place named on the warrant, to search the place, to seize any material found there, and to search any persons present where the person with the warrant is a member of AGS. [23]

35. It also includes the power to "require any person at that place who appears to him or her to have access to or to have under his power or control the information held in any such computer or which can be accessed by the use of that computer - to give to him or her any password or encryption key nec-

[22] *Nagla v Latvia*. Application no.: 73469/10, paras. 101-102 Accessible here: <http://hudoc.echr.coe.int/fre?i=001-122374>

[23] Garda Síochána (Powers) Bill, Head 16.

essary to operate it, to otherwise enable him or her to examine the information accessible by the computer in a form in which the information is visible and legible, to produce the information in a form in which it can be removed and in which it is, or can be made, visible and legible."[24]

36. This provision to compel any person at the location pertaining to the warrant to recall and truthfully disclose the password to their devices is a significant power and deeply concerning. Although there are currently similar powers under the Section 48 (5) (b) (i) of the *Criminal Justice (Theft and Fraud Offences) Act 2001* and Section 7 of *Criminal Justice Offences Relating to Information Systems Act 2017*, this bill will **vastly expand** the reach of this highly intrusive power to a much wider range of suspected offences. Worse, no offence will need to be suspected in respect of search warrants secured by members of the Competition and Consumer Protection Commission, or and/or the Office of the Director of Corporate Enforcement[25].

37. The bill also provides the power to "(a) to make and retain a copy of any document, record or electronically stored information, (b) where necessary, to use electronic equipment to [search for and] copy electronically stored information". And it provides a Garda will be able to "operate any computer at the place which is being searched or cause any such computer to be operated by a person accompanying the person acting under the authority of the warrant, including by use of any password or other information found in the course of the search".

38. This means that gardai will be able to not only take a copy of everything on a person's phone, computer or electronic device storing information during the search but also use passwords found on a device, to access other services where the person has information stored. ICCL believes that this power to compel a person to communicate a password which may lead to the discovery of incriminating material, either relevant to the search warrant or otherwise, that could eventually be used against them in a criminal prosecution may constitute a breach of the right to silence and privilege against self-incrimination.

[24] *Ibid*. Head 16.

[25] Explanatory Note of Part 4, Head 14, General Scheme of An Garda Siochana (Powers) Bill

The right to silence is a key part of the right to a fair trial, protected by the Constitution and by Article 6 of the European Convention on Human Rights[26].

39. We would also highlight the proliferation of connected devices with sensors and recording capabilities that are now used in people's private homes and lives, i.e. smart doorbell cameras, virtual/digital assistants, Amazon Alexa's microphones which can capture private conversations inside homes and cars, or wearables such as Fitbit which can track a person's movements and vital signs. These devices, which can track a detailed description of people's lives, have already been used for law enforcement purposes in the US.[27] Serious privacy concerns have been raised in Ireland in respect of contractors capturing and listening to Siri users' private information and interactions.[28] ICCL would be particularly concerned that this provision may ultimately allow Gardaí to access inadvertent recordings of private conversations and private life.

40. ICCL has increased concerns about the privacy and data protection implications of this power in light of the Data Protection Commission recently finding AGS had infringed a plethora of provisions in the Data Protection Act 2018 in respect of the use of ANPR cameras, access to CCTV monitoring rooms, governance issues, and general transparency[29].

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[26] *Murray v UK* (1996) EHRR 29, para. 45. The European Court of Human Rights held: "...There can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6... By providing the accused with protection against improper compulsion by the authorities, these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6."

[27] Wired, Alexa, Play My Alibi: The Smart Home Gets Taken to Court, August 31, 2020. Accessible here: https://www.wired.com/story/gadget-lab-podcast-470/ See also Cappellino A, Expert Institute, The Amazon Echo: Expert Witness in a Murder Trial?, February 21, 2021. Accessible here: https://www.expertinstitute.com/resources/insights/amazon-echo-expert-witness-murder-trial/ See also NBC News, Amazon's Alexa may have witnessed alleged Florida murder, authorities say, November 2, 2019. Accessible here: https://www.nbcnews.com/news/us-news/amazon-s-alexa-may-have-witnessed-alleged-florida-murder-authorities-n1075621

[28] The Journal, Hundreds of Cork-based Apple contractors lose jobs after hearing Siri users' private conversations, August 29, 2019. Accessible here: https://www.thejournal.ie/job-losses-apple-cork-siri-recordings-4786859-Aug2019/

[29] Data Protection Commission, *DPC Ireland 2018-2020 Regulatory Activity Under GDPR*, Appendix 1, Accessible here: <https://www.dataprotection.ie/en/news-media/latest-news/dpc-ireland-2018-2020-regulatory-activity-under-gdpr>. See also: Data Protection Commission, Annual Report 2020, chapter 6. Accessible here: <https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-publishes-2020-annual-report>

41. ICCL also has concerns about the principles of necessity and proportionality, in particular because it is not in any way clear to ICCL how many Garda investigations have been or are being thwarted by devices which cannot be accessed because of a lack of passwords. It is crucial to know this because AGS have access to and are using Europol's Decryption Platform, up and running since 2013, which is available to national law enforcement authorities of all EU member states to send lawfully obtained evidence for decryption. This platform is supervised by the European Data Protection Supervisor.[30]

42. It's worth noting that Europol, as recently as 2020, highlighted that only five member states had a legal provision compelling a suspect to hand over such passwords to police - Ireland, Belgium, France, Croatia and the UK. Europol said: "In the other Member States, such a provision is considered to conflict with the nemo tenetur principle [privilege not to self incriminate]." An expansion of this power, as provided for in this bill, will solidify Ireland's position as an outlier in the EU. ICCL urges government to remove this expanded power[31].

43. ICCL strongly recommends that given the vast amount of private information a garda may have access to on a personal device, where a Garda is seeking permission to look into a person's device, including by requesting a password, or obtain data from a phone company to track a device, they should be required to seek a separate warrant to the warrant required to search a person's house. This will ensure better oversight and reduce the scope for unreasonable interferences with the right to privacy.

Head 18

44. *Right to be informed of search*: The Bill provides that the person acting under the authority of a search warrant shall show it to the occupier of the place to

[30] Europol: *Europol and the European Commission inaugurate new Decryption Platform to tackle the challenge of encrypted material for law enforcement investigations*, December 18, 2020. Accessible here: <https://www.europol.europa.eu/newsroom/news/europol-and-european-commission-inaugurate-new-decryption-platform-to-tackle-challenge-of-encrypted-material-for-law-enforcement>

[31] Europol and Eurojust, *Second report of the Observatory Function on Encryption*, pages 12/13. Accessible here: <https://www.europol.europa.eu/publications-documents/second-report-of-observatory-function-encryption>

be searched before the search and provide them with a notice setting out different information, including a summary of powers which may be exercised and an explanation of the rights and obligations of the occupier and owner. This is positive.

Head 19

45. *Seizing privileged material:* The Bill provides that privileged material can be seized provided that this is done by means whereby the confidentiality of the material can be maintained pending the determination by the court of the issue as to whether the material is privileged material.[32] As ICCL previously noted this would "potentially constitute an unbalanced and far reaching power that is unnecessary and could potentially be a disproportionate interference with the right to privacy. This would be a radical departure from the existing law and could widen the scope for abuse of the power."[33] ICCL recommends that this provision be removed.

Head 21

46. *Superintendent can issue a search warrant in exceptional circumstances*: The Bill states that a superintendent can issue a search warrant in exceptional circumstances if satisfied this is necessary for the proper investigation of an offence and circumstances of urgency give rise to the need for the immediate issue of the search warrant. These warrants shall be valid for 24 hours. The LRC recommended that only a court should be able to issue a search warrant, ordinarily the District Court but provision could be made for the High Court to issue one in urgent cases.[34] ICCL previously agreed with this, highlighting how "the European Court of Human Rights has suggested that the best practice approach to search warrants is to require judicial supervision in order to ensure the interference with article 8 privacy rights is proportionate".[35]

47. We recommend the removal of the provision that a Superintendent can issue a search warrant.

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[32] *Ibid*. Head 19.

[33] ICCL, *Submission to the Department of Justice on the codification of police powers*, May 2020, p. 14.

[34] Law Reform Commission, *Search Warrants and Bench Warrants*, 2015, para. 8. 23.

[35] *Camenzind v. Switz*erland [1997] ECHR 99.

Recommendations:

- Remove the provision that a superintendent can issue a search warrant in exceptional circumstances and provide that only a court is able to issue a search warrant.
- Ensure sufficient and adequate safeguards in line with the ECHR are in place to protect journalists' freedom of expression in respect of the issuing of search warrants.
- Remove the power to compel a password as part of powers that can be exercised under the general search warrant provision and require that AGS must seek a separate warrant to seek permission to look into a person's device or obtain data from a phone company to track a device.
- Remove the provision that privileged material can be seized provided that this is done by means whereby the confidentiality of the material can be maintained pending the determination by the court of the issue as to whether the material is privileged material.

Part 5 of the Bill: Arrest

This part codifies arrest powers and includes some safeguards, which could be strengthened.

Head 23

48. *Power to arrest without warrant:* The Bill provides for a general power of arrest without warrant. As ICCL has noted:

    "A single piece of legislation that dictates the power to arrest without warrant would provide clarity and consistency and ensure the law is accessible. However, existing powers of arrest without warrant must not be expanded beyond those that currently exist for serious "arrestable" offences, as per section 4 of the Criminal Law Act 1997."[36]

49. The Bill provides for a power to arrest without warrant anyone whom a member of AGS suspects on reasonable grounds to be committing a serious offence or has committed a serious offence (which is an offence punishable by 5 years imprisonment or more). It also provides that a member of AGS may

[36] ICCL, *Submission to the Department of Justice on the codification of police powers*, May 2020, p. 17.

arrest without warrant someone who they suspect on reasonable grounds is committing or has committed a non-serious offence, if they have reasonable grounds, to believe it is necessary for a specific purpose, including preventing harm, preventing the continuation of the offence, and ensuring the person appears before the court. This is an expansion of the power to arrest without warrant.

50. ICCL strongly opposes the introduction of a power of arrest without warrant for non-serious offences.[37] ICCL recommends maintaining the current position that the power of arrest without warrant should only apply to serious offences.

Head 24

51. *Head 24* abolishes the common law power of arrest for breach of the peace.[38] ICCL has previously noted that "ICCL considers that the common law offence of breach of the peace is an imprecise and vague offence. It encompasses behaviour which is serious enough to constitute a criminal offence, as well as behaviour falling short of other thresholds in criminal law." The Bill provides for a statutory basis for the power of arrest for breach of the peace. However, it is defined broadly and does not specify what the penalties are, if convicted, and does not distinguish between serious and minor breaches of the peace. ICCL recommends greater precision in this provision to reflect this.

Head 27

52. *Head 27* sets out when and how a caution shall be administered. It updates the caution to: "You are not obliged to say anything unless you wish to do so, but whatever you do say will be recorded and may be given in evidence." This means the current requirement of contemporaneous note taking by AGS during electronically recorded interviews is no longer needed. ICCL welcomes this update.

Head 28

53. *Head 28* provides for the right to information on arrest, including that the person is being arrested, the reason for the arrest, and where applicable that

[37] *Ibid*. p. 18.

[38] Garda Síochána (Powers) Bill, Head 24.

they are being taken to a Garda custody facility.[39] This provision does not reference relevant rights, such as access to a lawyer. ICCL considers this should be added to the provision.

Recommendations:

- Narrow the definition of the breach of the peace to ensure clarity and accessibility, make reference to what the penalties are, if convicted, and distinguish between serious and minor breaches of the peace.
- Do not expand the power of arrest without warrant to non-serious offences; instead maintain the current position that the power of arrest without warrant should only apply to serious offences.
- Include reference to relevant rights in the right to information on arrest.

Part 6 of the Bill: Persons in Garda Custody

This part sets out provisions in relation to persons in Garda custody, including their rights, powers of detention, and powers in relation to detained persons.

Head 35

54. *Custody officer:* Head 35 provides for a custody officer role, which would replace the role of member in charge. Similar to the member in charge, the custody officer is set out to be "as far as practicable" a member not involved in the arrest of a person or investigation of that offence. ICCL recommends changing this wording to reflect the fact that only in exceptional circumstances should the custody officer be an officer involved in the arrest or investigation of the person.

55. Previous recommendations relating to the role of member in charge include that it should be carried out by someone of a minimum rank to reflect the importance of this role, held for a specific duration, and there should be specific training for the role.[40] This Bill does not reflect these recommendations. It states that a superintendent shall issue instructions as to who is to be the custody officer of each Garda custody facility.[41]

[39] *Ibid*. Head 28.

[40] Yvonne Daly and Vicky Conway, *Submission to Law Reform Commission for Fifth Programme of Law Reform, Regulation of Detention in Garda Custody*, p. 3.

[41] Garda Síochána (Powers) Bill, Head 35.

Head 38-42

56. *Rights of persons in custody:* Heads 38-42 outline the rights of persons in custody, including information to be given to a person in Garda custody following an arrest, rest periods, access to medical information, and notification to third persons and consular authorities. These are positive developments. However, it appears that the right to silence is not included in the list of right to be explained to persons in custody under Head 38. ICCL recommends that this right is included as a matter of priority.

Head 43

57. *Questioning of an accused person prior to legal advice:* The Bill allows adults to waive their right to consult with a legal representative. It also provides for the police questioning of a suspect who has not yet consulted with a legal representative, if a Garda of the rank of inspector or above authorises it. To authorise it, they must have reasonable grounds for believing that to delay the questioning would involve a risk of interference with or injury to other persons, serious loss of, or damage to property, the destruction of or interference with evidence, accomplices being alerted or hindering the recovery of property .[42] This provision may be a disproportionate interference with the constitutional right of access to a lawyer. ICCL recommends that this provision be removed. We are particularly concerned with Head 43(2) which provides that "*A person who refuses to consult with a legal representative who has made himself or herself available for the purpose of consulting with the person shall, in so refusing to consult with the legal representative, be deemed to have waived his or her right to consult a legal representative*". This is a clear interference with the right to choose one's own lawyer. ICCL calls for the removal of this section.

58. *Access to a lawyer during police questioning:* The Bill also provides for access to legal representation. Access to a lawyer, including during police questioning, is an important right. The Supreme Court has suggested that a right to have a lawyer present during police questioning may form part of the right of access to a lawyer.[43] The Bill sets out that a lawyer can accompany their client at police interviews. This is positive as it is currently not provided for on a

[42] Garda Síochána (Powers) Bill, Head 43.

[43] DPP v Gormley and White [2014] IESC 17; Violet Mols, Bri*nging directives on procedural rights of the EU to police stations: Practical training for criminal defence lawyers*, 2017, 8(3) New Journal of European Criminal Law, p. 304.

statutory basis but there is a DPP directive facilitating this.[44] However, the Bill states where a member not below the rank of inspector "reasonably believes that the presence of a legal representative… would prejudice any investigation or criminal proceedings regarding the offence, or, owing to the behaviour of the person, would be unduly disruptive, the member may require that the person concerned absent himself or herself from the interview".[45] If the inspector decides to exclude a legal representative, they shall inform the person that they may be accompanied by another legal representative. The limitations on the right of access to a lawyer provided for in the Bill seem overly broad and carries serious potential for abuse, especially given the importance of this right. ICCL recommends that these restrictions on access to a lawyer during police questioning be removed.

59. The Bill provides detail on consultation with a legal representative - that it shall take place in private but can take place in sight but out of hearing of a member of AGS. This does not seem sufficiently private, especially given the importance of these consultations. The Bill also sets out that the right to consult means the right to consult in person or by telephone if the detained person consents to a phone consultation.

Head 44 - 45

60. *Detention periods:* The Bill provides that the initial period of detention for serious/arrestable offences is 6 hours. This can be extended in 6 hour periods by an inspector up to 24 hours. A chief superintendent may extend a further 24 hours in respect of schedule 5 offences and 2 or more offences which don't arise out of the same set of facts. As previously recommended:

"The ICCL would propose that a 24 hour limit for detention, as currently stands under Section 4 of the Criminal Justice Act, 1984, is appropriate for all crimes. This provision has been sufficient to allow the investigation of some of the most serious crimes in Ireland, such as rape and murder. Consequently, we cannot see the reason for an arbitrary distinction between the detention periods. If a differentiated detention period is introduced, we believe that it should

[44] *See for example*, Aine Bhreathnach and Shalom Binchy, *The Experiences of Criminal Defence Solicitors in Garda stations during Covid-19*, 2020.

[45] Garda Síochána (Powers) Bill, Head 42.

only be permissible to extend it with judicial oversight. Therefore all applications to extend the detention period past 24 hours should be made to a judge who makes the final decision."

61. ICCL reiterates this recommendation that a 24 hour limit for detention is appropriate for generally all crimes and any further extension should require an application to a Court.

Head 47

62. ICCL notes that in the Notes under Head 47, there is reference to the fact that "the rank of Garda officer authorised to apply to the Court for an extension of detention under this Head has been set at superintendent, rather than chief superintendent under the existing powers. Given that the Court is the effective safeguard for the detained person's rights under this Head, this change would appear to be appropriate given the operational issues arising under the new Garda operating model." ICCL would welcome more information on why the rank of garda who can apply for an extension has been changed and what is meant by "operational issues arising under the new Garda operating model".

Head 51

63. *Need for further detail on use of the power to take photograph, fingerprint and palm print:* The Bill provides for a power to take photographs, fingerprints and palm prints of those who have been arrested for a serious offence or offences. However, no detail is provided on how long this information is kept, stored or when and how it is destroyed. A robust framework for data protection must be in place and ICCL recommends the inclusion of such a framework in this Bill.

Head 59

64. *Custody record:* It is positive that the custody record may be electronic. There is a need to record the number of arrests/detained persons and publish this information. The custody record should also gather information on ethnicity and other protected grounds to be able to analyse issues of discrimination as to who is arrested and how they are treated. If an electronic record is used, it should not be possible to alter information once entered and the record should give full details as to when information is inputted and by who. ICCL

recommends that safeguards for the use of an electronic custody record be included.

Head 60 and 61

65. *Electronic recording of interviews:* The Bill provides for the electronic recording of interviews. If the recording equipment is not available or fails to work at the start of an interview or during it, a member shall make a written note of the interview. ICCL welcomes this provision.

66. *Need for oversight of detention:* ICCL recommends the introduction of a human rights-compliant oversight scheme of police detention, such as the independent custody visiting scheme in Northern Ireland.[46] This is an important safeguard to protect the rights of detained persons. ICCL reiterate its recommendation to ratify OP-CAT and create an effective and independent National Preventive Mechanism to inspect all places of detention, including Garda stations.

Recommendations:

- Specify that the custody officer role should be carried out by someone of a minimum rank to reflect the importance of this role, held for a specific duration, and there should be specific training for the role.
- Remove the provision allowing for police questioning of an accused person prior to legal advice.
- Remove the restrictions on access to a lawyer during police questioning.
- Ensure that access to a legal representative is facilitated in private.
- Remove the possibility for extending detention periods beyond 24 hours as a 24 hour limit for detention is appropriate for all crimes.
- Ensure that the custody record gathers information on ethnicity and other protected grounds to be able to analyse issues of discrimination as to who is arrested and how they are treated.
- Include provisions to safeguard the use of an electronic custody record, such as giving full details as to when information has been inputted and by whom

[46] ICCL, *Submission to the Department of Justice on the codification of police powers*, May 2020, p. 26.

- Provide detail on how long photograph, fingerprint and palm print information is kept and stored for and when and how it is destroyed.
- Ratify OPCAT and create an effective and independent National Preventive Mechanism to inspect all places of detention, including Garda stations.

Part 7 of the Bill: Miscellaneous Provisions

This part sets out miscellaneous provisions. This submission examines two of these submissions as they are particularly important.

Head 65

67. *Need for further detail on the use of reasonable force:* The Bill provides that a Garda may use such force as is reasonably necessary to compel a person to comply with a requirement to stop a vehicle, to enter a premises or to open or inspect any container, to effect or maintain an arrest.[47] Force can only be used where in the circumstances, "the person believes them to be necessary to achieve the legitimate aim being pursued, and the degree of force is no more than is reasonably necessary for that purpose."[48]

68. The Bill also provides for a situation where a member of AGS may use lethal force in effecting an arrest - where the circumstances are such that the member believes that a person is doing or about to do something likely to cause serious harm to, or the death of, another person and they can't prevent the serious harm or death in another way, the force may include force likely to cause serious harm to a person or the person's death. If the member believes this use of force is necessary, they must, if practicable, first call on the person to stop doing the act. The use of lethal force is an extraordinary power that must be safeguarded and used as a measure of last resort. ICCL recommends that the Bill should include more detail on the use of lethal force and related safeguards, such as appropriate training.

69. ICCL considers that the Bill should explicitly reference the state's legal obligation to protect life. The use of firearms should be specifically addressed with reference to international standards on the use of force. In particular, it should be made explicit that the use of firearms is permitted only where there is an

[47] Garda Síochána (Powers) Bill, Head 65.

[48] *Ibid.*

imminent risk to life[49] and any use of force must be as minimal as possible to preserve life.[50]

70. We note that the current Garda public order incident command policy[51] states:

    The fundamental principle underpinning this policy is that any action taken must comply with the fundamental principles of legality, necessity (**absolute necessity in terms of lethal force**), proportionality and accountability and is applied in a non-discriminatory manner in accordance with the principles of the European Convention on Human Rights (ECHR).

71. ICCL recommends including the requirement of "absolute necessity in terms of lethal force" and a corresponding reference to relevant principles of the ECHR, including non-discrimination.

72. We note that current oversight legislation provides that the Garda Commissioner shall refer any matter that appears to indicate that the conduct of an AGS member may have resulted in death or serious harm to someone to the Garda Síochána Ombudsman Commission (GSOC).[52] Yet, GSOC investigations face different barriers and constraints. The Commission on the Future of Policing in Ireland noted there are numerous problems with the current structures and processes for handling complaints about police misconduct, including in relation to the resourcing of GSOC.[53] The Policing, Security and Community Safety Bill establishes a new Garda Ombudsman and contains a similar provision in relation to investigations into deaths and serious harm caused by members of AGS.[54]

Head 67

73. *Offence under this Bill – Provision of information and obstruction:* The Bill provides for a broad power to demand personal details where a member of AGS

[49] See for example the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx
[50] Garda Policy on Use of Force (including Firearms) was set out as an urgent priority area for review by the Garda Human Rights Strategy Document 2020-2022. It is not clear what use of force model is currently used by An Garda Síochána as it does not appear on the Policy Document page of garda.ie: see https://www.garda.ie/en/about-us/publications/policy-documents/ (accessed 21.1.21)
[51] https://www.garda.ie/en/about-us/publications/policy-documents/public-order-incident-command-policy.pdf p.7
[52] Garda Síochána Act, 2005, section 102.
[53] Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland*, 18 September 2018, p. 48.
[54] Garda Síochána (Powers) Bill, Head 164.

has reasonable grounds to suspect that a person has committed or is committing an offence or is in possession of a relevant article. It also provides for an offence if someone gives a false or misleading response, obstructs or attempts to obstruct any member acting under the powers conferred under this Bill or following specific directions given by a Garda. The penalty upon summary conviction is Class A fine and/or up to 12 months imprisonment or upon conviction on indictment a fine of €30,000 and/or up to 5 years imprisonment). This is a significant penalty, especially if convicted on indictment. The new broader power to demand personal details, expanded powers of arrest and search, and penalty for obstruction and failure to comply would result in the criminalisation of conduct that was not previously an offence. ICCL recommends that the criminal law be a measure of last resort and submits that such a severe penalty is inappropriate and unreasonable and that this Bill should refrain from creating new criminal offence, including broad offences of obstruction.

Recommendations:

- Include more detail on the permitted use of lethal force and further safeguards, including more explicit references to relevant rights and thresholds.
- Review and amend the provision introducing a general offence for obstruction and reduce the penalty for this new offence to ensure that it is appropriate and reasonable.

Impact of the Bill on the admissibility of evidence

74. *Codes of practice on search, search warrants, arrest, custody and detention:* The Bill provides for codes of practice in relation to search, search warrants, arrest, custody and detention.[55] The Bill sets out that a breach of one of the Codes "shall not of itself render that person liable to any criminal or civil proceedings or of itself affect the admissibility in evidence thereby obtained."[56] However, it will render them liable to disciplinary proceedings.

Head 68

75. Part 7 of the Bill contains a general provision relating to the admissibility of evidence. Head 68 provides that "A failure by a person exercising any powers

[55] Garda Síochána (Powers) Bill, Head 13; Head 22; Head 33; Head 64.
[56] *Ibid.*

under this Bill to comply with any provision of this Bill shall not, of itself, affect the admissibility in evidence of any evidence seized or otherwise obtained through the use of that power."[57] The need for this provision is unclear as the questions of admissibility should lie exclusively with the Courts.

76. Ireland has an exclusionary rule applying to evidence in breach of the accused's constitutional rights, including the right to liberty, the right to be tried in due course of law, the right to the inviolability of the dwelling, and the right to bodily integrity, which was set out by the Supreme Court in *DPP v JC*[58]. The powers in this Bill and the proposed codes of practice in relation to search, search warrants, arrest, custody and detention will infringe upon these constitutional rights.

77. These provisions highlighting that a failure to comply with codes of practice and the Bill will not affect the admissibility of evidence in and of itself are problematic and unnecessary. Given that a failure to comply with codes of practice and the Bill could entail a breach of constitutional rights, unconstitutionally obtained evidence should continue to be assessed by the Courts under the exclusionary rule. It is unclear why the provisions relating to the admissibility of evidence obtained due to failure to comply with codes of practice are necessary.

Recommendation:

- Remove the provision relating to the admissibility of evidence obtained due to failure to comply with the Bill.
- Remove the provisions relating to the admissibility of evidence obtained due to failure to comply with codes of practice.

Need to include a review of the Act

78. The Bill should incorporate the need for a periodic review of how the powers are operating. These are significant powers and should be regularly reviewed to ensure they are being exercised in compliance with human rights.

Recommendation:

[57] *Ibid*. Head 68.
[58] [2017] 1 IR 417.

- Include a periodic review of the Act.

Summary of Recommendations

Definition of reasonable suspicion

1. Amend the definition of reasonable suspicion to include that the grounds, when judged objectively are fair and reasonable.

Protection of fundamental human rights

2. Update the provision on the obligation to respect fundamental rights in exercising power to make it more meaningful by setting out detail as to how it will be implemented, such as by providing for human rights training for all members of AGS.
3. Amend the provision in relation to the protection of persons with impaired capacity to "any reasonable measures" which the Garda deems necessary and appropriate to protect the rights of the relevant person that the person may not be capable of taking himself or herself.
4. Develop the legal and policy framework to address the issue of parents, guardians and "other" or "appropriate" adults in the context of this Bill to provide clarity on the exercise of police powers in relation to children generally.
5. Clarify specific safeguards that may be taken when exercising powers in respect of persons with impaired capacity.
6. Ensure that the safeguards and protections in relation to procedures for dealing with children and persons with impaired capacity are put on a statutory footing.
7. Before creating procedures and protections, the Garda Commissioner should have to consult with: (a) the Policing Authority; (b) the Irish Human Rights and Equality Commission, (c) the Mental Health Commission, and (d) Ombudsman for Children.

Stop and search

7. Include gender, ethnicity and other protected characteristics in the record of stop and searches and include the geographic location of where the search is taking place.

8. Include information on the penal consequence of failing to comply in the right to be informed of the reason for a search.
9. Include a requirement of consent to be searched when there has been no arrest.
10. Provide for specific limitations on the scope of a search, including in relation to safeguards.
11. The Mental Health Commission and Ombudsman for Children should be consulted in respect of the code of practice on searches.

Search of premises

11. Remove the provision that a superintendent can issue a search warrant in exceptional circumstances and provide that only a court is able to issue a search warrant.
12. Ensure sufficient and adequate safeguards in line with the ECHR are in place to protect journalists' freedom of expression in respect of the issuing of search warrants.
13. Remove the power to compel a password as part of powers that can be exercised under the general search warrant provision and require that AGS must seek a separate warrant to seek permission to look into a person's device or obtain data from a phone company to track a device.
14. Remove the provision that privileged material can be seized provided that this is done by means whereby the confidentiality of the material can be maintained pending the determination by the court of the issue as to whether the material is privileged material.

Arrest

14. Narrow the definition of the breach of the peace to ensure clarity and accessibility, make reference to what the penalties are, if convicted, and distinguish between serious and minor breaches of the peace.
15. Do not expand the power of arrest without warrant to non-serious offences; instead maintain the current position that the power of arrest without warrant should only apply to serious offences.
16. Include reference to relevant rights in the right to information on arrest.

Persons in Garda custody

17. Specify that the custody officer role should be carried out by someone of a minimum rank to reflect the importance of this role, held for a specific duration, and there should be specific training for the role.
18. Remove the provision allowing for police questioning of an accused person prior to legal advice.
19. Remove the restrictions on access to a lawyer during police questioning.
20. Ensure that access to a legal representative is facilitated in private.
21. Remove the possibility for extending detention periods beyond 24 hours as a 24 hour limit for detention is appropriate for all crimes.
22. Ensure that the custody record gathers information on ethnicity and other protected grounds to be able to analyse issues of discrimination as to who is arrested and how they are treated.
23. Include provisions to safeguard the use of an electronic custody record, such as giving full details as to when information has been inputted and by whom
24. Provide detail on how long photograph, fingerprint and palm print information is kept and stored for and when and how it is destroyed.
25. Ratify OPCAT and create an effective and independent National Preventive Mechanism to inspect all places of detention, including Garda stations.

Miscellaneous provisions

26. Include more detail on the use of lethal force.
27. Reconsider the provision introducing a general offence for obstruction and reduce the penalty for this new offence to ensure that it is appropriate and reasonable.

Admissibility of evidence

28. Remove the provision relating to the admissibility of evidence obtained due to failure to comply with the Bill.
29. Remove the provisions relating to the admissibility of evidence obtained due to failure to comply with codes of practice.

Need to include a review of the Act

30. Include a periodic review of the Act.


Irish Council for
Civil Liberties

Submission of Dr Vicky Conway, DCU on the General Scheme of Garda Síochána (Powers) Bill

Garda Síochána (Powers) Bill

Submission by Dr Vicky Conway, Associate Professor of Law, Dublin City University.

To the Members of the Justice Committee,

I wish to make the following submission on the General Scheme of the Garda Síochána (Powers) Bill. I have attempted to be as comprehensive as possible, but do not suggest that this is exhaustive. As with any Bill of this size reflection on every head from different perspectives can generate additional thoughts. Therefore I submit the following as preliminary thoughts on the General Scheme.

If I can be of any further assistance to the Committee members I would be delighted to.

Dr Vicky Conway

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12 October 2010

Submission of Dr Vicky Conway, DCU on the General Scheme of Garda Síochána (Powers) Bill

Head 2

'serious offence' the inclusion of all of the Schedule 5 offences broadens the basis for what is considered serious, given that not all of these offences carry a 5 year term. We should be very wary of such expansions, especially where no justification for so doing is provided.

'reasonable suspicion' This is a largely ineffective standard in policing which is vague and does not engage with the reality of police work. Research from the UK shows that police find ways to make their actions fit such language, rather than having it as a guiding principle.

Head 5

It is essential that the codes of practice have full legal effect. They should, therefore be introduced by way of statutory instrument. This is key, given how much regulation of key powers in the Bill is being relegated to codes of practice.

Head 6

While it is welcomed to see respect for rights being placed on a statutory footing, the section is awkwardly worded. Rather than 'fundamental' it would be preferable to specify clearly both constitutional and human rights. Fundamental is not defined in Head 2 and it would be best to ensure clarity on this. Subsection b then goes on to mention fairness and non-discrimination, which are two of those rights. It is unclear why these, and not other rights, are pulled out for special mention in this way (right to privacy, family life or bodily integrity could just as easily be mentioned). Further, the following phrase similarly pulls out some duties of gardaí for special mention (investigation of crime, and respecting rights of the victim), but not others. One could argue that all obligations need to be observed at all times, but one might question whether the implication of this phrase is that the need to comply with the rights of an individual may breached on occasion. This would be problematic. If the intention is to clarify that, save for inhuman and degrading treatment, no right is absolute, then this is what should be said, but even then there are clear legal parameters which should be followed in the curtailment of any right. However, it needs to be very clear that this is what is intended, and it is not implying the other extreme, that a suspect's rights are superseded by the rights, for instance, of a victim. The Supreme Court, and the European Court of Human Rights have been clear that it is not for police to say that the investigative needs of a case outweigh the duty to comply with human rights (whether that relates to unlawful detention, oppressive questioning or assault).

Head 7

Beyond simply mentioned an appropriate person, the opportunity should be taken to create an appropriate adult scheme, such as operates in the UK and other jurisdictions. In the UK this is provided for in the Codes of Practice for PACE. The benefit of a properly regulated scheme is that it creates standards, consistency and permanence in the provision of this vital safeguard to those in need. This scheme is well regarded in the UK, and if anything authors like Dehaghani have sought its development (see https://academic.oup.com/ojls/advance-article-abstract/doi/10.1093/ojls/gqab029/6374802). This was also a key recommendation of a recent study by Prof Kilkelly and Dr Forde for the Policing Authority (https://www.policingauthority.ie/assets/uploads/documents/Children%E2%80%99s_Rights_and_P

olice_Questioning_-_A_Qualitative_Study_of_Children%E2%80%99s_Experiences_of_being_interviewed_by_the_Garda_S%C3%ADoch%C3%A1na.pdf)

There should also be a statutory requirement to conduct a risk assessment in the exercise of powers, particularly of arrest, detention and interrogation, of children.

There should be a statutory requirement to actively consider the juvenile diversion programme in every case where a charge is being considered. Its use should also be expanded to cover minor drug offences.

Head 8

It is good to see specific coverage of impaired capacity. However it is reliant on garda knowledge or suspicion of such impairment. It would not be problematic, and would be respectful of individual rights, to place a duty on gardaí to actively ascertain whether an individual as impaired capacity. In a detention context this should proactively include an assessment of capacity. There is also too much discretion in terms of how such an assessment should be acted upon. Much greater detail should be included in the legislation.

Guidelines on the treatment of person with impaired capacity should be on a statutory footing, given the extent to which such guidelines will overlap with legal rights and obligations. Further, given what we know of persons who have contact with police, a significant majority will have either a mental disorder or be under the influence of a substance which impairs their capacity. Therefore this section applies to most persons gardaí interact with, which enhances the need for legal clarity and certainty.

It would also be good, under 4(a) to include 'unable to communicate effectively with legal advisors'. It is essential that a detainee be able communicate with their legal advisor, understand legal advice and discuss their specific needs. If they are unable to do so they should not be considered to have full capacity.

It is also suggested that the criteria under 4 (a) and (b) should be the same. There is no justification for saying that if a person cannot communicate effectively with gardaí because of a substance they have taken that they should not be considered to have impaired capacity.

Head 9

It is very encouraging to have a consolidated power of stop and search. However, despite what police suggest, the existence of stop and search powers is highly questionable. It has been shown repeatedly that stop and search results in miniscule numbers of charges and convictions and yet has notably disastrous consequences for community relations. In the ECHR case of Gillan and Quitan v UK [2009] it was stated that just 1% of stops resulted in arrests, and fewer again in charges and convictions. Thus the efficacy of stop and search as a police power is minimal. Yet when we consider existing evidence we see that it is a breach of privacy, it is proven to be used in highly discriminatory ways that makes citizens feel subjugated. Indeed one UK study from that it was not a crime fighting tool, but one of social control (see https://academic.oup.com/bjc/article/58/5/1212/4827589?login=true) Indeed, it can be seen in the UK that stop and search is linked to many of the more violent experiences of policing: from race riots to the London riots.

In Ireland we do not have holistic evidence on the use of the powers because AGS has not produced it, but numerous studies suggest similar trends are evident in Ireland (see for instance https://www.youthworkireland.ie/images/uploads/general/YWI_Journal_Vol_5_No_1_Article_Niamh_Feeney_and_Sin%C3%83%C2%A9ad_Freeman.pdf and this episode of Policed in Ireland https://tortoiseshack.ie/9-policed-in-ireland-stop-and-search/).

For these reasons it is submitted that stop and search has more detrimental effects than benefits and should thus be terminated as a practice.

If this position is not accepted, I make a number of suggestions to amend the proposed powers to enhance safety.

Legislation should set out factors which cannot be taken into account in deciding to conduct a stop and search, including age, gender, ethnicity, clothing, hairstyles and so on. Only factors which suggest possession of a weapon should be considered.

While it is stated that a person can be removed to a garda station for the purpose of conducting a search it would helpful to clearly state that an individual's privacy must be respected in conducting a search and that clothing (including outer clothing) should not be removed in public.

Some limitation should be provided on what might be considered a reasonable length of time to detain someone under this head, given that the usual safeguards attaching to a detention do not apply under this head. There is too much discretion included here.

The concept of 'relevant article' is too broad in its inclusion of any article intended for use in a criminal offence. Given that any item could potentially be used in an offence, and the current wording assumes an ability of the officer to assess, on the side of the road, the intention of the member of the public, this is too broad. The explanatory note uses a slightly narrower phrasing than the head itself, of any item for a theft or fraud offence, but again this is too broad and gives too much subjective thinking.

Head 12

The ethnicity of the person searched should also be recorded. As mentioned previously discriminatory use of the power is a consistent feature internationally, in breach of rights of non-discrimination, and with adverse consequences not just for the individual but for police community relations. Without these strong relations the police are significantly impeded from doing their job. Thus it is essential that we record this data. It can be recorded either as indicated or as perceived by the officer (which it is being clearly labelled). This is not in breach of GDPR as such information can be gathered for justifiable purposes, such as this.

The destruction period for records should be set out in legislation, rather than codes of practice.

In addition to the making of the record, statistics on the use of police stop and search powers should be published.

It is also worth noting that in certain forces in England committees have been established to review bodycam footage of stops and searches to give feedback on the community perspective on the use of these powers. You can hear more about that here: https://tortoiseshack.ie/policed-the-beat-body-worn-cameras/

Head 13

Given the importance of this Code of Practice it should have the status of a statutory instrument. It should also be drafted by the Department, in consultation with others, rather than by the Commissioner. These should not be matters for AGS to determine.

For a full understanding of the importance of these Codes, and the level of detail which they should go into, it is worth viewing the UK codes of practice for the equivalent legislation: https://www.gov.uk/government/publications/pace-code-c-2019

Further, failure to abide by the Code, which has legal standing, should be a breach of discipline.

The statement that a breach of the Code will not affect admissibility needs to be carefully worded to comply with Supreme Court jurisprudence of JC. If it is a knowing breach of rights then this would affect admissibility.

Head 14

The Committee should satisfy itself that the wording is consistent with what was recommended by the Law Reform Commission, given the expansion that is involved.

The wording considers 'a member of AGS' can be an applicant. This suggests any rank, which differs with what is in the explanatory note.

Head 16

Again this applies to any member of AGS.

It is submitted that the requirements to bypass passwords and encryption is an unjustifiable interference with the right to privacy at this stage in proceedings. As has been argued by Dr McIntyre of UCD, the lack of safeguards mean these proposals quite possibly breach constitutional and human rights (see https://www.irishtimes.com/opinion/new-garda-powers-bill-must-go-back-to-the-drawing-board-1.4595274)

Head 19

The ability to seize privileged information seems very broad. Could this include information held by a solicitor and could seizure impact on ability to prepare for trial? All consequences of this need to be carefully considered.

Head 21

This head empowers a superintendent or above to issue a search warrant in urgent circumstances. Both the courts and the Law Reform Commission have been clear that search warrants should always come from the courts. We saw in the Morris Tribunal how such internally sanctioned search warrants could be abused. Given the impact on fundamental rights at the pre-trial stage this heading should be removed.

Head 22

Again this Code of Practice should be a statutory instrument, drafted by the Department. Search Warrants have been a deeply problematic space for the guards in the past and this needs to be properly regulated. Previous statements in relation to earlier mentioned codes (under Head 13) in terms of breaches of discipline and impact on admissibility of evidence also apply here. For clarity the Commission on the Future of Policing did not recommend that such codes be drafted by the Commissioner.

Head 23

This head includes a vast expansion on the garda power of arrest. Under the Criminal Law Act 1997 the guards can only arrest without warrant where they believe someone is committing an 'arrestable offence'. This is an offence for which you could be imprisoned for 5 years or more. This element is proposed to be deleted allowing the guards to arrest without warrant for any offence. This represents an enormous shift in police powers.

Traditionally arrest only existed to facilitate the delivery of a person to court to be charged. It is only since 1984 that we have permitted the police to arrest – and thereby deprive someone of their liberty – without intending to charge them immediately. This in effect permitted, for the first, arrest for the purpose of furthering an investigation but it was limited to serious offences. This proposal would remove that limitation, allowing arrest without charge even for minor offences. While there are some criteria set out in sub heading (3) it is still very broad. It is unclear what the reason for this is. I have not seen any evidence that the gardaí are impeded by not having this power. At a minimum evidence should be presented publicly to justify such a wide and significant shift in police powers. It is worrying that the explanatory note does not even acknowledge the breadth of this shift.

Head 27

It is very welcome to see the removal of the phrase 'taken down in writing' from the caution. This has meant that gardaí have had to transcribe, in writing, all that is said in an interview. The new wording recognises the fact that interviews are now recorded. This will prevent delays in interviews, meaning suspects can be deprived of their liberty for less time, less garda time will be spent in interviews (enhancing time spent on investigation), and less solicitor time (which is invariably provided for by legal aid). It will make interviews more fast paced which will take adjustment for all parties.

Head 28

Whilst it is good to see it clearly stated that a person should be informed of their arrest there is no information on what should happen where a person is not so informed. In interviewing people for my podcast Policed In Ireland this is a complaint I have heard repeatedly (for instance in this episode with Oscar https://tortoiseshack.ie/5-policed-in-ireland-children/). Given that this is essential both as a safeguard to ensure police can justify their use of the arrest power, but also for someone to know why they are being held and be able to discuss that with their legal team and build a defence, then the legislation should at least mention what should happen if this right is breached – such as invalidating the detention or rendering inadmissible any evidence secured during the detention.

In addition to the provision of information there should be a statutory duty to conduct a risk assessment on arrest, and a further risk assessment prior to release. This is essential to ensure that the police are aware of all potential issues, and can more fully understand and realise their duty of care towards a detainee. This is an issue that again we have covered on Policed in Ireland, in the context of a young man who died by suicide hours after he was released from garda custody: https://tortoiseshack.ie/10-policed-in-ireland-a-voice-for-niall/

Head 29

It should be stated that this should be done where at all possible, at a reasonable time (e.g. 9 am to 9pm). There is reference in the exercise of search warrants of doing so at a reasonable time. Complaints have been made that the use of midnight or dawn raids have been disproportionately been used on more working class sections of the community.

Head 30

The power of seizure on arrest is very broad, including the seizure of any item which may harm another. Given that the individual is under arrest, should seizure not be limited to either illegal items, or items which are permitted to be seized under a search warrant?

Head 33

Again a Code of Practice is proposed to be drafted by the Commissioner, rather than the Department. This needs to be a statutory instrument.

There are a great many elements to be regulated in the processing of arrests, in terms of information to be provided, information to be gathered, risk assessment to be undertaken, accessing appropriate supports (from social workers, doctors, interpreters, appropriate adults and so on).

There should also be a clear statement on the gathering of data to be published. We have no data at all in Ireland on how many people are arrested on an annual basis or any breakdowns of where, or what their needs are. This makes it incredibly difficult to plan effectively for estates, for medical supports, for interpreters, lawyers and so on. It also prevents us understanding the demographics of those going through the criminal justice system. Thus it is very important that the recording and publishing of this data be required so that we can meet our requirements to prevent discrimination in the criminal justice system.

We need provisions on the standards of interpreters. There are no standards required at present and significant issues in the provision of interpreters who can be unclear as to their role, and for whom they work.

There are also significant issues in the provision of medial support in garda stations. The current system of a gp being called if there is an issue is inadequate and lacks transparency. Instead we should have retained doctors and mental health staff collocated in detention centres. This model would enhance the medical services given to detainees in need, and save a great deal of time in call outs.

If this code of practice is where protections for children and vulnerable persons will be then detailed consideration needs to be given to the content of these, referring to research by scholars such as

Prof Kilkelly of UCC and Dr Cusack of UL, to ensure all rights are being protected. There is a wealth of excellent knowledge in this ever developing space that needs to be effectively drawn on.

Head 34

The custody officer needs to be an individual of sufficient rank or grade to be able to command respect and authority. This was identified as a serious issue by Justice Morris whereby a garda may have difficult telling a sergeant that they believe regulations have not been followed. This undermined the potential of the role and he was clear that the holder of that role needed to be of sufficient rank.

Head 35

This head should be amended to include a clear statement of the role of the custody officer, to ensure that the rights of the detainee are being protected and to complete and maintain the custody record (preferably electronic). Much more detail on the role needs to be provided, including a requirement of specialised training. It reads like a largely administrative role from this which undermines how essential it is in the protection of the detainee.

Head 37

Additional details on the conduct of a search are required to ensure that privacy and dignity are maintained, and also to minimise a potentially stressful and triggering event. The location, the number of officers that can be present, the gender of officers, the exact parameters of a search and when intimate searches can be conducted should be provided for. Again reviewing the UK codes of practice can show the scale of issues which need to be provided for.

Head 39

It is good to see the level of detail provided on rest periods, but it is notable that this very much contrasts with a lack of detail in other places such as the role of the custody officer or the protections for vulnerable detainees. The level of detail provided here should be replicated throughout.

While it is understandable that there may be grounds for suspending the night time rest period (6) this should be balanced against the capacity of the detainee: if they are overly tired or stressed and unlikely to understand the nature and purpose of the questioning then it should not be possible to suspend the questioning. In addition to being unfair on the detainee, it is also unlikely to produce reliable information and so will be a waste of garda time. So an assessment of the detainee should be part of any suspension.

Head 40

At present the determination of whether medical attention is required is entirely at the discretion of the garda. To protect the rights of the detainee, who has not at this point even been charged, the detainee should be seen where a lawyer, guardian or appropriate adult feels it is necessary. Some may suggest this could be used as a way to delay questioning but 1. That is not in the interest of the

detainee whose primary concern is invariably to be released from custody and 2. This is part of the inefficiency of the current system. If we had more centralised custody suites with medical practitioners and mental health practitioners in situ then there would be no such delay. Indeed, it could be argued, given the prevalence of mental health difficulties and substance abuse among detainees that all persons should be assessed by a medical practitioner on arrival at the station, as part of the risk assessment. This would be the best way to meet the duty of care which police owe to people they detain.

Further if a person has spent a period of their detention time in hospital, and are then returned to the station, it should be mandatory for a medical assessment to be conducted on their return to the station to ensure they are fit for questioning. Such a person is in a highly vulnerable position and the gardaí have a duty of care towards them.

Head 41

Where a decision is made under subsection 2 that a person will not be contacted, the detainee should be advised and offered an opportunity to substitute an alternative person to be contacted. This is required to ensure the person is not held in cognito.

Head 42

It is excellent to see legal provision for the right to access a solicitor, and for that person to attend the interview. Attendance at interview has been operating on the say of the DPP since 2015 (it was not permitted prior to that). Legal clarity is much needed.

There is much additional detail required – it may be sufficient for this to be covered in codes of practice which take the form of statutory instruments. For instance in subsection 6 it talks of the solicitor being overly disruptive but there is no indication of what this might look like. Part of the issue here is the need for clear statements on what the role of the solicitor is, what they are entitled to in the performance of that role, and what they are not entitled to do. At present there are two separate sets of guidelines, one from the Law Society and from AGS, covering this issue which is not ideal. There should be absolute clarity. Prof Yvonne Daly and have been doing a huge amount of work in this space, training solicitors on how to attend interviews. There are a great many issues to be covered from what information the solicitor is entitled to, the privacy of consultations, the length of consultations, the safety of solicitors, their right to engage interpreters to maintain confidentiality and so on that need to be addressed. Above all it must be recognised that the solicitor is building the defence from the moment they take the call, and given moves to non-trial disposal the interview takes on an increased importance in the legal process (to understand this further please read https://www.ijsj.ie/assets/uploads/7.%20Vicky%20Conway.pdf 0

There is current a great deal of discretion in the removal of a solicitor, too much so. If there was greater clarity on the role of the solicitor and what they are permitted to do this would minimise the scope for removal. For instance, it could be argued that under the current phrasing a solicitor who, legitimately, advises no comment is prejudicing an investigation. This however is well within the right of the detainee to silence. For such reasons much more clarity is needed.

Stating that the consultation shall take place in the sight of gardaí is in breach of the requirement of privacy under the European Convention of Human Rights. I have heard it said that this is for the

safety of the solicitor but the insertion of a call bell in the consultation room can satisfy this requirement.

We should also see clarity, either in the Bill or the Codes of Practice, on how solicitors are to be contacted. Prof Daly and I have done researched on the difficulties which emerge in current practice whereby options are inconsistently provided to detainees in different garda stations. We recommend that a consistent system be introduced which removes discretion from gardaí. Further details can be provided if helpful. We have encountered allegations of corruption in the contacting of certain solicitors, as well as an inclination to contact solicitors who are less inclined to attend interviews, or to intervene in interviews.

Head 43

Prof Kilkelly and Dr Forde, in research cited above, were very clear in their recommendation that children should never be able to waive their right to a lawyer. International experience shows very high rates of waiver, but the factors that inform this can be short sighted, such as a desire to get out of the station as soon as possible. This can cause serious harm to the building of the defence with significant consequences for the life of the child, consequences which may not be appreciated by the child. This is the expert view and should be respected.

Subsection 4 permits questioning to proceed prior to consultation with a solicitor in certain circumstances. This is in direct conflict with the Supreme Court. In 2014 in *DPP v Gormley and White* the Supreme Court ruled that questioning could not commence, ever, until a detainee who had requested legal advice had access to that advice. The Supreme Court ruled this to be on the basis of the constitutional right to a fair trial and so it should not be for the legislature to overrule this.

Head 44

For detention periods beyond 72 hours an application must be made to the court. At present this must be done by a Chief Superintendent, and this legislation reduces the rank to the Superintendent. The reason for this change is not addressed in the explanatory note so it is unclear why it is sought.

Head 45

Here we have a further example of the rank level being reduced. Now an inspector, rather than a superintendent for 6 hours and a chief superintendent for a further 12. Enabling an inspector to do something that previously was done by a chief superintendent is a significant change and again no reason has been provided for this shift.

This section goes on to permit a chief superintendent to authorise an addition 24 hours, something that can currently only be done by a judge. This means that a person who has not been charged can be detained for 48 hours on the say of a garda, without any external oversight. It is submitted that this is excessive and is an unjustified change. No evidence has been presented that this is necessary. Given that this involved a deprivation of liberty, without even a charge, let alone a conviction, the external oversight of a judge should be maintained from the 24 hour period.

Head 47

This provision seeks to extend the number of offences for which detention of 168 hours can apply. At present 7 day detention without charge can only be used for drug trafficking and certain other offences but here it is porposed to extend this to a further range of offences. While this is explained in the explanatory note it is not explained why this has been deemed necessary. Detaining someone for a week who has not been charged it is a hugely significant infringement of the right to liberty and should only be done for clear necessity.

Head 52

Any use of force under this head should be required to be recoded to ensure that use of force statistics are accurate.

Indeed, it could be made explicitly clear at some point that all uses of powers, including and particularly use of force, must be recorded and statistics on their use and outcomes published.

Head 53

It should also be included and explicitly required that a risk assessment be conducted on release to ensure that AGS is fulfilling its duty of care towards the detainee (to determine matters such as is the individual at risk of suicide or self harm as a result of detention, are they at risk of harm from others as a result of their arrest, if abuse has been disclosed – particularly by children- what actions do AGS need to take etc).

Head 59

Following what I've stated in previous heads, the custody record should also include the outcomes of risk assessments, any use of force, the outcome of a standardised medical assessment.

Head 60

Provision should not be made for alternatives to electronic recording. This should now be mandatory. If recording cannot happen in a particular station the individual should be transferred to a station where that can happen. An electronic record is the best, most reliable record and is the standard of evidence we should expect and demand.

Head 62

This generates a question of how little is covered in the Bill as to how interviews should be conducted. The Bill should include a head which explicitly states that oppressive and unfair questioning will not be used in questioning. It should state that the Garda Siochana Interview Model will be used and that a trauma informed approach will be adopted.

Head 64

Again, these codes of practice should be drafted by the Department and have the status of statutory instrument. These should also include the recording of uses of powers and the publication of statistics.

Head 65

Every use of force should be recorded, and statistics will be published on use of force.

Rather than discussing what is reasonably necessary, it would be preferable to discuss the minimum amount of force necessary.

Clarity and detail should be in the legislation on when lethal force options can be used.

Again a detailed code of practice will be required to set out the use of force options, the factors to be taken into account in using force, the difference between use of force options, and in particular factors to be taken into account in the use of lethal force. This should also provide for clear reviews of use of force, as well as how the use of serious force must be referred to GSOC.

It would also be helpful to clarify in the legislation that the unlawful use of force by a garda constitutes criminal assault.

Head 66

It is worrying to see a provision which allows for the seizing and retaining of communications between solicitors and clients where a garda has reasonable grounds for believing that the communications were not solely about legal advice. This has the potential to infringe upon or stymie the confidential communications between lawyers and clients.

It is surprising that a Bill to regulate the use of garda powers says nothing about what will happen if the provisions of this bill are not complied with. This should be clear address in the Bill itself. Regulation of police powers should not just be about *giving* the police powers, but regulating broadly how they are used.

Submission of Clare Daly MEP and Mick Wallace MEP to the Joint Oireachtas Committee on Justice on the General Scheme of the Garda Síochána (Powers) Bill.

October 2021

Introduction

We are serving members of the European Parliament for the constituencies of Dublin and Ireland South respectively, and we have amassed considerable experience in the area of Garda reform, beginning in 2012 and continuing throughout the ensuing decade. Specifically, we have served as members of the 32nd Oireachtas Committee on Justice and Equality, while our work on Garda malpractice during the 31st Dáil contributed to the establishment of, *inter alia*, the O'Higgins Commission of Investigation and the Disclosures Tribunal. In 2014, we published the Garda Síochána (Amendment) (No. 2) Bill 2014, which sought to improve the democratic accountability of An Garda Síochána, encourage community engagement and ensure adherence to the relevant human rights standards. Seven years later, it is clear that these goals have yet to be fully achieved, and, unfortunately, the General Scheme of the Garda Síochána (Powers) Bill, as currently drafted, will not improve things; in fact, the current General Scheme will have a detrimental impact on accountability, transparency and human rights standards within An Garda Síochána if not subjected to significant amendment.

We therefore welcome the opportunity to present a detailed submission on the proposed General Scheme, and we look forward to appearing before the committee as witnesses in the near future on the issue. The following submission is not intended to be a complete analysis of all 68 heads, but will instead focus on the most pertinent heads and specifically, those that we believe require further attention.

Analysis

The following section deals with an analysis of Parts 2-7 of the General Scheme of the Garda Síochána (Powers) Bill and offers comments and or recommendations where they have been deemed necessary to improve accountability and ensure adherence to the relevant human rights standards.

Part 2: Protection of Fundamental Rights

Head 6

Head 6 of the General Scheme provides for a general obligation to respect fundamental rights and states as follows:

> "(*1) In exercising their powers under this Bill, members of the Garda Síochána shall act with due respect for—*
>
> *(a) the fundamental rights of the person or persons in respect of whom the said power is being or is to be exercised, and*
> *(b) the fundamental principles of fairness and non-discrimination.*
>
> *(2) It shall not be lawful to exercise any power provided for under this Bill in a manner that amounts to inhuman or degrading treatment"*

Comment:

It should be noted that the Garda Síochána Act 2005 already requires members of An Garda Síochána to discharge duties 'with regard to human rights and equal respect to all people'. Such vague, non-binding statements, notwithstanding the fact they are contained in primary legislation, have had no impact on improving human rights standards within An Garda Síochána. This proposed Head 6 continues in this vein, and will not have any influence on improving human or fundamental rights. It should be noted also that members of An Garda Síochána are, under international and EU human rights law, already obliged to act at all times with due respect for human rights, and to not subject anyone to inhuman or degrading treatment, and that a mere restatement here of that fact is not sufficient.

Recommendation:

Respect for human rights is a key issue for policing legitimacy, as outlined more than 20 years ago in the Patten report:

> 'We cannot emphasize too strongly that human rights are not an impediment to effective policing but, on the contrary, vital to its achievement. Bad application or promiscuous use of powers to limit a person's human rights – by such means as arrest, stop and search,

> house searches – can lead to bad police relations with entire neighbourhoods, thereby rendering effective policing of those neighbourhoods impossible.
>
> 'In extreme cases, human rights abuses by police can lead to wrongful convictions, which do immense damage to the standing of the police and therefore also to their effectiveness. Upholding human rights and upholding the law should be one and the same thing.'

This Head is therefore key, and needs to be considerably strengthened if it is to form the core of a human rights-based approach to policing in Ireland. With that in mind, the reference to 'fundamental rights' should be replaced with a specific definition of human rights, per the UN International Covenant on Civil and Political Rights and/or a reference to the EU Charter of Fundamental Rights.

The phrase '*it shall not be lawful*' offers little clarity as to the consequences for any member of An Garda Síochána who breaches human rights standards, and amounts to no more than an effective restatement of rights already enumerated in both the European Convention on Human Rights (Article 3) and the Charter of Fundamental Rights (Article 4). Under Article 2 of the ECHR, there is an obligation on the state to carry out an independent, effective and prompt investigation if inhuman or degrading treatment is suspected. This head should therefore make explicit provision for this, and should also create a specific offence to apply in cases where a member of an Garda Síochána exercises any power within the Bill in breach of any fundamental human rights.

Head 8

Head 8 of the General Scheme relates to the Protection of the Rights of Persons with Impaired Capacity.

Recommendation: This Head is to be welcomed. However, it will be critical that the powers afforded to An Garda Síochána are in line with the requirements of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Furthermore, the Convention places particular importance on terminology, and the term 'impaired capacity' may well require further amendment.

Part 3: Stop and Search

Head 9 of the General Scheme provides for the power to stop and search for possession of relevant articles. Specifically, relevant articles are defined as follows:

> *"relevant article" means—*
> *(a) anything stolen or obtained unlawfully;*
> *(b) a controlled drug (within the meaning of section 2 of the Misuse of Drugs Act 1977) in contravention of the Misuse of Drugs Act 1977;*
> *(c) a firearm or ammunition in contravention of the Firearms Act 1925;*
> *(d) in a public place, any article in contravention of section 9 or 9A of the Firearms and Offensive Weapons Act 1990;*
> *(e) in a public place, a syringe, or any blood in a container intended by him or her unlawfully to cause or to threaten to cause injury to or to intimidate another; and*
> *(f) any article intended for use in the commission of an offence, if possession of that article in the said circumstances constitutes an offence."*

Comment: The explanatory note of the General Scheme outlines that 'any object which is intended for use in a theft or fraud offence' could include a computer used for hacking purposes. This would appear to suggest that *paragraph f* will be used as a catchall clause that will allow members of An Garda Síochána unprecedented powers of warrantless search. In the 21st century, when almost all citizens carry a computer device on their person which could in theory be used as 'hacking equipment' (in the form of a smart phone), this new proposed power is of grave concern.

In addition, given the prevalence of racialised and discriminatory stop-and-search practices elsewhere in Europe and globally it would be important to include a specific provision under this Head providing that gardaí will not exercise their powers in a discriminatory way, as well as a requirement under Head 12 for gardaí to record the ethnicity of each person stopped and searched under this section. Given the importance of this issue both for fundamental rights and for the public legitimacy of An Garda Síochána, such a requirement should not be left to be established by the Code of Practice to be created under Head 13.

Recommendation:

Paragraph F should be removed in its entirety or a tight definition provided of 'computer hacking equipment' in the Definitions section, with a corresponding reference to same under this section.

The Head should include an explicit prohibition on the exercise of stop-and-search powers in a discriminatory way, and Head 13 should introduce a requirement for the ethnicity of each person stopped and searched by gardaí to be recorded.

Part 4: Search of premises

Head 12

Head 12 of the General Scheme provides for a record to be made of a search and states:

"(1) A member of the Garda Síochána shall make a record of any search conducted under Head 9 or 10.

(2) A record made under subhead (1) shall contain the following information—
(a) the name, address and date of birth of the person, where known;
(b) the time and date of the search;
(c) the reason for the search;
(d) the power under which the search was conducted;
(e) the outcome of the search; and
(f) such other information as is provided for in the Code of Practice under Head 13.

(3) The person who is the subject of the search concerned shall be entitled to a copy of the record, on request in writing, at any time before the record is destroyed under subhead 5

(4) Where a search results in the seizure of a prohibited article or evidence of an offence, the record made under subhead (1), shall be retained in accordance with the procedures established in the Code of Practice under Head 13.

(5) Where a search does not result in the seizure of a prohibited article or evidence of an offence, the record made under subhead (1), shall be retained for a period established in the Code of Practice under Head 13 and destroyed in accordance with the procedures established therein"

Comment:
Subsection (5) of Head 12, which allows for the destruction of a record of a search after a particular time, may be problematic when viewed through the prism of the accountability and transparency requirements of a 21st century

police force. However, it is essential that An Garda Síochána is not permitted to retain the private data of innocent persons indefinitely. Striking a balance - between the need to retain a record as possible evidence of an offence by a member of An Garda Síochána, or for statistical purposes for an organisation such as the CSO, and the need for prompt deletion of personal data in order to safeguard the fundamental right to privacy - is key here.

Recommendation: The Data Protection Commission should be consulted regarding the provisions of subsection (5) of Head 12.

Head 13

Head 13 of the General Scheme provides for a Code of Practice on searches and states:

"(1) The Commissioner shall, as soon as practicable after the commencement of this section and following consultation with—
(a) the Policing Authority
(b) the Garda Síochána Inspectorate, and
(c) the Irish Human Rights and Equality Commission,
(d) such other persons as the Commissioner considers appropriate,
prepare for submission to the Minister a draft Code of Practice for the purposes of providing practical guidance for the carrying out of searches.

- *Code must be submitted to Minister for Justice for approval, and may be revoked or modified by Minister."*

Recommendation: The creation of a code of practice in relation to searches is welcomed. However, we propose that consultation should also be made with members of the community, which may include, but not limited to, Neighbourhood Watch Groups, Garda Schools Programme Groups and members of Joint Policing Committees. Such an addition would align with An Garda Síochána's stated aim to improve its relationship with the community.

Head 16

Head 16 of the General Scheme provides for Powers under Search Warrant. The majority of this section is based on section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997. However, sub section (v) listed below has created new powers:

"(v) to require any person at that place who appears to him or her to have access to or to have under his power or control the information

held in any such computer or which can be accessed by the use of that computer—
(I) to give to him or her any password or encryption key necessary to operate it,
(II) to otherwise enable him or her to examine the information accessible by the computer in a form in which the information is visible and legible,
(III) to produce the information in a form in which it can be removed and in which it is, or can be made, visible and legible."

Comment:

Similar to Head 9, this expanded power of search will allow members of An Garda Síochána access to information held by a citizen on a computer in their private dwelling. Furthermore, the explanatory note states that a computer includes a mobile phone. Notwithstanding the obvious lack of clear definitions, the power in Head 16 amounts to overt inference with a person's right to private life and goes against all consideration of the human rights standards that this General Scheme is supposedly grounded in, per Head 6. There are no safeguards in regard to data, such as sensitive information held by journalists or public representatives, that may be held on a computer/mobile phone, something which may be in breach of the European Convention on Human Rights. Notably, there is no provision for persons subject to a demand to surrender the passwords/access keys to their electronic devices to consult with a solicitor. Shockingly, Head 20 allows broad powers for gardaí to not make any effort to separate out possible evidence of a crime held on a computer from non-relevant material (which will certainly include the personal data, and in some cases the sensitive and intimate personal data, of persons entirely unconnected with a possible offence), meaning gardaí will end up taking 'dumps' of all the data on computers/mobile phones. Processes and procedures regarding how non-relevant material should be dealt with are to be left to a code of practice, which lacks a statutory footing, and is therefore not legally enforceable. Without question, this flies in the face of European data protection norms and fundamental rights protections, as does the general and indiscriminate right for gardaí to demand passwords to electronic devices with no conditionality (as to seriousness of crime, judicial oversight, etc.) attached.

Recommendation: *Part (V)* should be removed in its entirety.

Head 21

Head 21 of the General Scheme proves for an application for search warrant in urgent circumstances and states:

"(1) A member of the Garda Síochána not below the rank of superintendent may issue a search warrant in exceptional circumstances if he or she is satisfied—
(a) that the search warrant is necessary for the proper investigation of an offence
(b) that circumstances of urgency giving rise to the need for the immediate issue of the search warrant would render it impracticable to apply to a judge of the District Court under Head 15 for the issue of the warrant.
(2) Where an applicant applies to a member of the Garda Síochána for a search warrant under subhead (1), the applicant shall provide information that there are reasonable grounds for
suspecting that evidence of or relating to—
(a) an indictable offence may be found at a specified place, or
(b) a summary offence under the provisions of any enactment specified in schedule 3 may be found at a specified place."

Comment: It should be noted that allowing a member of An Garda Síochána of Superintendent rank or higher to grant a search warrant was previously considered by the Law Reform Commission in their 2015 Report on Search Warrants. However, having reviewed the relevant Irish and ECtHR case law, the Law Reform Commission **did not** recommend affording such powers to An Garda Síochána. It is worth noting that the LRC report states that, 'If appropriate technology were made available to enable persons to apply to a judge for a search warrant in urgent circumstances, there should be no need for legislative provisions providing for members of An Garda Síochána to issue search warrants in such circumstances.' Given it was published in 2015, and communications technology has progressed enormously since then, with remote working having become commonplace for the judiciary during the Covid 19 pandemic, the LRC's point here bears even more weight. No evidence has been offered in the explanatory note as to why there is a requirement for members of An Garda Síochána to be empowered to issue search warrants; given the foregoing, there does not appear to be any good reason as to why it should be extended to them.

Recommendation: This is a clear attempt to allow An Garda Síochána to bypass the Courts, and regardless of any safeguards that may be introduced alongside this Head, it should not progress. The granting of search warrants should stay within the remit of the judiciary.

Part 5: Arrest

Head 24

Head 24 provides for arrest for breach of the peace and states:

> *"(1) Where any person has reasonable grounds for believing that a person has committed, is committing or is about to commit, a breach of the peace contrary to common law, he or she may arrest the person without warrant.*
> *(2) breach of the peace means—*
> *(a) any harm actually done or likely to be done to a person;*
> *(b) any circumstance, whether in a public or a private place, where owing to the behaviour of some other person or persons, a person is in fear of being harmed through an assault, an affray or riot, unlawful assembly or other disturbance; or*
> *(c) behaviour by any person which creates a real risk of a response which is disorderly and in consequence potentially violent whereby, through direct or indirect means, bystanders may be caught up in violence.*
> *(3) The common law power of arrest for breach of the peace is hereby abolished."*

Comment: This head puts the common law powers, established in the United Kingdom by *R v. Howell* [1981] 3 All E.R. 383 and in this jurisdiction by *Thorpe v. Director of Public Prosecutions* [2007] 1. I.R 502. However, the abolishing of the common law power of arrest for breach of the peace creates an opportunity to consider the need for such an offence in a modern 21st century country, particularly when a police force has multiple powers of arrest already under statute.

Recommendation: This Head places the common law power of arrest for breach of the peace on a statutory footing. While we agree with the abolishment of the common law power, it does not follow that such a power should immediately be then placed on the statute book. Instead, it would be wise to reconsider the use and effectiveness of the power to arrest a person for 'breach of the peace' and specifically, take into account empirical evidence with regard to its use and effectiveness. The pause button should be pressed on this head pending analysis.

Part 6: Persons in Garda Custody

Head 42

Head 42 of the General Scheme provides for to access to legal representation and subheads (6) and (7) and (8) provide the following:

> *"(6) Where a member of the Garda Síochána not below the rank of inspector reasonably believes that the presence of a legal representative referred to in subhead (5), would prejudice any investigation or criminal proceedings regarding the offence, or, owing to the behaviour of the person, would be unduly disruptive, the member may require that the person concerned absent himself or herself from the interview.*
>
> *(7) Where a member of the Garda Síochána not below the rank of inspector decides to exclude a legal representative from accompanying a person at an interview under subhead (6), the member shall inform the person that subhead (5) continues to apply and he or she may be accompanied by another legal representative and the member shall make such arrangements as are necessary for the person to be so accompanied.*
>
> *(8)(a) Subject to paragraph (b), consultation with a legal representative, referred to in subhead (1), shall take place in private.*
> *(b) Any consultation with a legal representative may take place in the sight but out of hearing of a member of the Garda Síochána or the custody officer."*

Comment: Subsections 6-8 of Head 42 are a particular concern with regard to the rights of a person to legal representation. In particular, subsection 6 and 7, which allow a member of An Garda Síochána to remove a legal representative based on vague and spurious reasons relating to disruptiveness, are clearly in breach of the constitutional right of access to a legal representative, as established in *DPP v. Healy* [1990] ILRM 313. The right of access to legal representation in criminal proceedings is a key component of the right to a fair trial. It is enshrined in Article 47(2) of the Charter of Fundamental Rights of the European Union, and in Article 6(3)(c) of the European Convention on Human Rights. Minimum EU standards on the right of access to a lawyer are enumerated in *EU Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings*, which provides that persons who are suspected or accused of having committed a criminal offence shall have a right to access legal representation 'without undue delay', including, *inter alia*, 'before they are questioned by the police or by another law enforcement or judicial authority' or 'upon the carrying out by investigating or other competent authorities of an

investigative or other evidence-gathering act'. Neither the Directive, the Charter nor the ECHR envisages a situation in which a person can be deprived of their right to legal representation on the grounds that the relevant competent authority 'decides to exclude' them. While Ireland did not exercise its option under Article 3 of Protocol 21 to the Lisbon Treaty to participate in the adoption of the Directive, the Directive does, as mentioned, elucidate minimum standards, which Ireland should, as a matter of principle, attempt to uphold in its domestic legislation. The provisions under this Head are, however, gravely out of line with those minimum standards, not to mention the Charter and the Convention.

Furthermore, subsection 8, which contemplates a consultation taking place in sight of a member of An Garda Síochána, is a breach of Article 6(3)(c) of the Convention. In *S v. Switzerland* [1991] EHRR 670, the European Court of Human Rights reasoned that the right of an accused to consult with his solicitor in private and in confidence is one of the basic requirements of Article 6(3)(c).

Recommendation: Subsections 6-8 should be removed in their entirety.

Head 52

Head 52 relates to the use of reasonable force to take photograph, fingerprint and palm print and provides:

> "(*1) Without prejudice to the generality of Head 51, a member of the Garda Síochána and the*
> *member or members of the Garda Síochána assisting that member may, where—*
> *(a) a person is detained under Head 44, and*
> *(b) he or she fails or refuses to allow his or her photograph or fingerprints and palm prints to be taken pursuant to Head 51, use such force as is reasonably considered necessary—*
> *(i) to take the photograph or fingerprints and palm prints, or*
> *(ii) to prevent them from being lost, damaged or otherwise being made imperfect, or both*."

Comment: Head 52 appears at total odds with the aims of the Bill, in particular, with regard to ensuring fundamental rights are protected. Allowing members of An Garda Síochána to use force 'as is reasonably considered necessary' is not proportionate to the task of taking fingerprints and or photographs and further work is required on this section, in particular as regards safeguards against undue use of force, and the right to a prompt and efficient investigation if undue force is suspected or alleged.

Recommendation: The use of force as a means of acquiring fingerprints and photographs should be reconsidered, and at a minimum, stringent safeguards applied.

Head 60

Head 60 of the General Scheme relates to the electronic recording of interviews and states:

> *"(1) Subject to subhead (2), any interview conducted at a Garda custody facility of a person detained under this Part shall be made by electronic recording.*
>
> *(2) If the recording equipment or a recording medium is not available for use or fails to work at the commencement of an interview or through the course of the interview, a member of the Garda Síochána present at the interview shall make a written note of that interview.*
>
> *(3) Nothing in this Head precludes the recording by electronic means of any interview or statement not referred to in subhead (1)."*

Comment: It is to be welcomed that all interviews at a Garda custody facility should be electronically recorded. However, subsection (2) appears to obviate this need and further consideration should be given as to whether subsection 2 is required, or, at the very least, whether it should be made clear that it is an exceptional provision.

Furthermore, subsection (3) appears to condone the use of electronic recording by a member of An Garda Síochána by a person not in a Garda custody facility. If this is the case, this is tantamount to allowing covert recording of a person, and therefore, the intention and purpose of subsection (3) should be clarified.

Part 7: Miscellaneous Provisions

Head 68

Head 68 of the General Scheme considers the effect of failure to comply with Act on admissibility of evidence and states:

> *"A failure by a person exercising any powers under this Bill to comply with any provision of this Bill shall not, of itself, affect the admissibility in evidence of any evidence seized or otherwise obtained through the use of that power."*

Comment: It is remarkable that a Bill which begins with a statement espousing the protection fundamental rights, ends with a clause which would allow members of An Garda Síochána ignore any of the safeguards that accompany the vast powers contained within this Bill.

Undoubtedly, this provision has been influenced by the Supreme Court judgment in DPP vs. JC [2015] IESC 31, a decision which allows evidence obtained unconstitutionally to be admitted where officers of the State claim to have no knowledge of the breach, and which was described by Nial Fennelly, a retired judge of the Supreme Court and former advocate general of the European Court of Justice, as 'the most astounding judgment ever handed down by an Irish court'. In a five-year review of the decision by the ICCL, legal practitioners described the decision as an 'easy out' for gardaí, and as a 'carte blanche' to gardaí to ignore constitutional rights and then to retrospectively argue inadvertence. As the ICCL put it in the report, 'Experienced practitioners referred during interviews to gardaí lying when giving evidence, threatening to arrest close relatives, planting evidence and physically assaulting clients[1].' The provision here goes even further than the judgment in DPP vs JC, given gardaí do not need even to argue that any breach of rights under the Bill was inadvertent. Given the cultural problems with An Garda Síochána, there is broad agreement that the effects of DPP vs. JC have been pernicious; extending the 'carte-blanche' that exists for gardaí to obtain evidence in an unlawful or rights-abusive way would therefore be an absolutely shocking direction for the legislature to go in.

Finally, it should be noted that the clause amounts to an obvious breach of the separation of powers, specifically, as the decision as to admissibility of evidence in a trial lies solely with the judiciary.

Recommendation: Head 68 should be removed in its entirety.

[1] A Revolution in Principle: Assessing the impact of the new evidentiary exclusionary rule - Claire Hamilton/ICCL, 2020, page 42.

Concluding remarks

The aims of the General Scheme of the Garda Síochána (Powers) Bill, to paraphrase the Minister for Justice, are to consolidate certain police powers, target reforms to improve police effectiveness and create new fundamental rights provisions to ensure rights are protected. Unfortunately, this Bill will not achieve either police effectiveness or ensure fundamental rights are protected. In its current form, the Bill amounts to a veiled attempt at a land grab under the guise of consolidation, in order to further bolster the powers of An Garda Síochána. Furthermore, token references to adhering to fundamental rights amount to little, particularly in light of the continued evidence that certain members of An Garda Síochána view adherence to human rights and code of ethics standards as an optional requirement when carrying out their duties.

In addition, the Bill contains provisions that open the door to allow An Garda Síochána unfettered access and powers to obtain private information held by private citizens. This is a trend that is emerging throughout Europe and the provisions within the Bill mirror recent proposals of the European Commission to update the mandate of Europol by amending Regulation (EU) 2016/794, to allow Europol access personal data and process such data on a mass scale in the name of protecting EU citizens from serious crime and cyber terrorism. Affording such increased powers to law enforcement agencies is the antithesis of achieving transparency, accountability and respect for human rights. It is also inimical to the concept of policing by consent which is supposed to lie at the heart of all of An Garda Síochána's activities.

To conclude, the Bill, in its current form, will not deliver the aims as set out by the Minister for Justice. Instead, it moves Ireland further towards a situation in which the powers of An Garda Síochána are becoming inexorable in nature, at the expense of the citizens they are charged with protecting. We wish the committee well in its work on this Bill and we look forward to expanding on the views expressed within this submission as witnesses before the committee in the near future.

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